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CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ANTHONY G. WILLIS, EXECUTOR OF THE ESTATE OF JANICE D. WILLIS, BENEFICIARY AND TRUSTEE OF THE JANICE D. WILLIS REVOCABLE TRUST DATED THE 25TH OF SEPTEMBER, 2009, AND INDIVIDUALLY, AND THE JANICE D. WILLIS REVOCABLE TRUST DATED THE 25TH OF SEPTEMBER, 2009, PLAINTIFF v. ROBERT WILLIS, ROBIN WILLIS, AND THE ESTATE OF EDWARD CARROLL WILLIS, DEFENDANTS

No. COA10-1338

(Filed 20 September 2011)

Deeds—reformation—original intent—no unilateral mistake

The trial court did not err in a deed reformation case by granting defendants' motion for directed verdict at the close of all evidence. The facts did not negate the validity of the original understanding of the parties at the time that the property was devised, but instead showed only that the deviser had not expected her son's untimely death and never anticipated that his children would be entitled to inherit the property. There was not a scintilla of evidence that a unilateral mistake occurred.

Appeal by Plaintiff from order entered 28 May 2010, *nunc pro tunc* 29 April 2010 by Judge W. Allen Cobb, Jr. in Carteret County Superior Court. Heard in the Court of Appeals 23 March 2011.

Harvell and Collins, P.A., by Wesley A. Collins and Russell C. Alexander, for Plaintiff-Appellant.

Beswick & Goines, PLLC, by Erin B. Meeks and George W. Beswick, for Defendant-Appellees.

BEASLEY, Judge.

Anthony G. Willis (Anthony), executor of the Estate of Janice D. Willis (Ms. Willis), beneficiary and trustee of the Janice D. Willis Revocable Trust, and individually, and the Janice D. Willis Revocable Trust (collectively Plaintiff) appeal the trial court's order granting a directed verdict to Robert Willis (Robert), Robin Willis (Robin), and the Estate of Edward Carroll Willis (Eddie) (collectively Defendants). After careful review, we affirm the trial court's order.

I. Background

In December 2004, Ms. Willis procured the services of attorney John Way (Mr. Way) to draft her will. At that time, Ms. Willis' husband was deceased and she had two adult sons, Eddie and Anthony. The will signed by Ms. Willis included the following provision regarding Ms. Willis' "home place":

> I bequeath and devise any interest that I may own in my home place to my son, Edward Carroll Willis. If I decide to convey my home place in Beaufort, North Carolina to Edward Carroll Willis before my death, and, if he decides to sell said home, then it is my wish that he divide the proceeds after expenses with his brother, Anthony Grady Willis.

Ms. Willis bequeathed the residue of her estate to Eddie and Anthony in equal shares. The will further provided that if one or both of her sons predeceased her, then the residue of her estate would pass to the deceased son's "living issues per stirpes."

Ms. Willis continued to conduct meetings with Mr. Way and consulted with him about her legal options for transferring an interest in her home to Eddie immediately, rather than upon her death. It is undisputed that Ms. Willis expressed a desire to provide a place for Eddie, who was currently living with Ms. Willis in her home, to live for the remainder of his life. As a result of these meetings, Mr. Way drafted a general warranty deed (Deed) in which Ms. Willis reserved a life estate in her home and transferred the remainder interest to Eddie in fee simple. The Deed did not devise any interest in the home to Anthony or contemplate a reversionary interest of any kind. Ms. Willis executed the Deed on 4 January 2005. The Deed stated it was "for a valuable consideration paid by the Grantee, the receipt of which is hereby acknowledged." However, the Deed was filed without revenue stamps and no money changed hands between Ms. Willis and Eddie.

In November 2007, Eddie died intestate. Shortly thereafter, Ms. Willis received a copy of the Deed and realized that Eddie's interest

in her property would pass to his two children, Robin and Robert. It is undisputed that Ms. Willis expressed displeasure regarding the legal ramifications of the Deed she executed.

In February 2008, Ms. Willis initiated an action in Carteret County Superior Court to reform the Deed on the basis of a unilateral mistake. Ms. Willis asserted in the complaint that she "thought that the [D]eed only gave . . . [Eddie] the right to live in her home the rest of his life." Beginning on 26 April 2010, the case was tried by a jury. After all of the evidence was presented, Defendants moved for a directed verdict, which was granted by the trial court. Ms. Willis appealed.[1]

II. Discussion

Plaintiff argues that the trial court erred by directing a verdict for Defendants at the close of all the evidence. We disagree.

A. Standard of Review

> "The standard of review for a motion for directed verdict is whether the evidence, considered in the light most favorable to the non-moving party, is sufficient to be submitted to the jury. A motion for directed verdict should be denied if more than a scintilla of evidence supports each element of the non-moving party's claim. This Court reviews a trial court's grant of a motion for directed verdict *de novo*."

Weeks v. Select Homes, Inc., 193 N.C. App. 725, 730, ___ S.E.2d ___, ___ (2008) (quoting *Herring v. Food Lion, LLC*, 175 N.C. App. 22, 26, 623 S.E.2d 281, 284 (2005)). "Where the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and submit the case to the jury." *Edwards v. West*, 128 N.C. App. 570, 573, 495 S.E.2d 920, 923 (1998).

B. Reformation of the Deed

Generally, "[i]n an action for reformation of a written instrument, the plaintiff has the burden of showing that the terms of the instrument do not represent the original understanding of the parties and must do so by clear, cogent and convincing evidence." *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 651, 273 S.E.2d 268, 270 (1981). "Additionally, there is 'a strong presumption in favor of the correctness of the instrument as written and executed, for it must be assumed that the parties knew what they agreed and have chosen fit and proper words to express

1. After notice of appeal was entered, Ms. Willis died. By consent of the parties, her estate was substituted as Plaintiff for purposes of this appeal.

that agreement in its entirety.' " *Id.* (quoting *Clements v. Insurance Co.*, 155 N.C. 57, 61, 70 S.E. 1076, 1077 (1911)).

In the instant case, Plaintiff sought the reformation of the Deed on the basis of a unilateral mistake. Plaintiff relies on *Nelson v. Harris*, 32 N.C. App. 375, 232 S.E.2d 298 (1977), for the proposition that unilateral mistake by one party, when not induced by the fraud or inequitable conduct of the other, may still support the reformation of a deed conveying property as a gift. Specifically, "[t]he grantor of a conveyance for which no consideration was given by the grantee is entitled to reformation when the deed fails to express the actual intent of the parties due to the grantor's unilateral mistake." *Nelson*, 32 N.C. App. at 379, 232 S.E.2d at 300 (citing 66 Am. Jur., *Reformation of Instruments*, § 45 (1973); Annot. 69 A.L.R. 423, 430-31 (1930)). Thus, in order for this case to proceed to the jury, Ms. Willis had to produce more than a scintilla of evidence that the Deed was not supported by consideration *and* that the Deed failed to express her actual intent in executing the Deed due to her unilateral mistake. Assuming, *arguendo*, that there was sufficient evidence to establish that the Deed was executed without consideration, we hold that there was not sufficient evidence to establish that a unilateral mistake occurred on the part of Ms. Willis.

There is abundant testimony in the record that Ms. Willis intended to provide a place for Eddie to live for the rest of his life; however, there was not a scintilla of evidence to establish that Ms. Willis intended to merely give Eddie a life estate as she now contends. In fact, the evidence presented to the jury tended to establish that Ms. Willis fully understood that the Deed conveyed fee simple title to Eddie and a life estate to Ms. Willis. Mr. Way testified that he and Ms. Willis discussed tax consequences and Ms. Willis' eligibility for Medicare as she contemplated the best devisal to Eddie.[2] The discussion in reference to the impact of the conveyance to Eddie on Ms. Willis' eligibility for Medicare tended to show that Ms. Willis fully understood the effect of a conveyance by life estate and by fee simple. As demonstrated by her own deposition and Mr. Way's testimony, Ms. Willis thoroughly considered her options and Mr. Way complied with Ms. Willis' requests. Moreover, it is not enough for Plaintiff to assert that Ms. Willis did not read the Deed and that she assumed that

2. Mr. Way may have given Ms. Willis improper advice about how a conveyance to Eddie might affect Ms. Willis' qualifications for Medicare, and Ms. Willis may have relied on this advice. However, Plaintiff does not raise this issue and Mr. Way's advice, even if incorrect, did not alter Ms. Willis' general intent.

Mr. Way drafted the Deed pursuant to her wishes—to give Eddie a life estate. *See Rourk v. Brunswick County*, 46 N.C. App. 795, 797, 266 S.E.2d 401, 403 (1980) ("It must be assumed the plaintiff[] signed the instrument [she] intended to sign.").

Additionally, the evidence established that Ms. Willis "had no idea that Eddie was going" to die before her and that she was angry when she discovered the legal effect of the Deed after Eddie's death. These facts do not negate the validity of the original understanding of the parties at the time that the property was devised but, rather, show only that Ms. Willis simply had not expected Eddie's untimely death and never anticipated that his children would be entitled to inherit the property. As discussed, a party's "mistake[] as to the legal consequences of the deed . . . will not support reformation." *Mims v. Mims*, 48 N.C. App. 216, 218, 268 S.E.2d 544, 546 (1980), *rev'd on other grounds*, 305 N.C. 41, 286 S.E.2d 779 (1982).

Our Courts have often acknowledged that "mere ignorance of law, unless there be some fraud or circumvention, is not a ground for relief in equity whereby to *set aside* conveyances or avoid the legal effect of acts which have been done." *Mims*, 305 N.C. at 60, 286 S.E.2d at 792 (internal quotation marks and citation omitted). The case *sub judice* is thus unlike *Nelson*, in which reformation was predicated on a mistake of fact, *see Nelson*, 32 N.C. App. 375, 232 S.E.2d 298 (affirming order reforming deed where draftsman failed to include a lot description in the deed that all parties had intended to be included), and more akin to *Mims*, where "[t]he only mistake supported by the evidence [was the] plaintiff's erroneous understanding of North Carolina law governing deeds and perhaps his misunderstanding of the legal effect of having the deed made to both him and his wife as grantees." *Mims*, 305 N.C. at 60, 286 S.E.2d at 792. While the plaintiff in *Mims*, "relying on a real estate agent, was mistaken as to the legal requirements in this state" and the deed's legal effect, "[h]e was not mistaken as to how the deed was drawn"; thus, recovery could not be had on the theory of reformation by mistake. *Mims*, 48 N.C. App. at 218, 268 S.E.2d at 546.

Although Ms. Willis regretted the results of the conveyance after Eddie died, Plaintiff has the burden of proving that the Deed did not represent the original intent of the parties *at the time the deed was signed*. *See Hice*, 301 N.C. at 651, 273 S.E.2d at 270. As stated *supra*, all of the evidence in this case showed that Ms. Willis understood the conveyance she made in the Deed at the time she deliberately and intentionally signed the instrument. *See Wright v. McMullan*, 249 N.C.

591, 596, 107 S.E.2d 98, 101 (1959) ("[Plaintiff's] mistake as to the legal consequences flowing from his deliberate and intentional act cannot destroy the force and effect of the law."). While we recognize that, in a close case, it is better for the trial court to submit the case to the jury upon a motion for directed verdict, the record does not contain even a scintilla of evidence that a unilateral mistake occurred when Ms. Willis executed the Deed at issue. Therefore, the trial court properly granted Defendants' motion for directed verdict, and we affirm the trial court's order.

Affirmed.

Judge STEELMAN concurs.

Judge CALABRIA dissents.

CALABRIA, Judge, dissenting.

The majority improperly affirms the trial court's order on a directed verdict on the basis of a ground that was not asserted in defendants' motion to the court. Moreover, the majority incorrectly relies upon cases which do not involve the conveyance of gift deeds or the issue of unilateral mistake. Finally, the majority misapplies the standard of review for a directed verdict motion by failing to disregard conflicts in the evidence which were unfavorable to plaintiff. Since I believe Janice Willis ("Ms. Willis") provided more than a scintilla of evidence that her deed to Edward Carroll Willis ("Eddie") was not supported by consideration and that the deed did not express her intent due to her unilateral mistake, I respectfully dissent.

I. Standard of Review

> This Court reviews a trial court's grant of a motion for directed verdict *de novo*. The Court must determine whether, upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence [is] sufficient to be submitted to the jury.

Day v. Brant, ___ N.C. App. ___, ___, 697 S.E.2d 345, 348 (2010) (internal quotations and citations omitted). A motion for directed verdict "should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim." *Norman Owen Trucking v. Morkoski*, 131 N.C. App. 168, 172, 506 S.E.2d 267, 270

(1998). "Where the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and submit the case to the jury." *Edwards v. West*, 128 N.C. App. 570, 573, 495 S.E.2d 920, 923 (1998).

II. Grounds for Directed Verdict

" '[I]n reviewing the trial court's decision to grant a directed verdict, this Court's scope of review *is limited to those grounds asserted by the moving party at the trial level.*' " *Farndale Co. v. Gibellini*, 176 N.C. App. 60, 67, 628 S.E.2d 15, 19 (2006) (quoting *Freese v. Smith*, 110 N.C. App. 28, 34, 428 S.E.2d 841, 844-45 (1993)) (emphasis added). In the instant case, Ms. Willis sought the reformation of a gift deed on the basis of a unilateral mistake. As the majority correctly notes, this required Ms. Willis to present more than a scintilla of evidence that (1) the deed was not supported by consideration and (2) that the deed failed to express her actual intent in executing the deed due to her unilateral mistake.

However, in their motion for a directed verdict at trial, defendants only challenged the sufficiency of Ms. Willis' evidence on the first issue, consideration. When making her motion for directed verdict, defendants' counsel argued to the trial court, "[t]here was clearly consideration for this deed, and we'd ask you to direct a verdict in our favor." When Ms. Willis' counsel attempted to address the issue of unilateral mistake in his response to defendants' argument, the trial court interrupted him and asked defense counsel if her argument only involved consideration. Defense counsel replied, "[t]hat's correct." Finally, when making its ruling, the trial court stated:

> The Court here finds that there was adequate consideration given by the grantee of the prevailing law of North Carolina, especially the Graham and the Jones case. *Whether or not the draftsmanship was adequate to carry out the wishes of the plaintiff, this Court does not have jurisdiction to pass on, so I'm without power to do so.* That's the order of the Court.
>
> The directed verdict motion is allowed.

(Emphasis added). It is clear from this ruling that the trial court granted defendants' motion for directed verdict solely on the basis of consideration, as the trial court specifically stated that it did not have the power to rule on the issue of unilateral mistake. Since defendants did not raise the issue of unilateral mistake in their motion for a directed verdict and the trial court did not rule upon that issue, we

are precluded from considering it for the first time on appeal. *Farndale*, 176 N.C. App. at 67, 628 S.E.2d at 19; *see also* N.C.R. App. P. 10(a)(1) (2010). Instead, the majority improperly affirms the trial court's order on this basis.

III. Unilateral Mistake

Even assuming, *arguendo*, that this Court may properly consider whether Ms. Willis presented sufficient evidence to withstand a motion for a directed verdict on the issue of unilateral mistake, the majority makes several errors in its analysis of this issue.

"The grantor of a conveyance for which no consideration was given by the grantee is entitled to reformation when the deed fails to express the actual intent of the parties due to the grantor's unilateral mistake." *Nelson v. Harris*, 32 N.C. App. 375, 379, 232 S.E.2d 298, 300 (1977) (citing 66 Am. Jur., Reformation of Instruments, § 45 (1973); Annot. 69 A.L.R. 423, 430-431 (1930)). The Restatement (Third) of Property, which governs donative transfers such as gift deeds, describes the doctrine of unilateral mistake as follows:

> A donative document, though unambiguous, may be reformed to conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was. In determining whether these elements have been established by clear and convincing evidence, *direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered.*

2 Restatement (Third) of Property: Wills & Other Donative Transfers § 12.1 (2003) (emphasis added).

In holding that Ms. Willis presented no evidence of unilateral mistake, the majority relies primarily on the fact that Ms. Willis deliberately and intentionally executed the deed, thereby binding her to its legal effects. However, the deed reformation cases cited by the majority did not involve gift deeds or the issue of unilateral mistake and thus, are not applicable to the instant case. In *Rourk v. Brunswick Cty.*, this Court stated that "[w]e have concluded previously the deed was based on consideration and not a deed of gift. Therefore, there is no basis for reformation based on unilateral mistake . . . ." 46 N.C. App. 795, 798, 266 S.E.2d 401, 403 (1980). In *Mims v. Mims*, this Court had to determine only "whether the evidence as forecast by the

papers filed in this case would be sufficient for the jury to find there was a *mutual mistake*." 48 N.C. App. 216, 218, 268 S.E.2d 544, 545 (1977) (emphasis added), *rev'd on other grounds*, 305 N.C. 41, 286 S.E.2d 779 (1982).

The majority does not cite any cases which involve the reformation of a gift deed on the basis of a unilateral mistake. Such cases should be treated differently than those involving deeds which are supported by consideration, since the grantor of a gift deed receives nothing in return for his or her conveyance. *See*, *e.g.*, *Tyler v. Larson*, 235 P.2d 39, 41 (Cal. App. 1951) ("[Where] [t]he grantee has given nothing for the conveyance [] he is deprived of nothing; and he cannot complain if the mistake [in a deed] is corrected."); Restatement (Third) of Property: Wills & Other Donative Transfers § 12.1, cmt. b. ("Equity rests the rationale for reformation [of donative transfers] on two related grounds: giving effect to the donor's intention and preventing unjust enrichment. . . . Using the equitable remedy of reformation to correct a mistake is necessary to prevent unjustly enriching the mistaken beneficiary at the expense of the intended beneficiary."). Due to the differences between gift deeds and deeds supported by consideration, the fact that a grantor had the opportunity to read the gift deed before signing should not be determinative:

> l. *Donor's signature after having read document does not bar remedy.* Proof that the donor read the document or had the opportunity to read the document before signing it does not preclude an order of reformation or the imposition of a constructive trust. The English Law Reform Committee, in recommending the adoption of a reformation doctrine for wills, stated well the rationale for this position:
>
> > We have also considered whether any special significance ought to be given to cases in which the will has been read over to the testator, perhaps with explanation, and expressly approved by him before execution. In our view it should not. Some testators are inattentive, some find it difficult to understand what their solicitors say and do not like to confess it, and some make little or no attempt to understand. As long as they are assured that the words used carry out their instructions, they are content. Others may follow every word with meticulous attention. It is impossible to generalise, and our view is that reading over is one of the many factors to which the court should pay attention, but that it should have no conclusive effect.

> Law Reform Committee, Nineteenth Report: Interpretation of Wills, Cmnd. No. 5301, at 12 (1973).

Restatement (Third) of Property: Wills & Other Donative Transfers §12.1, cmt. l.

In the instant case, Ms. Willis presented direct evidence of her unilateral mistake regarding the effect of the executed deed, which the majority ignores. Ms. Willis testified, in relevant part:

> Q. You were attempting by this deed to give lifetime rights to Edward, is that right?
>
> [Ms. Willis]. Yes.
>
> . . .
>
> Q. At some point in time, Ms. Willis, you, in fact, learned that this deed did not do what you intended it to do, is that right?
>
> [Ms. Willis]. That's right.
>
> . . .
>
> Q. Can you recall what Anthony told you this deed did . . . ?
>
> [Ms. Willis]. I just thought it was what I intended it to be.
>
> Q. Which is lifetime rights for Eddie?
>
> . . .
>
> [Ms. Willis]. Yes.
>
> . . .
>
> Q. Why did you not read [the deed]?
>
> [Ms. Willis]. Because I had enough faith in [attorney John Way] that he wrote what I said to.

Thus, Ms. Willis gave explicit testimony that she only intended to deed Eddie "lifetime rights," i.e., a life estate, in her property and that the deed did not do what she intended. In addition, several witnesses testified that Ms. Willis was extremely upset and surprised when she learned about the actual legal effect of the deed because it was not what she had intended. While the majority discusses portions of attorney John Way's ("Way") testimony and Ms. Willis' testimony which appears to contradict her direct assertion that the deed did not do what she intended, this testimony is irrelevant. "[O]n a motion for

directed verdict[,] conflicts in the evidence unfavorable to the plaintiff must be disregarded [and] . . . contradictions within a particular witness' testimony are for the jury to resolve." *Springs v. City of Charlotte*, ___ N.C. App. ___, ___, 704 S.E.2d 319, 325 (2011) (internal quotations and citations omitted). Ultimately, I would hold that Ms. Willis presented sufficient evidence to submit to the jury the issue of her unilateral mistake.

IV. Consideration

As it is necessary for the full and proper disposition of this appeal, I also address plaintiff's argument regarding the issue of consideration. I would hold, and the majority does not conclude to the contrary, that Ms. Willis presented sufficient evidence to submit to the jury the issue of whether Ms. Willis intended the deed to Eddie to be a gift deed.

Plaintiff contends that Ms. Willis presented sufficient evidence at trial that the deed was not supported by consideration to submit the issue to the jury. Plaintiff first notes that the deed did not have any revenue stamps affixed to it. In *Estate of Graham v. Morrison*, the plaintiffs attempted to have deeds to the grantor's niece and grandnephew, which had no revenue stamps attached, voided. 156 N.C. App. 154, 156, 576 S.E.2d 355, 357 (2003). The deeds were challenged because they were conveyed by the grantor's niece as an attorney-in-fact, and she did not have the authority to execute gift deeds in that capacity. *Id.* The trial court entered summary judgment for plaintiffs on the issue, determining that the deeds were gift deeds, because although the deeds stated they were for "valuable consideration," no excise tax appeared on them. *Id.* at 159, 576 S.E.2d at 359. This Court reversed, holding that "[o]mission of excise tax does not *per se* transform a deed given for valuable consideration into a deed of gift. Recitation of valuable consideration within the deed and recording create a rebuttable presumption that the conveyance was valid." *Id.* The *Graham* Court found that genuine issues of material fact existed as to whether the deeds were gift deeds because of (1) the recitation of consideration in the deed; and (2) evidence before the trial court that the deeds could have been supported by consideration in the form of personal services that had been provided to the grantor by his niece and grandnephew. *Id.* at 159-60, 576 S.E.2d at 359.

In the instant case, the deed also recited valuable consideration. Thus, the lack of revenue stamps on the deed was insufficient, standing alone, to meet Ms. Willis' burden of proving that the deed was a

gift deed. Ms. Willis was still required to rebut the presumption of validity that stemmed from the recitation of consideration with more than a scintilla of evidence that the deed was not actually supported by any consideration.

The trial court relied upon our Supreme Court's opinion in *Jones v. Saunders*, 254 N.C. 644, 119 S.E.2d 789 (1961) to hold that Ms. Willis' deed was supported by consideration as a matter of law when it directed a verdict for defendants. In *Jones*, the plaintiff, Myrtle Jones ("Jones"), attempted to have a deed from her father to her sister, Maggie Saunders ("Saunders"), executed in 1947, set aside. 254 N.C. at 645, 119 S.E.2d at 791. The issue before the *Jones* Court was whether Saunders' motion for nonsuit should have been granted on Jones' claim that the deed was procured by fraud or duress. *Id.* at 647, 119 S.E.2d at 792. Saunders argued, *inter alia*, that the motion should have been denied because the deed was only supported by a payment of $500, which should have been considered grossly inadequate consideration. *Id.* at 649, 119 S.E.2d at 793. Our Supreme Court disagreed and held that the motion for nonsuit should have been granted on the basis of evidence presented at trial which showed, *inter alia*, that Saunders lived with her father after his wife died in the late 1930s and that she attended to the duties of their household until her father's death in 1957, ten years after the deed was executed. *Id.* at 647, 119 S.E.2d at 791. In addition, there was also evidence that while living with her father, Saunders procured employment, paid her father's medical bills, and helped with other expenses such as rent and taxes. *Id.*

The *Jones* Court recited the general rule that "[s]ervices performed by one member of the family for another, within the unity of the family, are presumed to have been rendered in obedience to a moral obligation and without expectation of compensation." *Id.* at 649, 119 S.E.2d at 793. However, the Court then noted that "this principle of law *does not prevent a parent from compensating a child for such services*, and does not render consideration for a compensating conveyance inadequate[,]" and ultimately determined that the combination of "[l]ove and affection, recognition of kindness and care, and provision for the future of a child furnish adequate consideration as between parent and child, in the absence of evidence of fraud and duress." *Id.* (emphasis added). The evidence presented at trial established that all of these elements of consideration were present in the conveyance to Saunders from her father, and the Court presumed that they provided consideration for the deed. *Id.* Accordingly, the *Jones* Court held that Saunders' motion for nonsuit should have been granted. *Id.*

A key distinction between *Jones* and the instant case is that in *Jones*, the deed was being challenged by a third party after the grantor was deceased. There is no indication in *Jones* that any direct evidence was presented at trial regarding the grantor's intent or his reasons for conveying his property to his daughter. Instead, the *Jones* Court assumed that the grantor "considered [Saunders'] constancy and devotion a more valuable consideration [than the $500 recited in the deed]." *Id.* at 647, 119 S.E.2d at 792. In contrast, the deed in the instant case was being challenged directly by the grantor, who testified at trial regarding her intentions in executing the deed. As *Jones* itself makes clear, a parent *may* compensate a child for services the child provided, but there is no requirement that the parent do so. *Id.* at 649, 119 S.E.2d at 793.

The evidence at trial, taken in the light most favorable to Ms. Willis, did not establish as a matter of law that Ms. Willis intended to compensate Eddie for any services he provided. "The evidence most relevant in determining donative intent [or the lack of donative intent] is the donor's own testimony." *Burnett v. Burnett*, 122 N.C. App. 712, 715, 471 S.E.2d 649, 651 (1996) (internal quotations and citations omitted). In the instant case, Ms. Willis, upon being asked why she executed a deed to Eddie, testified only that her intention in executing the deed was to ensure that Eddie had a place to live for the rest of his life. Other witnesses, including Way, also testified that Ms. Willis had stated that this was her intent. Ms. Willis' limited intent to provide Eddie with a place to live for the rest of his life did not satisfy all of the elements needed for consideration as stated by the Court in *Jones*. While her intent clearly constituted "provision for the future of a child," it could not, without further testimony regarding her desire to compensate Eddie for his services, be presumed to constitute "recognition of kindness and care."

During her testimony, Ms. Willis never evinced a specific intent to compensate Eddie for any services he provided to her when she was directly asked about her reason for executing the deed. In addition to Ms. Willis' own testimony, Way specifically testified at trial that Ms. Wills did not indicate a desire to compensate Eddie for his services during their discussions about drafting the deed:

> Q. Okay. Were you aware of any consideration given for the deed?
>
> . . .

A. I was not told that this deed was for consideration. I was not described any activities on Eddie's part as being defined as—as consideration.

I do know that we talked at great length about Eddie and the things that he had done for his father and her and things like that.

Q. Okay. In your practice don't you find it typical that children often times help their parents though?

A. Without any doubt, yes.

Q. Okay. And usually isn't that seen as a gratuitous situation unless there's some agreement to the contrary?

A. I hate to use the word usual, but nothing else appearing, it's usually—usually not thought of or discussed with me about that being consideration.

Q. Okay. So you didn't know about any type of situation where Eddie had perhaps done anything for [Ms. Willis] and in return [Ms. Willis] was deeding the property to him?

A. That specific point was not discussed with me.

Since Ms. Willis, the grantor, did not explicitly state, in either her testimony or in her conversation with Way, that she was compensating Eddie for his kindness and care by executing the deed, the trial court should not have presumed that Eddie's kindness and care to Ms. Willis provided consideration for the deed. That determination should have been made by the jury.

V. Conclusion

Defendants' motion for a directed verdict at trial was not based on the ground of unilateral mistake, and thus, the majority improperly affirms the trial court's order on this basis. Contrary to the majority's conclusion, Ms. Willis presented more than a scintilla of evidence that the deed did not express her intent due to her unilateral mistake. Finally, Ms. Willis presented more than a scintilla of evidence to support her claim that the deed to Eddie was not supported by consideration and was thus, a gift deed. Therefore, I would hold that the trial court erred by granting defendants' motion for a directed verdict. I respectfully dissent.

STATE OF NORTH CAROLINA v. ALEX JEROME TROGDON

No. COA10-1344

(Filed 20 September 2011)

1. Evidence—expert testimony—death certificate—autopsy report—homicide—manner of child's death

The trial court did not commit plain error in a second-degree murder case by admitting expert testimony, a death certificate, and an autopsy report that the cause of the child victim's death was homicide. The expert witnesses and the exhibits did not use the word "homicide" as a legal term of art. The expert witness's use of the word "homicide" to explain the manner of death as opposed to accidental means was permissible.

2. Evidence—expert testimony—bite marks

The trial court did not abuse its discretion in a second-degree murder case by allowing a doctor to testify that, in her professional opinion, the bite marks on the child victim's arm were made by defendant. Even assuming *arguendo* that defendant properly objected and the testimony was inadmissible, defendant failed to show that there was a reasonable possibility that a different result would have been reached absent the alleged error.

3. Homicide—second-degree murder—motion to dismiss—sufficiency of evidence—malice

The trial court did not err by denying defendant's motion to dismiss and by entering judgment on the verdict of second-degree murder. The evidence was sufficient for a jury to find malice even in the absence of a finding that defendant's hands were a deadly weapon.

Appeal by defendant from judgment entered 4 March 2010 by Judge R. Stuart Albright in Randolph County Superior Court. Heard in the Court of Appeals 11 April 2011.

Attorney General Roy Cooper, by Assistant Attorney General Sandra Wallace-Smith, for the State.

Glenn Gerding for defendant-appellant.

GEER, Judge.

Defendant Alex Jerome Trogdon appeals from his conviction of second degree murder of his girlfriend's 16-month-old son. He primarily contends on appeal that the trial court committed plain error by admitting expert testimony, a death certificate, and an autopsy report that the cause of the child's death was "homicide." Our review of the record indicates, however, that the expert witnesses and the exhibits did not use the word "homicide" as a legal term of art. Instead, the expert witnesses detailed the nature of the child's injuries, the processes by which such injuries could occur, and the relation of the injuries to the child's death. They then explained that the "manner of death" was "homicide" as opposed to accidental means. Because our Supreme Court has already held in *State v. Parker*, 354 N.C. 268, 553 S.E.2d 885 (2001), that an expert witness' use of the word "homicide" in this manner is permissible, we hold that the trial court did not err in admitting the challenged evidence.

Facts

The State's evidence tended to show the following facts. In 2003, Christal Milton had three children: Tre'Shaun, who was 16 months old, and two older daughters. Ms. Milton and Tre'Shaun's father, Walter Lamont Williams, were no longer in a relationship together, but Mr. Williams would call and visit his son. Ms. Milton began dating defendant in July 2003.

Earlier, in January 2003, Tre'Shaun, who had been wheezing, was diagnosed as having asthma, a reflux-induced respiratory disease, and laryngomalacia, which is "a developmental abnormality of the inlet of the larynx." Individuals with this condition breathe in the flap of skin that covers the air way and make a whistle or wheezing type sound. In Tre'Shaun's case, this condition required only observation, and there was no indication that it was severe enough to obstruct Tre'Shaun's air way. His reflux was treated with the drug Nexium, and his asthma was treated with daily breathing treatments.

In November 2003, Ms. Milton and defendant planned to spend Thanksgiving together at Ms. Milton's home. However, Tre'Shaun's father, Mr. Williams, came to visit the children on Thanksgiving. Ms. Milton called defendant to let him know that Mr. Williams was there. Although Mr. Williams assured defendant that he was only there to visit the children, defendant became upset and refused to go over to Ms. Milton's home. He drove past the house more than once and called Ms. Milton complaining that "he's still there."

The next day, defendant was very upset that Ms. Milton had let Mr. Williams visit. He did not trust Ms. Milton and thought that she and Mr. Williams were "trying to be together behind his back." Two days after Thanksgiving, when Ms. Milton and defendant were arguing again, defendant told her that Tre'Shaun "wasn't his damn kid, anyway." This statement upset Ms. Milton, and defendant apologized.

On approximately 8 December 2003, Tre'Shaun's sisters were carrying him upstairs and fell, tumbling down the steps. The next day, because of the fall, Ms. Milton took Tre'Shaun to the doctor and then to the hospital to have x-rays taken. The fall had not resulted in any head injuries, but Tre'Shaun had a knot and sore area on one of his ribs. Although his doctor suspected that the rib might be fractured, the x-ray showed that there was no fracture.

On 15 December 2003, Tre'Shaun was sick with a cold, fever, and diarrhea. Ms. Milton stayed home from work with him and took the children to a Christmas program at church. When they left the program, Ms. Milton was surprised to see that defendant was in the parking lot "to make sure [Ms. Milton] was there and how things went." That night, defendant spent the night at Ms. Milton's house but stayed downstairs watching television because he could not sleep.

The next morning, 16 December 2003, Ms. Milton took her daughters to daycare, briefly leaving Tre'Shaun at home with defendant. When she got home she brought Tre'Shaun downstairs, tried to get him to eat, and let him play with some toys. Ms. Milton decided to go to the grocery store to get some food she thought Tre'Shaun might eat and left Tre'Shaun with defendant. When she got home, defendant had gotten Tre'Shaun to eat a piece of cake. Tre'Shaun was crying, however, and defendant told Ms. Milton that she needed to change his diaper.

After changing the diaper, Ms. Milton gave Tre'Shaun some more food that he ate while Ms. Milton and defendant played Monopoly. Because Tre'Shaun looked like he was going to fall asleep, she put him down for a nap in the living room while she and defendant continued to play Monopoly. At about 4:30 p.m., Ms. Milton needed to go pick her daughters up from daycare. She asked defendant to watch Tre'Shaun once more while she was gone.

Ms. Milton returned home with her daughters approximately 30 minutes later. When she arrived, defendant was on the porch, telling her to "[h]urry up and come here." She went inside and saw Tre'Shaun propped in the corner of the couch, but slumped over. He looked bluish-grey in color.

She drove Tre'Shaun to Randolph Hospital's emergency room. Defendant sat in the passenger seat holding Tre'Shaun. Ms. Milton asked defendant what happened and why he did not call 911. Defendant told her that he did not know what happened—that Tre'Shaun just looked like he was not breathing. He said that he tried to call 911 twice and could not drive Tre'Shaun for help because his car was parked down the street.

Upon his arrival at the emergency room, at approximately 5:15 p.m., Tre'Shaun was placed on a ventilator. He was breathing with assistance, but he was comatose. Three hours later, Tre'Shaun was flown by helicopter to the intensive care unit of Brenner Children's Hospital in Winston-Salem. Defendant drove Ms. Milton to Winston-Salem, and, during the drive, told Ms. Milton that they should pray about the situation and when it was over, they could be a family.

At Brenner Children's Hospital, Tre'Shaun's pediatrician examined him—she believed that his condition was not the result of a cold, allergies, or a fall down the stairs. Dr. Thomas Nakagawa, a pediatric intensive care specialist at Brenner Children's Hospital, determined that Tre'Shaun had bleeding over the surface of the brain and massive brain swelling as a result of blunt force injury to his head and neck. As a result of the injury, Tre'Shaun was brain dead. Dr. Nakagawa concluded that Tre'Shaun's injuries resulted from his "head moving back and forth very rapidly and the head being slammed into some type of soft object."

According to Dr. Nakagawa, the head injuries likely occurred just before he was brought to the emergency room. After talking with Ms. Milton and defendant, Dr. Nakagawa decided that Tre'Shaun had no significant history that would account for his injuries. Dr. Nakagawa concluded that Tre'Shaun's injuries were non-accidental.

When defendant was questioned by the police, he first denied shaking or dropping Tre'Shaun. Defendant told the police that he went to the bathroom and, when he returned, Tre'Shaun was still asleep. Tre'Shaun, however, then raised and lowered his head and started breathing fast. His eyes were "laid back," and he was limp. Defendant said he tried to call 911, but the call did not go through so he laid the phone down. When he tried to call again, the phone did not ring. He claimed that he rocked Tre'Shaun, took him outside for fresh air, and breathed into his mouth. In a subsequent interview, defendant said that when Tre'Shaun did not wake up, he shook Tre'Shaun and hit him on the back.

On 1 June 2004, defendant was indicted for first degree murder. The case was first tried in August 2006, but ended in a mistrial. It was tried again at the 23 February 2010 session of Randolph County Superior Court.

At trial, Dr. Ellen Riemer, the forensic pathologist who performed the autopsy of Tre'Shaun testified that he had bruises on the left side of his forehead, the back of his scalp, around his ear, on his tongue, and on the underside of the lips overlaying the teeth. There were two bruises that looked like bite marks on his left forearm and a bruise on the right side of his buttock. She also discovered hemorrhages underlying the bruises on his scalp, which included bleeding in his actual scalp. There was a subdural hemorrhage and subarachnoid hemorrhage of the brain and a bruise of the brain itself.

Dr. Riemer testified that she believed there were four blunt force impact sites on Tre'Shaun's skull. Dr. Riemer had concluded that the trauma was not consistent with an accidental fall, but rather was consistent with striking Tre'Shaun's head against an object.

According to Dr. Riemer, after receiving these injuries, Tre'Shaun would have immediately lost consciousness and been limp and unresponsive. He would have had a difficult time breathing, and would not have been able to eat, play, or interact after the injuries occurred. She concluded that Tre'Shaun's cause of death was acute brain injury with hemorrhage and edema due to blunt force trauma of the head and the manner of his death was homicide.

A forensic odontologist, Dr. Sarah Shoaf, also testified regarding the marks on the top and on the bottom of Tre'Shaun's arm that were suspected to be human bite marks. According to Dr. Shoaf, the two marks could not have been made at the same time because of their placement on the arm. After examining plaster casts of the teeth of Ms. Milton, her two daughters, Mr. Williams, and defendant, she then compared overlays created by scanning the casts with to-scale photographs of the bite marks on Tre'Shaun's arm. Dr. Shoaf concluded that defendant caused the bite marks on Tre'Shaun's arm.

At the close of the State's evidence, defendant moved to dismiss. After the court denied his motion, defendant presented no evidence. The jury was instructed on first degree murder based on malice, premeditation and deliberation; first degree murder based on felony murder; second degree murder; and involuntary manslaughter. The jury returned a verdict of guilty of second degree murder. The trial

court sentenced defendant to a presumptive-range term of 189 to 236 months imprisonment. Defendant timely appealed to this Court.

I

[1] Defendant first argues that the trial court erred by admitting (1) expert testimony, (2) a death certificate, and (3) an autopsy report, all of which identified Tre'Shaun's death as a homicide. Dr. Riemer who performed the autopsy testified without objection that "[t]he cause of death was acute brain injury with hemorrhage and edema due to blunt force trauma of [the] head. And the manner of death is homicide." The trial court then admitted without objection the death certificate prepared by Dr. Riemer identifying the cause of death as "homicide" and the autopsy report that set out her opinion that the manner of death was homicide. Dr. Nakagawa testified that he agreed with Dr. Riemer's opinions, including her conclusion that the manner of death was homicide.

Because defendant did not object to the admission of any of this evidence at trial, he now argues plain error.

> "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

Pursuant to N.C.R. Evid. 704, "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Our Supreme Court has explained, however:

> In interpreting Rule 704, this Court draws a distinction between testimony about legal standards or conclusions and factual premises. An expert may not testify regarding whether a legal standard or conclusion has been met at least where the standard

> is a legal term of art which carries a specific legal meaning not readily apparent to the witness. Testimony about a legal conclusion based on certain facts is improper, while opinion testimony regarding underlying factual premises is allowable.
>
> For example, an expert may not testify regarding specific legal terms of art including whether a defendant deliberated before committing a crime. Additionally, a medical expert may not testify as to the "proximate cause" of a victim's death.

Parker, 354 N.C. at 289-90, 553 S.E.2d at 900 (internal citations and quotation marks omitted).

In *Parker*, the Court noted that it had previously held that "[t]here was no error . . . where an expert characterized a death with the term 'homicidal assault.' " *Id.* at 290, 553 S.E.2d at 900 (quoting *State v. Flippen*, 344 N.C. 689, 699, 477 S.E.2d 158, 164 (1996)). The Court explained that it had reached that conclusion because the term "homicidal assault" was " 'not a legal term of art, nor [did] it correlate to a criminal offense.' " *Id.* (quoting *Flippen*, 344 N.C. at 699, 477 S.E.2d at 164).

Applying *Flippen*, the *Parker* Court then concluded that a medical examiner's reference to a death as a "homicide" was likewise admissible:

> Dr. Thompson used the word "homicide" to explain the factual groundwork of his function as a medical examiner. Dr. Thompson did not use the word as a legal term of art. He explained how he determined the death was a homicide instead of death by natural causes, suicide, or accident. Dr. Thompson's testimony conveyed a proper opinion for an expert in forensic pathology, and the trial court properly allowed it.

Parker, 354 N.C. at 290, 553 S.E.2d at 900. *See also McNeil v. Pilot Life Ins. Co.*, 19 N.C. App. 348, 350-51, 198 S.E.2d 753, 755-56 (1973) (holding that "homicide" is defined only as " '[t]he act of a human being taking away the life of another' " and, while it often involves intentional acts, "[a]n *un*intended killing of one human being by another is also a homicide" (quoting *Black's Law Dictionary*, Fourth Edition)).

Based on our review of the record, we hold that *Parker* controls. Similar to the testimony in *Parker*, Drs. Riemer and Nakagawa's testimony described the nature of the injuries and how those injuries had resulted in the death of Tre'Shaun. Like the medical examiner in *Parker*, their testimony did not use "homicide" as a legal term of art, but rather as a means of describing how these injuries came to be

inflicted—the "manner of death" was a homicide and not through accidental means. In other words, neither witness (nor the two exhibits) provided evidence that amounted to a legal conclusion based on the facts. Instead, they testified as to the factual mechanism that resulted in Tre'Shaun's death. The trial court, therefore, did not err in admitting this evidence.

II

[2] Defendant next contends that the trial court erred by allowing Dr. Shoaf to testify that, in her professional opinion, the bite marks on Tre'Shaun's arm were made by defendant. " 'A trial court has wide discretion in determining whether expert testimony is admissible, and may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Crandell*, ___ N.C. App. ___, ___, 702 S.E.2d 352, 357 (2010) (quoting *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000)), *disc. review denied*, ___ N.C. ___, 710 S.E.2d 34 (2011).

Defendant does not challenge the admissibility of Dr. Shoaf's testimony generally. Indeed, the trial court made detailed findings on the record regarding each prong of the test set out in *State v. Morgan*, 359 N.C. 131, 160, 604 S.E.2d 886, 903-04 (2004) (holding that "a trial court that is considering whether to admit proffered expert testimony pursuant to North Carolina Rule of Evidence 702 must conduct a three-step inquiry to determine: (1) whether the expert's proffered method of proof is reliable, (2) whether the witness presenting the evidence qualifies as an expert in that area, and (3) whether the evidence is relevant").

While defendant recognizes that "Dr. Shoaf could testify [defendant's] bite pattern was consistent with the bite pattern found on [Tre'Shaun's] arm," he contends that Dr. Shoaf "improperly invaded the province of the jury by testifying [that defendant] did in fact cause the bite mark." At trial, Dr. Shoaf first testified twice that the marks on the underside of Tre'Shaun's arm were "consistent" with a bite by defendant. The following then occurred:

> Q. Now, did you put your findings in written form, Doctor?
>
> A. Yes, I did.
>
> [PROSECUTOR]: And if I may approach.
>
> THE COURT: You may.

[DEFENSE COUNSEL]: May we approach the bench? May we approach?

THE COURT: Yes, sir.

(There was a Bench conference with [the prosecutor] and [defense counsel] in attendance.)

THE COURT: All right. *Objection sustained at this time.*

Q. (By [PROSECUTOR]) Dr. Shoaf, in your opinion and based on your experience in forensic odontology, who made the bite mark on Tre'Shaun Williams?

[DEFENSE COUNSEL]: *Objection.*

THE COURT: Overruled.

A. Do I answer?

THE COURT: You may. You may answer.

A. Okay. In my professional opinion, the bite mark on Tre'Shaun Williams was made by [defendant].

(Emphasis added.) Dr. Shoaf was then asked to read her report to the jury, which similarly stated her opinion that the bite mark was made by defendant. Defense counsel did not specifically object to that portion of the report, but lodged an objection "for the record" when the State moved the admission of the report.

It is not apparent from the record that defendant objected at trial on the same basis that he raises on appeal. The only specific objection asserted was that Dr. Shoaf's testimony was not reliable under *Howerton v. Arai Helme*t, *Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004). The record contains no indication that defendant ever specifically objected on the grounds that Dr. Shoaf's testimony was invading the province of the jury. Even assuming, without deciding, (1) that defendant did properly object and (2) that Dr. Shoaf's testimony that defendant had in fact made the bite mark was inadmissible, defendant has failed to show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached" by the jury. N.C. Gen. Stat. § 15A-1443(a) (2009).

Dr. Shoaf explained that she examined the dentition of the five people who could have made the bite mark (Tre'Shaun's two sisters, Mr. Williams, Ms. Milton, and defendant); she analyzed the different types of dentition of the five individuals; and she explained how the

"bites" of each person compared to the bite mark on the underside of Tre'Shaun's arm. Dr. Shoaf testified that one sister had only baby teeth—her bite and teeth were too small to match. The second sister had mixed permanent and baby teeth, but the arch of her bite was too round and too small to fit the bite mark. Mr. Williams was missing teeth where the bite mark showed that teeth existed, leading Dr. Shoaf to conclude that he could not have made the bite mark. Ms. Milton had a more rounded bite while the bite mark on Tre'Shaun was squared off. In addition, her canine teeth did not correspond with the canine marks visible in the bite mark on Tre'Shaun. With respect to defendant, however, his bite was squared off like the bite mark on Tre'Shaun, and his canines corresponded to the position of the canines in the bite mark.

Based on her analysis, Dr. Shoaf testified on direct examination without objection, before expressing her conclusion that defendant had made the bite mark, that the bite mark was "consistent" with a bite from defendant's upper teeth and that the overlay made from defendant's cast "is the one that is most consistent" with the bite mark and is "consistent with [defendant's] making that bite mark." Dr. Shoaf subsequently displayed for the jury the overlay for each of the individuals, so that the jury could decide for itself whether to believe Dr. Shoaf's analysis.

On cross-examination, defense counsel repeated that Dr. Shoaf's conclusion that "the bite mark that [she] observed was consistent with the pattern of [defendant] was based upon [her] comparison of that and the four other—others, as well . . . ." Dr. Shoaf then acknowledged that she was not testifying that no one else "in the world" could have made the bite mark because bite marks are not like fingerprints—they are not different from everyone else's bite mark. She then agreed with defense counsel's statement that her "conclusion is, of the five you looked at, it's the only one that could have made the bite . . . ."

Thus, even if the challenged testimony had been omitted, the jury still would have heard Dr. Shoaf's detailed analysis of the overlays in relation to the actual bite mark; her conclusion on cross-examination (not challenged on appeal) that defendant's bite is "the only one that could have made the bite" mark on Tre'Shaun; and her repeated statements that defendant's overlay was the most consistent with the bite mark. In addition, the jury would still have had the opportunity to make its own determination of how the overlay of each individual fit with the photograph of the bite mark. Given this evidence, we cannot

conclude that the admission of the challenged testimony was prejudicial under N.C. Gen. Stat. § 15A-1443(a).

III

[3] Finally, defendant contends the trial court erred in denying his motion to dismiss and in entering judgment on the verdict of second degree murder. Specifically, defendant argues that the State presented insufficient evidence that he acted with malice for purposes of second degree murder and that the trial court should have submitted to the jury only the charge of involuntary manslaughter.

"This Court reviews the denial of a motion to dismiss for insufficient evidence *de novo*." *State v. Robledo*, 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008). "In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence." *Parker*, 354 N.C. at 278, 553 S.E.2d at 894. "The trial court must also resolve any contradictions in the evidence in the State's favor." *Id.* "The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility." *Id.*

In order for evidence to sustain a conviction it must be substantial. *Robledo*, 193 N.C. App. at 524, 668 S.E.2d at 94. " 'Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion.' " *Id.* at 525, 668 S.E.2d at 94 (quoting *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255 (2002)).

The essential elements of second degree murder are an unlawful killing of a human being with malice, but without premeditation and deliberation. *State v. Johnson*, 196 N.C. App. 330, 334, 674 S.E.2d 727, 730, *appeal dismissed*, 363 N.C. 378, 679 S.E.2d 395 (2009). *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982), holds that "there are at least three kinds of malice." First, there is actual malice, meaning "express hatred, ill-will or spite." *Id.* The second type of malice exists "when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief." *Id.* The third type of malice is a " 'condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.' " *Id.* (quoting *State v. Foust*, 258 N.C. 453, 458, 128 S.E.2d 889, 893 (1963)).

Here, during its instruction on second degree murder, the trial court stated the following:

> In order for you to find the Defendant guilty of second degree murder, the State must prove beyond a reasonable doubt that the Defendant intentionally and with malice wounded Tre'Shaun Lamont Williams with a deadly weapon thereby proximately causing his death. If the State proves beyond a reasonable doubt that the Defendant intentionally inflicted a wound upon Tre'Shaun Lamont Williams with a deadly weapon that proximately caused his death, you may infer, first, that the killing was unlawful and, second, that it was done with malice, but you are not compelled to do so.
>
> You may also infer that the killing was unlawful and that it was done with malice, if you find from the evidence that the victim's death resulted from an attack by hand alone without the use of other weapons when the attack was made by a strong or mature person upon a weaker or defenseless person, but, again, you are not compelled to do so. You may consider the inferences along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice. If the killing was unlawful and was done with malice, the Defendant would be guilty of second degree murder.
>
> And, again, a deadly weapon is a weapon which is likely to cause death or serious injury. In determining whether the hands of the Defendant were used as a deadly weapon, you should consider their nature, the manner in which they were used and the size and strength of the Defendant as compared to Tre'Shaun Lamont Williams.

Defendant contends that the trial court only instructed the jury on the third form of malice, i.e. where a person intentionally takes the life of another without cause, excuse or justification.[1] Although defendant acknowledges that the trial court instructed the jury both (1) that it could "infer [defendant] acted with malice if it found he used a deadly weapon, namely his hands," or (2) that it could "infer malice if it believed [defendant] attacked [Tre'Shaun] with hands alone without a deadly weapon if it found the attack was by a stronger person on a weaker person," defendant seems to argue only on appeal that the State "failed to present substantial evidence that [defendant] used a deadly weapon to intentionally injur[e] [Tre'Shaun]."

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1. The trial court, when defining malice for the jury during its first-degree murder instruction, included the other forms of malice.

We need not address that argument since the evidence was sufficient for a jury to find malice even in the absence of a finding that defendant's hands were a deadly weapon. Although defendant attempts to characterize his actions in shaking Tre'Shaun as an overreaction intended to revive the child, his contentions would require us to view the evidence in the light most favorable to defendant. When the proper standard of review is applied, however, we conclude that the jury could find that defendant acted with malice.

Based on the expert testimony, the jury could reasonably conclude that Tre'Shaun did not die from his medical conditions or from his fall on the stairs. Further, the jury could reasonably reject defendant's claim that he simply shook Tre'Shaun in an attempt to revive him. The jury could find instead that during the time while Tre'Shaun was in the sole custody of defendant, Tre'Shaun suffered non-accidental injuries to the head with acute brain injury due to blunt force trauma of the head. The evidence would permit a finding that Tre'Shaun suffered a minimum of four impacts to the head, most likely due to his head being slammed into some type of soft object.

When this evidence is combined with the evidence permitting the jury to find that defendant bit Tre'Shaun, that defendant was extremely upset about Ms. Milton's relationship with Tre'Shaun's father, and that defendant resented Tre'Shaun, the jury could find that defendant intentionally attacked the 16-month-old child, resulting in his death. This evidence was sufficient to support the charge of second degree murder. *See State v. Murphy*, 172 N.C. App. 734, 745, 616 S.E.2d 567, 574 (2005) ("[W]hile malice is not necessarily inferred where death results from an attack upon a strong or mature person, malice may be inferred where death results from an attack made by a strong person and inflicted upon a young child, because '[s]uch an attack is reasonably likely to result in death or serious bodily injury' to the child." (quoting *State v. Elliott*, 344 N.C. 242, 269, 475 S.E.2d 202, 213 (1996))), *disc. review denied in part*, 361 N.C. 176, 641 S.E.2d 309, *vacated in part on other grounds*, 361 N.C. 164, 696 S.E.2d 527 (2006). Defendant has, therefore, failed to demonstrate that the trial court erred in denying his motion to dismiss and in entering judgment on the verdict of second degree murder.

No error.

Chief Judge MARTIN and Judge ELMORE concur.

REBECCA W. ROMULUS, PLAINTIFF v. JOHN M. ROMULUS, DEFENDANT

No. COA10-1593

(Filed 20 September 2011)

Divorce—equitable distribution—subject matter jurisdiction—unpaid periodic distributive award payments—execution pending appeal

The trial court erred by ordering enforcement of payment of a distributive award as provided in an equitable distribution order based on lack of subject matter jurisdiction. Although an equitable distribution distributive award is theoretically a "judgment directing the payment of money" which is enforceable during the pendency of an appeal unless the appealing spouse posts a bond under N.C.G.S. § 1-289, the trial court does not have jurisdiction after notice of appeal is given to determine the amount of periodic payments which have come due and remain unpaid during the pendency of the appeal and to reduce that sum to an enforceable judgment. The case was remanded for further proceedings.

Appeal by defendant from orders entered 23 July 2010, 3 September 2010, and 15 September 2010 by Judge Jeffrey Evan Noecker in District Court, New Hanover County. Heard in the Court of Appeals 8 June 2011.

Jonathan McGirt, for plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for defendant-appellant.

STROUD, Judge.

This case is a companion case to *Romulus v. Romulus*, COA 10-1453, in which we considered defendant's appeal from the equitable distribution order entered on 4 March 2010. In this appeal, defendant contends that the trial court erred by its orders entered to enforce payment of the distributive award as provided in the equitable distribution order. For the following reasons, we vacate the trial court's orders for lack of subject matter jurisdiction and remand this matter to the trial court for further proceedings.

I. Background

On 4 March 2010, the trial court entered an equitable distribution order which ordered that defendant pay plaintiff a distributive award

of $629,840.00, payable over a period of seven years in 84 monthly installments of $7,498.10. The first payment on the distributive award was due on 10 January 2010.[1] On 25 March 2010, plaintiff filed a motion to show cause why defendant should not be held in contempt for failure to comply with the equitable distribution order by making the monthly payments as due, and on the same day, the trial court issued an order for defendant to appear and show cause why he should not be held in contempt. On 31 March 2010, defendant filed notice of appeal from the 4 March 2010 equitable distribution order.

On 8 April 2010, defendant filed a motion to dismiss plaintiff's motion to show cause and the order to show cause, alleging that proceedings to enforce the judgment could not be held prior to expiration of the time for giving of notice of appeal, and time for appeal did not expire until 5 April 2010. Defendant also alleged that the trial court lacked jurisdiction to enter orders for contempt while an appeal was pending. On 25 May 2010, the trial court held a hearing upon plaintiff's motion for contempt and defendant's motion to dismiss the motion, but the order from this hearing was not "reduced to writing, signed, and entered" until 23 July 2010. At the 25 May 2010 hearing, the trial court "noted that proceedings in the case by writ of execution and levy were not prohibited by law and opined on how such proceedings might occur."

On 1 June 2010, plaintiff filed an affidavit alleging that defendant had not paid any of the distributive award monthly payments due thus far, with a total past due of $37,490.50. On 17 June 2010, the New Hanover County Clerk of Superior Court issued a writ of execution for the entire amount of the distributive award, $645,639.50; on 9 July 2010, the New Hanover County Sheriff seized defendant's 1994 Chevrolet Suburban and 2007 Triton Sea Hunt 220 boat. On 16 July 2010, defendant filed a motion for a temporary restraining order and injunction seeking to have the writ of execution withdrawn, alleging in part that the execution was done in contravention to the equitable distribution order which provided for monthly payments, with the total award not due and payable in full until December 2016.

On 23 July 2010, the trial court entered two orders. One order memorialized the trial court's rulings at the 25 May 2010 hearing,

1. The equitable distribution trial concluded on 9 October 2009 and the order was filed 4 March 2010. The order provided that the monthly payments were to be paid "on or before the the [sic] 10th day of each month, retroactive to January 10, 2010." Defendant does not raise any argument on appeal as to the retroactivity of the distributive payments.

which addressed plaintiff's motion to show cause and defendant's motion to dismiss. The trial court denied defendant's request for relief under Rule 62(a) of the North Carolina Rules of Civil Procedure but allowed defendant's request for relief under Section 1-294 of the North Carolina General Statutes and provided that "Plaintiff's Motion to Show Cause and the Court's Order to Show Cause shall be held in abeyance."

On 23 July 2010, the trial court also entered an order based upon a "hearing in chambers" held on 21 July 2010 on defendant's motion for temporary restraining order and to withdraw the writ of execution. The trial court ordered as follows:

> 1. The Defendant's Motion to Withdraw the Writ of Execution is denied, pending further hearing.
>
> 2. Defendant is entitled to a temporary restraining order in this matter.
>
> 3. The Sheriff of New Hanover County and the Clerk of Superior Court are hereby restrained from making any payment to the Plaintiff from any property seized or sold in this case pursuant to the Writ of Execution in excess of the amounts currently due and unpaid under the Equitable Distribution Judgment.
>
> 4. In order to determine said amounts, the Plaintiff is directed to regularly file Affidavits with the Clerk of Court in this case, as has already been done on at least one occasion, updating the amounts currently due and payable under the Equitable Distribution Judgment. Any such Affidavits are to be served on the Defendant. If there is a dispute as to amounts due and unpaid, the Court will on appropriate motion schedule a hearing to make the determination after hearing from all parties.
>
> 5. Any property already seized by the Sheriff pursuant to the Writ of Execution, including but not limited to a 1994 Chevrolet Suburban and a 2007 boat, may remain in the Sheriff's possession for sale and/or other proceedings pursuant to statute.
>
> 6. This matter shall be calendared for hearing as to whether Defendant is entitled to further injunctive or other relief on August 10, 2010 in Courtroom #301 at 9:30 am or as soon as the matter can be reached.

On 3 August 2010, plaintiff filed a motion to have amounts alleged due in the amount of $52,486.70 reduced to judgment. On the same date, defendant filed a motion to alter or amend the 23 July 2010

order on the motion to dismiss and order to show cause pursuant to Rule 59, alleging that two conclusions of law in that order were in error. On 5 August 2010, defendant filed a motion for return of his property which was seized by the sheriff and a response to plaintiff's 3 August 2010 motion to have the past-due payments reduced to judgment.

On 3 September 2010, the trial court entered a "Decree on Pending Motions" which denied defendant's Rule 59 motion, dissolved the temporary restraining order, denied defendant's motion for return of property, and directed the clerk of superior court "to immediately docket a judgment against the Defendant and in favor of the Plaintiff in the principal amount of $52,486.70, which is reflective of amounts due and unpaid through August 9, 2010." The order provided that interest would accrue on "each unpaid payment at the legal rate." The order further provided that "an amended Writ of Execution shall immediately issue" in the amount of $52,486.70 and the sheriff was directed to retain the property seized from defendant "for further proceedings[.]" The trial court also ordered that defendant was entitled to "a period of twenty (20) days from entry of this order to post a sufficient undertaking in compliance with Section 1-289, in an amount of $150,000.00, such amount being deemed sufficient by the court to protect the parties pending the determination of the appeal."

On 15 September 2010, another copy of the 3 September 2010 order was filed with the clerk of superior court ("the modified order"). This order is identical to the 3 September 2010 order except for several handwritten changes to the order, initialed by "JEN[,]" presumably the Honorable Jeffrey Evan Noecker, the judge who also entered the prior orders in this matter. One change is a correction to a typographical error which is not at issue here; the other is a handwritten addition which states that "[t]he accrued interest through August 9, 2010 is $1,354.15."

On 21 September 2010, defendant filed notice of appeal from the 3 September 2010 order, the 15 September 2010 modified order, the 23 July 2010 order on defendant's motion to withdraw the writ of execution and temporary restraining order, and the 23 July 2010 order on motion to dismiss and order to show cause.

II. Standard of review

Defendant raises two arguments regarding the authority of the trial court to enter order enforcing the distributive award. Defendant first argues that the "trial court had no statutory authority to enter orders permitting plaintiff to seek to have alleged unpaid periodic dis-

tributive award payments reduced to judgment or to enter judgment on the amounts alleged to be due," based upon N.C. Gen. Stat. § 50-20(e) and N.C. Gen. Stat. § 1-294. Defendant's second argument is that the trial court had no subject matter jurisdiction to enter orders enforcing the distributive award as both parties had appealed from the equitable distribution order. On both of defendant's arguments, our standard of review is *de novo*, as both issues present questions of law. Because defendant's first argument presents a question of "statutory interpretation, full review is appropriate, and 'the conclusions of law 'are reviewable de novo.' ' " *Mark IV Beverage, Inc. v. Molson Breweries USA, Inc.*, 129 N.C. App. 476, 480, 500 S.E.2d 439, 442 (quoting N.C. *Reinsurance Facility v. N.C. Insurance Guaranty Assn.*, 67 N.C. App. 359, 362, 313 S.E.2d 253, 256 (1984)), *disc. review denied*, 349 N.C. 231, 515 S.E.2d 705 (1998). Defendant's N.C. Gen. Stat. § 1A-1, Rule 59 motion also presents "a question of law or legal inference" which is reviewed *de novo*. *Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000). Also, "[t]he standard of review for lack of subject matter jurisdiction is *de novo*." *Keith v. Wallerich*, 201 N.C. App. 550, 554, 687 S.E.2d 299, 302 (2009) (citation omitted).

III. Subject matter jurisdiction

We will address defendant's second argument first, because if the trial court did not have subject matter jurisdiction to consider plaintiff's motions seeking enforcement of the equitable distribution order, it would be unnecessary for us to address the merits of any orders entered. Also, as a practical matter, both arguments raise the same issues, for if the trial court had statutory authority to enter the contested orders, those statutes would presumably confer subject matter jurisdiction to enter the orders. Defendant argues that the filing of notice of appeal by both parties divested the trial court of subject matter jurisdiction to enter additional orders. Essentially, defendant argues that the distributive award in the equitable distribution order is unenforceable as a practical matter while the order is on appeal, where the trial court did not secure the award by a lien upon specific property under N.C. Gen. Stat. § 50-20(e) and did not enter a judgment for a fixed sum payable on one date.

N.C. Gen. Stat. § 1-294 (2009) provides as follows:

> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the

> court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. The court below may, in its discretion, dispense with or limit the security required, when the appellant is an executor, administrator, trustee, or other person acting in a fiduciary capacity. It may also limit such security to an amount not more than fifty thousand dollars ($50,000), where it would otherwise exceed that sum.

An appeal is not "perfected" until it is docketed in the appellate court, but when it is docketed, the perfection relates back to the time of notice of appeal, so any proceedings in the trial court after the notice of appeal are void for lack of jurisdiction. *Lowder v. All-Star Mills, Inc.*, 301 N.C. 561, 580-81, 273 S.E.2d 247, 258-59 (1981). Defendant argues that there are specific statutory provisions which provide for enforcement of orders regarding child custody, child support, and alimony during an appeal, but there is no such statute for an equitable distribution order. *See* N.C. Gen. Stat. § 50-16.7 (alimony enforceable by contempt pending appeal); N.C. Gen. Stat. § 50-13.3 (child custody enforceable by contempt pending appeal); N.C. Gen. Stat. § 50-13.4(f)(9) (child support enforceable by contempt pending appeal). The only specific statutory provision in Chapter 50 regarding enforcement of a distributive award requiring periodic payments is N.C. Gen. Stat. § 50-20(e), which provides authority for the trial court to place a lien upon specific property to secure payment of a distributive award. *See* N.C. Gen. Stat. § 50-20(e) (2009) (stating that "[t]he court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or divisible property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property."). In contrast to a "lien on specific property[,]" a docketed money judgment under N.C. Gen. Stat. § 1-234 becomes a lien upon all real property owned by the debtor in the county where the judgment is recorded. N.C. Gen. Stat. § 1-234 (2009). Defendant argues that "[t]he applicable rule of statutory construction here is that 'where one statute deals with a particular subject or situation in specific detail, while another statute deals with the subject in broad, general terms, the particular, specific statute will be construed as controlling, absent a clear legislative intent to the contrary.' " *Lewis v. Edwards*, 147 N.C. App. 39, 50, 554 S.E.2d 17, 24 (2001) (quoting *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 154-55, 423 S.E.2d 747, 751 (1992)).

Plaintiff responds that although N.C. Gen. Stat. § 50-20(e) provides for a lien upon specific property as one method of enforcement of a distributive award, it is certainly not the only method, nor is the trial court compelled to use only this method, and nothing in N.C. Gen. Stat. § 50-20 addresses its application to an appeal from an equitable distribution order. Plaintiff claims that "Defendant's Brief asserts an absurd or bizarre consequence from the Defendant's misinterpretation of Subsection 50-20(e), namely: That merely by filing a Notice of Appeal, the Defendant may automatically paralyze the trial court from taking any action toward enforcement of or execution on its validly entered Equitable Distribution Judgment." But this Court has noted:

> It is well settled that in construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results. Accordingly, an unnecessary implication arising from one statutory section, inconsistent with the express terms of another on the same subject, yields to the expressed intent.

Duplin County Bd. of Educ. v. Duplin County Bd. of County Com'rs, 201 N.C. App. 113, 119, 686 S.E.2d 169, 173 (2009) (citations, quotation marks, and brackets omitted).

Plaintiff notes that Chapter 1, Article 27 governs appeals and argues that we should look to its provisions in addressing rights upon appeal. Although N.C. Gen. Stat. § 1-294, as quoted above, provides for an automatic stay of "all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein[,]" other provisions in Article 27 do permit execution to proceed upon a judgment, even if it has been appealed, in certain circumstances. In this instance, plaintiff argues that N.C. Gen. Stat. § 1-289 (2009) is applicable to the equitable distribution order; it provides in pertinent part as follows:

> (a) If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall

> be awarded against the appellant upon the appeal, except as provided in subsection (b) of this section. . . .

Thus, the first issue we must address is whether an equitable distribution judgment which orders payment of a distributive award by periodic payments is "a judgment directing the payment of money" within the meaning of N.C. Gen. Stat. § 1-289. Neither party has cited, nor can we find, a prior case which addresses this exact issue. However, our Supreme Court has recognized that judgments directing the payment of alimony or child support are "judgments directing the payment of money" under N.C. Gen. Stat. § 1-289 which "apparently" may be enforced by execution during an appeal. *Quick v. Quick*, 305 N.C. 446, 462, 290 S.E.2d 653, 663 (1982).

In *Joyner v. Joyner*, our Supreme Court addressed an order for alimony *pendent lite* and child custody, holding that the order was not enforceable by contempt while the order was on appeal, as this case was decided prior to statutory amendments which allowed enforcement by contempt during an appeal. 256 N.C. 588, 592, 124 S.E.2d 724, 727 (1962). While the *Joyner* court held that the trial court was "divested of jurisdiction by the appeal" and its contempt order was therefore void, it also noted:

> However, with respect to the money judgments, the appeal does not stay execution against the defendant's property for the collection of the judgment unless a stay or *supersedeas* is ordered. The appeal stays contempt proceedings until the validity of the judgment is determined. But taking an appeal does not authorize a violation of the order. One who wilfully violates an order does so at his peril.

Id. at 591, 124 S.E.2d at 727. Our Supreme Court again recognized the distinction between enforcement by contempt and by execution as to an alimony order in *Quick v. Quick:*

> It has also been held that an order for the payment of alimony, alimony *pendente lite*, child support and counsel fees is a money judgment under the provisions of G.S. 1-289. Therefore, an appeal does not stay execution against the defendant's property for the collection of judgment unless a stay or supersedeas is ordered. *Vaughan v. Vaughan*, 211 N.C. 354, 190 S.E. 492 (1937); *Joyner v. Joyner*, 256 N.C. 588, 124 S.E.2d 724.
>
> > An appeal does not stay execution on the judgment unless the supporting spouse puts up an execution bond. Where no stay

> of execution bond has been executed, *apparently* the dependent spouse may enforce the court order by ordinary execution against the property of the supporting spouse to collect the judgment even though the case has been appealed.
>
> 2 R. Lee, [*North Carolina Family Law* § 147 (4th ed. 1980)]; *see also* G.S. § 50-16.7, .7(k) (1976).

305 N.C. 446, 462, 290 S.E.2d 653, 663 (1982) (emphasis added). However, neither *Joyner* nor *Quick* actually ruled upon the issue of execution pending an appeal; execution was not attempted in either case and both cases dealt with orders for contempt. As a general proposition, although child support and alimony orders are entered under different statutory provisions than a distributive award, all are under Chapter 50 and all are orders for periodic payments of a fixed amount and are, in the plain language of N.C. Gen. Stat. § 1-289, "judgment[s] directing the payment of money[.]" As the defendant herein did not "put[] up an execution bond[,]" *see Quick*, 305 N.C. at 462, 290 S.E.2d at 663, as directed by N.C. Gen. Stat. § 1-289, the appeal of the equitable distribution order did not stay enforcement of the order "by ordinary execution against the [defendant's] property . . . even though the case has been appealed." *See id.*

The question then becomes determination of the amount of the money judgment upon which execution could issue during the pendency of an appeal. Here, the problem is that the amount of the sums due under the order may change each month, as additional payments come due; the entire distributive award here is not payable until December 2016.[2] Plaintiff argues that "[t]he fact that Judge Noecker totaled the seven (7) periodic monthly payments that had accrued and not been paid . . . and noted the total ($52,486.70) in the September 3, 2010 Order did not mean that Judge Noecker was entering a **new or additional judgment**." (emphasis by plaintiff.) Neither party has cited, nor can we find, any case which has addressed an order reducing past-due payments to judgment in the context of an equitable distribution distributive award, but it has been addressed as to an alimony order. As noted above, we see no reason to treat distributive award payments differently from alimony payments for pur-

2. This problem was evidenced here when the clerk of court issued execution for the entire amount of the distributive award; this execution was withdrawn by the trial court and there is no dispute that execution for the entire amount was improper as the award was payable in 84 monthly installments, not all at once. To address this problem, in the 23 July 2010 order the trial court fashioned an order requiring periodic affidavits from plaintiff as to amounts due.

poses of N.C. Gen. Stat. § 1-289. In *Carpenter v. Carpenter*, the plaintiff sought enforcement of an alimony order during the pendency of an appeal of the alimony order by the defendant, by having the trial court determine the amount of alimony payments in arrears and reducing this amount to judgment upon which execution could issue. 25 N.C. App. 307, 212 S.E.2d 915 (1975). The *Carpenter* court vacated the trial court's order reducing the arrears to judgment for lack of jurisdiction; the entire legal analysis stated by the court is as follows:

> G.S. 1-294 provides that "[w]hen an appeal is perfected as provided by this article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from." Here, by entering the order of 25 November 1974 the District Court undertook to proceed upon the very matters which were embraced in and which were directly affected by the previous order appealed from which was dated 24 June 1974.
>
> As a general rule an appeal takes the case out of the jurisdiction of the trial court, *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E.2d 879 (1971); *Bowes v. Bowes*, 19 N.C. App. 373, 198 S.E.2d 732 (1973); *Upton v. Upton*, 14 N.C. App. 107, 187 S.E.2d 387 (1972); G.S. 1-294; and, with certain exceptions noted in *Machine Co. v. Dixon*, 260 N.C. 732, 133 S.E.2d 659 (1963) and not here applicable, pending the appeal the trial judge is *functus officio*. Therefore, the District Court in the present case had no jurisdiction to hear and pass upon defendant's motion filed on 19 November 1974 while the appeal of this case was pending in the Court of Appeals.

Id. at 308-09, 212 S.E.2d at 916. Thus, although an equitable distribution distributive award is theoretically a "judgment directing the payment of money" which is enforceable during the pendency of an appeal unless the appealing spouse posts a bond pursuant to N.C. Gen. Stat. § 1-289, the trial court does not have jurisdiction after notice of appeal is given to determine the amount of periodic payments which have come due and remain unpaid during the pendency of the appeal and to reduce that sum to an enforceable judgment. Plaintiff here is thus left in the unfortunate position of the dependent spouses in *Quick* and *Joyner*, who had no means of enforcement of their alimony orders during the pendency of the appeal. The Supreme Court noted as follows regarding this dilemma:

> "Surely, however, some more adequate provision [than execution] should be made . . . during the legal battle . . . . Frequently it is months after an appeal is taken until the record is seen here." [*Joyner*,] 256 N.C. at 592, 124 S.E.2d at 727.
>
> We agree with counsel for plaintiff that a more satisfactory answer should be found, but that answer can come only from the Legislature.

Quick, 305 N.C. at 462, 290 S.E.2d at 663-64. Our Legislature has found a "more satisfactory answer" for orders for child support, alimony, and custody, as noted above, which are now enforceable by contempt pending appeal, but provided no answer as to equitable distribution distributive awards. We would also note, as did the *Quick* court, that defendant "should find little consolation in our decision to vacate the trial court order" as on remand, the trial court will determine the amount of the distributive award payments which are past due and "should defendant fail to make [distributive award] payments while the case is on appeal and prior to the new hearing, he runs a serious risk of facing an order for substantial arrearages." *Id.* at 462-63, 290 S.E.2d at 664. We also note that when defendant's companion appeal as to the equitable distribution order and this appeal are over and the trial court makes its determination of the amounts owed, defendant will still be subject to proceedings for contempt of court. In addition, we would note that under N.C. Gen. Stat. § 50-20(e), upon remand in the companion case, the trial judge could make any distributive award paid by periodic payments a lien upon specific property owned by the defendant, up to and including all of his property.

We are thus compelled by *Carpenter* to hold that the trial court did not have subject matter jurisdiction to enter the 23 July 2010 order on the motion to dismiss and order to show cause, which permitted plaintiff to pursue a judgment against defendant pending appeal of the equitable distribution order for the distributive payments which were past due; the 3 September 2010 decree on pending motions which entered the judgment; and the hand-modified version of the 3 September 2010 decree which was re-filed on 15 September 2010. We therefore vacate these orders and remand this matter to the trial court for further proceedings in conjunction with remand on the appeal in the companion case, *Romulus v. Romulus*, COA 10-1453, which is filed simultaneously with this opinion.

VACATED AND REMANDED.

Judges HUNTER, Robert C. and HUNTER, JR., Robert N. concur.

DAVID CRUMP AND WIFE, SHARON CRUMP, PLAINTIFFS V. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES AND CALDWELL COUNTY HEALTH DEPARTMENT, DEFENDANTS

No. COA10-1138

(Filed 20 September 2011)

Tort Claims Act—negligent inspection by state environmental health specialist—intentional certification of incorrect soil depths—jurisdiction

The Industrial Commission did not err by requiring defendant North Carolina Department of Environment and Natural Resources to pay $28,300.00 to plaintiffs based on the negligent actions of an environmental health specialist who intentionally certified incorrect soil depths and issued a wastewater system construction permit to plaintiffs even though the inspected property was not suitable for any type of septic system. However, because the evidence did not establish the specialist intended to injure plaintiffs, the Commission properly concluded that plaintiffs' claim was within the jurisdiction of the State Tort Claims Act.

Appeal by defendant North Carolina Department of Environment and Natural Resources from Decision and Order entered 28 June 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 February 2011.

Wake Forest University School of Law Appellate Advocacy Clinic, by John J. Korzen; and Todd, Vanderbloemen & Brady, P.A., by Charles A. Brady, III, for plaintiffs-appellees.

Attorney General Roy Cooper, by Assistant Attorney General Donna B. Wojcik, for defendant-appellant.

GEER, Judge.

Defendant North Carolina Department of Environment and Natural Resources ("NCDENR") appeals from the Industrial Commission's Decision and Order requiring NCDENR to pay $28,300.00 to David and Sharon Crump. NCDENR was ordered to pay this sum to the Crumps due to the negligent actions of Michael Beane, an environmental health specialist who intentionally certified incorrect soil depths and issued a wastewater system construction permit to the Crumps even though the property that Beane inspected was not suitable for any type of septic system. NCDENR primarily argues that the

Crumps' claim does not fall within the State Tort Claims Act since Beane acted intentionally. Because, however, the evidence did not establish that Beane intended to injure the Crumps, the Commission could still conclude, as it did, that the Crumps' claim was within the jurisdiction of the State Tort Claims Act. Therefore, we affirm the Decision and Order.

Facts

The Crumps contracted to purchase Lot 38 in a subdivision in Caldwell County, North Carolina. A condition precedent for the purchase was that the property be suitable for a septic system, which was to be determined by certification of the property by the Caldwell County Health Department. On 13 July 2001, the Crumps applied for an improvement permit, and the application was randomly assigned to Beane.

Beane conducted an on-site evaluation of Lot 38 and concluded that the lot was suitable for a traditional wastewater septic system. The Commission found that Beane "visited the site, bored test holes as required, and rendered calculations concluding that the lot was suitable for a traditional wastewater septic system. Beane's field notes, drawings and calculations all appear to have complied with applicable administrative standards for performing the analysis." On 23 July 2001, Beane issued to plaintiffs an "Authorization for Wastewater System Construction Permit" together with an "Improvement Permit (Site Soil Evaluation)." These permits certified Lot 38 for installation of a traditional wastewater septic system.

In reliance on the issuance of the wastewater system construction permit, the Crumps purchased Lot 38 on 14 August 2001 for $80,000.00. They then made various improvements to the lot, including grading and land clearing where the septic system was to be placed.

NCDENR eventually became aware that Beane had made a certification of a septic system for an unrelated property that, according to the Commission, "gave Defendants reason to believe that Beane was not performing inspections in accordance with administrative rules." NCDENR and the Caldwell County Health Department, therefore, reinspected 25 other properties inspected by Beane. On 23 of those lots, they found the soil conditions "entirely inadequate" for the septic systems Beane had certified. On two of the lots, septic systems could be installed as certified by Beane with minor modifications.

On 14 November 2004, the Caldwell County Health Department mailed a letter to the Crumps, which informed them that their

improvement permit and wastewater system construction permit may have been improperly issued. Defendants retested Lot 38, determined that the lot was not suitable for any type of wastewater septic system, and revoked the Crumps' permit.

The Crumps then began investigating alternatives in order to lawfully provide a wastewater septic system to service Lot 38. The Crumps discovered that their only option was to purchase a lot across the street from Lot 38 and use it for the sole purpose of installing a wastewater septic system. They purchased the lot for $20,000.00. In order to use this lot to treat wastewater from Lot 38, a pumping system, costing an additional $8,300.00, was required in conjunction with the septic system, which by itself would have cost only $2,800.00 to install.

Joe Lynn, a regional soil scientist with defendant NCDENR, retested Lot 38. Although Beane had certified that the lot had a soil depth of 48 inches, Lynn conducted nine separate bore tests that found only 17, 8, 5, 27, 11, 5, 6, 10, and 8 inches of soil respectively. Lynn concluded that Beane's findings were so inconsistent with Lynn's that either (1) soil had been removed from the property subsequent to Beane's evaluation or (2) Beane did not comply with the administrative rules regarding soil testing. Because there was no evidence that plaintiffs had removed soil in a sufficient amount to account for the discrepancy and because testing of two properties in the immediate vicinity of Lot 38 also resulted in substantially less than 48 inches of soil, the Commission found that "[t]he greater weight of the evidence establishes that, having performed some of the required tests on Lot 38, Beane intentionally certified incorrect soil depths."

Ultimately, Beane was criminally charged and pled guilty to bribery of a public official in connection with some of the septic permits he issued. Lot 38 was not included in the charges resulting in Beane's guilty plea, and the Commission found that "the evidence fails to establish circumstantially that the developers who owned Lot 38 were involved in a criminal conspiracy with Beane."

On 20 July 2007, the Crumps filed a claim pursuant to the North Carolina State Tort Claims Act against Beane, the North Carolina Department of Health and Human Services ("NCDHHS"), and the Caldwell County Health Department.[1] On 15 December 2009, the

1. The Crumps originally filed their claim against NCDHHS, and the deputy commissioner's Decision and Order refers to NCDHHS. The Full Commission's Decision

deputy commissioner filed a Decision and Order finding in favor of the Crumps and ordering the State to pay damages in the amount of $28,300.00. The Decision and Order dismissed with prejudice the claims against Beane, in his individual capacity, and the Caldwell County Health Department. On 17 December 2009, NCDENR filed notice of appeal to the Full Commission. On 28 June 2010, the Full Commission entered its Decision and Order adopting the Decision and Order of the deputy commissioner with modifications. NCDENR timely appealed to this Court.

Discussion

When this Court reviews a Decision and Order from the Commission, we are " 'limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision.' " *Gonzales v. N.C. State Univ.*, 189 N.C. App. 740, 744, 659 S.E.2d 9, 12 (2008) (quoting *Simmons v. Columbus Cnty. Bd. of Educ.*, 171 N.C. App. 725, 728, 615 S.E.2d 69, 72 (2005)). *See also* N.C. Gen. Stat. § 143-293 (2009) ("[A]ppeal shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them.").

As long as the Commission's decision is supported by competent evidence, it does not matter if some of the evidence could support a conflicting finding. *Simmons*, 171 N.C. App. at 728, 615 S.E.2d at 72. The Commission's conclusions of law are, however, reviewed de novo. *Holloway v. N.C. Dep't of Crime Control & Pub. Safety/N.C. Highway Patrol*, 197 N.C. App. 165, 169, 676 S.E.2d 573, 576 (2009).

Under the State Tort Claims Act, N.C. Gen. Stat. § 143-291(a) (2009), the Industrial Commission has jurisdiction over claims that "arose as a result of the negligence of any . . . agent of the State while acting within the scope of his . . . employment . . . under circumstances where the State of North Carolina, if a private person, would be liable to the claimant . . . ." The Supreme Court has explained that "[u]nder the Tort Claims Act, jurisdiction is vested in the Industrial Commission to hear claims against the State of North Carolina for personal injuries sustained by any person as a result of the negligence of a State employee while acting within the scope of his employ-

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and Order, however, substitutes NCDENR for NCDHHS. The record does not indicate how the caption came to be changed, although it is apparent that NCDENR is, in fact, the proper defendant.

ment." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 536, 299 S.E.2d 618, 626 (1983).

NCDENR, in arguing that the Commission lacked subject matter jurisdiction, first contends that Beane was not acting as an agent of the State. NCDENR acknowledges that "[c]ounty environmental specialists/sanitarians conducting soil evaluations for septic systems are considered to be agents of [NCDENR] when they have been authorized pursuant to 15A NCAC 010.0101-.0103, and if they are enforcing N.C.G.S. § 130A-333 *et.* [sic] *seq.* . . ." *See Carter v. Stanly Cnty.*, 123 N.C. App. 235, 238, 472 S.E.2d 378, 381 (1996) (holding that local health departments, their directors, and registered sanitarians act as State agents "[w]ith regard to sewage treatment and disposal and the issuance of improvement permits"), *aff'd per curiam*, 345 N.C. 491, 480 S.E.2d 51 (1997). *See also* 15A N.C. Admin. Code § 18A.1938 (2010) ("The permitting of a wastewater system shall be the responsibility of agents authorized by the State . . . and registered with the State of North Carolina Board of Sanitarian Examiners . . . .").

The Commission's conclusion, citing *Carter*, that "the Caldwell County Health Department and its employee, Beane, are considered agents of the state with respect to this claim," was supported by the Commission's finding that "[a]t all times pertinent hereto, Beane was acting in the course and scope of his employment and in his official capacity as an inspector for the purpose of evaluating suitability for waste water septic systems." NCDENR contends, however, that "the evidence shows that Beane was not acting as an agent of [NCDENR] when he issued the improvement permit for Lot 38, because he was not enforcing the rules of the Health Commission. He was acting outside the scope of his authority."

In support of this contention, NCDENR relies on *Cates v. N.C. Dep't of Justice*, 346 N.C. 781, 786, 487 S.E.2d 723, 726 (1997), pointing to the Supreme Court's holding that a registered sanitarian employed by the Durham County Health Department was not enforcing the rules when he conducted a preliminary soil evaluation and when "[t]he rules of the Commission [did] not require or make any provision for preliminary soil evaluations." Because the State rules did not encompass preliminary soil evaluations, the Court concluded that "a local sanitarian who conducts a preliminary soil evaluation is providing a local service and is not enforcing the rules of the Commission." *Id.*

NCDENR contends that Beane, like the sanitarian in *Cates*, was not actually enforcing the State regulations and, therefore, was not acting as an agent of the State. NCDENR's reliance on *Cates* is misplaced. The basis for the decision in *Cates* was the fact that the State's "rules provide for the issuance or denial of an improvements permit but not for the assurance of future permitability." *Id.* The sanitarian was not acting for the State because he was assuring future permitability—not a State function—and not issuing or denying an improvements permit. Indeed, no one had even applied for an improvements permit. *Id.*

Here, however, the Crumps filed an application for a permit for a wastewater septic system, Beane performed the inspection, and Beane issued a permit to the Crumps for a wastewater septic system on Lot 38. Thus, Beane was acting within the scope of the authority set out in 15A N.C. Admin. Code § 18A.1938 to issue or deny improvements permits and, under *Cates*, he was acting as an agent of the State.

NCDENR next contends that the Crumps' claim does not fall under the State Tort Claims Act because Beane acted intentionally and not negligently. The Supreme Court has held that "[i]njuries intentionally inflicted by employees of a State agency are not compensable under the North Carolina Tort Claims Act." *Givens v. Sellars*, 273 N.C. 44, 50, 159 S.E.2d 530, 535 (1968). NCDENR points to the Commission's finding that Beane "intentionally certified incorrect soil depths" and argues that this finding precludes any award under the State Tort Claims Act.

While the Commission, in this case, found that Beane had intentionally certified incorrect soil depths, it concluded that "Beane, as agent of [NCDENR], was *negligent* in issuing Plaintiffs' Wastewater System Construction Permit number 017666 and the Improvement Permit (Site Soil Evaluation), and as a direct and proximate result of *the negligence* of [NCDENR's] agent, Plaintiffs have been damaged in the amount of $28,300.00." (Emphasis added.) Our Supreme Court has held that "[n]egligence is a mixed question of law and fact, and the reviewing court must determine whether the Commission's findings support its conclusions." *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988). Under the State Tort Claims Act, "negligence is determined by the same rules as those applicable to private parties." *Id.*

NCDENR overlooks the fact that the focus is not on whether Beane's actions were intentional, but rather on whether he intended

to injure or damage the Crumps. As the Supreme Court explained in *Givens*, 273 N.C. at 50, 159 S.E.2d at 535 (emphasis added) (quoting *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 38 (1929)), " '[a] breach of duty may be wanton and wilful while the act is yet negligent; the idea of negligence is eliminated only when the *injury or damage* is intentional.' "

The leading North Carolina case addressing when an intentional act may still amount to negligence is *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985). In that decision, the Supreme Court wrote:

> Defining "willful negligence" has been more difficult. At first glance the phrase appears to be a contradiction in terms. The term "willful negligence" has been defined as the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed. A breach of duty may be willful while the resulting injury is still negligent. Only when the injury is intentional does the concept of negligence cease to play a part. We have noted the distinction between the willfulness which refers to a breach of duty and the willfulness which refers to the injury. In the former only the negligence is willful, while in the latter the injury is intentional.

Id. at 714-15, 325 S.E.2d at 248 (internal citations omitted).

This Court has similarly explained:

> Willful negligence arises from the tort-feasor's willful breach of a duty arising by operation of law. The tort-feasor must have a deliberate purpose not to discharge a legal duty necessary to the safety of the person or property of another. This willful and deliberate purpose not to discharge a duty differs crucially for our purposes from the willful and deliberate purpose to inflict injury—the latter amounting to an intentional tort.

Siders v. Gibbs, 39 N.C. App. 183, 187, 249 S.E.2d 858, 860 (1978) (internal citations omitted). *See also Britt v. Hayes*, 142 N.C. App. 190, 193, 541 S.E.2d 761, 763 (2001) ("Based on this precedent we now restate the principle that defendant's conduct precludes an action for negligence only when defendant intended to injure the plaintiff.").

The Commission properly based its award to the Crumps on these principles. The Commission noted that NCDENR had contended—just as it argues on appeal—"that proof of Beane's criminal conviction for bribery of a public official, his highly inaccurate soil

measurements, and [NCDENR's expert witness'] opinion that Beane's highly inaccurate report must be fraudulent, all prove that Beane's survey of Lot 38 was an intentional act." The Commission then acknowledged that "[i]ntentional injuries are not within the jurisdiction of the Act[;] only claims for negligence are covered." The Commission concluded, however, relying upon *Pleasant*, that "[t]he evidence in the present case establishes that Beane's breach of [his] duty to perform the soil test was intentional, but the evidence does not compel a conclusion that Beane intended to cause injury to Plaintiffs."

We agree with the Commission's analysis. While the Commission found that Beane's certification of inaccurate soil depths was intentional, it determined that his issuance of the two permits to the Crumps constituted negligence. The evidence cited by NCDENR is sufficient to prove an intentional failure to carry out the duty imposed on Beane regarding site inspections and issuing permits. NCDENR, however, cites no evidence and the Commission found none that required the Commission to find that Beane intended to injure the Crumps. The Commission's findings—and the evidence supporting those findings—establish willful negligence rather than intentional injury. *See Lynn v. Burnette*, 138 N.C. App. 435, 443, 531 S.E.2d 275, 281 (2000) (holding that when defendant intentionally shot at tire on plaintiff's vehicle but bullet struck plaintiff, plaintiff could proceed with claim for negligence).

NCDENR argues, however, that Beane made a fraudulent misrepresentation and that our Supreme Court has held that "[n]either intentional misrepresentation nor conspiracy to defraud is negligence, and injuries intentionally inflicted are not compensable under the Torts Claim [sic] Act." *Davis v. N.C. State Highway Comm'n*, 271 N.C. 405, 408, 156 S.E.2d 685, 687 (1967). While this language in *Davis* appears to be *dicta* since the case did not involve a State Tort Claims Act claim, the *Davis* Court nonetheless recognized the need for an intentional injury. In *Davis*, the plaintiffs alleged that the defendants made their misrepresentation specifically in order to induce the plaintiffs to vacate their home. *Id.* at 406, 156 S.E.2d at 686. Since the plaintiffs' alleged injury was the vacating of their property, the purpose of the misrepresentation was in fact to cause the injury, making the injury intentional. *Id.*

In contrast to *Davis*, nothing in the record in this case suggests that Beane intended, through his misrepresentations, to cause the Crumps' injury, which was their purchase of a property on which a septic system could not be installed. The Commission, therefore, prop-

erly concluded that the Crumps were entitled to recover for negligence. Since NCDENR asserts no other basis for reversal of the Commission's Decision and Order, we affirm.

Affirmed.

Judges STEPHENS and McCULLOUGH concur.

SHAUN MARSO, PLAINTIFF v. UNITED PARCEL SERVICE, INC., DEFENDANT

No. COA11-201

(Filed 20 September 2011)

Contracts—breach—summary judgment improper—genuine issue of assent to limiting terms—actual or constructive notice—doctrine of ratification

The trial court erred in a breach of contract case by granting summary judgment in favor of defendant, denying plaintiff's motion for summary judgment, and dismissing plaintiff's complaint with prejudice. There was a genuine issue as to whether plaintiff assented to be bound by the limiting terms of the UPS Tariff and whether defendant presented plaintiff with actual or constructive notice of the terms. Further, plaintiff's claims were not barred by the doctrine of ratification because although he admitted to endorsing the cashier's check, plaintiff provided uncontradicted sworn testimony by affidavit from a local bank employee that the check was determined to be fraudulent prior to its deposit.

Appeal by plaintiff from order entered 4 October 2010 by Judge Arnold O. Jones, II in Wayne County Superior Court. Heard in the Court of Appeals 29 August 2011.

Dees, Smith, Powell, Jarrett, Dees & Jones, by Tommy W. Jarrett, for plaintiff–appellant.

Alston & Bird LLP, by Anitra Goodman Royster, for defendant–appellee.

MARTIN, Chief Judge.

Plaintiff Shaun Marso appeals from the trial court's 4 October 2010 order denying his motion for summary judgment and granting summary judgment in favor of defendant United Parcel Service, Inc. ("defendant UPS"). We reverse summary judgment and remand for further proceedings.

According to the record before us, in November 2008, plaintiff placed an advertisement in a Goldsboro newspaper to sell a ladies diamond engagement ring. Plaintiff was contacted by a man identifying himself as Karl Thompson, who agreed to purchase the ring from plaintiff for $12,000.00. On 14 November 2008, plaintiff visited a UPS Customer Center in Goldsboro, North Carolina, to make arrangements to ship the ring to Mr. Thompson, who was located in Lafayette, Louisiana. Plaintiff averred that, "[p]rior to the time [he had visited the UPS Customer Center, plaintiff] had called the same store and verified that UPS would take cash from the purchaser and not release the ring until the person delivered the cash for the ring." Plaintiff further asserted that "the person with whom [he] dealt directly at the UPS Center assured [him] that [defendant] UPS would collect cash only and that the collection was guaranteed," and that plaintiff "would be getting a check from [defendant] UPS, not from the purchaser."

The parties do not dispute that plaintiff paid defendant UPS $145.23 to ship the ring by UPS Next Day Air Service, and that the package was shipped by C.O.D. ("Collect on Delivery") service, by which plaintiff requested that defendant collect $12,145.00 upon delivery of the package to cover the purchase price and shipping costs. The record includes a copy of the shipment receipt provided to plaintiff, which indicates that the package was shipped "COD=$12,145.00, Guaranteed."

On 17 November 2008, defendant UPS delivered the package to the addressee and collected an instrument identified as a cashier's check drawn upon Compass Bank of Houston, Texas, in the amount of $12,145.00 made payable to plaintiff. Defendant UPS delivered the instrument by regular mail to plaintiff, who then brought it to his local bank. Because the check was drawn upon an out-of-state bank, and because of the amount of the check, the bank representative from plaintiff's bank stated by affidavit that she sought to verify the validity of the instrument before accepting the check for deposit. Plaintiff avers that he was then advised by the bank representative that the instrument was "a bogus check of no value." Plaintiff reported the incident to the Goldsboro Police Department, which closed the

case after determining that "the actual crime occurred in another jurisdiction." According to a supplementary police report, the Goldsboro Police Department provided plaintiff with contact numbers for the Lafayette Police Department and advised plaintiff to file a report with that agency. The record does not indicate whether plaintiff filed a criminal complaint with the local police department in Louisiana.

On 15 September 2009, plaintiff filed a complaint in Wayne County Superior Court seeking to recover $12,145.00 from defendant UPS on the grounds that defendant UPS "agreed to collect on delivery the sum of $12,145.00," "guaranteed that collection as a matter of contract," "did not collect the sum of $12,145.00," and thus "materially breached its contractual obligation." Defendant filed its answer denying plaintiff's claims and filed a motion for summary judgment. Shortly thereafter, plaintiff filed a cross-motion for summary judgment. The trial court heard both motions and, on 4 October 2010, the court entered its order granting defendant UPS's motion for summary judgment, denying plaintiff's motion for summary judgment, and dismissing plaintiff's complaint with prejudice. Plaintiff appeals.

"Summary judgment is properly granted when the forecast of evidence 'reveals no genuine issue as to any material fact, and when the moving party is entitled to a judgment as a matter of law.' " *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972)); *see also* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009) ("[Summary judgment is proper] if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."). "[T]he real purpose of summary judgment is to go beyond or to pierce the pleadings and determine whether there is a genuine issue of material fact." *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972). "All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party." *Dobson*, 352 N.C. at 83, 530 S.E.2d at 835 (citation omitted). "[I]n ruling on a motion for summary judgment the court does not resolve issues of fact and must deny the motion if there is any issue of genuine material fact." *Singleton*, 280 N.C. at 464, 186 S.E.2d at 403. "On appeal, an order allowing summary judgment is reviewed *de novo*." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

Plaintiff concedes that the determination of liability for an action against defendant—an air carrier engaged in interstate commerce—is governed by federal common law. *See Butler Int'l, Inc. v. Cent. Air Freight, Inc.*, 102 N.C. App. 401, 405, 402 S.E.2d 441, 444 (1991); *see also Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926–27, 929 (5th Cir. 1997) ("The Supreme Court has made it clear that notwithstanding [*Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 82 L. Ed. 1188, 1194 (1938)], federal common law causes of action continue to exist when a federal rule of decision is necessary to protect uniquely federal interests. . . . Therefore, a federal cause of action continues to survive for freight claims against air carriers." (internal quotation marks omitted)). Although plaintiff provides some argument that defendant is liable to plaintiff for the amount of $12,145.00 under federal common law, plaintiff alternatively relies on *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 130 L. Ed. 2d 715 (1995), to argue that the issue in the present case falls within an exception that plaintiff claims would permit his action to proceed under state law. *Am. Airlines, Inc.*, 513 U.S. at 224–25, 228–29, 130 L. Ed. 2d at 723, 725–26 (concluding that a breach of contract claim arising from plaintiffs' complaint that the retroactive application of modifications to the airline's AAdvantage frequent flyer program, which had the effect of devaluing credits that AAdvantage members had already earned, was not preempted by federal law because "[a] remedy confined to a contract's terms simply holds parties to their agreements—in this instance, to business judgments an airline made public about its rates and services" regarding "its own, self-imposed undertakings"). Thus, plaintiff urges this Court to conclude that he is entitled to judgment as a matter of law under both state law and federal common law.

Nevertheless, our understanding of the facts as presented by the parties' competing affidavits in support of their cross-motions for summary judgment does not comport with their respective representations that there are no genuine issues as to any material facts. In support of defendant's motion for summary judgment, the record includes an affidavit from Kenny Davis, a Security Supervisor for defendant who is familiar with defendant's "package intake procedures, including the procedures used in [defendant] UPS's Customer Centers when shipping packages such as the package that is the subject of this litigation." According to Mr. Davis, each customer who ships packages from the UPS Customer Center in Goldsboro that was visited by plaintiff "use[s] a computer program," which "allows a shipper to personally enter the information relevant to or necessary for shipment of [a] package," including the shipper's address, the recipi-

ent's address, and "a Collect On Delivery amount for the UPS driver to collect." After the shipper inputs the information in the computer program, he or she must then click a button on the computer screen which launches a pop-up screen with the heading "Terms of Service" and displays the following message:

> By clicking on "Print" and tendering your package for shipment, you agree to, for yourself and as agent for and on behalf of any other person having interest in this package, Terms of Service specified by UPS on any applicable waybill, tariff or service guide, including terms which may limit the liability of UPS. UPS Terms of Service and Tariff Information is viewable at www.ups.com or may be obtained from the counter attendant upon request.

The terms of service in the "UPS Tariff/Terms and Conditions of Service for Small Package Shipments in the United States" ("UPS Tariff") provide, in relevant part, that "UPS will not accept currency in any amount for payment of C.O.D. shipments," and that

> [a]ll checks or other negotiable instruments (including cashier's checks, official bank checks, money orders and other similar instruments) tendered in payment of C.O.D.s will be accepted by UPS *based solely upon the shipper assuming all risk relating thereto including, but not limited to, risk of non-payment, insufficient funds, and forgery, and UPS shall not be liable upon any such instrument. . . .*

(Emphasis added.) These excerpted provisions are not visible on the "Terms of Service" pop-up screen.

According to Mr. Davis's affidavit, after the "Terms of Service" pop-up screen appears before the shipper, the shipper must manifest his or her assent to these terms of service by clicking the "OK" button on the screen; the shipping process will not continue until the shipper does so. Once the shipper clicks this button, the shipping process continues and a bar code label is printed, which is then presented to the UPS counter attendant, who scans the bar code and collects payment from the shipper.

However, in plaintiff's affidavit in support of his motion for summary judgment, plaintiff "categorically den[ies]" that he used a computer "in any way, shape, or form" when he visited the UPS Customer Center in Goldsboro. Instead, plaintiff asserts that defendant's employee entered the information into the computer, and that "[n]o one advised [plaintiff], orally or in writing, about any UPS Tariff, way-

bill, or service guide," or advised him that he could request a copy of the same. Plaintiff asserts that defendant's employee at the UPS Customer Center "assured [him] that UPS would collect cash from the purchaser," that "the collection was guaranteed," and that plaintiff "would be getting a check from UPS, not from the purchaser." In other words, plaintiff suggests by his argument that he did not assent to the terms of service identified in the UPS Tariff, which would limit defendant's liability for the fraudulent cashier's check collected by defendant upon delivery of plaintiff's package to Mr. Thompson, and instead asserts that he formed an oral contract with defendant's employee which obligated defendant to be liable to plaintiff for $12,145.00 without limitation. Thus, there appears to be a genuine issue as to whether plaintiff assented to be bound by the limiting terms of the UPS Tariff, and whether defendant presented plaintiff with actual or constructive notice of the terms set forth by the UPS Tariff.

Therefore, we conclude the trial court could not properly grant summary judgment in favor of defendant under either federal or state law, since there is a genuine issue as to a material fact in this case, *see Singleton*, 280 N.C. at 464, 186 S.E.2d at 403. Here, the parties presented conflicting evidence in competing affidavits regarding the attendant circumstances of the formation and terms of the agreed-upon contract, including whether plaintiff had either actual or constructive notice that he would be bound by the terms of the UPS Tariff. These facts and circumstances are determinative of the issue, notwithstanding whether plaintiff's claim is controlled by federal common law or by state law. *See*, *e.g.*, *E.J. Rogers*, *Inc. v. United Parcel Serv.*, *Inc.*, 338 F. Supp. 2d 935, 939–41 (S.D. Ind. 2004) (holding that, while an airbill or receipt "can incorporate by reference outside materials limiting liability," a shipper was *not limited* by the terms of a tariff when there was no reference to that tariff in any documentation provided to the shipper, since a shipper is not "presumed to know every single detail included in a carrier's tariff on file with the Interstate Commerce Commission," and "the mere existence of a tariff, without more, is not sufficient to limit or avoid liability"); *Sam L. Majors Jewelers*, 117 F.3d at 930–31 (holding that a shipper's liability *was limited* by the provisions included on an airbill, and that "[t]he carrier need not demonstrate that the customer had actual knowledge of the liability limitations," when the court determined that "the liability limiting provisions were sufficiently plain and conspicuous to give reasonable notice of their meaning . . . [based on its analysis of] the physical characteristics of the airbill . . . to determine

whether they provide reasonable notice to the customer [and] . . . the conditions under which the shipment was made"); *Anthony v. Am. Express Co.*, 188 N.C. 407, 409–10, 124 S.E. 753, 754–55 (1924) ("There is a distinction, uniformly recognized by the courts, between the liability of defendant, as a common carrier, with respect to the shipment of the goods received by it, and its liability under its special contract to collect from the consignee upon delivery the value of the goods as specified in the receipts, and to remit the money thus collected to consignor. . . . [Accordingly,] such obligation [to act as the collecting agent of the shipper] arises only by contract, express or implied, and . . . [the carrier] is bound to a strict compliance with its undertaking." (internal quotation marks omitted)). Accordingly, we reverse the trial court's order granting defendant's motion for summary judgment, denying plaintiff's motion for the same, and dismissing plaintiff's complaint with prejudice, and we remand this matter for further proceedings.

Because there is a genuine issue as to whether the parties contracted to limit defendant's liability pursuant to the terms of service set forth in the UPS Tariff, we decline to address defendant UPS's cross-issues on appeal which presume that plaintiff was bound by these terms. We further find unpersuasive defendant UPS's footnote suggesting that the trial court properly granted summary judgment in its favor because plaintiff's claims are "barred pursuant to the doctrine of ratification." Although plaintiff admits that he endorsed the cashier's check, taking the undisputed facts in the light most favorable to plaintiff, plaintiff provided uncontradicted, sworn testimony by affidavit from an employee at his local bank stating that the employee determined the cashier's check to be fraudulent "prior to accepting it for deposit," and that she "returned the original of the [cashier's] check to [plaintiff] without making a deposit of it for him." However, unlike the present case, the cases upon which defendant UPS relies in the footnote to its brief describe instances in which the shippers *actually deposited* instruments collected upon the delivery of packages which were non-conforming on their face in either amount or form in express contravention of the contract terms to which the parties agreed to be bound. We conclude these cases are not sufficiently analogous to the present case to provide relevant legal authority for defendant UPS's assertion that the trial court could have properly granted summary judgment in its favor on this basis.

Reversed and remanded.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA v. STANLEY BRIAN BURGESS

No. COA11-193

(Filed 20 September 2011)

1. Sexual Offenders—registration not required—second-degree kidnapping—crime against nature

The trial court erred by ordering defendant to register as a sex offender. Neither of the offenses for which defendant was convicted, second-degree kidnapping and crime against nature, was a sexually violent offense under N.C.G.S. § 14-208.6(5).

2. Sentencing—prior record level—failure to show out-of-state offenses substantially similar to NC offenses

The trial court erred by sentencing defendant as a level IV offender. The State failed to present sufficient evidence to establish defendant's out-of-state offenses were substantially similar to North Carolina offenses. The case was remanded for resentencing.

Appeal by defendant from judgment entered 28 January 2010 by Judge Edgar B. Gregory in Yadkin County Superior Court. Heard in the Court of Appeals 29 August 2011.

Roy Cooper, *Attorney General*, *by Lisa G. Corbett*, *Assistant Attorney General*, *for the State.*

Staples Hughes, *Appellate Defender*, *by Kathleen M. Joyce*, *Assistant Appellate Defender*, *for defendant-appellant.*

MARTIN, Chief Judge.

The record indicates defendant was charged with first-degree rape, two counts of first-degree sex offense, first-degree kidnapping, assault on a female, and communicating threats. He entered pleas of not guilty and a jury was empaneled to hear the case. Following a recess on the third day of trial, defendant entered a plea of no contest to second-degree kidnapping, a Class E felony, and crime against nature, a Class I felony, and pursuant to the plea agreement, the trial court dismissed the remaining charges.

The plea agreement provided that the State would stipulate to the mitigating factor "[t]hat the defendant has been a good inmate" and that "upon the defendant's pleas of no contest to 2nd degree kidnapping and crime against nature *the charges will be consolidated and*

defendant sentenced in mitigated range of 36 [months] to 53 months (as a record level 4)."[1] (Emphasis added.) The State's prior record level worksheet listed defendant's prior record level as IV based on 12 prior record level points from three Class H or I felonies and six Class A1 or 1 misdemeanors. Consistent with the plea agreement, the trial court sentenced defendant to a minimum term of 36 months and a maximum term of 53 months in the custody of the North Carolina Department of Correction.

The trial court also found that defendant had been convicted of a "reportable conviction" under N.C.G.S. § 14-208.6, specifically, "a sexually violent offense under G.S. 14-208.6(5)," and ordered that defendant, upon his release from imprisonment, register as a sex offender under Part 2 of Article 27A of Chapter 14 of the General Statutes, for a period of 30 years.

After failing to give notice of appeal, defendant filed a Petition for Writ of Certiorari in this Court. This Court granted review.

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[1] On appeal, defendant contends, and the State concedes, the trial court erred by ordering that defendant register as a sex offender.[2] We agree, and therefore vacate the trial court's order.

During sentencing, the trial court found that defendant "has been convicted of a reportable conviction under G.S. 14-208.6." The basis the trial court indicated for its finding was defendant's conviction of "a sexually violent offense under G.S. 14-208.6(5) or an attempt, solicitation, or conspiracy to commit such offense (other than an offense under G.S. 14-27.2A or G.S. 14-27.4A)." However, neither of the offenses for which defendant was convicted—second-degree kidnapping and crime against nature—is a "sexually violent offense" under N.C.G.S. § 14-208.6(5). *See* N.C. Gen. Stat. § 14-208.6(5) (2009) (listing offenses deemed "sexually violent"). The trial court therefore erred by finding that defendant had been convicted of a "reportable con-

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1. We note the plea agreement is inconsistent. When offenses are consolidated and a single judgment is imposed, "[t]he judgment shall contain a sentence disposition specified for the class of offense and prior record level of the most serious offense." N.C. Gen. Stat. § 15A-1340.15(b) (2009). The mitigated range of minimum durations for a Class E felony and a prior record level IV offender is 23-30 months and the presumptive range of minimum durations is 30-38 months. *See* N.C. Gen. Stat. § 15A-1340.17(c) (2009).

2. To the extent defendant has not properly preserved this issue for appellate review under N.C.R. App. P. 10, in our discretion under N.C.R. App. P. 2, we elect to address this issue.

viction," and we vacate its order that defendant register as a sex offender upon his release from imprisonment.

[2] Defendant also contends the trial court erred by sentencing him as a level IV offender.[3] We agree with this contention as well and remand for resentencing.

"The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court . . . finds to have been proved in accordance with this section." N.C. Gen. Stat. § 15A-1340.14(a) (2009). The number of prior record points for each class of felony and misdemeanor offense is specified in N.C.G.S. § 15A-1340.14(b). "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f). A prior conviction shall be proved by stipulation of the parties, an original or copy of the court record of the prior conviction, a copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts, or any other method found by the court to be reliable. *Id.* N.C.G.S. § 15A-1340.14(e) governs classification of offenses from other jurisdictions and provides that,

> [e]xcept as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. If the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assign-

3. Despite defendant's failure to object during sentencing, he has not waived this argument. *See State v. Jeffery*, 167 N.C. App. 575, 579, 605 S.E.2d 672, 674 (2004) (holding that the defendant's failure to object during sentencing did not preclude the defendant from arguing on appeal that the State had failed to meet its burden of proving the defendant's prior record level).

> ing prior record level points. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e). Whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense. *State v. Hanton*, 175 N.C. App. 250, 254, 623 S.E.2d 600, 604 (2006).

In this case, the State's prior record level worksheet indicates that, at the time of sentencing, defendant had fifteen prior convictions, which were from Florida, South Carolina, and Georgia. Defendant's counsel stipulated to the existence of the convictions by signing Section III of the worksheet. *See* N.C. Gen. Stat. § 15A-1340.14(f). However, defendant contends, and we agree, the State failed to present sufficient evidence to establish the out-of-state offenses were substantially similar to North Carolina offenses.

Although the State presented the trial court with Exhibit 3, printed copies of out-of-state statutes purportedly serving as the basis for the nine out-of-state convictions the State used in computing defendant's prior record level, the "out-of-state crimes [on the State's worksheet] were not identified by statutes," but "only by brief and non-specific descriptions" and "could arguably describe more than one specific South Carolina and [Florida] crime," which makes it unclear whether those statutes were the basis for defendant's convictions. *See State v. Henderson*, 201 N.C. App. 381, 388, 689 S.E.2d 462, 467 (2009) (declining to determine on appeal whether out-of-state offenses were substantially similar to North Carolina offenses because, although the State's brief identified out-of-state statutes under which it contended the defendant had been convicted, the record did not identify the crimes by statute and therefore provided the Court with insufficient information for such a determination). Furthermore, while the State's worksheet indicates defendant's South Carolina conviction for "Poss of Xanax" was from 1993 and his South Carolina convictions for "MFG/Poss other Sch I, II, III with intent," "Poss of Marijuana W/I to Distribute," "(M) Poss of Sch I-V 1st Offense," "Open Cont, Simple Poss of Marij, Poss Drug Para," and "Poss Marij, Poss Drug Para, Opn Cont, Criminal DV" were from 1994, the State presented 2008 copies of the out-of-state statutes purport-

edly serving as the basis for those convictions and presented no evidence that the statutes were unchanged from the 1993 and 1994 versions under which defendant had been convicted. *See State v. Morgan*, 164 N.C. App. 298, 309, 595 S.E.2d 804, 812 (2004) (holding the State failed to prove by the preponderance of the evidence that a New Jersey offense was substantially similar to a North Carolina offense where "[t]he State presented no evidence . . . that the 2002 New Jersey homicide statute was unchanged from the 1987 version under which [the] [d]efendant was convicted"). Finally, the record in this case indicates the trial court accepted the classification of defendant's out-of-state offenses on the State's worksheet without comparing the elements of the out-of-state offenses to the elements of the North Carolina offenses the State contended were substantially similar. We emphasize that "copies of the . . . statutes [from another jurisdiction], *and comparison of their provisions to the criminal laws of North Carolina*, [a]re sufficient to prove by a preponderance of the evidence that the crimes of which defendant was convicted in those states were substantially similar to classified crimes in North Carolina for purposes of G.S. § 15A-1340.14(e)." *State v. Rich*, 130 N.C. App. 113, 117, 502 S.E.2d 49, 52 (1998) (emphasis added); *see also Hanton*, 175 N.C. App. at 254, 623 S.E.2d at 604 (holding that "[w]hether an out-of-state offense is substantially similar to a North Carolina offense" involves "comparing the elements of a defendant's prior convictions under the statutes of foreign jurisdictions with the elements of crimes under [North Carolina] statutes" (second alteration in original) (internal quotation marks omitted)). Because defendant's 12 prior record level points were based on out-of-state convictions and the State failed to prove by the preponderance of the evidence that the out-of-state offenses were substantially similar to North Carolina offenses, we must remand for resentencing. The State and defendant may offer additional evidence at the resentencing hearing.[4]

We also note the State's reliance on *State v. Hamby*, 129 N.C. App. 366, 499 S.E.2d 195 (1998), for its contention that defendant cannot raise issues related to his sentence on appeal because he stipulated to his prior record level and agreed to his sentence in his plea agreement is misplaced. *See id.* at 369-70, 499 S.E.2d at 197 (holding the defendant's admission to her prior record level "mooted the issue[] of whether her prior record level was correctly determined").

4. Because we vacate the trial court's order that defendant register as a sex offender and remand this case for resentencing, we do not address defendant's argument that his trial counsel's failure to object to his sentence and the order that he register as a sex offender amounted to ineffective assistance of counsel.

This Court has repeatedly held a defendant's stipulation to the substantial similarity of offenses from another jurisdiction is ineffective because the issue of whether an offense from another jurisdiction is substantially similar to a North Carolina offense is a question of law. *See*, *e.g.*, *State v. Moore*, 188 N.C. App. 416, 426, 656 S.E.2d 287, 293-94 (2008); *State v. Palmateer*, 179 N.C. App. 579, 581-82, 634 S.E.2d 592, 593-94 (2006); *see also State v. Wall*, 348 N.C. 671, 676, 502 S.E.2d 585, 588 (1998) (vacating the trial court's order despite the defendant's plea agreement providing for concurrent sentences because a statute mandated consecutive sentences).

Vacated in part and remanded for resentencing.

Judges BRYANT and CALABRIA concur.

IRVING EHRENHAUS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF-APPELLEE v. JOHN D. BAKER, II, PETER C. BROWNING, JOHN T. CASTEEN, III, JERRY GITT, WILLIAM H. GOODWIN, JR., MARYELLEN C. HERRINGER, ROBERT A. INGRAM, DONALD M. JAMES, MACKEY J. MCDONALD, JOSEPH NEUBAUER, TIMOTHY D. PROCTOR, ERNEST S. RADY, VAN I. RICHEY, RUTH G. SHAW, LANTY L. SMITH, DONA DAVIS YOUNG, WACHOVIA CORPORATION AND WELLS FARGO & COMPANY, DEFENDANTS-APPELLEES v. NORWOOD ROBINSON AND JOHN H. LOUGHRIDGE, JR., OBJECTORS-APPELLANTS

No. COA10-1034

(Filed 4 October 2011)

1. Class Actions—appeal of prior injunction denial—no authority

The Court of Appeals declined to consider the question of whether objector-appellants in a class action could appeal the denial of a preliminary injunction when that denial occurred before they became involved in the case. Authority permitting such an appeal was not cited nor found.

2. Class Actions—class representative—adequate

A class representative was adequate in a class action suit and settlement arising from the merger of Wachovia and Wells Fargo. Owning a relatively small number of shares is not a bar to a class member serving as a class representative, and there was no

authority cited for the proposition that a trial court may not conduct a final certification hearing after the parties have agreed in principal to a settlement.

3. Class Actions—class counsel—adequate and sufficient representation

The Court of Appeals was not persuaded that the class counsel in a class action suit deprived the class of adequate and reasonable representation by virtue of a conflict of interest or insufficient class action proficiency.

4. Class Actions—bank merger—settlement agreement—opt-out rights not required

The trial court did not err in a class action suit by determining that due process did not require opt-out rights based on the claims that were articulated to the trial court. The predominant claim was plaintiff's attempt to enjoin the merger of two banks.

5. Banks and Banking—bank merger—Board's fiduciary duties

The Wachovia Board did not breach its fiduciary duties during a merger by employing improper deal protection measures, failing to comply with statutory share exchange requirements, and failing to make material disclosures. The statutes alleged to have been violated were not applicable; the class had little or no chance of prevailing on a breach of fiduciary duty claim against the Board related to an allegedly coercive share exchange; and, although plaintiff raised potentially meritorious claims related to the fiduciary duty to disclose material facts, additional disclosures made pursuant to the settlement largely alleviated those issues.

6. Banks and Banking—bank merger—approval of settlement—release of claims

The trial court did not err by approving a settlement involving the release of claims in a class action arising from a bank merger. Given the tumultuous market conditions and the time demands under which the Wachovia Board acted, the business judgment rule was likely insurmountable on the issue of release of claims.

7. Class Actions—public reaction—trial court's discretion

The trial court was in the best position to determine whether the public outcry over a class action settlement raised fairness

concerns grounded in law. The trial court's appraisal of the public reaction as "muted," which supported a finding that the settlement was fair, did not rise to the level of an abuse of discretion.

8. Class Actions—approval of settlement—recommendations of counsel

The trial court did not err when approving a class action settlement by basing its decision in part on the recommendations of counsel. Moreover, the contents of the notice to class members adequately apprised them of the proposed settlement and hearing.

9. Class Actions—settlement—attorney fees

The portion of an order approving a settlement in a class action that concerned attorney fees was remanded where the trial court did not make complete findings of fact and conclusions of law.

10. Appeal and Error—preservations of issues—brief—authority not cited—issue not considered

An issue was not reviewed on appeal where the brief did not contain any citations of legal authority on the issue and the appellants did not explain a legal principle that would entitle them to relief.

Appeal by Objectors-appellants from judgment entered 5 February 2010 by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 February 2011.

Greg Jones & Associates, P.A., by Gregory Jones, and Wolf Popper LLP, by Robert M. Kornreich, Chet Waldman, and Carl L. Stine, for Plaintiff-appellee.

Robinson Bradshaw & Hinson, P.A., by Robert W. Fuller, Mark W. Merritt, Louis A. Bledsoe, III, and Adam K. Doerr, for Defendants-appellees.

Norwood Robinson and John H. Loughridge, pro se.

HUNTER, JR., Robert N., Judge.

I. Introduction

As of 30 September 2008, Wachovia Corporation ("Wachovia") was the nation's fourth largest banking institution. Founded in 1908, Wachovia's stock was widely held throughout this state. Many regarded Wachovia as a conservative, sound financial institution that

had survived previous financial crises such as the Great Depression. When the 2008 financial collapse began, Wachovia's loan portfolio was encumbered with a large number of mortgages that it had obtained through its 2007 acquisition of Golden West Financial Corporation ("Golden West"), the nation's second largest dedicated mortgage bank. These mortgage liabilities caused Wachovia's depositors and investors to lose confidence in that institution and a "run" on the bank developed, causing the Federal Deposit Insurance Corporation ("FDIC") to inform Wachovia's corporate officers and the Wachovia board of directors (the "Wachovia Board" or the "Board") that Wachovia needed to merge with a solvent financial institution or be placed into receivership. After negotiation with other financial institutions, the Board agreed to a merger proposal (the "Proposed Merger" or the "Merger") from Wells Fargo & Company ("Wells Fargo").

Shortly after the Proposed Merger was announced, Irving Ehrenhaus filed this class action, on behalf of a class consisting of all shareholders of Wachovia common stock (the "Class"), challenging the Merger and seeking injunctive relief. After the trial court granted in part and denied in part Ehrenhaus's motion for a preliminary injunction, the parties entered into a settlement (the "Proposed Settlement" or the "Settlement"), which resolved or released the Class's claims—both pending claims and any claims that could be asserted pertaining to the Merger. The trial court heard from several individuals and groups that objected to the Settlement, but ultimately approved the Settlement after a fairness hearing. The final Settlement did not release claims pending in other courts.

This appeal concerns the events which led to the precipitous decline of Wachovia, its subsequent Merger with Wells Fargo, the dissatisfaction with that Merger, the ensuing litigation and Settlement, and the dissatisfaction with that Settlement. Norwood Robinson and John H. Loughridge ("Objectors-appellants") are dissatisfied with the court-approved Settlement and raise five central arguments asking this court to reverse the Merger. First, they argue the trial court erred in denying Ehrenhaus's motion for a preliminary injunction, and in doing so, the trial court denied Wachovia shareholders' their statutory voting rights. Objectors-appellants' second argument is that the trial court failed to examine properly the qualifications and adequacy of the Class representative (Ehrenhaus) and his counsel. Third, Objectors-appellants contend the trial court approved an unreasonable, inadequate Settlement. Objectors-appellants' fourth argument is that Wachovia shareholders were wrongfully denied the right to opt

out of the Class and pursue their own causes of action. Finally, Objectors-appellants argue the trial court erred in omitting certain evidence from the record and failing to consider that evidence in approving the Settlement. After careful review, we affirm in part and reverse in part.

II. Factual & Procedural Background

The causes of the financial collapse were not at issue before the trial court. However, the events leading to the Wachovia–Wells Fargo Merger, and the rapidity with which they occurred, provide the context for the Board's decision to approve the Merger and the parties' decision to approve the Settlement. The following narrative is primarily derived from the factual findings contained in the trial court's orders. These findings are binding because they are either unchallenged or supported by competent evidence. *Blitz v. Agean, Inc.*, 197 N.C. App. 296, 300, 677 S.E.2d 1, 4 (2009).

A. The Financial Crisis, Merger Negotiations, and Merger Approval

Beginning in the spring of 2008, a series of financial failures began to erode confidence in our nation's financial institutions. The following events culminated in a rapid decline in the public confidence in banks that held large positions in government-backed mortgage securities. On 7 September 2008 the United States government seized control of two mortgage giants: the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac).[1] On 15 September 2008, Lehman Brothers Holding, Inc. collapsed and filed for bankruptcy. The same day, Merrill Lynch & Co. avoided filing for bankruptcy by agreeing to be acquired by Bank of America. On 16 September 2008, the United States government agreed to a multi-billion dollar rescue plan for American International Group, Inc. ("AIG").

The Wachovia Board met by telephone on 16 September 2008. Management informed the Board that the bank was experiencing liquidity problems due to financial market conditions. The Board expressed a preference for the bank to remain an independent entity

1. Freddie Mac and Fannie Mae are government-sponsored enterprises whose stock was publically traded. These organizations would buy mortgages on the secondary market, pool them, and sell them as mortgage backed securities to investors. By purchasing mortgages from conventional lenders, the lenders assets could be used for additional loans, theoretically expanding the secondary mortgage market. The seizure of these institutions signaled that mortgage backed securities held by financial institutions were problematic to their holders, including investment banks.

and directed management to pursue that goal. Realizing Wachovia might not be able to stand on its own, the Board also directed management to explore a potential merger. On 20 September 2008, U.S. government officials expressed concern to Wachovia's management concerning the bank's liquidity, encouraging management to enter discussion with an unidentified potential merger partner. Those negotiations proved fruitless.

On 25 September 2008, the FDIC seized the banking assets of Washington Mutual, Inc. That same day, the United States House of Representatives rejected the initial "bailout" plan proposed by the United States Department of the Treasury for the nation's financial system. These two events exacerbated Wachovia's liquidity crisis. Wachovia's share price descended to $1.84—down over 90 percent from the closing price ten days earlier. The Wachovia Board met again by telephone conference the following day, when management informed it that, if Wachovia did not arrange a merger by 29 September, the FDIC would place Wachovia's bank subsidiaries into receivership.

Wachovia engaged in parallel negotiations with Citigroup, Inc. and Wells Fargo over the terms of a potential merger during the weekend of 27 September 2008. However, both suitors were unwilling to move forward without government assistance in the form of a loss-sharing arrangement. On 28 September, the FDIC notified Wachovia that the bank posed a "systemic risk" to the banking system and that the FDIC intended to exercise its authority to force a sale of Wachovia to another financial institution. The FDIC rejected a Wachovia counterproposal that would have given the FDIC an equity stake in Wachovia and allowed the firm to remain independent.

Wachovia subsequently entered into a non-binding agreement in principle by which Citigroup would acquire Wachovia's bank subsidiaries with assistance from the FDIC. Citigroup would have paid Wachovia $2.16 billion in cash and/or stock and assumed $53.2 billion of Wachovia's debt. The merger would have left Wachovia as a stand-alone entity, but with its principal businesses limited to its retail brokerage and mutual fund operations. Disagreements between the two financial institutions remained, however, and Citigroup insisted the two firms finalize the deal by 3 October 2008. Shortly before 9:00 p.m. on 2 October 2008, Wells Fargo forwarded a merger agreement, approved by its board, to Wachovia representatives.

This merger agreement required Wachovia and Wells Fargo to conduct a separate share exchange, pursuant to which Wells Fargo

would acquire ten newly issued shares of Wachovia Series M, Class A Preferred Stock, representing 39.9 percent of Wachovia's aggregate voting rights, including the right to vote on the approval of the proposed merger, in exchange for 1000 shares of Wells Fargo common stock. These shares were subject to a "tail provision," providing they could not be redeemed by Wachovia for eighteen months following the shareholder vote on the merger agreement—even if the merger was not consummated. Unlike the proposed Citigroup merger, the proposed Wells Fargo merger did not contain a "material adverse change clause."[2] The exchange ratio provided that Wachovia's public shareholders would receive 0.1991 shares of Wells Fargo common stock in exchange for each share of Wachovia common stock they owned. The proposal also contained a "fiduciary out" provision that required Wachovia's Board to submit the merger to a vote even if the Board no longer recommended the merger.

The Wachovia Board convened at 11:00 p.m. to consider the Wells Fargo merger proposal. Perella Weinberg and Goldman Sachs, financial services firms hired to advise the Board, counseled the Board that the offer was fair under the circumstances and counseled against attempting to negotiate with Wells Fargo for more favorable terms in light of the time constraints imposed upon Wachovia by the FDIC. (The following day was the deadline to agree to the proposed Citigroup merger.) These advisors stated the exchange ratio was fair. In light of Wachovia's increasingly perilous liquidity problem, the FDIC's refusal to provide Wachovia with government assistance, and other considerations,[3] the Board was left with no reasonable alternative and unanimously voted to approve the Merger. Shortly thereafter, Wachovia notified Citigroup that Wachovia intended to merge with Wells Fargo.[4] The next day, the public announcement of the Merger

2. A material adverse change provision gives the acquiring company the right to walk away from the deal in the event the target company experiences a significant adverse event or a material decline in value in the time period between signing and closing.

3. Wachovia's financial advisors (Parella Weinberg and Goldman Sachs) both expected—pending completion of due diligence and a financial review of the final documentation—to be able to render an opinion that the exchange ratio pursuant to the merger agreement was fair to Wachovia's shareholders. These opinions were later confirmed in writing.

4. Citigroup initiated litigation to force Wachovia to merge with Citigroup, rather than Wells Fargo, but was ultimately unsuccessful.

agreement alleviated Wachovia's liquidity crisis; its share price closed at $6.21—up from the previous day's close of $3.91.[5]

On 8 October 2008, Ehrenhaus filed this class action on behalf of the public shareholders of Wachovia common stock against Wachovia, Wells Fargo, and members of the Wachovia Board. *See infra* Section II.B. Wachovia and Wells Fargo pressed on to consummate the Merger.

The Board of Governors of the Federal Reserve System (the "Fed Board") quickly approved the Merger agreement on 12 October 2008. In doing so, the Fed Board noted, "[T]he unusual and exigent circumstances affecting the financial markets [and] the weakened financial condition of Wachovia . . . justified expeditious action on [the Merger Agreement]." (Second and third alterations in original.)

Pursuant to a 1990 amendment to the Wachovia articles of incorporation, the Wachovia Board issued ten shares of Series M, Class A Preferred Stock pursuant to the share exchange agreement. Wachovia and Wells Fargo completed the share exchange on 20 October 2008. The Wachovia Board scheduled a special shareholders' meeting for 23 December 2008 for the purpose of voting on the Merger agreement.

B. The Action and Preliminary Injunction Proceedings

Ehrenhaus's complaint challenged the Merger on the following grounds: (1) the share exchange, which provided Wells Fargo with 39.9 percent of the voting power for the Merger, invalidly disenfranchised Wachovia shareholders; (2) the tail provision was coercive with respect to the shareholder vote because it impeded the Board from seeking out other bidders for at least eighteen months after a shareholder vote rejecting the Merger; (3) the Merger provided Wachovia shareholders with insufficient consideration in exchange for their shares; and (4) the fiduciary out clause was inadequate because the Board would have been required to submit the Merger to a vote in the event of a superior proposal, rather than withdraw entirely from the Merger agreement. The complaint sought to enjoin the Merger or rescind it if consummated. The complaint also sought a judgment directing Defendants-appellees to pay the Class "all damages caused to them and account for all profits and any special benefits obtained as a result of their wrongful conduct."

5. Several days after the Board executed the merger documents, Wachovia reported a $9.1 billion loss for the second quarter of 2008 on 22 October 2008. Wachovia's poor performance was due in part to losses related to assets acquired as part of its purchase of Golden West.

On 15 October 2008, Ehrenhaus moved for a preliminary injunction, seeking to invalidate the tail provision, the fiduciary out provision contained in the Merger agreement, and the issuance of the preferred stock to Wells Fargo. The trial court held a hearing on 24 November 2008. Wachovia shareholders did not personally receive notice of the hearing. At this time, however, the legal proceedings had attracted attention from the news media and public. The trial court received over 200 letters and emails from public officials, Wachovia shareholders, and others on the subject, most expressing dissatisfaction with the Proposed Merger. For example, the *Charlotte Observer* published an editorial entitled, "Let Shareholders Have Their Say on Wells Deal." No other shareholder sought to intervene under Rule 24 and offered to serve as class representative at any time prior to the fairness hearing.

The trial court granted in part and denied in part Ehrenhaus's preliminary injunction motion. Wachovia and Wells Fargo were successful in protecting the core components of the Merger. The trial court concluded the Board's approval of the Merger agreement was an informed decision, made in good faith, with an honest belief that the action was in the best interests of Wachovia and its shareholders. The trial court denied preliminary injunctive relief as to the issuance of the preferred stock and concluded the preferred stock did not disenfranchise Wachovia's shareholders because "Wells Fargo ha[d] not 'locked up' an absolute majority of the votes required for approval of the Merger Agreement." The existence of the preferred stock was not coercive or preclusive of another bidder, according to the trial court because, other than Citigroup, there was no other offer to consider, and it was unlikely that another suitor would emerge. Therefore, the trial court concluded the Board's decision to approve the merger agreement was reasonable under the circumstances. The trial court granted partial preliminary injunctive relief, voiding the tail provision because the court concluded the provision would impede the Board in fulfilling its fiduciary duty to seek out merger partners in the event a potential suitor's overtures had been rejected.

C. The Amended Complaint, Negotiations, Terms of the Proposed Settlement, Merger Approval, Preliminary Class Certification, and Preliminary Settlement Approval

Following the issuance of the partial injunction, Ehrenhaus amended his complaint to allege Wachovia's proxy statement contained material false and misleading statements and omitted material

information related to the Merger. The parties began settlement negotiations shortly thereafter, and on 17 December 2008, they entered into a memorandum of understanding ("MOU") setting forth an agreement-in-principle to settle the case. The settlement reflected in the MOU required Wachovia to make additional disclosures regarding the Merger (the "Additional Disclosures"). Pursuant to this requirement, Wachovia filed a Form 8-K with the Securities and Exchange Commission, put out a press release, and published a post on its website. These materials disclosed matters related to previous omissions Ehrenhaus alleged in his complaint.

Wells Fargo agreed to absorb the cost of providing notice to the Class of the proposed settlement and to pay up to $1.975 million in attorney's fees to Class counsel. The final amount was to be awarded by the court. The Proposed Settlement would release and discharge all causes of action against Defendants-appellees arising from the allegations contained in Ehrenhaus's complaint as well as any claims not asserted in the complaint that Class members could have brought related to the Merger. These claims expressly did not include (1) enforcement of the Proposed Settlement or (2) "the claims asserted by [the] plaintiffs in the 'Amended Class Action Complaint for Violations of the Federal Securities Laws' " filed in the *Lipetz v. Wachovia Corp.*, No. 08 Civ. 6171 (RJS) (S.D.N.Y.), litigation. The Proposed Settlement agreement also provided that Class counsel would conduct confirmatory discovery to ensure the fairness of the Settlement.

On 23 December 2008, the Merger was approved by 76 percent of the votes entitled to be cast of Wachovia's outstanding common and preferred stock.[6] The firms consummated the Merger on 31 December 2008. During the time period between 31 December 2008 and 24 April 2009, Class counsel reviewed documents and took depositions to examine the conduct of corporate officials with regard to the Merger. Upon completing this due diligence, the parties entered into a stipulation of settlement.

On 24 April 2009, the trial court granted preliminary approval of the Proposed Settlement based on the parties' stipulation. This preliminary approval order conditionally certified the case as a non-opt-out class action, Ehrenhaus as Class representative, the law firm of Wolf Popper LLP as Ehrenhaus's lead counsel, and Greg Jones & Associates, P.A. as North Carolina Liaison Counsel. Pursuant to this

6. If the voting power held by Wells Fargo is completely disregarded, i.e., we assume the shares were never issued to Wells Fargo, over 50 percent of the independent Wachovia shareholders voted to approve the Merger.

order, Wells Fargo distributed over one million copies of a notice of the pending class action settlement to Class members.

D. Objections to the Proposed Settlement and Resolution

At a settlement fairness hearing held on 20 August 2009, the trial court heard from several parties who objected to the Proposed Settlement, including Objectors-appellants Norwood Robinson and John H. Loughridge, Jr. Following the hearing, the Orange County Employees' Retirement System and a group led by John M. Rivers withdrew their objections after agreeing to a modification of the release of claims stipulation. These include claims not arising out of either the Merger or the negotiation of terms and disclosures related to the Merger. These also include claims arising from Wachovia's business or Defendants-appellees' acts or omissions before or after the Class period. Mr. Robinson and Mr. Loughridge filed an objection to the Revised Stipulation, attaching a complaint they and others filed asserting claims against Wachovia and the Wachovia Board related to Wachovia's 2006 acquisition of mortgage lender Golden West. All other objectors withdrew their objection to the Proposed Settlement.

On 5 February 2010, the trial court entered its final order certifying the Class and approving the Proposed Settlement. The court awarded $932,621.98 in attorney's fees to Class counsel.

III. Analysis

Objectors-appellants make four general arguments on appeal: (1) the trial court should have enjoined the Merger; (2) the trial court erred in certifying the Class; (3) the trial court erred in approving the Settlement; and (4) the trial court failed to consider critical evidence.

North Carolina Rule of Civil Procedure 23 provides, "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued." N.C.R. Civ. P. 23(a). This rule is based on the federal counterpart to Rule 23 as it existed prior to 1966, when North Carolina adopted a modified version of the Federal Rules of Civil Procedure for state proceedings. *See generally Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 277–80, 354 S.E.2d 459, 463–64 (1987). While the language of North Carolina Rule 23 has remained constant, Federal Rule 23 has been amended, and the case law interpreting the rule is extensive. "[W]hile federal class action cases are not binding on [North Carolina courts,] we have held in the past that the reason-

ing in such cases can be instructive. This is so even though North Carolina's [Rule 23] . . . is quite different from the present federal Rule 23." *Scarvey v. First Fed. Sav. & Loan Ass'n.*, 146 N.C. App. 33, 41, 552 S.E.2d 655, 660 (2001) (citations omitted).

The requirements of establishing a class action have been established by our Supreme Court in *Crow*.

> The party seeking to bring a class action under Rule 23(a) has the burden of showing that the prerequisites to utilizing the class action procedure are present. First, parties seeking to employ the class action procedure under our Rule 23 must establish the existence of a class. As we have indicated, the plaintiffs properly alleged the existence of a class. On remand, however, the plaintiffs also will be required to demonstrate the actual existence of the class.
>
> The named representatives also must establish that they will fairly and adequately represent the interests of all members of the class. This prerequisite is a requirement of due process.
>
> The named representatives must show that there is no conflict of interest between them and the members of the class who are not named parties, so that the interests of the unnamed class members will be adequately and fairly protected. The named parties also must have a genuine personal interest, not a mere technical interest, in the outcome of the action.
>
> The class representatives within this jurisdiction also must establish that they will adequately represent those outside the jurisdiction. The class the plaintiffs in the present case seek to represent is defined as including only "current residents of North Carolina." Therefore, by definition, there are no class members outside the jurisdiction.
>
> Parties seeking to utilize Rule 23 also must establish that the class members are so numerous that it is impractical to bring them all before the court. It is not necessary that they demonstrate the impossibility of joining class members, but they must demonstrate substantial difficulty or inconvenience in joining all members of the class. There can be no firm rule for determining when a class is so numerous that joinder of all members is impractical. The number is not dependent upon any arbitrary limit, but rather upon the circumstances of each case.
>
> Additionally, although Rule 23(a) says nothing about the need for notice to members of the class represented, we believe that fun-

> damental fairness and due process dictate that adequate notice of the class action be given to them. The actual manner and form of the notice is largely within the discretion of the trial court. The trial court may require, among other things, that it review the content of any notice before its dissemination.
>
> The trial court should require that the best notice practical under the circumstances be given to class members. Such notice should include individual notice to all members who can be identified through reasonable efforts, but it need not comply with the formalities of service of process. Notice of the action should be given as soon as possible after the action is commenced. As part of the notification, the trial court may require that potential class members be given an opportunity to request exclusion from the class within a specified time in a manner similar to the current federal practice.

319 N.C. at 282–84, 354 S.E.2d at 465–66.

In reviewing the decisions of a trial court involving class certifications, our Supreme Court has instructed us to apply the abuse of discretion standard. *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 199, 540 S.E.2d 324, 331 (2000). A trial court abuses its discretion when its "decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citations omitted) (internal quotation marks omitted).

Rule 23(c) provides, "A class action shall not be dismissed or compromised without the approval of the judge." Because settlements are "compromises," a class action must therefore be subject to judicial review before it can be effectuated. While our business courts have reviewed class action settlements with regularity under a "fairness, reasonable and adequacy" standard based upon persuasive authority developed by federal courts and cases from other jurisdictions, no North Carolina appellate court has specifically reviewed this standard. For example, Judge Diaz in his February 2008 opinion viewed the standards as follows:

> Settlement has long been favored over litigation, and public policy favors upholding good faith settlements, even without strong regard to the consideration underlying the settlement.
>
> In light of the law and policy favoring settlement, federal courts reviewing a settlement agreement in class action cases conduct first a preliminary approval hearing to determine whether there is

> probable cause to notify class members of the proposed settlement, then a fairness hearing to determine if the proposed settlement is "fair, reasonable, and adequate." The burden is on the proponents of the settlement to demonstrate the proposed settlement is fair, reasonable, and adequate.
>
> The weight given to each factor in evaluating the fairness, reasonableness, and adequacy of a proposed class action settlement varies depending on the circumstances of a given case. Generally, a trial court should ensure that the proposed settlement is "not the product of collusion between the parties," and should evaluate its terms relative to the strength of the plaintiff's case.
>
> In addition to the strength of the plaintiff's case, some factors commonly evaluated include: (a) the defendant's ability to pay; (b) the complexity and cost of further litigation; (c) the amount of opposition to the settlement; (d) class members' reaction to the proposed settlement; (e) counsel's opinion; and (f) the stage of the proceedings and how much discovery has been completed. (Citations omitted.)

Our judicial system has a strong preference for settlement over litigation. Courts are generally indifferent to the nature of the parties' agreement; *why or how* the case is settled is of little concern. *See, e.g., Knight Publ'g Co., Inc. v. Chase Manhattan Bank, N.A.*, 131 N.C. App. 257, 262, 506 S.E.2d 728, 731 (1998) ("The real consideration is not found in the parties['] sacrifice of rights, but in the bare fact that they have settled the dispute."). This preference for settlement applies to class actions. *See Ass'n For Disabled Americans v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002) ("There is an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex."). But due to unique due process concerns implicated by binding a group of individuals not before the court, we *are* concerned with the circumstances and terms of class action settlements. Thus, parties cannot settle a class action without court approval. N.C.R. Civ. P. 23(c). The purpose of the settlement approval requirement is to

> (1) assure[] that any person whose rights would be affected by settlement has the opportunity to support or oppose it; (2) prevent[] private arrangements that may constitute "sweetheart deals" contrary to the best interests of the class; (3) protect[] the rights of those whose interests may not have been given due regard by the negotiating parties; and finally, (4) assure[] each

> member of the class that his or her integrity and right to express views and be heard on matters of vital personal interest has not been violated by others who have arrogated to themselves the power to speak and bind without consultation and consent.

In re Agent Orange Prod. Liab. Litig., 597 F. Supp. 740, 758 (E.D.N.Y. 1984) (citations omitted), *aff'd sub nom.*, *In re Agent Orange Prod. Liab. Litig. MDL No.* 381, 818 F.2d 145 (2d Cir. 1987).

A trial court evaluating a class action settlement should follow the two-step procedure generally employed by federal courts. First, the trial court should conduct "a preliminary approval or pre-notification hearing to determine whether the proposed settlement is 'within the range of possible approval' or, in other words, whether there is 'probable cause' to notify the class of the proposed settlement." *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994). If the trial court grants preliminary approval, "notice is sent to the class, [and] the court conducts a 'fairness' hearing, at which all interested parties are afforded an opportunity to be heard on the proposed settlement." *Id.*; *cf. Frost*, 353 N.C. at 197, 540 S.E.2d at 330 ("[N.C.] Rule 23 does not by its terms require notice to class members, but adequate notice is dictated by 'fundamental fairness and due process.' " (quoting *Crow*, 319 N.C. at 283, 354 S.E.2d at 466)). At this second hearing, the trial court must ascertain whether the proposed settlement is "fair, reasonable, and adequate." *Horton*, 855 F. Supp. at 827. Proponents of class action settlements bear the burden of showing the settlement meets this standard. *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983). Appellate courts review the decision to approve a settlement for abuse of discretion. 7B Charles Alan Wright et al., *Federal Practice & Procedure* § 1797.1, at 80 (3d ed. 2005); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) ("[T]he decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants, and their strategies, positions and proof." (quotation marks omitted) (citation omitted).

When reviewing a class action settlement, the trial court must protect, to the extent practicable, the rights of passive class members. It should also be sensitive to the possibility of collusion by the parties actively involved in the case. Wright et al., *supra*, § 1797.1, at 79. "[I]t is generally accepted that where settlement precedes class certification (e.g., approval for settlement and certification are sought simultaneously, as is the case here) district courts must be 'even more scrupulous than usual' when examining the fairness of the

proposed settlement." *In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1255 (D. Kan. 2006) (citation omitted). Courts consider a variety of factors in evaluating a settlement, giving heavy weight to two in particular. The first is the likelihood the class will prevail should litigation go forward and the potential spoils of victory, balanced against benefits to the class offered in the settlement. *State of W. Va. v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir. 1971); *see also Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25, 20 L. Ed. 2d 1, 10 (1968) ("Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation. It is here that we must start in the present case."). The second is the class's reaction to the settlement. *Sala v. Nat'l R.R. Passenger Corp.*, 721 F. Supp. 80, 83 (E.D. Pa. 1989) ("[T]he reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.").

Professor Wright emphasizes, among other things,

> the points of law on which the settlement is based[;] . . . if the action went forward, the plan for allocating the settlement among the class members or for distributing the settlement to the class[;] whether proper procedures were adopted for giving notice to the absent class members[;] and whether a settlement would waive other viable claims.

Wright et al., *supra*, § 1797.1, at 82–94 (footnotes omitted); *see also* 4 Abba Conte & Herbert Newberg, *Newberg on Class Action* § 13:68, at 479-81 (4th ed. 2002). The opinion of counsel is also a relevant factor. *Armstrong v. Bd. of Sch. Dir. of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998).

Because the trial court's final order both certified the class and approved a final settlement, Objectors-appellants contest portions of each determination. Of the multiple *Crow* requirements to certify a class, Objectors-appellants contest only two requirements: the adequacy of class representative, *see infra* Section III.B.1; and the adequacy of class counsel, *see infra* Section III.B.2. Objectors-appellants also raise a due process argument concerning the trial court's decision to certify the Class as a non-opt-out class, *see infra* Section III.B.3. Objectors-appellants also contend the trial court approved a settlement that was not fair, adequate and reasonable. *See infra* Section III.C.

Our analysis proceeds as follows. Objectors-appellants' first contention is that the trial court erred in denying Ehrenhaus's motion for a preliminary injunction. Appellees respond that Objectors-appellants lack standing to appeal the denial of the injunction. While we decline to answer that question, *see infra* Section III.A, the substantive issues raised by Objectors-appellants' preliminary injunction argument are resolved in other portions of our analysis.

We next turn to Objectors-appellants' argument that Ehrenhaus, as Class representative, and his attorneys, as Class counsel, are not qualified to serve the Class. *See infra* Sections III.B.1–2, respectively. We then address the third class certification issue: whether the trial court erred in certifying a non-opt-out class. *See infra* Section III.B.3.

Objectors-appellants next take issue with the trial court's decision to approve the Settlement. Our review examines (1) the probability the Class would have prevailed had this matter been litigated in full and the potential benefits to the Class, *see* Section III.C.1; (2) the merits of a claim that was not the thrust of Ehrenhaus's litigation strategy: a claim for damages against the Wachovia Board, *see* Section III.C.2; and (3) the reaction of the Class, recommendations of counsel, and notice adequacy, *see* Section III.C.3.

We then turn to the trial court's award of attorney's fees. *See infra* Section III.C.4. Finally, we address Objectors-appellants' allegations that the trial court omitted evidence from the record and refused to consider material evidence. *See infra* Section III.D.

A. The Denial of the Motion for a Preliminary Injunction

[1] Objectors-appellants argue the trial court erred in denying Ehrenhaus's motion for a preliminary injunction to enjoin the issuance of Series M shares to Wells Fargo. Specifically, they argue Wachovia's articles of incorporation did not authorize the issuance of the shares.

Before attempting to settle the case, Ehrenhaus sought to enjoin the issuance of these shares to Wells Fargo. After failing to convince the trial court to issue the preliminary injunction, Ehrenhaus opted to settle. Objectors-appellants became involved in this case only when Appellees sought court approval of the settlement. Prior to that time, they did not seek to intervene or to represent the Class themselves. Thus, Objectors-appellants not only appeal the class certification and settlement approval—which were entered after objectors-appellants intervened in this case through the objection process—but also seek appellate review of an order entered *before* they participated in this case.

Appellees contend Objectors-appellants have no right to appeal the denial in part of the injunction. Objectors-appellants have not directed us to any binding authority establishing that a party may appeal under these circumstances. Nor has our research discovered any. Neither party has briefed the practical strengths or weaknesses of a procedural rule that would permit an objector to appeal under these circumstances. For this reason, and because we address the substance of Objectors-appellant's argument below, *see infra* Section III.B (reviewing the fairness of the Settlement), we decline to expound on whether Objectors-appellants have a right to appeal the denial of a preliminary injunction under these circumstances.

B. Class Certification

The trial court's decision to certify the class was appropriately based on the *Crow* requirements. We now consider (1) whether the Class representative was adequate; (2) whether Class counsel was adequate; and (3) whether Class members should have been permitted to opt-out.

1. Class representative

[2] Objectors-appellants argue Ehrenhaus was an inadequate Class representative and that the trial court selected him as the Class representative because the court failed to conduct an adequate inquiry of his qualifications. We disagree.

The trial court concluded Ehrenhaus

> fairly and adequately represents the interests of the Class because [Ehrenhaus] is a Class member with the same legal claims as the other Class members, he has a genuine personal interest in the outcome of the litigation, and he has no conflict of interest with other Class members because he will not receive compensation for serving as Class Representative.

Ehrenhaus owned 1080 shares of Wachovia stock before Wells Fargo acquired the stock and will not be compensated for serving as Class representative. Objectors-appellants fail to direct us to any fact indicating Ehrenhaus's interest in the litigation would be different from the remainder of the Class. Their brief implies that his ownership of 1080 shares is problematic because there were over two billion outstanding shares of Wachovia stock. But owning a (relatively) small number of shares is not a bar to a class member serving as class representative. *Cf. Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) ("Differences in the amount of damages

between the class representative and other class members does not affect typicality.").[7]

Objectors-appellants maintain "[t]here was no one to represent the Wachovia Shareholders after the MOU was executed." Essentially, Objectors-appellants object to the trial court conducting a final certification hearing after the parties entered into the MOU and contend that, once the MOU was consummated, the parties were colluding to the shareholders' detriment. Objectors-appellants cite no authority for the proposition that a trial court may not conduct a final certification hearing after the parties have agreed in principle to a settlement, and we see no reason why the trial court's approach was inappropriate, particularly in light of the time constraints imposed by financial crisis. In contending the Class received no representation following the date of the MOU, Objectors-appellants completely fail to mention the extensive post-MOU discovery conducted by Class counsel in order to confirm the Proposed Settlement was fair and adequate.

After the parties agreed on the MOU, Class counsel conducted four depositions and reviewed nearly 10,000 pages of documents. The Settlement was contingent on Ehrenhaus determining whether the discovery confirmed the Settlement was fair; Ehrenhaus could walk away from the Proposed Settlement, in his sole discretion, if the confirmatory discovery indicated the Settlement was unfair. Ehrenhaus retained a financial advisor to provide an opinion concerning deficiencies in the proxy statement as well. Objectors-appellants have not referred us to anything in the record indicating Ehrenhaus or Class counsel were covertly engaged in conduct contrary to the Class's best interests. Finally, we note that no other shareholder came forward at this time to intervene seeking to serve as Class representative.

2. Class counsel

[3] Objectors-appellants also take issue with the adequacy of Class counsel. They maintain "there was a direct conflict of interest between the attorneys and their clients, shareholders, forward" following the date of the MOU. Objectors-appellants do not, however, explain what this conflict is. They take issue with Class counsel being paid on a contingency basis, citing the North Carolina Rules of Pro-

7. Objectors-appellants do not point to any evidence in the record that Ehrenhaus purchased stock immediately prior to the Merger for the sole purpose of challenging the Merger or that he conspired with management to engage in sweetheart litigation to eliminate legitimate claims of Class members. Had such evidence existed, the Court's determination may have been different, but speculation that such a conflict of interest is present is very distinct from proof of such a conflict.

fessional Conduct for the proposition that "Rule 1.8(f) . . . recognizes the inherent conflict where a third party defendant (Wells Fargo) pays for a litigant's attorneys fee [sic]," but provide no further analysis. Rule 1.8(f) does not prohibit a lawyer from representing a class on a contingency basis. In fact, some class actions "are by their very nature contingency fee cases." *Long v. Abbott Laboratories*, 97-CVS-8289, 1999 WL 33545517 (N.C. Super. July 30, 1999) (discussing class actions that create a common fund). We also note that the trial court found that Class counsel is "highly respected and experienced in shareholder class action litigation." We are not persuaded that Class counsel deprived the Class of adequate and reasonable representation by virtue of a conflict of interest or insufficient class action proficiency.

3. Opt-out certification

[4] Objectors-appellants contend the trial court's certification of a non-opt-out Class fell below procedural guarantees of the Due Process Clause of the Constitution of the United States. Specifically, Objectors-appellants maintain they should have been able to opt out of the Class and bring an action seeking damages. As this issue concerns a question of law, we review the trial court's decision in this matter *de novo*. *Blitz*, 197 N.C. App. at 300, 677 S.E.2d at 4. Citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 n.3, 86 L. Ed. 2d, 628, 642 n.3 (1985), the trial court concluded the Class did not require opt-out rights because the parties did not attempt to bind Class members with respect to claims predominantly seeking monetary relief. In doing so, the court explained that, from the outset, Ehrenhaus pled and litigated the case as one seeking predominantly equitable relief.

The trial court focused on whether Ehrenhaus's claim sought equitable, rather than monetary, relief. The trial court's analysis relied heavily on the "predominance" opt-out analysis employed by many courts. Although the United States Supreme Court recently criticized reliance on that analysis, we nevertheless hold the trial court reached the correct result.

The term "opt-out" refers to a class member's ability exclude himself from a class action settlement. By opting out, the class member avoids the preclusive effect of the settlement, in that he is free to bring his own lawsuit. He also forgoes any payments he might receive from the settlement.

In *Shutts*, the United States Supreme Court held that, when a class action seeks to bind the class members "concerning claims wholly or predominately for money judgments," due process requires

opt-out rights for class members. *Id.* at 812 n.3, 86 L. Ed. 2d at 642 n.3. Federal Rule 23 authorizes non-opt-out classes, and the federal courts have developed a substantial, albeit somewhat inconsistent, body of law pertaining to class certification and opt-out rights. Under Federal Rule 23, there are three categories of class actions: the (b)(1) class, which, as a general matter, can be certified when individual adjudication is unworkable; the (b)(2) class, which can be certified when injunctive or declaratory relief will affect the entire class at once; and the (b)(3) class, which can be certified when a class action is a superior manner of adjudicating common questions of law or fact applicable to the entire class. *See* Fed. R. Civ. P. 23(b); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 412 (5th Cir. 1998). Federal Rule 23 requires opt-out rights for (b)(3) classes, but not (b)(1) and (b)(2) classes. Consequently, federal court decisions concerning whether (b)(1) and particularly (b)(2) classes are appropriate are instructive. *See Frost*, 353 N.C. at 196, 540 S.E.2d at 330 (stating our decisions should be informed by federal decisions where appropriate).

There are numerous federal decisions stating (b)(2) certification is appropriate, even when the action seeks monetary relief, provided the damages sought do not "predominate" or are "incidental" to the injunctive relief. *E.g.*, *Lemon v. Int'l Union of Operating Engineers, Local No. 139, AFL-CIO*, 216 F.3d 577, 581 (7th Cir. 2000); *Allison*, 151 F.3d at 412; *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995); *see also Manual for Complex Litigation (Fourth)* § 21.221 (2004). When the class representative seeks injunctive or declaratory relief, a non-opt-out class is necessary "to avoid unnecessary inconsistencies and compromises in future litigation." *DeBoer*, 64 F.3d at 1175. If a prospective settlement cannot bind all members of the class, the defendant has little motivation to settle. The underlying premise of the (b)(2) class is that it enjoys uniformity and therefore a lack of conflicts among class members. *Allison*, 151 F.3d at 413. "[A] class seeking primarily equitable relief for a common injury is assumed to be a cohesive group with few conflicting interests, giving rise to a presumption that adequate representation alone provides sufficient procedural protection." *In re Veneman*, 309 F.3d 789, 792 (D.C. Cir. 2002). However, this homogeneity breaks down when claims for monetary relief hinge on individual injuries that differ across the class. *Allison*, 151 F.3d at 413.

The federal courts' analysis (implicitly, for the most part) involves a balancing of judicial economy and the procedural component of the Fourteenth Amendment. *See Wal-Mart Stores v. Dukes*,

564 U.S. ___, ___, 180 L. Ed. 2d 374, 397-98 (2011) ("Similarly, (b)(2) does not require . . . opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause."). "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 58 L. Ed. 1363, 1369 (1914). When homogeneity exists and the class's interests are aligned, non-opt-out certification does not offend due process. We assume each litigant does not *need* to be heard individually. But when uniformity is lacking, the class members' interests may not be aligned. Individual class members must be able to opt-out in these situations and exercise their right to be heard.

Recently, in *Wal-Mart Stores*, the United States Supreme Court noted that there was a "serious possibility" that the Due Process Clause might forbid the certification of monetary claims in non-opt-out classes, even when they do not predominate. 564 U.S. at ___, 180 L. Ed. 2d at 398. This possibility was one reason why the Court determined the class action could not be certified under (b)(2). *Id.* The Court explained that a "mere 'predominance' " of a proper (b)(2) claim does not cure notice and opt-out problems. *Id.* In *Wal-Mart Stores*, the named plaintiffs pleaded claims for injunctive relief and monetary relief in the form of back pay, which is equitable in nature. *Id.* They did not plead claims seeking compensatory damages. *Id.* This made it less likely that the monetary claims asserted in the lawsuit would predominate. *Id.* The Court explained that this strategy

> also created the possibility (if the predominance test were correct) that individual class members' compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from. If it were determined, for example, that a particular class member is not entitled to backpay because her denial of increased pay or a promotion was *not* the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on the same denial. That possibility underscores the need for plaintiffs with individual monetary claims to decide for *themselves* whether to tie their fates to the class representatives' [sic] or go it alone—a choice Rule 23(b)(2) does not ensure that they have.

Id.

The Court explicitly stated that its ruling did not address whether *any* form of incidental monetary relief could comply with the Due Process clause, *Id.*, but it does indicate courts must be careful—more careful than they have previously been—to protect class members' due process rights when monetary claims are involved. *Wal-Mart Stores* also establishes that the claims pled by the named plaintiff are not the only claims that must be considered. It is critical that courts determine whether it offends due process to preclude monetary claims that are *not* plead as a basis for relief.

In this case, Objectors-appellants take issue with the preclusion of potential claims for damages against the Wachovia Board. These claims were not articulated before the trial court. The only claims brought to this Court's attention on appeal that could be brought as a class action are potential claims for diminution of shareholder voting strength and inadequate merger consideration. Because no Class member presented these to the trial court, there is no record for us to review. Although a trial court should examine potential liability of the Board for claims before approving a settlement, without a proffer by an Objector, an evaluation of any additional and unarticulated claims by this court would be speculative. Furthermore, it appears to us that the equitable claims brought by Ehrenhaus fully resolve any claim for diminution of shareholder voting strength, and the record fails to disclose any set of facts upon which a claim for inadequate merger consideration could have been based. We need not address the issue of whether any derivative action could have been brought because the procedural requirements for bringing such a claim are not in the record and it is unlikely that any such claim would be successful under these factual circumstances.

The predominant claim here was Ehrenhaus's attempt to enjoin the Merger. Objectors-appellants did not explain to the trial court, with any specificity, what causes of action they wished to bring and how the nature of those claims might impact the due process analysis. Our role is to review the trial court's ruling. Based on the claims that were articulated to the trial court by Appellees and Objectors-appellants, the trial court correctly determined due process does not require opt-out rights in this case.

* * * *

In conclusion, we disagree with Objectors-appellants' three argments challenging class certification. First, the trial court's selection

of Ehrenhaus as Class representative did not deprive the Class of adequate representation. Second, we are not persuaded Class counsel was inadequate. Third, the trial court did not err certifying a non-opt-out class. Therefore, we hold the trial court did not err in certifying this class action.

C. Settlement Approval

1. The likelihood of success and the benefits of the Settlement

[5] The amended complaint sought relief based on allegations that the Wachovia Board breached its fiduciary duties by employing improper deal protection measures, failing to comply with statutory share exchange requirements, and failing to make material disclosures concerning the Merger. The amended complaint also alleged an aiding and abetting breach of fiduciary duty claim against Wells Fargo. Corporate directors owe fiduciary duties to the corporation. *Pierce Concrete, Inc. v. Cannon Realty & Constr. Co., Inc.*, 77 N.C. App. 411, 413–14, 335 S.E.2d 30, 31 (1985). A fiduciary duty is

> one in which "there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . , [and] it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and *resulting domination and influence on the other.*"

Dalton v. Camp, 353 N.C. 647, 651, 548 S.E.2d 704, 707–08 (2001) (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (some citations omitted). The General Statutes prescribe a standard of conduct for corporate directors: a director must discharge his duties "(1) [i]n good faith; (2) [w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) [i]n a manner he reasonably believes to be in the best interests of the corporation." N.C. Gen. Stat. § 55-8-30(a) (2009).

> In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
>
> (1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

> (2) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within their professional or expert competence; or
>
> (3) A committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.

N.C. Gen. Stat. § 55-8-30(b). "The duties of a director weighing a change of control situation shall not be any different, nor the standard of care any higher, than otherwise provided in this section." N.C. Gen. Stat. § 55-8-30(d).

The business judgment rule is a standard of review courts use to determine whether directors have met the statutory standard of conduct. The rule

> creates, first, an initial evidentiary presumption that in making a decision the directors acted with due care (i.e., on an informed basis) and in good faith in the honest belief that their action was in the best interest of the corporation, and second, absent rebuttal of the initial presumption, a powerful substantive presumption that a decision by a loyal and informed board will not be overturned by a court unless it cannot be attributed to any rational business purpose.

Hammonds v. Lumbee River Elec. Membership Corp., 178 N.C. App. 1, 20–21, 631 S.E.2d 1, 13 (2006) (quoting Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 14.06, at 14-16 to -17 (2005)).

We first address the allegation in Ehrenhaus's amended complaint that the share exchange violated Chapter 55 of the General Statutes when Wachovia issued the Wachovia Series M, Class A Preferred Stock, representing 39.9 percent of the Wachovia's aggregate voting rights in exchange for 1000 shares of Wells Fargo common stock. (The class is prohibited from mounting further challenges to the share exchange by the Settlement.)

Ehrenhaus alleged, and Objectors-appellants maintain, the Wachovia Board failed to comply with subsection 55-10-03(b), which states that "after adopting the proposed amendment [of the articles of incorporation] the board of directors must submit the amendment to the shareholders for their approval." N.C. Gen. Stat. § 55-10-03(b) (2009). In a proper case, a breach of fiduciary duty claim may be premised on a violation of the North Carolina Business Corporation

Act. *See Robinson*, *supra*, § 14.03[3], at 14-9 to -10 ("The duty of care requires the directors of every corporation to see that it is operated according to the terms of its articles of incorporation, and, it would seem, also according to law." (footnotes omitted)); *Miller v. Am. Tel. & Tel. Co.*, 507 F.2d 759, 763 (3d Cir. 1974) (concluding statutory violation could form the basis for breach of fiduciary duty claim). Objectors-appellants contend an amendment is required because section 55-10-02, which provides a list of amendments that do not require shareholder approval, does not authorize the issuance of shares that will dilute shareholder voting rights. *See* N.C. Gen. Stat. § 55-10-02 (2009). This line of reasoning assumes an amendment to the articles of incorporation was required.

Subsection 55-6-01(a) states that "[t]he articles of incorporation must prescribe the classes of shares and the number of shares of each class that the corporation is authorized to issue." N.C. Gen. Stat. § 55-6-01(a) (2009). Aside from several exceptions not applicable here, "after adopting [a] proposed amendment the board of directors must submit the amendment to the shareholders for their approval." N.C. Gen. Stat. § 55-10-03(b) (2009). In 1990, the Wachovia (then First Union Corporation) shareholders authorized the Board to issue the Class A preferred shares. The articles of incorporation were modified to allow the board to issue "Class A Preferred Stock." The amendment permitted the Board to issue the shares "from time to time in one or more series." It also authorized the Board to set the "provisions as to voting rights, if any." Thus, it appears the shareholders previously authorized the Series M, Class A Preferred Stock.

Objectors-appellants also point out that section 55-10-04 provides circumstances under which shareholders must be entitled to vote as a class. *See* N.C. Gen. Stat. § 55-10-04 (2009). But this section applies to amendments to articles of incorporation—not the issuance of a class of shares already authorized by articles of incorporation. *See id.*

Objectors-appellants next argue that, pursuant to subsection 55-11-03(a), the Board was required to submit the share exchange to the shareholders for a vote. Subsection 55-11-03(a) provides:

> After adopting a plan of merger or share exchange, the board of directors of each corporation party to the merger, and the board of directors of the corporation whose shares will be acquired in the share exchange, shall submit the plan of merger . . . or share exchange for approval by its shareholders.

N.C. Gen. Stat. § 55-11-03(a) (2009). However, the term "share exchange," as it is employed by Chapter 55, does not apply to the transaction between Wachovia and Wells Fargo. Under Chapter 55, a share exchange is "a transaction by which a corporation becomes the owner of all the outstanding shares of one or more classes of another corporation by an exchange that is compulsory on all owners of the acquired shares." N.C. Gen. Stat. § 55-11-02 commentary (2009); *see also* N.C. Gen. Stat. § 55-11-02(a) ("A corporation may acquire all of the *outstanding* shares of one or more classes or series of another corporation if the board of directors of each corporation adopts and its shareholders . . . approve the exchange." (emphasis added)). This transaction was not compulsory on any owners of the acquired shares because they were *issued directly to Wells Fargo*. There were no prior-owners of the acquired shares. Wells Fargo provided consideration to Wachovia in the form of Wells Fargo shares, but this type of "share exchange" does not trigger the voting rights set forth in section 55-11-03.

We also conclude the Class had little or no chance of prevailing in a breach-of-fiduciary-duty claim against the Wachovia Board related to allegations that the share exchange was coercive. Among other prerequisites, in order for Wachovia and Wells Fargo to merge, a majority of Wachovia shareholder votes needed to be cast in favor of the Merger. *See* N.C. Gen. Stat. §§ 55-11-01, -03 (2009). The failure to vote in favor of the Merger amounted to a vote against it. *See id.*

Our research does not disclose any controlling authority on such a claim. Based on our review of Delaware decisions, we conclude that, in North Carolina, a deal protection measure, such as the share exchange here, cannot be so coercive that it deprives the pre-exchange shareholders of the opportunity to exercise their voting rights in a meaningful way. If "the vote will be a valid and independent exercise of the shareholders' franchise, without any specific preordained result which precludes them from rationally determining the fate of the proposed merger [a court] has no basis to intervene." *In re IXC Communications, Inc. S'holder Litig.*, No. 17334, 1999 Del. Ch. LEXIS 210 at *3 (Oct. 27, 1999). Two Delaware decisions illustrate this principle.

In *In re IXC Communications, Inc. S'holder Litig.*, Vice Chancellor (now Delaware Chief Justice) Steele addressed a similar situation. The case involved a merger between IXC Communications, Inc. ("IXC") and Cincinnati Bell, Inc. ("CBI"). *Id.* at *2. The General Electric Pension Trust ("GEPT") was IXC's largest shareholder. *Id.* at *7. CBI acquired

half of GEPT's IXC holdings and secured a promise from GEPT to support the IXC-CBI merger with GEPT's remaining shares. *Id.* at *21. This effectively gave CBI control of about 40 percent of IXC's shares. *Id.* at *23.

Noting that an independent majority of IXC shareholders controlled nearly 60 percent of all IXC shares, Chief Justice Steele stated that CBI had "not, in fact, 'locked up' an absolute majority of the votes required for the merger through the GEPT deal." *Id.* at *23–24. He opined that " '[*a*]*lmost locked up*' does not mean 'locked up,' and 'scant power' may mean less power, but it decidedly does not mean 'no power.' " *Id.* at *24. Because "a numerical majority" of independent shareholders were in a position to defeat the merger, he concluded, the vote-buying agreement did not "have the purpose or effect of disenfranchising this remaining majority of shareholders." *Id.*

In *Omnicare, Inc. v. NCS Healthcare, Inc.*, the Supreme Court of Delaware held that a corporate board of directors cannot "accede to [a controlling shareholder] demand for an absolute 'lock-up.' " 818 A.2d 914, 938 (Del. 2003). There, Genesis, Health Care Ventures, Inc. ("Genesis") and Omnicare, Inc. ("Omnicare") were competing to acquire NCS Healthcare, Inc. ("NCS"). *Id.* at 917. The NCS board approved a merger agreement with Genesis pursuant to which the NCS board was required to place the agreement before the NCS shareholders for a vote, even if the NCS board no longer recommended the merger. *Id.* at 918. Two NCS stockholders held a majority of the shareholder voting power; they entered into an agreement to vote all of their shares in favor of the merger. *Id.* The NCS board eventually withdrew its support for the merger, submitting it to the shareholders with a recommendation that the shareholders reject the proposed merger because the competing Omnicare bid was a superior transaction. *Id.*

In holding the NCS board breached its fiduciary duty to minority shareholders, the court explained that its decision

> [did] not involve the general validity of either stockholder voting agreements or the authority of directors to insert a . . . provision in a merger agreement [requiring the board to submit a merger to the shareholders even if the board later came to disapprove of the merger]. In this case, the NCS board combined those two otherwise valid actions and caused them to operate in concert as an absolute lock up, in the absence of an effective fiduciary out clause in the Genesis merger agreement.

Id. at 939.

Returning to the matter at bar, the trial court concluded in its order denying Ehrenhaus's motion for preliminary injunction that he failed to establish by clear and convincing evidence that the share exchange was coercive. In so ruling, the court noted there were "few (if any)" entities in position to offer a superior merger proposal, and that, in all likelihood, the federal government would not provide any financial assistance to Wachovia. Wells Fargo acquired only 40 percent of the Wachovia voting rights—nearly identical to the amount the GEPT effectively controlled in *In re IXC Communications, Inc. S'holder Litig.* As was the case in *Omnicare*, the Wachovia Board agreed to a fiduciary out provision.

The facts of this case fall between the two Delaware decisions, but the critical distinction between the matter at bar and *Omnicare* is that the merger protection measures here did not prevent the shareholders from voting down the Merger. In *Omnicare*, the shareholders in favor of the merger had already locked up enough votes to ensure the merger would succeed. The fiduciary out clause forced the NCS board to submit the proposed merger for a shareholder vote, even if a superior merger opportunity arose; and a superior merger opportunity did, in fact, come available. While there was a similar fiduciary out clause in the matter at bar, independent shareholders held 60 percent of the voting rights and there was very little chance the Wachovia Board would receive a comparable merger offer from a different suitor. Once the voting agreement and fiduciary out clause were in place in *Omnicare*, the board of directors could not protect the independent shareholders from being forced into an inferior transaction. In this case, on the other hand, *the independent shareholders could protect themselves*. We conclude that, under these facts, it is highly unlikely the Class would have prevailed on a breach of fiduciary duty claim alleging the Wachovia Board breached its fiduciary duty by approving a coercive share exchange.[8]

8. Delaware applies various standards of review to evaluate director conduct related to different types of transactions. *See* Thanos Panagopoulos, 3 Berkley Bus. L.J. 437 (2006). In *Omnicare*, the Delaware Supreme Court employed the *"Unocal"* standard of review, which places enhanced scrutiny on deal protection measures beyond that of the business judgment rule. 818 A.2d at 934. Nothing in our opinion should be construed as adopting a standard of review that varies from the business judgment rule; that issue is not before us. Rather, we contrast *Omnicare* with *In re IXC Communications, Inc. S'holder Litig.* to illustrate the considerations involved in determining whether deal protection measures are coercive.

The amended complaint also alleged the "definitive Proxy Statement contain[ed] materially misleading statements and omissions" and that "[w]ithout material and accurate information, Wachovia's public shareholders c[ould not] make an informed judgment as to whether to vote for or against the Merger." We find the Delaware courts' articulation of the non-disclosure principle persuasive. We hold that North Carolina directors "are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action." *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992). Delaware has adopted a definition of the term "material" from a United States Supreme Court securities law decision:

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. This standard is fully consistent with *Mills [v. Elec. Auto-Lite Co.*, 396 U.S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593] general description of materiality as a requirement that "the defect have a significant *propensity* to affect the voting *process*." It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

Rosenblatt v. Getty Oil Co., 493 A.2d 929, 944 (Del. 1985) (alteration in original) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 48 L. Ed. 2d 757, 766 (1976)). We believe this is an appropriate standard, and our review indicates Ehrenhaus raised potentially meritorious claims related to the fiduciary duty to disclose material facts.

Ehrenhaus also claimed that Wells Fargo aided and abetted a breach of fiduciary duty by the Wachovia Board. First, it is unclear whether such a cause of action exists in North Carolina. *In re Bostic Constr., Inc.*, 435 B.R. 46, 66 (Bankr. M.D.N.C. 2010) ("It is not even clear that North Carolina recognizes a cause of action for aiding and abetting breach of fiduciary duty."); *Battleground Veterinary Hosp., P.C. v. McGeough*, No. 05 CVS 18918, slip op. at 7 (N.C. Super. Ct. Oct.

19, 2007) ("It remains an open question whether North Carolina law recognizes a claim for aiding and abetting breach of fiduciary duty."). *Compare Ahmed v. Porter*, 1:09CV101, 2009 WL 2581615 (W.D.N.C. June 23, 2009) (unpublished) (concluding North Carolina recognizes such a claim), *with Laws v. Priority Tr. Servs. of N.C., L.L.C.*, 610 F. Supp. 2d 528, 532 (W.D.N.C. 2009) (concluding North Carolina does not recognize such a claim). This Court recognized an aiding and abetting theory of liability for federal securities laws violations in *Blow v. Shaugnessy*, 88 N.C. App. 484, 490, 364 S.E.2d 444, 447 (1988). However, the underlying rationale of that decision was abrogated by *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 128 L. Ed. 2d 119 (1994). *Laws*, 610 F. Supp. 2d at 532. We elect not to delve into whether such a claim exists because it is highly unlikely Ehrenhaus or another Class member could establish a primary fiduciary duty violation by the Wachovia Board. *See Blow*, 88 N.C. App. at 489, 364 S.E.2d at 447 (aiding and abetting theory required "a securities law violation"); *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1039 (Del. Ch. 2006) (Delaware claim requires the fiduciary to breach his fiduciary duty and the non-fiduciary to participate knowingly in that breach). Because Ehrenhaus would have had a difficult time establishing the Wachovia Board breached its fiduciary duties, it would have been very difficult to establish Wells Fargo aided and abetted in a breach of fiduciary duty (assuming such a claim exists in this state).

The class action also sought relief on the basis that the tail provision—which provided the shares issued to Wells Fargo could not be redeemed by Wachovia for eighteen months following the shareholder vote on the Merger agreement, even if the Merger was not consummated—constituted a breach of fiduciary duty. The trial court agreed, enjoining the tail provision. Ultimately, the tail provision was eliminated from the share exchange, so the Class had no chance of prevailing on this claim.

In addition to negating the tail, Ehrenhaus was successful in securing disclosures by the Wachovia Board that aided shareholders in making an informed vote on the Merger. As the trial court found, the Settlement largely remedied the disclosure deficiencies alleged in Ehrenhaus's amended complaint. These disclosures included information concerning communications with potential suitors, communications with regulatory authorities prior to the Wachovia Board's vote on the Merger, and some of the methodologies utilized by Wachovia's financial advisors in evaluating the Merger. The trial court noted the

Settlement did not require disclosure concerning a tax benefit to which Wells Fargo might be entitled as a result of the Merger. As we note above, however, we fail to see how information concerning tax benefits obtained by Wells Fargo would have been a critical piece of information for shareholders. In sum, the additional disclosures made by Wachovia pursuant to the Settlement largely alleviated the issues raised by the most meritorious part of Ehrenhaus's allegations.

2. Other claims released by the Settlement

[6] The Released Claims include all causes of action against Defendants-appellees arising under Ehrenhaus's complaint as well as any claims related to:

> (i) the Merger, the Merger Agreement, the Share Exchange Agreement or any amendment thereto; (ii) the fiduciary obligations of any of the Defendants in connection with the Merger, the Merger Agreement, and the Share Exchange Agreement; (iii) any discussions or negotiations in connection with the Merger, or Merger Agreement, the Share Exchange Agreement, or any amendment thereto; (iv) the issuance and terms of the Series M Shares; (v) the amendment to Wachovia's articles of incorporation with respect to the issuance of the Series M Shares; (vi) the Proxy Statement or any amendment or supplement thereto; and (vii) the disclosure obligations of any of the Defendants in connection with the Merger, the Merger Agreement, the Share Exchange Agreement, and any discussions or conduct preparatory thereto . . . .

Initially, the Proposed Settlement excluded the following from the Released Claims: "(i) the right of the Plaintiff or any members of the Class to enforce in the Court the terms of the Stipulation; or (ii) the claims asserted by plaintiffs in the Amended Class Action Complaint for Violations of the Federal Securities Laws, dated December 15, 2008, in *Lipetz v. Wachovia Corp. et al.*, Civil Action No. 08-6171 (RJS) (S.D.N.Y.)." The Settlement was modified to exclude the following from the Released Claims:

> (iii) the claims asserted by plaintiffs in the Consolidated Class Action Complaint filed on September 4, 2009 in *In Re Wachovia Preferred Securities and Bond/Notes Litigation*, Master File No. 09 Civ 6351 (RJS) (S.D.N.Y.); (iv) claims not arising out of either the Merger or events involving the negotiation of, terms of and disclosures related to the Merger, (v) claims that arise from Wachovia's business or the Defendants'/Released Persons' acts or

> omissions before or after the Class period; (vi) claims arising from alleged mismanagement, misconduct, misrepresentations, or non-disclosures about Wachovia's business and/or its securities during the Class period unrelated to the Merger; (vii) claims relating to the decline in value of Wachovia's share price before the Class period, or (viii) claims relating to the decline in value of Wachovia's share price during the Class period to the extent that such claims either arise from events, acts, or omissions that preceded the Class period or do not arise from the Merger.

Notably, claims seeking relief based on a decrease in Wachovia's share price due to Wachovia's acquisition of Golden West fall into at least one of the categories of additional exclusions from the Released Claims.

However, the exclusions from the Released Claims do not cover claims for damages related to un-alleged claims concerning the inadequacy of the Merger consideration. While Objectors-appellants failed to explain specifically what type of claim they wish to pursue, we note here that any action against the Wachovia Board would have little, if any, chance of success.

This type of lawsuit must hurdle the business judgment rule, which creates a strong presumption that the Wachovia Board acted with due care. A plaintiff may defeat this presumption only by demonstrating the Wachovia Board's conduct "cannot be attributed to any rational business purpose." *Hammonds*, 178 N.C. App. at 20–21, 631 S.E.2d at 13. Given the time demands and tumultuous market conditions, the business judgment rule is likely insurmountable in this case.

After the FDIC notified Wachovia that the FDIC intended to exercise its authority to conduct a forced sale of Wachovia to another financial institution, the Wachovia Board was under pressure to work out a deal with Citigroup or Wells Fargo. These were the only two potential suitors; the FDIC had rejected a deal that would have given the regulatory body an equity stake in Wachovia.

Wells Fargo offered more monetary consideration per share than Citigroup. And unlike Citigroup's offer, the proposal from Wells Fargo did not contain a material adverse change provision that would have allowed the acquiring institution to walk away from the deal if Wachovia experienced a material decline in value between signing the merger agreement and consummating it. Wachovia was successful in negotiating some concessions from Wells Fargo. Initially, Wells Fargo sought, through the share exchange, 50 percent of the voting power on the Merger. Wachovia negotiated the percentage down to 39.9 percent.

The Wachovia Board's advisors, Perella Weinberg and Goldman Sachs, uniformly advised against attempting to negotiate for superior terms in light of the time constraints imposed by the market and the FDIC. A director is entitled to rely on the advice of "[l]egal counsel, public accountants, or other persons as to matters the director reasonably believes are within their professional or expert competence." N.C. Gen. Stat. § 55-8-30(b)(2) (2009). The director loses that protection, however, "if he has actual knowledge concerning the matter in question that makes reliance" unwarranted. N.C. Gen. Stat. § 55-8-30(c) (2009). We note that in this case, a large portion of both financial advisors' fees were contingent on the success of the merger with Wells Fargo. While the Wachovia Board should have tempered its reliance accordingly—and nothing suggests the Board did not—we believe Perella Weinberg's and Goldman Sachs' advice indicates the Board's conduct was reasonable under the circumstances.

[7] *3. The reaction of the Class, recommendations of counsel, and notice adequacy*

There were over 150,000 Wachovia shareholders and over two billion shares of stock. The trial court received over 200 letters and emails regarding this case and remarked that much of that correspondence was directed to issues that were not before the court. Counsel indicated they received hundreds of calls from individuals unhappy with the Settlement, but there are only two remaining objectors in this case: Mr. Robinson and Mr. Loughridge. "In the class action context, silence may be construed as assent." *In re GNC S'holder Litig.: All Actions*, 668 F. Supp. 450, 451 (W.D. Pa. 1987). Provided there has been adequate notice of the terms of a settlement, a dearth of objections may indicate a settlement is fair. *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001). The trial court viewed the reaction of the Class as "muted," which supported a finding that the Settlement is fair, reasonable, and adequate. The trial court was in the best position to determine whether the public outcry over the Settlement raised fairness concerns grounded in law. Furthermore, given the unlikely prospect of success on any of the claims in this case, even if the trial court underestimated the legitimate complaints of Class members, the court's appraisal of the Class reaction did not rise to the level of an abuse of discretion.

[8] The trial court also based its decision on the recommendations of counsel. The trial court specifically found that Ehrenhaus's attorneys are "highly respected and experienced in shareholder class action litigation." The court agreed with both plaintiff and defense counsel

that the Settlement is a "reasonable compromise given the uncertain value of the remaining claims and the expense and delay that would result from further litigation." "[T]he opinion of experienced and informed counsel is entitled to considerable weight." *Id.* at 430. At the Settlement approval hearing, the trial court inquired as to why the discovery confirmed the reasonableness of the Settlement. Ehrenhaus's counsel replied that, based on the depositions of executives involved in the case, "there were pieces here and there that . . . were favorable to [Ehrenhaus's] position, but overall it wasn't even close."

Our review also indicates the parties employed proper procedures for providing notice to absent Class members. The trial court required Wells Fargo to mail notice of the Proposed Settlement to Class members on or before 24 May 2009 at the last address appearing in Wachovia's stock transfer records. The notice instructed record owners of stock who were not also the beneficial holders to forward the notice to the beneficial holders. Wells Fargo employed Georgeson, Inc., a proxy solicitation firm, to distribute the notice. Georgeson, Inc., distributed the notice to the required recipients on 22 May 2009. The firm also contacted over 450 banks, brokers, and other intermediaries that might have held shares on behalf of beneficial owners of Wachovia stock. Over one million copies of the notice were distributed to Class members. Our review indicates the contents of the notice adequately apprised Class members of the Proposed Settlement and Settlement hearing.

4. Attorneys' Fees

[9] In their factual analysis, Objectors-appellants state, "In the Court's 5 February 2010 Order, the fact that the [sic] Ehrenhaus's counsel had a contingency fee agreement was revealed for the first time and yet a fee was allowed by the Court despite no award to the shareholders." Their contentions are that the Settlement was negotiated prior to any hearing on the adequacy of Class counsel and an agreement that Class counsel was to be paid "$2 million by the [Defendants-appellees] and the shareholders were to receive nothing." Objectors-appellants further contend that, "[f]rom the date of the settlement (17 December 2008) there was a direct conflict of interest between the attorneys and their clients, the shareholders, forward. The attorneys for the shareholders have refused to talk with Appellants or correspond with them in any way concerning the facts of the case." Furthermore, Objectors-appellants contend, "Ehrenhaus'[s] attorneys were to be paid, by agreement, almost $2,000,000 by Wells Fargo. The Court finally approved a fee of $900,000 plus expenses.

There is no evidence as to what the attorneys or Ehrenhaus have actually received or been promised." The Objectors-appellants contend that the trial court did not perform the "rigorous" analysis required under Rule 23.

North Carolina follows the American Rule with regard to award of attorney's fees. In *Stillwell Enterprises, Inc. v. Interstate Equipment Co.*, our Supreme Court opined as follows:

> As was stated by Chief Judge (now Justice) Brock in *Supply, Inc. v. Allen*, "[t]he jurisprudence of North Carolina traditionally has frowned upon contractual obligations for attorney's fees as part of the costs of an action." Certainly in the absence of any contractual agreement allocating the costs of future litigation, it is well established that the non-allowance of counsel fees has prevailed as the policy of this state at least since 1879. Thus the general rule has long obtained that a successful litigant may not recover attorneys' fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute. Even in the face of a carefully drafted contractual provision indemnifying a party for such attorneys' fees as may be necessitated by a successful action on the contract itself, our courts have consistently refused to sustain such an award absent statutory authority therefor.

300 N.C. 286, 289, 266 S.E.2d 812, 814–15 (1980) (citations omitted).

There are, however, certain exceptions to this rule. One such exception, which applies in North Carolina, is the "common fund doctrine":

> [T]he rule is well established that a court of equity, or a court in the exercise of equitable jurisdiction, may in its discretion, and without statutory authorization, order an allowance for attorney fees to a litigant who at his own expense has maintained a successful suit for the preservation, protection, or increase of a common fund or of common property, or who has created at his own expense or brought into court a fund which others may share with him.

Horner v. Chamber of Commerce, 236 N.C. 96, 97–98, 72 S.E.2d 21, 22 (1952). When, as here, there is no common fund, courts in some jurisdictions can award attorney's fees under the "common benefit" doctrine.

The "common benefit doctrine" is another equitable exception to the American Rule. The Delaware Supreme Court explained the doctrine as follows:

> "[A] litigant who confers a common monetary benefit upon an ascertainable stockholder class is entitled to an award of counsel fees and expenses for its efforts in creating the benefit . . . . [T]o be entitled to an award of fees under the corporate benefit doctrine, an applicant must show . . . that:
>
> (1) the suit was meritorious when filed;
>
> (2) the action producing benefit to the corporation was taken by the defendants before a judicial resolution was achieved; and
>
> (3) the resulting corporate benefit was causally related to the lawsuit."

Cal-Maine Foods, Inc. v. Pyles, 858 A.2d 927, 929 (Del. 2004) (quoting *United Vanguard Fund v. Takecare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997)) (alterations in original).

The parties to this Settlement originally entered into a memorandum of understanding and a stipulation that, subject to court approval, settled all outstanding issues between the Class, Wachovia, the Wachovia Board, and Wells Fargo. The text of the stipulation reads as follows:

> As part of the terms and conditions of this Stipulation, Wells Fargo agrees to pay to Plaintiff's Counsel, for their efforts in achieving the benefits of the Settlement of this Action, the sum of $1.975 million, for their fees and litigation-related expenses, subject to Court approval of the Settlement contemplated by this Stipulation. Wells Fargo shall make payment to Wolf Popper LLP of the fees and expenses provided in this paragraph within five days of the Court's order approving the Settlement, subject to Plaintiff's Counsel's obligation to repay such amount as may become necessary should the Settlement not obtain Final Court Approval or the fees and expenses become reduced or modified on any appeal.

This stipulation was later modified so that the trial court had to determine the final amount of the fees to be awarded and the parties agree only to pay "up to" $1.975 million. The court further found that Plaintiff's counsel did not submit time records detailing the work done on the case. Furthermore, the lodestar calculation as submitted

by counsel requested an award of $1,325,168.50 in fees and $32,621.98 in expenses.

We read the procedure as adopted by the trial court as the functional equivalent of requiring the court to make an award of attorney's fees. This case does not involve a settlement expressly dependent upon payment of a liquidated amount of attorney's fees. However, here the court was asked to award a fee and not approve a fee agreed to by the parties. While any "compromise" in a class action must be reviewed by a court, a court cannot modify a purely contractual settlement. *See Cabarrus Cty. v. Systel Bus. Equip. Co.*, 171 N.C. App. 423, 425, 614 S.E.2d 596, 597 (2005) (stating settlements are interpreted according to "general principles of contract law); *Cherry, Bekaert & Holland v. Worsham*, 81 N.C. App. 116, 120, 344 S.E.2d 97, 100 (1986) (stating that courts cannot rewrite the plain language of a contract).

Regrettably, we are unable to adequately review the decision of the trial court for lack of complete findings of fact and conclusions of law on the issue of attorney's fees. For the following reasons, we vacate that portion of the court's order regarding attorney's fees and remand the matter for additional findings of fact and conclusions of law. The reasonableness of attorney's fees in this state is governed by the factors found in Rule 1.5 of the Revised Rules of Professional Conduct of the North Carolina State Bar.

> (a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

. . . .

(2) a contingent fee in a civil case in which such a fee is prohibited by law.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

N.C. Rev. R. Prof. Conduct 1.5 (2011).

At the fairness hearing, Class counsel and the Class representative announced that the fee agreement they had negotiated was a "contingent" fee. Without the written agreement of the parties, as required by Rule 1.5, as to their agreed-upon compensation, it would be problematic for the Court to determine what amount would be reasonable.

Second, the decision of the court fails to make any allowance for an award to North Carolina local counsel. Clearly both the local and Class counsel participated in the results obtained and the award, if any, should consider both firms' efforts. Furthermore, Rule 1.5(e)(2) provides that the client must agree to any fee sharing agreement in writing. *Id.* The record contains no such agreement.

Next, the attorneys did not present contemporaneous records showing the number of hours expended and the hourly rates for the attorneys charged. It would be difficult for the Court to draw a conclusion of what amount of time Class counsel spent litigating compensable matters without such records. Furthermore, although the Court may take judicial notice of these efforts, some evidence must be presented from a witness that the fee sought would be that which is customarily charged in the locality for similar legal services.

Rule 1.5(e) also provides that a contingency fee cannot be charged in a civil case in which such a fee is prohibited by law. Because the trial court did not examine the contingency fee nature of the written agreement, we cannot know the legal basis upon which the parties agreed to the contingency. In *In re Wachovia S'holder Litig.*, the trial court awarded attorney's fees using the common benefit doctrine and urged the appellate courts of this state adopt this exception to the American Rule. *See* 2003 NCBC 10 ¶74 (N.C. Super. Ct. Dec. 19, 2004) (unpublished), *rev'd*, *In re Wachovia S'holder Litig.*, 168 N.C. App. 135, 607 S.E.2d 48 (2005). However, this Court specifically rejected the common benefit theory as an exception to the American Rule in this state. *In re Wachovia Shareholders Litig.*, 168 N.C. App. at 140, 607 S.E.2d at 51.[9] We view the resolution of this issue as central to the question of whether there is any evidence of a settlement. While we presume good faith on the part of all counsel

9. The trial court cited *In re Wachovia Shareholders Litig.*, 2003 NCBC 10, but it is unclear whether that opinion formed the basis for the trial court's decision to award attorney's fees in this case.

admitted to practice, the shareholders had a right to adequate disclosure of information on this issue since they are being asked to pay a portion of the fees and a fiduciary relationship exists.

While the trial court's analysis did partially complete its task, it did not finish the task of reviewing the necessary evidence to make its decision. On remand, we trust the trial court to examine additional evidence and to make the appropriate findings of fact and conclusions of law, including a reasoned decision on the issue of how it arrived at the figure to be awarded.

D. Alleged Omission of Evidence from the Record and Refusal to Consider Material Evidence

[10] The heading of Objectors-appellants' brief states that "the trial court erred in omitting from the record and failing to consider material evidence in approving the settlement." (Capitalization omitted). The body of this section fails to support this argument with even a single citation to legal authority, violating the Rules of Appellate Procedure. N.C.R. App. P. 28(b)(6) ("The body of the argument . . . shall contain citations of the authorities upon which the appellant relies."); *cf. Hatcher v. Harrah's NC Casino Co.*, 169 N.C. App. 151, 159, 610 S.E.2d 210, 214–15 (2005) ("[P]laintiff fails to cite any legal authority in support of his position. Accordingly, we conclude that this issue does not warrant appellate review, and we dismiss this assignment of error."). Furthermore, Objectors-appellants fail to explain what legal principle would entitle them to relief on appeal. This argument is without merit.

IV. Conclusion

For the foregoing reasons, the ruling of the trial court is

Affirmed in part and Reversed in part.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA v. CHARLES O'BRIEN TEAGUE

No. COA11-39

(Filed 4 October 2011)

1. Homicide—attempted murder—intent to kill—evidence sufficient

There was more than sufficient evidence of defendant's intent to kill to permit both counts of attempted murder to be presented to a jury in a prosecution for attempted murder.

2. Criminal Law—prosecutor's arguments—defendant as predator

The trial court did not abuse its discretion in not intervening *ex mero motu* in the prosecutor's closing arguments in a prosecution for attempted murder and other offenses where the prosecution compared the victims to sheep and defendant to a predator. As there were conflicting arguments and interpretations of the State's evidence as to whether defendant had the intent to kill and committed these acts with premedication and deliberation, the disputed portions of the prosecutor's closing argument were made in furtherance of the State's duty to strenuously present its case.

Appeal by defendant from judgments entered on or about 16 April 2010 by Judge R. Stuart Albright in Superior Court, Randolph County. Heard in the Court of Appeals 17 August 2011.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Richard J. Votta, for the State.

Anne Bleyman, for defendant-appellant.

STROUD, Judge.

Charles O'Brien Teague ("defendant") appeals from a conviction for two counts of attempted first-degree murder, robbery with a dangerous weapon, and larceny of a motor vehicle. For the following reasons, we find no error in defendant's trial.

I. Background

On 23 June 2008, defendant was indicted on two counts of first-degree kidnapping, two counts of attempted first-degree murder, larceny of a motor vehicle, and robbery with a dangerous weapon. On 21

July 2008, by separate indictment defendant was also indicted for one count of second-degree kidnapping. On 8 December 2008, defendant was indicted by superseding indictment with two counts of first-degree kidnapping. Defendant was tried on these charges during the 13 April 2010 Criminal Session of Superior Court, Randolph County. The State's evidence presented at trial tended to show the following: Maranda Teague married defendant when she was 17 years old and shortly thereafter became pregnant. Because they did not have their own place, defendant and Maranda lived with defendant's parents until they were asked to leave on or about 26 April 2008, when Maranda was around eight and a half months pregnant. Maranda then went to live with Wanda and Cecil Burke Myers, as Wanda had helped raise Maranda since she was a baby. However, Wanda and Burke did not allow defendant to live in or visit their home because he did not have a job and they did not trust him. In fact, the Myers did not even want defendant to know where they lived. However, Wanda allowed Maranda and defendant to talk on the phone. Maranda testified that she had talked to defendant at the Myers' residence one night without their knowledge, when defendant drove to their residence in a "gray color" Dodge, and defendant had told her that he did not want her staying with the Myers anymore. On 5 May 2008, Wanda came home from work at lunch and saw Maranda and defendant returning in his car to their residence and told defendant he "needed to leave[,]" and if Burke found out defendant had been there, he would probably tell Maranda to leave. After returning to work, Wanda sent her daughter-in-law, Jennifer Walker, to her house to check on Maranda. Ms. Walker found defendant at the Myers' residence and told him that "he wasn't allowed there[.]" Defendant got angry and cursed her telling her that "he had a right to be there" because Maranda was his wife and then "got in the car and spun out of the driveway."

In the early morning hours of 6 May 2008, defendant entered the Myers' home without their permission, while Maranda and the Myers were asleep. Wanda testified that after locking the doors, she went to bed around 11 p.m., and was awakened by her husband moving in bed and then something sharp sticking her in the neck. Wanda was cut twice in the throat and on her hand. After realizing that something was happening, Wanda rolled out of bed and saw someone leaving their bedroom. Burke testified that he awoke in the early morning hours of 6 May 2008 and saw defendant cutting his throat and his wife's throat with a knife. After following the person out of the bedroom, Wanda went to the hallway and saw defendant standing holding the hedge clippers and a knife; she then noticed that her neck was

dripping blood where she had been cut. Defendant then began arguing with Maranda accusing her of "sleeping with his daddy and his brothers and everybody[,]" and told Maranda "if [she] didn't tell him the truth he was gonna kill [her], too." Defendant told Maranda that "he was gonna kill [them] all." While they were arguing, Wanda and Burke went to the bathroom and Wanda saw that Burke had been cut in the throat and on his face, as part of his jaw was "hanging down[.]" Burke wrapped a towel around his neck to stop the bleeding, but there was "a lot of blood" coming out of his wounds. Defendant then entered the bathroom with the knife, and ordered Wanda and Burke to get into the bathtub, telling them "I should have just finished what I started." Wanda stated that she was "[s]cared to death[.]" Maranda was in the hall begging defendant to leave them alone and telling him "if he wanted to kill somebody to kill her[.]" Burke told defendant that he was getting weak from the loss of blood and defendant allowed Burke and Wanda to go sit on the bed. Burke thought that in the bedroom defendant "was gonna finish the job up."

In an effort to get defendant to leave, Burke told defendant he could take $600, their red Dodge Neon car, and Maranda and go to Virginia, Mexico, or Myrtle Beach, South Carolina. Thirty to forty five minutes after the initial attacks, defendant agreed with Burke and left the Myers' residence with their car, the money, and Maranda. Wanda then called 911. Maranda testified that after leaving the Myers' residence with defendant, they got a motel room in Greensboro. Defendant told Maranda that "he felt like [the Myers] were trying to keep me away from him." Defendant and Maranda then traveled to Myrtle Beach in the Myers' car and checked into a hotel; defendant still had the knife with him in the car. Maranda began having stomach pains so defendant tried to take her to the hospital. Defendant stopped a police officer in Myrtle Beach to ask for directions to the hospital but when they arrived at the hospital there were three police patrol vehicles at the entrance of the hospital so they abandoned the car on the side of the road and ran through the woods to the beach. The next day the police apprehended defendant and Maranda while they were walking on the beach and took them into custody.

Dr. David Moore, a physician specializing in ear, nose, and throat medicine, testified that he treated Wanda's injuries to her throat and Burke's injuries to his face and throat. Dr. Moore testified that Wanda received two horizontal lacerations to her throat, with the upper wound penetrating "through the skin and fat underneath the skin" and the lower wound penetrating deeper through the skin, fat, and

the "first layer of muscle[.]" Neither wound penetrated to the nerves or blood vessels of the neck. Dr. Moore estimated that it took around forty stitches to repair these wounds. As to Burke, Dr. Moore testified that his wounds were more extensive, as the lacerations to his face went from just below his left ear to the corner of his mouth and penetrated "through the facial artery," requiring "ligating off and sewing it off[.]" Burke was cut three or four times in the neck and those lacerations were "quite deep" as they

> went through the skin, through the fatty tissue, through the platysma, through the deeper layer of fat, through the strap muscles, and into the sternocleidomastoid muscle. But it didn't go into the trachea, the windpipe, which would be one layer down from those muscles, and it didn't affect the great vessels—the carotid artery or the internal jugular vein, and it didn't affect any major nerves in the neck either[.]

Dr. Moore testified that it took two hours to repair the lacerations to Burke. Wanda testified that at the hospital they stitched up her neck wound and she had surgery on her hand to repair a tendon. Burke testified that he had three surgeries, including reconstructive surgery, to repair the lacerations to his face.

Detective Derrick Hill with the Randolph County Sheriff's Department, investigated the scene at the Myers' residence on the day in question and found a pair of generic binoculars under the Myers' back porch and discovered a grassy area to the right of the back porch that had been flattened out "as if someone had been sitting, kneeling, or laying in that particular location." Deputy Victor Welch with the Randolph County Sheriff's Department, investigated an abandoned silver Dodge Neon a short distance from the Myers' residence and after running the tag it came back as stolen. Inside the vehicle, Deputy Welch discovered a Walmart blister pack for a pocketknife and a receipt from Walmart dated 5 May 2008 for a pair of binoculars and a folding knife. Detective Hill testified that upon viewing the security video at Walmart, he saw an individual matching the description of defendant purchasing a pair of binoculars and a folding knife on 5 May 2008.

Lester Cook, a detective with the Myrtle Beach Police Department, searched the abandoned red Dodge Neon near the hospital and discovered a pocketbook, camera, and a knife with what appeared to be blood on it. Officer Bobby Jordan with the Myrtle Beach Police Department recovered a black knife from the passenger

side of the red Dodge Neon. A search of defendant's person upon arrest revealed a black folding knife in his front right pocket.

At the close of the State's evidence, defendant moved to dismiss all charges for lack of sufficient evidence. The trial court dismissed both counts of first-degree kidnapping, but submitted to the jury the charges of two counts of first-degree attempted murder, robbery with a dangerous weapon, misdemeanor breaking and entering, false-imprisonment, and larceny of a motor vehicle. After stating that he would not be presenting any evidence, defendant renewed his motion to dismiss, which was denied by the trial court.

On 16 April 2010, the jury found defendant guilty of two counts of attempted first-degree murder, robbery with a dangerous weapon, and larceny of a motor vehicle. The trial court sentenced defendant to two consecutive terms of 282 to 348 months imprisonment for the two attempted first-degree murder convictions, a consecutive term of 133 to 169 months imprisonment for the robbery with a dangerous weapon conviction, and a consecutive term of 15 to 18 months imprisonment for the larceny of a motor vehicle conviction. Defendant gave notice of appeal in open court. On appeal, defendant contends that (1) the trial court erred by not granting defendant's motion to dismiss the charges of attempted first-degree murder for insufficiency of the evidence; (2) the trial court erred and committed an abuse of discretion by permitting the State to make improper remarks during its closing arguments; and (3) the trial court did not have jurisdiction and the indictments charging defendant with attempted first-degree murder did not sufficiently allege the elements of the offense.

II. Sufficiency of the evidence

[1] Defendant contends that the trial court erred in not granting his motion to dismiss the charges for attempted first-degree murder as the State did not present sufficient evidence of his intent to kill in violation of his "state and federal rights."[1] Defendant further contends that the evidence when viewed in its totality showed that he "did not intend to kill [the victims]."

1. It is unclear whether defendant is making a constitutional argument by stating the trial court violated his "state and federal rights." In any event, we note that defendant did not properly preserve any constitutional challenge to the trial court's ruling on his motion to dismiss by raising this issue at trial, *see State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal."), *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002).

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

State v. Johnson, ___ N.C. App. ___, ___, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted). Our Supreme Court has further noted that

> "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). 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. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (alteration in original) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)).
>
> [*State v. Barnes*, 334 N.C. 67, 75-76, 430 S.E.2d 913, 918-19 (1993)]. "Both competent and incompetent evidence must be considered." *State v. Lyons*, 340 N.C. 646, 658, 459 S.E.2d 770, 776 (1995). . . . 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. *See id.* at 67, 296 S.E.2d at 652.

State v. Fritsch, 351 N.C. 373, 379, 526 S.E.2d 451, 455-56, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "The elements of attempted first-degree murder are: (1) a specific intent to kill another; (2) an overt act calculated to carry out that intent, which goes beyond mere preparation; (3) malice, premeditation, and deliberation accompanying the act; and (4) failure to complete the intended killing." *State v.*

Tirado, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). Our Supreme Court has stated that

> "Specific intent to kill is an essential element of first degree murder, but it is also a necessary constituent of the elements of premeditation and deliberation." *State v. Jones*, 303 N.C. 500, 505, 279 S.E.2d 835, 838-39 (1981). "Thus, proof of premeditation and deliberation is also proof of intent to kill." *Id.* at 505, 279 S.E.2d at 838-39.

State v. Chapman, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005). This Court has noted that

> " 'An intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred.' " *State v. Ferguson*, 261 N.C. 558, 561, 135 S.E.2d 626, 629 (1964) (quoting *State v. Cauley*, 244 N.C. 701, 708, 94 S.E.2d 915, 921 (1956)). "The nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred." *State v. White*, 307 N.C. 42, 49, 296 S.E.2d 267, 271 (1982).

State v. Poag, 159 N.C. App. 312, 318, 583 S.E.2d 661, 666-67, *appeal dismissed and disc. review denied*, 357 N.C. 661, 590 S.E.2d 857 (2003). Similarly,

> [p]remeditation and deliberation are "processes of the mind" which are generally proved by circumstantial evidence. [*State v. Smith*, 357 N.C. 604, 616, 588 S.E.2d 453, 461 (2003), *cert. denied*, 542 U.S. 941, 159 L.Ed. 2d 819 (2004)]. " 'Premeditation means that [the] defendant formed the specific intent to kill the victim for some length of time, however short, before the actual killing.' " [*State v. Cagle*, 346 N.C. 497, 508, 488 S.E.2d 535, 543 (1997) (quoting *State v. Arrington*, 336 N.C. 592, 594, 444 S.E.2d 418, 419 (1994)), *cert. denied*, 522 U.S. 1032, 139 L.Ed. 2d 614 (1997)] (alteration in original). " 'Deliberation' means that the defendant formed the intent to kill in a cool state of blood and not as a result of a violent passion due to sufficient provocation." *State v. Truesdale*, 340 N.C. 229, 234, 456 S.E.2d 299, 302 (1995).

Chapman, 359 N.C. at 374, 611 S.E.2d at 827. In the context of attempted first-degree murder, an intent to kill and the existence of malice, premeditation, and deliberation may be inferred from cir-

cumstances including: (1) lack of provocation by the intended victims; (2) conduct and statements of the defendant both before and after the attempted killing; (3) threats made against the intended victims by the defendant; (4) animosity or previous difficulty between the defendant and the intended victims; and (5) the nature and manner of the attempted killing. *State v. Peoples*, 141 N.C. App. 115, 118, 539 S.E.2d 25, 28 (2000); *State v. Cozart*, 131 N.C. App. 199, 202, 505 S.E.2d 906, 909 (1998), *disc. review denied*, 350 N.C. 311, 534 S.E.2d 600 (1999).

Here, the direct evidence and reasonable inferences from the circumstantial evidence put forth by the State showed that defendant had an intent to kill as the day that defendant was told to leave the victims' residence by Jennifer Walker defendant drove to Walmart and bought a pair of binoculars and a knife; eventually returned to the victims' residence; laid near the residence watching them with his binoculars; when Maranda and the victims went to bed, he entered the residence and cut both of the victims multiple times in the neck while they were asleep. The evidence further showed that the Myers did not provoke defendant as they made no threats or actions against defendant. Wanda testified that they were not trying to keep Maranda from defendant, but that they did not want defendant around because they did not trust him and Maranda was free to leave at any time. Even though defendant felt that the Myers were keeping him from Maranda, Maranda did not want to leave with defendant as she was almost nine months pregnant and defendant had no place for them to live. As to "animosity or previous difficulty between the defendant and the intended victims" and "conduct and statements of the defendant both before and after the attempted killing" *see id.*, the evidence showed that defendant became increasingly angry at Wanda and Burke for not permitting him to visit Maranda at their home, as he told Jennifer Walker, after she told him to leave, that "he had a right to be there" because Maranda was his wife and he then "got in the car and spun out of the driveway." As to "threats made against the intended victims by the defendant" and defendant's conduct and statements after his actions, defendant told Maranda "if [she] didn't tell him the truth he was gonna kill [her], too[,]" and later told them "he was gonna kill [them] all." Also defendant ordered Wanda and Burke to get into the bathtub, telling them, "I should have just finished what I started." As to "the nature and manner of the attempted killing" evidence was presented that defendant used a knife to make multiple deep cuts to the victims' necks while they were asleep, which required numerous stitches to repair, and cut Burke from his

ear to the corner of his mouth, severing a main artery and causing excessive bleeding. Defendant also prevented Wanda and Burke from seeking medical treatment for approximately 45 minutes while they bled severely from their wounds. Therefore, "consider[ing] the evidence in the light most favorable to the State" and giving "the State . . . every reasonable inference to be drawn from that evidence" *see Johnson*, ___ N.C. App. at ___, 693 S.E.2d at 148, we hold that there was more than sufficient evidence of defendant's intent to kill the victims to permit both counts of attempted murder to be presented to a jury. *See Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455-56. As defendant makes no further challenges to any of the other elements of attempted first-degree murder or any of his other convictions, we need not address those issues. Accordingly, defendant's argument is overruled.

III. Closing arguments

[2] Defendant next contends that "the trial court committed error and abused its discretion in failing to intervene during the State's closing argument when the State made improper remarks that exceeded the scope of fair comment on the law[.]" In making his argument, defendant points us to the following portion of the State's closing statements:

> There are three kinds of people in the world: there are sheep, there are sheepdogs, and there are predators.
>
> Everybody in the normal course of business is what we consider a sheep. Sheep don't hurt each other, they don't do anything intentional, they just live their lives and they go on about their business. That's what Wanda and Burke Myers are. They're just trying to live their lives.
>
> Predators are the ones who come in the middle of the night and they slit your throats and they try to kill you because they want what they want, and they want what you have, and they're upset because life hasn't treated them fairly. But that's no excuse for them to be a predator.
>
> Sheepdogs. Those are the people that protect the sheep. Those are the people who are willing to stand up and do what's right. They serve in law enforcement, they are firefighters, they are the people who protect our communities and our citizens from people like Charles Teague.

> Ladies and gentlemen, each and every one of you, for the purposes of being here today, is now a sheepdog. And I submit to you that it is your duty to protect the community from people like Charles Teague by finding him guilty on each and every one of these charges. Thank you.

Defendant argues that his convictions should be vacated as the State referring to defendant as a "predator" who the community needed to be protected by the jury was an "appeal to the jury's passion or prejudice" and those statements "were so grossly improper they rendered the trial and convictions fundamentally unfair."

Our Supreme Court has stated

> It is well settled in North Carolina that counsel is allowed wide latitude in the argument to the jury. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Williams*, 276 N.C. 703, 174 S.E. 2d 503 (1970), *rev'd on other grounds*, 403 U.S. 948. Even so, counsel may not place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975). The control of the arguments of counsel must be left largely to the discretion of the trial judge, *State v. Britt*, *supra; State v. Monk*, [286 N.C. 509, 212 S.E.2d 125 (1975)] and the appellate courts ordinarily will not review the exercise of the trial judge's discretion in this regard unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations. *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976).

State v. Johnson, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979). Defendant made no objection regarding the prosecutor's statements during or following the State's closing arguments. "Therefore, our review on appeal is limited to the question of whether the arguments of the prosecutor were so grossly improper as to require the trial court to intervene *ex mero motu*." *State v. Garner*, 340 N.C. 573, 597, 459 S.E.2d 718, 731 (1995) (citation omitted), *cert. denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996).

We further note that "the prosecutor has a duty to strenuously present the State's case and use every legitimate means to bring about a just conviction." *State v. Daniels*, 337 N.C. 243, 277, 446 S.E.2d 298, 319 (1994) (citations and quotation marks omitted), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). "[P]articular prosecutorial arguments are not viewed in an isolated vacuum, but are considered in con-

text based upon the underlying facts and circumstances." *State v. Love*, 131 N.C. App. 350, 359, 507 S.E.2d 577, 583 (1998) (citation and quotation marks omitted), *aff'd per curiam*, 350 N.C. 586, 516 S.E.2d 382, *cert. denied*, 528 U.S. 944, 145 L. Ed. 2d 280 (1999).

As noted above the defendant was charged with two counts of attempted first-degree murder and in order to prove these charges the State had to put forth evidence showing that defendant had an intent to kill and the existence of malice, premeditation, and deliberation which could be inferred from circumstantial evidence. *See Peoples*, 141 N.C. App. at 118, 539 S.E.2d at 28; *Cozart*, 131 N.C. App. at 202, 505 S.E.2d at 909. As portions of the State's closing argument demonstrate, it was the State's position that, without provocation from the victims, defendant committed the act of cutting the victims' throats with the intent to kill, and with premeditation and deliberation. In making this argument the State pointed to evidence showing that defendant had purchased the knife and binoculars, drove back to the victims' residence and watched the residence using the binoculars until he saw that they had gone to bed, and then in the early hours of morning broke in and cut both of the victims' throats while they were asleep. Specifically, the State made the following arguments in its closing argument as to evidence presented and the elements of intent to kill, premeditation, and deliberation:

> Premeditation means that he formed the intent to kill over some period of time, however short, before he acted. He formed the intent to kill when he strolled into the Wal-Mart like a big man, got out his wallet—as you saw on the video, got out his money and paid for the instrument of death and destruction.
>
> That's when he had formed that intent. He knew what he was gonna do. He was gonna get these people back for treating him the way he thinks that they treated him.
>
> Deliberation means that the defendant acted while he was in a cool state of mind. How cold can you be? You know? Who had a fair chance at even getting to him? Nobody. How cold is it that you go in while two people who have taken care of your wife, loved her, raised her, provided for her, and provided for your baby? How cold and deliberate is it that you go in and you look at them and you see them, they're helpless and defenseless and sleeping, nothing to aid them in the assault or to fend off their attacker, but you go in and you slit them from ear to ear? That's cold.

It was defendant's contention that he did not have the intent to kill the victims, as defense counsel argued in her closing: "if he had possessed the intent to kill them, there was nothing in the world stopping him from doing it. But he didn't do it because he did not have that intent." Instead, it was defense counsel's argument that, defendant's actions amount to "assault with a deadly weapon inflicting serious injury." As there were conflicting arguments and interpretations of the State's evidence as to whether defendant had the intent to kill and committed these acts with premedication and deliberation, the above disputed portions of the prosecutor's closing argument were made in furtherance of the State's duty to strenuously present its case. *See Daniels*, 337 N.C. at 277, 446 S.E.2d at 319. In using the analogy to argue that defendant committed these acts with the intent to kill, premeditation, and deliberation, the prosecutor compared the victims to sheep that did not provoke any attack or do "anything intentional" and defendant, as the predator who had a plan to "come in the middle of the night" and "try to kill" the victims. Similarly, in *State v. Oakes*, ___ N.C. App. ___, ___, 703 S.E.2d 476, 480-82, *appeal dismissed*, ___ N.C. ___, 709 S.E.2d 918, *disc. review denied*, ___ N.C. ___, 709 S.E.2d 920 (2011), the prosecutor, in "pursuing defendant's conviction for . . . first-degree murder" made an analogy in his closing arguments that like a "cheetah[]," "tiger[,]" or "black panther[]" and their prey, a "gazelle" or "deer[,]" defendant stalked, lay in wait, and ultimately attacked and killed the victim. This Court stated that "[w]e reiterate that comparisons between criminal defendants and animals are *strongly* disfavored, but we are convinced by the State's argument on appeal that the use of the analogy, in context, helps to explain the complex legal theory surrounding premeditation and deliberation[,]" and, after analyzing the State's evidence as to premeditation and deliberation, went on to hold that "the challenged portions of the prosecutor's remarks were not so grossly improper so as to warrant the trial court's intervention *ex mero motu*[.]" *Id.* at ___, 703 S.E.2d at 482 (emphasis in original). Likewise, here we also "reiterate that comparisons between criminal defendants and animals are *strongly* disfavored" *see id.*, but, as the State has a "wide latitude in jury argument[,]" *see Johnson*, 298 N.C. at 368, 259 S.E.2d at 761, hold that the State's closing argument did not rise to the level of being so "grossly improper as to require the trial court to intervene *ex mero motu*." *See Garner*, 340 N.C. at 597, 459 S.E.2d at 731. Accordingly, the trial court did not abuse its discretion in not interfering in the prosecutor's closing arguments and defendant's argument is overruled. *See Johnson*, 298 N.C. at 369, 259 S.E.2d at 761.

IV. Indictment

Finally, defendant argues that "the indictments purporting to charge [him] with attempted first-degree murder are fatally defective because they do not sufficiently allege the essential elements of the offense and the trial court did not have jurisdiction and committed error in not dismissing these charges in violation of [his] state and federal rights." However, defendant concedes that he "raises this issues in brief for preservation purposes so as not to be considered to have abandoned this claim" as he is "mindful that the Supreme Court has previously held this not to violate a defendant's constitutional protections" in *State v. Jones*, 359 N.C. 832, 838-39, 616 S.E.2d 496, 499-500 (2005), which held that the use of short-form indictment which does not "allege specific intent, premeditation, and deliberation" to charge the defendant with attempted first-degree murder did not violate his constitutional rights. We agree that *Jones* is controlling, defendant's indictments were not in error, and his argument is noted and overruled.

For the foregoing reasons, we find no error in defendant's trial.

NO ERROR.

Judges HUNTER, Robert C. and HUNTER, JR., Robert N. concur.

STATE OF NORTH CAROLINA v. RASHAD DONTE JORDAN

No. COA10-1432

(Filed 4 October 2011)

1. Constitutional Law—Miranda rights—waiver—findings binding

The trial court's findings of fact were accepted as binding in an appeal from a motion to suppress statements to the police raising the issue of whether defendant invoked or raised his *Miranda* rights. A video of the interview that was seen by the trial court contained inaudible portions and was not available on appeal, yet was essential in the trial court's consideration of the motion. A transcript of the interview was prepared only from an enhanced audio version, not the original video used by the court.

2. Constitutional Law—Miranda rights—waiver—video not provided on appeal

The trial court did not err by concluding that defendant voluntarily and knowingly waived his *Miranda* rights where the trial court's findings demonstrated that it considered what the officer reasonably believed defendant to be communicating, although without the original video of the interview the appellate court could not properly analyze several of the findings concerning the circumstances of the waiver.

3. Constitutional Law—Miranda rights—waiver—voluntary—conclusions supported by findings

The trial court's findings supported its conclusions that defendant was fully informed and advised of his *Miranda* rights, fully understood those rights, waived them voluntarily and knowingly, never made a clear and unequivocal assertion of his right to counsel, and never unambiguously invoked his right to remain silent.

4. Confessions and Incriminating Statements—motions to suppress denied—conclusions supported by findings

There was no error in a first-degree murder prosecution where the trial court denied defendant's motions to suppress and allowed defendant's confession to be presented to the jury. Although several of defendant's arguments regarding his motions to suppress could not be reviewed on appeal because the original video was not before the appellate court, the trial court's findings supported its conclusions.

5. Evidence—transcript of recording—poor sound quality

There was no prejudicial error in a first-degree murder prosecution where the jury saw a videotaped interview at which defendant confessed and the jury was allowed to read a transcript made from enhanced audio without hearing the audio. A different result was not likely without the transcript in light of the other evidence.

6. Evidence—exchange between defendant and reporter—not prejudicial

There was no prejudice in a first-degree murder prosecution where the jury was presented with a portion of an exchange between defendant and a television reporter but the evidence against defendant was overwhelming.

Appeal by defendant from judgment entered 16 December 2009 by Judge R. Stuart Albright in Superior Court, Caldwell County. Heard in the Court of Appeals 12 April 2011.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Steven M. Arbogast, for the State.

Marilyn G. Ozer, for defendant-appellant.

STROUD, Judge.

Defendant appeals his conviction for first degree murder. For the following reasons, we find no error.

I. Background

The State's evidence tended to show that in January 2007, defendant told Mr. Ronald Barnes he was going to kill Mr. Barnes's cousin, Cedric Harshaw, known as "Mickey." On 19 January 2007, defendant knocked on Ms. Joelle Michaux's front door looking for Mr. Harshaw. Ms. Michaux told defendant where Mr. Harshaw currently lived. Mr. Timothy Jolly, Mr. Makiaya Powell, and defendant then drove to Mickey's home. Once at Mr. Harshaw's home, defendant and Mr. Harshaw got into an argument. Mr. Powell then got out of the car with a gun. Defendant took the gun from Mr. Powell, and said, "Mickey, you got my money?" Mr. Jolly then saw defendant begin shooting and heard four gunshots, and Mr. Harshaw fell. Mr. Harshaw died of "internal hemorrhag[ing] due to multiple bullet wounds." That night, Ms. Marrissa Patterson saw defendant at West End Convenient Store, and defendant told her he had killed someone.

In the early morning hours of 20 January 2007, Sergeant Daryl Cornett of the Lenoir Police Department interviewed defendant. During the interview, defendant confessed to shooting Mr. Harshaw. Sergeant Cornett also collected defendant's clothing which "reveal[ed] the presence of particles characteristic to gunshot residue[.]"

On 29 January 2007, defendant was indicted for murder. On 16 November 2009, by superseding indictment, defendant was indicted for murder. Defendant was tried by a jury which found him guilty of first degree murder. The trial court sentenced defendant to life imprisonment without parole. Defendant appeals.

II. Motions to Suppress

On 3 November 2009, defendant filed a motion to suppress statements he had made while he was being interviewed by the police. On

or about 24 November 2009, defendant amended his motion to suppress arguing his interview with the police should be suppressed because "he asserted his right to remain silent AND . . . he invoked his right to counsel." On 11 December 2009, the trial court ordered that

> defendant's statements, "I don't want to talk no more man. Just fingerprint me and take me to the Magistrate's Office[,]" and anything the defendant said to law enforcement officers after he made those statements [are suppressed.] Except as specifically set forth herein, the defendant's Motion to Suppress and amended Motion to Suppress are denied in each and every respect.

Defendant first contends that "the trial court committed reversible error by denying . . . [his] suppression motions[.]" (Original in all caps.)

A. Standard of Review

> It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. In addition, findings of fact to which defendant failed to assign error are binding on appeal. Once this Court concludes that the trial court's findings of fact are supported by the evidence, then this Court's next task is to determine whether the trial court's conclusions of law are supported by the findings. The trial court's conclusions of law are reviewed *de novo* and must be legally correct.

State v. Campbell, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724, (citations, quotation marks, and brackets omitted).

B. Invocation of Right to Remain Silent and Right to Counsel

[1] Here, though defendant had signed a waiver of rights form, the trial court concluded that when defendant stated during his interview, "I don't want to talk no more man. Just fingerprint me and take me to the Magistrate's Office[,]" defendant invoked his right to remain silent; defendant contends that he invoked his right to remain silent and his right to counsel before this point in time. Defendant directs our attention to the transcript of his interview with police whereupon defendant is presented with a waiver of rights form:[1]

1. While defendant contests the admissibility of this transcript at trial, we note that defendant stipulated to its use for purposes of his motion to suppress.

Jordan: I need my rights. I ain't signing my away right, (Inaudible).

Cornett: (Inaudible).

Jordan: No promises or threats have been made to me (Inaudible) of any kind (Inaudible). Naw man, I ain't doin' that. (Inaudible).

Cornett: You don't want to talk about it at all?

Jordan: I mean look man.

Cornett: Look, you know I can't talk to you without . . .

Jordan: I know.

Cornett: Without you signing saying it's ok. You know.

Jordan: I know but that ain't right. Ya'll ain't even wanting to question me man without a lawyer present. My people's already getting me a lawyer cuz.

Cornett: Ok.

Jordan: Know what I'm saying?

Cornett: I understand. I mean . . .

Jordan: Do what you want. (Inaudible).

Cornett: I can't ask you, (Inaudible). That's the problem. I can't ask you questions. You know I can't ask you questions.

Jordan: (Inaudible) Answers.

Cornett: Exactly and you do have that right; you, you answer what you want to. I mean it's not like if you don't answer it right or don't give me (Inaudible) throw you in the floor or nothing, you know better than that.

Defendant and Sergeant Cornett then began discussing what defendant was being charged with and the facts of the case.

As to a defendant invoking his right to counsel the United States Supreme Court has stated:

> [W]e held in *Miranda v. Arizona*, 384 US 436, 469-473, 16 L Ed 2d 694, 86 S Ct 1602, (1966), that a suspect subject to custodial interrogation has the right to consult with an attorney and to have

counsel present during questioning, and that the police must explain this right to him before questioning begins. . . .

The right to counsel recognized in *Miranda* is sufficiently important to suspects in criminal investigations, we have held, that it requires the special protection of the knowing and intelligent waiver standard. If the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him. But if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation. This second layer of prophylaxis for the *Miranda* right to counsel is designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights. To that end, we have held that a suspect who has invoked the right to counsel cannot be questioned regarding any offense unless an attorney is actually present. . . .

The applicability of the rigid prophylactic rule of *Edwards* requires courts to determine whether the accused actually invoked his right to counsel. To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning.

Rather, the suspect must unambiguously request counsel. As we have observed, a statement either is such an assertion of the right to counsel or it is not. Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect.

. . . .

> To recapitulate: We held in *Miranda* that a suspect is entitled to the assistance of counsel during custodial interrogation even though the Constitution does not provide for such assistance. We held in *Edwards* that if the suspect invokes the right to counsel at any time, the police must immediately cease questioning him until an attorney is present. But we are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect might want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.

Davis v. United States, 512 U.S. 452, 457-62, 129 L. Ed. 2d 362, 370-73 (1994) (citations, quotation marks, and brackets omitted).

The Court went on to extend its rationale in *Davis* regarding the right to counsel to the right to remain silent:

> In the context of invoking the *Miranda* right to counsel, the Court in *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), held that a suspect must do so unambiguously. If an accused makes a statement concerning the right to counsel that is ambiguous or equivocal or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights.
>
> The Court has not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal, but there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*. Both protect the privilege against compulsory self-incrimination, by requiring an interrogation to cease when either right is invoked.
>
> There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that avoids difficulties of proof and provides guidance to officers on how to proceed in the face of ambiguity.

Berghuis v. Thompkins, ___ U.S. ___, ___, 176 L. Ed. 2d 1098, 1110-111 (2010) (citations, quotation marks, ellipses, and brackets omitted).

Here, Sergeant Cornett's interview with defendant was videotaped. After interviewing defendant and reviewing the videotape, Sergeant Cornett "determined that the quality of it was somewhat substandard due to the noise of the air handling unit, air conditioning

unit at the Police Department in relation to where the microphone was." Agent Jonathon Dilday of the crime laboratory in Raleigh, North Carolina was asked "to clarify the audio and make it more intelligible." Agent Dilday made a CD of the audio in the videotape ("enhanced audio"). Sergeant Cornet and Sharron Hendrix, a secretary of the Lenoir Police Department, prepared a transcript based on the enhanced audio, not the original videotape. While defendant provides and directs this Court's attention to the transcript, defendant has failed to provide the videotape. Yet the videotape was an essential piece of evidence in the trial court's consideration of the motion to suppress, as it found:

> 7. The Court was able to see the entire videotaped interview with the defendant (state's exhibit VD number 1) that took place on 20 January, 2007, which included watching the defendant sign the written waiver of his Miranda rights (state's exhibit VD number 3).
>
> 8. While the audio was less than perfect, the picture quality was clear allowing the Court to observe the body language, demeanor, conduct and actions of all participants in the interview.
>
> 9. The defendant read all of the written waiver (state's exhibit VD number 3).
>
> 10. The defendant did not sign state's exhibit VD number 3 immediately, but instead hesitated reading parts of the written waiver out loud to himself, and talking out loud to himself making reference to his rights.
>
> 11. At this time the defendant did not make a clear and unequivocal assertion of his right to counsel, and did not unambiguously invoke his right to remain silent.
>
> 12. Considering the defendant's initial waiver of his Miranda rights, and considering his subsequent hesitation to sign the written waiver, Detective Cornett asked clarifying questions to the defendant to determine if he was going to talk with Detective Cornett, and told the defendant he could not talk to the defendant.
>
> 13. As Detective Cornett was informing the defendant that he, Detective Cornett, could not ask the defendant any questions, the defendant picked up a pencil on his own, signed the written waiver, and then pushed the signed written waiver (state's exhibit VD number 3) to Detective Cornett.

> 14. The defendant clearly understood his Miranda rights as demonstrated, in part, by his hesitation to sign the written waiver (state's exhibit VD number 3) after he read it.
>
> . . . .
>
> 18. Based on the totality of the circumstances by his words and actions, the defendant freely, intelligently, voluntarily, and knowingly waived his Miranda rights, including his right to counsel and his right to remain silent, after having those rights read to him free from any coercion, duress, or threats.[2]

Many of the trial court's findings of fact are based upon viewing the videotape of the interview, particularly as "the audio was less than perfect[.]" Without the videotape, we are unable to review the trial court's findings of fact as to the "body language, demeanor, conduct and actions of all participants in the interview." Furthermore, without viewing the videotape in conjunction with the transcript, as the trial court did, it is unclear when defendant is speaking to the police, reading the waiver of rights form to himself, and signing the waiver of rights form. Reading the transcript without viewing the videotape leaves us no way of knowing *when* defendant made the statements he purports invoke his rights; for instance, we do not know if defendant made the aforementioned statements and then signed the form, thereby waiving those prior statements, or if defendant signed the form and then made further statements regarding his rights in order to reiterate his position. While certainly in every case a visual recording is not required to determine whether defendant invoked or waived his Miranda rights, here the videotape is essential, in light of the largely inaudible portions of the transcript and the trial court's reliance upon the visual aspect of defendant's interview. As we do not have the videotape before us, and therefore are presented with an incomplete record, we must accept the findings of fact as binding. *See State v. Ali*, 329 N.C. 394, 412, 407 S.E.2d 183, 194 (1991) ("The defendant has failed to bring forward a record sufficient to allow proper review of this issue and has failed to overcome the presumption of correctness at trial.")

[2] Based upon these findings of fact, we must consider the trial court's conclusion of law that defendant "freely, intelligently, volun-

2. Finding of fact 18 is actually a conclusion of law. "Where a trial court makes a conclusion of law but erroneously labels it a finding of fact, the conclusion is nonetheless reviewed *de novo*." *State v. Davison*, 201 N.C. App. 354, 361, 689 S.E.2d 510, 515 (2009), *disc. review denied*, ___ N.C. ___, 703 S.E.2d 738 (2010).

tarily, and knowingly waived his Miranda rights, including his right to counsel and his right to remain silent, after having those rights read to him free from any coercion, duress, or threats." In this determination, we must consider what "a reasonable police officer in the circumstances would understand" defendant to be communicating, *see Davis*, 512 U.S. at 459, 129 L. Ed. 2d at 371, which necessarily includes the "body language, demeanor, conduct and actions" of defendant in communicating, particularly when such evidence is available and relied upon by the trial court. The trial court's findings of fact demonstrate that it considered what Sergeant Cornett would reasonably believe defendant to be communicating and fully support its conclusion of law.

C. Honoring Defendant's Right to Cease Questioning

Defendant next argues that

> [o]nce Miranda warnings have been given, if a suspect indicates 'in any manner, and at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.' *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966). Interrogation may be resumed only if the officers have 'scrupulously honored' the individual's 'right to cut off questioning.' *Michigan v. Mosely*, 423 U.S. 96, 104 (1975); *State v. Murphy*, 342 N.C. 813, 823, 467 S.E.2d 428, 434 (1996).

(Brackets omitted). Without the videotape of the interview, as noted above, this Court cannot properly analyze whether "officers . . . scrupulously honored . . . [defendant's] right to cut off questioning," (quotation marks omitted), or even consider the precursor question of exactly when defendant did invoke his rights, thereby requiring questioning to cease.

D. Deceptive Tactics

Defendant next argues that

> Detective Cor[n]ett first reminded Mr. Jordan of their relationship. He persevered with the interrogation even when Mr. Jordan repeatedly declared he would not sign the form and did not wish to waive any of his rights. Detective Cor[n]ett succeeded in convincing Mr. Jordan to waive his rights only by giving him the false legal advice that as an alternative he could answer some questions and not others. *Miranda* instructed: 'any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant

> did not voluntarily waive his privilege.' *Id.* at 476. As Rashad Jordan was both tricked and cajoled after repeatedly asserting his refusal to waive his rights to silence and to assistance of counsel, this Court must find his constitutional rights to the effective assistance of counsel under the Sixth Amendment and right against self-incrimination under the Fifth and Fourteenth Amendments were violated.

Again, without a videotape this Court is unable to review the trial court's findings of fact as to when defendant invoked his rights to silence and to counsel, so we certainly cannot determine whether defendant was "tricked and cajoled after repeatedly" invoking these rights in violation of the Constitution.

E. Conclusions of Law

[3] Defendant next argues that the trial court's conclusions of law were erroneous in light of the evidence before it. Once again, as we do not have the evidence which was before the trial court, we are unable to consider this contention. However, we can consider whether the findings of fact support the conclusions of law. *See Campbell*, 188 N.C. App. at 704, 656 S.E.2d at 724. Beyond those findings of fact specifically already listed the trial court further found:

> 3. On 20 January 2007, while in custody, Detective Cornett orally advised the defendant of his rights as required by *Miranda v. Arizona*, 384 US 436 (1966) (hereinafter "Miranda rights").
>
> 4. The defendant understood his Miranda rights, including his right to remain silent and his right to counsel.
>
> . . . .
>
> 16. The defendant signed the written waiver (state's exhibit VD number 3) freely, intelligently, voluntarily, and knowingly, free from any threats, coercion or duress.
>
> . . . .
>
> 30. The defendant never made a clear and unequivocal assertion of his right to counsel at any time during the interview on 20 January, 2007 or at any other time on 20 January, 2007.
>
> . . . .
>
> 32. The defendant never unambiguously invoked his right to remain silent during the interview on 20 January, 2007 until the defendant stated, 'I don't want to talk no more man. Just finger-

print me and take me to the Magistrate's Office." *See* state's exhibit VD number 4 at page 1571, lines 9 and 10).

The trial court's conclusions of law ultimately determine that "defendant was fully informed and advised of his Miranda rights," "defendant fully understood his Miranda rights," "defendant waived his Miranda rights freely, intelligently, voluntarily, and knowingly, free from any threats, coercion or duress," "defendant never made a clear and unequivocal assertion of his right to counsel[,] and "defendant never unambiguously invoked his right to remain silent during the interview on 20 January, 2007 until the defendant stated, 'I don't want to talk no more man. Just fingerprint me and take me to the Magistrate's Office.' " Accordingly, the findings of fact do support the conclusions of law.

F. Defendant's Statements at Trial

[4] Lastly, defendant contends that it was prejudicial error for the trial court to allow his confession to killing Mr. Harshaw made during his interview with the police to be presented before the jury as the State did not meet "its burden of proving a knowing and intelligent waiver of rights, resulting in a voluntary statement."[3] As we have already determined that we are unable to review several of defendant's arguments regarding his motions to suppress, but that the trial court's findings of fact support the conclusions of law, we must ultimately conclude that the trial court properly denied defendant's motions to suppress until he unequivocally invoked his right to remain silent. Accordingly, it was not error for the trial court to allow defendant's confession to be heard before the jury. Defendant's arguments regarding his motions to suppress are overruled.

III. Transcript

[5] During defendant's trial, the jury saw the videotaped interview and received a copy of the transcript which was prepared based upon the enhanced audio. The jury was instructed to use the transcript only "to corroborate previous testimony[.]" The jury did not hear the enhanced audio from which the transcript was made. Defendant argues that "the trial court erred by allowing an inaccurate transcript of the defendant's interrogation to be published to the jurors[.]" (Original in all caps.) We first note that it would be virtually impossi-

3. To the extent that defendant's argument addresses the trial court admitting his confession to the police through the transcript made by the police, we will address these issues in the next section. Here, we focus solely on whether defendant's confession should have come in generally or whether it should have been suppressed.

ble for the jury to consider whether the transcript was accurate, as they heard only the videotape's audio, which was apparently of very poor quality.

However, even assuming *arguendo* that it was error for the trial court to allow the jury to use the transcript prepared from the enhanced audio, where they did not hear the enhanced audio, we cannot say that it prejudiced defendant in light of Mr. Barnes's testimony that defendant told him he was going to kill his cousin, Mr. Harshaw; Ms. Michaux's testimony that defendant came to her house the day of the murder looking for Mr. Harshaw; Mr. Jolly's eyewitness testimony wherein he saw and heard defendant demand money from Mr. Harshaw, saw defendant take a gun from Mr. Powell, saw defendant begin shooting, and heard four shots; Ms. Patterson's testimony that defendant told her he had killed someone; Detective Cornett's testimony that defendant told him he killed Mr. Harshaw; and the gunshot residue found on defendant's clothing. *See State v. Paige*, 272 N.C. 417, 424, 158 S.E.2d 522, 527 (1968) ("[V]erdicts and judgments are not to be set aside for mere error and no more. To accomplish this result it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, and that a different result likely would have ensued, with the burden being on the appellant to show this." (citations omitted)). This argument is overruled.

IV. Jurors Hear Exchange between Defendant and Reporter

[6] Lastly, defendant contends it was error for the jury to be presented with "[a] portion of [an] exchange" between defendant and "a television reporter[.]" Again, even assuming *arguendo* that this evidence was erroneously admitted, in light of the overwhelming evidence against defendant, defendant cannot show prejudice as to this issue. *See id.*

IV. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges McGEE and BEASLEY concur.

REBECCA S. WHITE, PLAINTIFF v. CURTIS COCHRAN, DEFENDANT

No. COA10-1191

(Filed 4 October 2011)

1. Public Officers and Employees—retaliatory discharge against sheriff—right-to-sue letter—subject matter jurisdiction

The trial court erred by dismissing plaintiff's Retaliatory Employment Discrimination Act claim for lack of subject matter jurisdiction where plaintiff's right-to-sue letter from the North Carolina Department of Labor identified only the Sheriff's Department and the County as respondents while the complaint referred to the Sheriff by name. The allegations in the right-to-sue letter suggest an official capacity suit; moreover, an action is deemed to be in an official capacity in the absence of a clear statement of defendant's capacity.

2. Public Officers and Employees—common law wrongful discharge—right-to-sue letter—not pertinent

The trial court erred by dismissing plaintiff's common law wrongful discharge claim against a sheriff based on an alleged insufficiency in the right-to-sue letter. That letter related only to a statutory claim for violation of the Retaliatory Employment Discrimination Act. The issues of sovereign immunity or joinder of the surety were not determined on this appeal.

Appeal by plaintiff from order entered 28 June 2010 by Judge Bradley B. Letts in Swain County Superior Court. Heard in the Court of Appeals 9 March 2011.

The Moore Law Office, by George W. Moore, for plaintiff-appellant.

Melrose, Seago & Lay, PA, by Kimberly C. Lay, for defendant-appellee.

GEER, Judge.

Plaintiff Rebecca S. White appeals from an order entering judgment on the pleadings and dismissing for lack of subject matter jurisdiction this action brought against defendant Curtis Cochran, the Sheriff of Swain County. Ms. White had alleged that the sheriff's termination of her employment violated the Retaliatory Employment Discrimination Act ("REDA") and amounted to a wrongful discharge in violation of public policy.

The sole basis argued in support of the trial court's dismissal of this action was Sheriff Cochran's contention that the North Carolina Department of Labor's notice of right to sue, naming the "Swain County Sheriff's Department" as the respondent, was insufficient to support Ms. White's suit against Sheriff Cochran. This contention, however, relates only to Ms. White's statutory claim for violation of REDA. We, therefore, hold that the trial court erred in dismissing, based on the right-to-sue letter, Ms. White's common law wrongful discharge claim.

With respect to the REDA claim, Ms. White has failed to indicate in her complaint whether she is suing Sheriff Cochran in his individual or in his official capacity. Based on our review of the complaint and the course of proceedings, we hold that Sheriff Cochran has been sued only in his official capacity. As a suit against a sheriff in his official capacity is synonymous with a suit against the sheriff's department, Ms. White did obtain the necessary right-to-sue letter. The trial court, therefore, also erred in dismissing Ms. White's statutory REDA claim.

Facts

Ms. White filed her complaint on 9 October 2009 alleging the following facts. On 5 November 2008, Sheriff Cochran hired Ms. White as a detention officer at the Swain County Jail. On 24 January 2009, Ms. White slipped and fell at work on a floor that was being refinished. She immediately informed her supervisor that she had been injured from the fall, and an accident report was prepared by another employee of Sheriff Cochran. Ms. White was referred by her employer for medical treatment, and Sheriff Cochran was provided with copies of the medical records resulting from the treatment. Ms. White was disabled as a result of the fall until 25 February 2009.

Ms. White filed a claim with the North Carolina Industrial Commission and received benefits, including compensation and medical treatment. While Ms. White was out of work on temporary total disability, she received a letter dated 4 February 2009 that was titled "Continuation of Coverage Rights Under COBRA." Ms. White contacted her employer, but she was unable to obtain any information regarding why the letter was sent to her.

Ms. White returned to work on 25 February 2009. After working on 25 February, 26 February, 3 March, 4 March, and 6 March 2009, she was advised by another detention officer that she was not to return to work until she talked to the jail administrator, Jenny Hyatt, on 9 March 2009. Ms. White went to Ms. Hyatt's office on 9 March 2009 and

met with Ms. Hyatt and Martha Marr, another employee of Sheriff Cochran. At this meeting, Ms. Marr informed Ms. White, " 'Your services here are no longer needed.' "

Ms. White alleged that Sheriff Cochran "fabricated reasons for terminating [her] when the actual motive for such termination was to retaliate against [Ms. White] for participating in a worker's compensation claim." Ms. White alleged that Sheriff Cochran's actions violated REDA, N.C. Gen. Stat. § 95-241 (2009), and constituted a wrongful discharge in violation of the public policy set out in § 95-241(a)(1)(a).

Ms. White asserted that the Superior Court of Swain County had jurisdiction under REDA because Ms. White had filed the action within 90 days of the date upon which the Commissioner of Labor had issued a right-to-sue letter. Ms. White attached to her complaint a 26 August 2009 right-to-sue letter issued by the North Carolina Department of Labor to Ms. White. The letter listed two file numbers with one naming the "County of Swain" as the respondent and the second naming the "Swain County Sheriff's Department" as the respondent.

Sheriff Cochran filed an answer to Ms. White's complaint on 16 December 2009 alleging a single affirmative defense: "Defendant would have taken the action to terminate Plaintiff in the absence of her filing a workers compensation claim under Chapter 97 of the North Carolina General Statutes." On 6 January 2010, Sheriff Cochran filed an amended answer asking the court to award him reasonable costs and expenses, including attorneys' fees, under N.C. Gen. Stat. § 95-243(c) (2009).

On or about 28 April 2010, Sheriff Cochran filed a motion for judgment on the pleadings and motion to dismiss for lack of subject matter jurisdiction. Sheriff Cochran asserted (1) that "the undisputed facts appearing [in the pleadings] entitle Defendant to such judgment as a matter of law," and (2) that "Plaintiff's claims are upon claims arising under N.C. Gen. Stat. 95-243(a) and this Court lacks jurisdiction as it pertains to this Defendant and Plaintiff's actions therefore should be dismissed." Sheriff Cochran served a Notice of Hearing of this motion on 30 April 2010, scheduling the motion for the 17 May 2010 session.

The trial court heard Sheriff Cochran's motion on 17 May 2010 and entered an order on 28 June 2010 granting Sheriff Cochran judgment on the pleadings and "[a]lternatively and independently" dismissing Ms. White's action for lack of subject matter jurisdiction. The trial court further explained:

> It appeared to the Court upon the review of pleadings in this case and the arguments and authorities presented by counsel, that as a matter of law the allegations of the Plaintiff's Complaint and the attachments thereto, treated as true, are insufficient to state a claim upon which relief may be granted and therefore, the Defendant's Motion for Judgment on the Pleadings is granted. Further, as alternative and independent grounds, upon the review of pleadings and attachments thereto in this case and the arguments and authorities presented by counsel, the Court concludes that it has no jurisdiction over the subject matter of this case and Plaintiff's claims and therefore Defendant is entitled to a dismissal of Plaintiff's claims and action against him.

Ms. White timely appealed to this Court.

Discussion

"As we have recognized, a complaint is subject to dismissal under Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim. On the other hand, a motion for judgment on the pleadings pursuant to Rule 12(c) should only be granted when the movant clearly establishes that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law." *Cash v. State Farm Mut. Auto. Ins. Co.*, 137 N.C. App. 192, 201-02, 528 S.E.2d 372, 378 (internal citations and quotation marks omitted), *aff'd per curiam*, 353 N.C. 257, 538 S.E.2d 569 (2000). We review decisions pursuant to Rule 12(b)(6) and 12(c) de novo.

Sheriff Cochran argued in the trial court and contends on appeal that Ms. White failed to state a claim for relief and that the trial court lacked subject matter jurisdiction because Ms. White sued Sheriff Cochran, while the Department of Labor's right-to-sue letter identified only the Sheriff's Department and the County as respondents. In making this argument, Sheriff Cochran has assumed that Ms. White's complaint only alleged a REDA claim. In fact, however, the complaint expressly asserted both (1) a statutory REDA claim under N.C. Gen. Stat. § 95-243(a) and (2) a claim for wrongful discharge in violation of public policy. We address each cause of action in turn.

REDA

[1] N.C. Gen. Stat. § 95-241(a) provides that "[n]o person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to . . . [f]ile a claim or

complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to . . . Chapter 97 of the General Statutes." In order to state a claim for relief under REDA, "a plaintiff must show (1) that he exercised his rights as listed under N.C. Gen. Stat. § 95-241(a), (2) that he suffered an adverse employment action, and (3) that the alleged retaliatory action was taken because the employee exercised his rights under N.C. Gen. Stat. § 95-241(a)." *Wiley v. United Parcel Serv., Inc.*, 164 N.C. App. 183, 186, 594 S.E.2d 809, 811 (2004).

Prior to filing suit, an employee must, within 180 days of an alleged violation, file a written complaint with the Commissioner of Labor alleging a violation of N.C. Gen. Stat. § 95-241. *See* N.C. Gen. Stat. § 95-242(a) (2009). "If the Commissioner determines after the investigation that there is not reasonable cause to believe that the allegation is true, the Commissioner shall dismiss the complaint, promptly notify the employee and the respondent, and issue a right-to-sue letter to the employee that will enable the employee to bring a civil action pursuant to G.S. 95-243." *Id.* Pursuant to N.C. Gen. Stat. § 95-243(a), "[a]n employee who has been issued a right-to-sue letter . . . may commence a civil action in the superior court of the county where the violation occurred, where the complainant resides, or where the respondent resides or has his principal place of business."

Sheriff Cochran does not dispute that Ms. White's complaint contains sufficient factual allegations to state a violation of REDA. He argues, however, that the right-to-sue letter identified the respondent as the "Swain County Sheriff's Department," while the complaint sued Curtis Cochran. Sheriff Cochran contends that the Sheriff's Department cannot be equated with Sheriff Cochran. His argument, however, overlooks the fact that a government official may be sued in his official capacity and/or in his individual capacity.

A suit against a sheriff in his official capacity is a suit against the Office of the Sheriff. *See Boyd v. Robeson Cnty.*, 169 N.C. App. 460, 466, 621 S.E.2d 1, 5 (2005) ("The official capacity claims [against the Sheriff and his employees] in this case are, therefore, actually claims against the office of the Sheriff of Robeson County."). Further, reference to the Sheriff's Department is simply another way of denoting the Office of the Sheriff. *See also Layman ex rel. Layman v. Alexander*, 343 F. Supp. 2d 483, 493 (W.D.N.C. 2004) ("A claim against [Sheriff and his employees] in their official capacities constitutes a claim against the entity for which they act as agents, here the . . . County Sheriff's Department."); *Gantt v. Whitaker*, 203 F. Supp. 2d

503, 508 (M.D.N.C. 2002) (holding that claims against sheriff and officer in their official capacities "actually constitute a suit against the entity of which those officials are agents—in this case, the Office of Sheriff of Davie County"), *aff'd per curiam*, 57 Fed. Appx. 141 (4th Cir. 2003).

However, as was true in *Mullis v. Sechrest*, 347 N.C. 548, 495 S.E.2d 721 (1998), the complaint, in this case, does not specify the capacity in which Curtis Cochran is being sued—in other words, whether Ms. White is suing him in his individual capacity, his official capacity, or both capacities. The Supreme Court stressed in *Mullis* that "[i]t is a simple matter for attorneys to clarify the capacity in which a defendant is being sued." *Id.* at 554, 495 S.E.2d at 724. A plaintiff should indicate that capacity in the caption, in the allegations, and in the prayer for relief. *Id.*, 495 S.E.2d at 724-25. "These simple steps will allow future litigants to avoid problems such as the one presented to us by this appeal." *Id.*, 495 S.E.2d at 725. Fourteen years after *Mullis*, we are still confronted with the same problems. In order to decide whether the trial court properly allowed the motion to dismiss, we must first determine in which capacity Curtis Cochran has been sued.

When, as here, the complaint does not specifically identify the defendant's capacity,

> "[t]he crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged. If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant is named in an official capacity. If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities."

Id. at 552, 495 S.E.2d at 723 (quoting *Meyer v. Walls*, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997)).

The complaint in this case seeks only money damages as relief. In order to determine whether those damages are sought from the governmental entity or from the pocket of the individual, "it is appropriate to consider the course of the proceedings and allegations contained in the pleading to determine the capacity in which defendant

is being sued." *Id.* at 553, 495 S.E.2d at 724. Our review of the allegations and the course of proceedings leads us to conclude that Sheriff Cochran was sued only in his official capacity.

We acknowledge that the caption, standing alone, would suggest that defendant was sued in his individual capacity since it refers to "Curtis Cochran" without mentioning the office of Sheriff. Never-theless, the allegations identify the defendant solely as "the duly elected sheriff of Swain County, North Carolina" without referencing Sheriff Cochran's county of residence, as is customary when suing a defendant in his individual capacity. *See id.* (concluding that defendant was sued in official capacity in part because initial allegation identified defendant as being employed by Board of Education even though same allegation identified defendant as citizen and resident of Mecklenburg County). *Compare Schmidt v. Breeden*, 134 N.C. App. 248, 257, 517 S.E.2d 171, 177 (1999) (holding that defendants were sued in individual capacities in part because complaint alleged defendants were citizens and residents of Charlotte, Mecklenburg County and only subsequently "linked them to the Board [of Edu-cation] as agents").

In addition, the complaint repeatedly refers to Ms. White's "job assignment for the Defendant," "her employment for the Defendant," and other "employee[s] of the Defendant." All of these allegations suggest an official capacity suit since Ms. White was working for the Office of the Sheriff and not as a personal employee of Curtis Cochran.

Significantly, the complaint does not assert separate claims for relief that distinguish between the Sheriff as her employer and the Sheriff as an individual—both claims for relief allege a wrongful termination of her employment. *See Mullis*, 347 N.C. at 553, 495 S.E.2d at 724 (noting, in holding that plaintiff brought only official capacity claim, that plaintiff asserted only single claim for relief that Board was negligent based on negligent acts of individual defendant who was acting as Board's agent).

Even in the prayer for relief, Ms. White seeks "from the Defendant compensatory and punitive damages for wrongful discharge." She does not include any indication—such as by using the phrase "joint and several"—that she is seeking damages both from the Office of the Sheriff or Sheriff's Department and from Curtis Cochran individually. *Compare Schmidt*, 134 N.C. App. at 257, 517 S.E.2d at 177 (in concluding that relief was sought in defendants' individual capacities, pointing out that plaintiff sought relief jointly and severally).

In addition, Ms. White alleged that the superior court had jurisdiction over her action based on the right-to-sue letter attached to the complaint. As indicated above, that right-to-sue letter identified the respondent as the "Swain County Sheriff's Department." That letter, therefore, also suggests that this lawsuit involves only official capacity claims.

Finally, this Court has held that "in the absence of a clear statement of defendant's capacity a plaintiff is deemed to have sued a defendant in his official capacity." *Reid v. Town of Madison*, 137 N.C. App. 168, 172, 527 S.E.2d 87, 90 (2000). Here, as in *White v. Crisp*, 138 N.C. App. 516, 520, 530 S.E.2d 87, 89 (2000), "[i]n view of [the complaint's] allegations and the absence of any clear indication that defendant . . . is being sued in his individual capacity, we treat [plaintiff's] complaint as a suit against defendant . . . solely in his official capacity."

We have concluded that Ms. White has, in this action, brought a claim against Sheriff Cochran solely in his official capacity. Ms. White has attached to her complaint a right-to-sue letter allowing her to sue Sheriff Cochran in his official capacity. Consequently, the superior court had jurisdiction over Ms. White's claim under REDA. Because Sheriff Cochran has not argued that any other basis existed for dismissing Ms. White's REDA claim, we reverse the dismissal of that claim.

Wrongful Discharge

[2] Ms. White also argues that her complaint asserts a separate claim for wrongful discharge in violation of public policy. Our Supreme Court recognized an exception to the employment at will doctrine in *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989) (quoting *Sides v. Duke Univ.*, 74 N.C. App. 331, 342, 328 S.E.2d 818, 826 (1985)):

> "[W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent."

Following *Coman*, the Supreme Court, in *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 353, 416 S.E.2d 166, 169 (1992), clarified that "at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes."

Although Sheriff Cochran makes no argument regarding Ms. White's wrongful discharge claim, a review of the complaint indicates that it alleges both a violation of REDA and a common law claim for wrongful discharge in violation of public policy. The complaint specifically asserts that Ms. White "was discharged from her employment with the Defendant in violation of the state public policy set out in N.C.G.S. § 95-241(a)(1)a." The complaint then states that "[a]s a direct and proximate result of the Defendant's violation of state statutory law and the wrongful discharge of the Plaintiff, the Plaintiff has incurred substantial damages including lost wages, lost benefits, and other economic losses that were proximately caused by the retaliatory action of the Defendant." The complaint further confirms the intent to assert two separate causes of action by seeking both punitive damages and treble damages pursuant to N.C. Gen. Stat. § 95-243 for willful violation of N.C. Gen. Stat. § 95-241.

Our courts have previously held that a plaintiff may pursue both a statutory claim under REDA and a common law wrongful discharge claim based on a violation of REDA. As this Court explained in *Whitings v. Wolfson Casing Corp.*, 173 N.C. App. 218, 222, 618 S.E.2d 750, 753 (2005), "[b]oth the Workers' Compensation Act and the Retaliatory Employment Discrimination Act (REDA) are sources of policy establishing an employee's legally protected right of pursuing a workers' compensation claim. An action pursuant to REDA is a supplemental remedy to the common law claim of wrongful discharge." *See also Tarrant v. Freeway Foods of Greensboro, Inc.*, 163 N.C. App. 504, 509, 593 S.E.2d 808, 812 (2004) ("In this case, plaintiff has alleged sufficient facts to survive a motion to dismiss on the claim of wrongful discharge in violation of public policy. Plaintiff claims that she was fired because she asserted her rights under the Workers' Compensation Act."); *Brackett v. SGL Carbon Corp.*, 158 N.C. App. 252, 260, 580 S.E.2d 757, 762 (2003) ("[A] plaintiff may state a claim for wrongful discharge in violation of public policy where he or she alleges the dismissal resulted from an assertion of rights under the Workers' Compensation Act.").

Ms. White has argued that "a sheriff can be sued in his individual capacity for wrongful discharge of an employee in violation of public policy," citing *Phillips v. Gray*, 163 N.C. App. 52, 592 S.E.2d 229 (2004). We have, however, concluded that the complaint only sues Sheriff Cochran in his official capacity. Nonetheless, a wrongful discharge claim may be asserted against a sheriff in his official capacity subject to the defense of sovereign immunity. *See Efird v. Riley*, 342

F. Supp. 2d 413, 426 (M.D.N.C. 2004) (holding that plaintiff could assert official capacity claim against sheriff for wrongful discharge if sovereign immunity was waived, although ultimately concluding that allegations of complaint did not allege any violation of state public policy); *Hill v. Medford*, 158 N.C. App. 618, 627, 582 S.E.2d 325, 331 (Martin, J., dissenting), (holding that at will employee of Sheriff did not have claim for breach of contract but did have wrongful discharge claim against Sheriff in his official capacity, although governmental immunity would limit potential recovery), *rev'd per curiam for reasons stated in the dissent*, 357 N.C. 650, 588 S.E.2d 467 (2003).

The issue of sovereign immunity is not before this Court. Defendant's initial answer and amended answer did not assert the defense of sovereign immunity. The day after the hearing on the motions at issue in this appeal, defendant filed a second motion for judgment on the pleadings and motion to dismiss for lack of jurisdiction on the grounds that Ms. White had failed to join Sheriff Cochran's surety as required by N.C. Gen. Stat. § 58-76-5 (2009) and that the sheriff was, therefore, immune from liability. That motion has not yet been decided, and nothing in this opinion should be deemed as expressing any view on that motion or the defense of sovereign immunity.

Reversed.

Judges BRYANT and ELMORE concur.

DONALD E. SELLERS, EMPLOYEE, PLAINTIFF v. FMC CORPORATION, EMPLOYER, NATIONAL UNION FIRE INSURANCE COMPANY AND INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, CARRIERS, DEFENDANTS

No. COA11-12

(Filed 4 October 2011)

1. Appeal and Error—jurisdiction—review of intermediate order

The Court of Appeals had jurisdiction to review an order from the Industrial Commission where the notice of appeal designated the Full Commission's opinion and award as the subject of appeal but plaintiff's first issue related to an earlier order.

Plaintiff met the requirements of N.C.G.S. § 1-278, as expounded in *Yorke v. Novant Health, Inc*, 192 N.C. App. 340, for review of an intermediate order involving the merits and necessarily affecting the judgment.

2. Workers' Compensation—jurisdiction of Full Commission—appeal from order of Chair—not timely—no excusable neglect

The Industrial Commission did not have jurisdiction to hear defendant's appeal from an order of the Chair vacating denials of defendant's motion for reconsideration where defendant did not timely appeal and there was no excusable neglect. Defendant argued that there was confusion due to two intertwined cases, but assuming rather than confirming that a notice of appeal had been filed did not amount to excusable neglect.

Appeal by plaintiff and cross-appeal by defendant, FMC Corporation, from the opinion and award of the North Carolina Industrial Commission filed 28 July 2010. Heard in the Court of Appeals 16 August 2011.

Wallace and Graham, P.A., by Cathy A. Williams and Edward L. Pauley, for plaintiff appellant-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Neil P. Andrews and M. Duane Jones, for defendant appellants-appellees.

McCULLOUGH, Judge.

Donald E. Sellers ("plaintiff") appeals and FMC Corporation ("defendant") cross-appeals from the Full Commission's Opinion and Award dated 28 July 2010. For the reasons discussed herein, we agree with plaintiff and reverse.

I. Background

Plaintiff worked for defendant and its predecessors from 1974 to 2002. He started out as a welder and moved to the electrical and instrumentation shop in 1993 or 1994, while continuing to do some welding. During his employment, plaintiff was continually exposed to high-intensity light from his and his coworkers' welding. Plaintiff began to experience difficulty with his vision in 2000. Defendant provided glasses for plaintiff, but the glasses did not help his vision.

In 2002, Dr. Jonathan D. Christenbury diagnosed plaintiff with a type of cataracts typically seen in glass blowers and welders due to the exposure to high-intensity light. Following diagnosis, plaintiff underwent separate surgeries on each eye and upon completion of the surgeries was diagnosed with macular edema, a thickening and swelling of the retina, which is a common complication of cataract surgery. The macular edema caused substantial blindness. Christenbury Eye Associates submitted four short-term disability forms to defendant, stating that plaintiff could not return to work due to vision loss. Defendant terminated plaintiff in early October 2002. Plaintiff subsequently filed his workers' compensation claim on 23 October 2002.

Plaintiff's workers' compensation claim consisted of two claims, one for the injury to his eyes, and another for asbestosis, contracted as a result of exposure during his employment with defendant. The two claims were consolidated and heard by Deputy Commissioner George T. Glenn, II, on 20-21 August 2008 and 27 October 2008.

On one of the short-term disability forms, Dr. Samuel A. Gallo noted that plaintiff's cataracts were "most likely caused by the high-intensity light [due to] welding." During the hearing it came out that Dr. Mark Malton had initially seen plaintiff in 2003 and told plaintiff that he did not believe welding caused cataracts. However, Dr. Malton had not done a thorough study on the subject at the time. In 2008, Dr. Malton was asked to help with plaintiff's case, but did not realize he had seen plaintiff in 2003. After doing some research, Dr. Malton testified that he believed welding could cause cataracts. He testified that if plaintiff had not had cataract surgery, plaintiff, in all likelihood, "would not have developed macular edema." Also during the hearings, Dr. Frank T. Hannah testified that he believed welding could cause cataracts. Dr. Hannah also testified that plaintiff's retinal disease was causing his blindness and not his cataracts. He further testified that macular edema can be seen after perfectly successful cataract surgery.

On 24 June 2009, Deputy Commissioner Glenn issued an Opinion and Award, granting plaintiff $654.00 per week from 23 April 2002, payable in a lump sum, and $654.00 per week for the rest of plaintiff's life, for the injury to his eyes. The Opinion and Award also required defendant to pay all medical expenses incurred as a result of the occupational disease, along with attorney fees in the amount of twenty-five percent of the total award.

Defendant had fifteen days to file a notice of appeal from the Opinion and Award. The 9 July 2009 deadline came and went without defendant filing a notice of appeal. Defense counsel's assistant acknowledged receipt of the Opinion and Award on 24 June 2009 and defense counsel noted they set their electronic diary to 9 July 2009 as the date to check to see if the notice of appeal had been filed. Defense counsel did not file the notice of appeal until 24 July 2009.

As a result of the delayed filing of the notice of appeal, plaintiff moved to dismiss the appeal as untimely. Defense counsel argued excusable neglect in that a notice of appeal was prepared and he was under the impression that it had been filed. Defense counsel further argued that there was confusion as a result of his assistant's and his receiving a 9 July 2009 email from the Industrial Commission, transmitting a joint transcript for this case and the related case of *Ensley v. FMC Corporation.* The present case and the *Ensley* case had been combined for the convenience of all parties, as both cases had the same counsel on both sides, and the parties were able to use some of the same witnesses and testimony for both cases. Thus, defense counsel argued he mistakenly assumed that the receipt of the joint transcript meant that the notice of appeal had been filed in this case. However, the Industrial Commission had not received the notice of appeal. Defense counsel also acknowledged that, while drafting the briefs in the two cases, he noticed he had never received an acknowledgment letter from the Industrial Commission confirming receipt of the notice of appeal for this case.

On 4 August 2009, Chair Pamela Young, on behalf of the Industrial Commission, granted plaintiff's motion and dismissed defendant's appeal as untimely. Defendant filed a motion to reconsider the dismissal on 13 August 2009, based again on excusable neglect for confusion caused by the misinterpreted email and transcript. Attached to the motion to reconsider were affidavits by defense counsel and his assistant attesting to not knowing why the drafted notice of appeal was not filed and attempting to explain their failure to note this omission. Chair Young again denied the motion to reconsider.

Defendant finally filed a notice of appeal to the Full Commission on 27 August 2009, challenging Chair Young's 4 August 2009 and 25 August 2009 Orders. Plaintiff again moved to dismiss the appeal. The Full Commission reviewed the issue on 9 December 2009, without oral argument, and issued an order on 26 January 2009 ("January Order"), vacating Chair Young's orders of dismissal. The Full Commission determined it did not have jurisdiction to review a Deputy Commis-

sioner's Opinion and Award that was not timely appealed, but did have the authority to review a defendant's motion for relief due to excusable neglect. The order noted excusable neglect due to confusion with the two cases and a clerical mistake or breakdown in the law firm's procedure. The parties proceeded to an appeal on the merits.

On 28 July 2010, the Full Commission approved Commissioner Glenn's Opinion and Award. It concluded that plaintiff's cataracts were a compensable occupational disease and his resulting visual and psychological impairments rendered him totally and permanently disabled under the statutes. The Full Commission affirmed the award of $654.00 per week with all medical expenses paid for, but awarded attorney fees of twenty-five percent of the accrued disability compensation as a cost of the action, along with attorney fees of twenty-five percent paid by deducting every fourth check owed to plaintiff.

Plaintiff appeals the Full Commission's vacating of Chair Young's dismissal of defendant's appeal, as well as the Full Commission's alteration of the award, in the area of attorney fees. Defendant cross-appeals the Full Commission's decision finding that plaintiff suffers from an occupational disease and awarding of the maximum compensation rate, along with attorney fees.

II. Analysis

A. Full Commission's Vacating of Order Dismissing Appeal

Plaintiff argues the Full Commission erred in vacating Chair Young's 4 August 2009 Order dismissing defendant's appeal and the 25 August 2009 Order denying defendant's motion for reconsideration. We agree.

When reviewing an order from the Industrial Commission our Court must determine whether the findings of fact are supported by competent evidence and whether the conclusions of law are supported by findings of fact. *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980). The conclusions of law from the Industrial Commission are reviewed *de novo*. *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000). "Under the *de novo* standard of review, the trial court ' "consider[s] the matter anew[] and freely substitutes its own judgment for the agency's." ' " *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 889, 895 (2004) (alteration in original).

[1] Plaintiff contends the trial court abused its discretion in reviewing and vacating Chair Young's orders dismissing defendant's un-

timely appeal; but as a preliminary matter, defendant argues plaintiff did not appeal from the Full Commission's January Order vacating Chair Young's order. Therefore, according to defendant, our Court does not have jurisdiction, pursuant to N.C.R. App. P. 3(d) (2009), to review plaintiff's appeal regarding the Full Commission's order vacating Chair Young's order. Defendant contends plaintiff's notice of appeal does not state the proper order from which plaintiff is appealing.

Appellate Rule 3(d) states in pertinent part, "[t]he notice of appeal required to be filed and served by subsection (a) of this rule shall . . . designate the judgment or order from which appeal is taken and the court to which appeal is taken[.]" N.C.R. App. P. 3(d). However, "[u]pon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." N.C. Gen. Stat. § 1-278 (2009). Therefore, our Court may still have jurisdiction to review an intermediate order "even if an appellant omits a certain order from the notice of appeal . . . [where] three conditions are met: '(1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment.' " *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 348, 666 S.E.2d 127, 133 (2008) (quoting *Dixon v. Hill*, 174 N.C. App. 252, 257, 620 S.E.2d 715, 718 (2005)), *disc. review denied*, 363 N.C. 260, 677 S.E.2d 461 (2009). "An order involves the merits and necessarily affects the judgment if it deprives the appellant of one of the appellant's substantive legal claims." *Id.*

In the case at hand, plaintiff's notice of appeal designates the Full Commission's 28 July 2010 Opinion and Award as the one from which appeal is taken. However, plaintiff's first issue on appeal relates to the January Order vacating Chair Young's dismissal of defendant's appeal. Consequently, for plaintiff to maintain his first issue on appeal, he must meet the requirements of G.S. § 1-278 as expounded in *Yorke*.

Plaintiff meets the first requirement of having timely objected to the January Order by stating in his Reply Brief to the Full Commission that, "[w]hile it is admitted that by order dated January 26, 2010, the Full Commission permitted the appeal, Plaintiff would like to restate the objection to that ruling." While this is not a formal objection, it is sufficient to meet the first requirement of the *Yorke* test.

Plaintiff also meets the second prong of the *Yorke* test because the January Order was interlocutory. An interlocutory order is one

"that relates to some intermediate matter in the case; any order other than a final order." *Black's Law Dictionary* 1130 (8th ed. 2004). Clearly, the January Order is an interlocutory order, since it overturned Chair Young's previous order and allowed defendant to continue with its appeal.

Lastly, the January Order must have "involved the merits and necessarily affected the judgment." *Yorke*, 192 N.C. App. at 348, 666 S.E.2d at 133 (internal quotation marks and citation omitted). We conclude the January Order involved the merits of the case and affected the judgment as Commissioner Glenn's initial Opinion and Award granted attorney fees to be paid to plaintiff in addition to compensation for past and future benefits, while the Full Commission's ultimate Opinion and Award required plaintiff's attorney fees to be deducted from his compensation rather than be in addition to his compensation. Therefore, the January Order necessarily affected the final judgment and our Court has the jurisdiction to review it.

[2] Now we must return to plaintiff's first argument that the Full Commission erred in issuing its January Order vacating Chair Young's 4 August 2009 and 25 August 2009 Orders denying defendant's motion for reconsideration. Generally,

> [i]f application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and if proper, amend the award[.]

N.C. Gen. Stat. § 97-85 (2009).

Plaintiff first contends the 25 August 2009 Order by Chair Young was a final order and should have been appealed to this Court rather than to the Full Commission. This is a jurisdictional issue and the Full Commission in its January Order acknowledged that it did not have "jurisdiction to review a Deputy Commissioner's Opinion and Award that was not timely appealed." G.S. § 97-85; *Cornell v. Western & S. Life Ins. Co.*, 162 N.C. App. 106, 590 S.E.2d 294 (2004). However, "this Court held that the Industrial Commission has the inherent power and authority, in its discretion, to consider a motion for relief due to excusable neglect." *Moore v. City of Raleigh*, 135 N.C. App. 332, 336, 520 S.E.2d 133, 137 (1999) (internal quotation marks and citation omitted); *see Allen v. Food Lion, Inc.*, 117 N.C. App. 289, 450 S.E.2d

571 (1994); *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985). Thus, the issue becomes whether or not defendant's failure to file its notice of appeal within the statutory 15-day period resulted from excusable neglect.

"Whether excusable neglect has been shown is a question of law, not a question of fact." *Engines & Equipment, Inc. v. Joe Lipscomb*, 15 N.C. App. 120, 122, 189 S.E.2d 498, 499 (1972). " '[E]xcusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case." *Higgins v. Michael Powell Builders*, 132 N.C. App. 720, 726, 515 S.E.2d 17, 21 (1999) (quoting *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 425, 349 S.E.2d 552, 554-55 (1986)). A litigant's carelessness, negligence, or ignorance of the rules of procedure is not excusable neglect. *Briley v. Farabow*, 348 N.C. 537, 546, 501 S.E.2d 649, 655 (1998). " '[I]nadvertent conduct that does not demonstrate diligence' " does not constitute excusable neglect. *Egen v. Excalibur Resort Prof'l*, 191 N.C. App. 724, 731, 663 S.E.2d 914, 919 (2008) (citation omitted). The test for excusable neglect generally does not allow for attorney negligence. *See Pioneer Inv. Servs. v. Brunswick Assocs.*, 507 U.S. 380, 123 L. Ed. 2d 74 (1993) (outlining the factors to weigh in determining the existence of excusable neglect in the context of Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure); *Symbionics Inc. v. Ortlieb*, No. 10-1042, 2011 WL 2076335 (4th Cir. May 23, 2011) (unpublished) (notice of appeal filed one day late because of a computer glitch not excusable neglect in the context of Rule 4(a)(5) of the Federal Rules of Appellate Procedure); *Cornell*, 162 N.C. App. 106, 590 S.E.2d 294 (new attorney to firm took over prior attorney's case and due to the turnover received the Opinion and Award late, causing him to file the notice of appeal after the 15-day period, did not constitute excusable neglect); *Moore*, 135 N.C. App. 332, 520 S.E.2d 133 (*pro se* plaintiff cannot argue excusable neglect where did not hire counsel).

Here, in analyzing defendant's reasons for delay, defendant argues there was a mix-up due to the fact that defense counsel was handling two intertwined cases before the Industrial Commission and an email pertaining to one case caused confusion in the other. Defense counsel was under the impression that by receiving the joint transcript for this case and the *Ensley* case meant the Industrial Commission had received defendant's notice of appeal for this case. Defendant cites to *Egen* in support of its contention that a firm's confusion and late filing of a notice of appeal can be forgiven under

excusable neglect where a case has unique facts. *Egen*, 191 N.C. App. 724, 663 S.E.2d 914. In *Egen* the Industrial Commission sent the Opinion and Award to the clerical employee by email, but did not send it directly to the attorney. *Id.* The employee did not understand the significance of the email and the attorney did not see it until six weeks later. *Id.* The employee was under the impression that she was blind copied on the email due to her name not appearing in the "To" line, while the attorney's did. *Id.* The Full Commission dismissed the appeal, but our Court reversed based on the employee's mistake. *Id.*

We find the *Egen* case distinguishable because it appears that it was primarily the employee's fault and partly the Industrial Commission's fault for not sending the email directly to the attorney. In the case *sub judice*, however, defense counsel and his assistant both stated they did not know what happened and did not have a real excuse as to why the notice of appeal was not filed on time. The assistant acknowledged receipt of the Opinion and Award on 24 June 2009 and the attorney noted that he had set the electronic diary to insure that he filed the notice of appeal by 9 July 2009. Although the attorney did receive an e-mail transmitting the joint transcript and listing both this case and the related case, he simply assumed that the fact that both cases were listed meant that both cases had been properly appealed rather than determining whether the required notice of appeal had, in fact, been filed. Nevertheless, the notice of appeal was not filed until 24 July 2009. The attorney even admitted he did not become aware that he had not received an acknowledgment letter from the Industrial Commission until he began working on the briefs.

We note that the Full Commission cites to *Egen* in its order overturning Chair Young's dismissal of defendant's appeal in stating " '[i]nadvertent conduct that does not demonstrate diligence[]' " has been held to not constitute excusable neglect, yet does not come to our conclusion that defendant's failure to timely file its appeal does not meet the test for excusable neglect. *Egen*, 191 N.C. App. at 731, 663 S.E.2d at 919. After reviewing our state's case law regarding the standard for excusable neglect, we are unable to agree with the Industrial Commission's determination that defense counsel's actions amounted to excusable neglect. Failing to definitively determine whether a notice of appeal was filed does not demonstrate due diligence. Due to the applicable test for excusable neglect, we do not believe trial counsel's action in failing to confirm, and merely assuming, a notice of appeal had been filed amounts to excusable neglect. Trial counsel's errors were not extraordinary or unusual enough to

constitute excusable neglect, but were simply due to insufficient attentiveness.

Consequently, the Full Commission did not have jurisdiction to hear defendant's appeal as it lacked the inherent authority sometimes obtained through excusable neglect, and as a result, we must reverse the Full Commission's 26 July 2010 Opinion and Award, meaning Deputy Commissioner Glenn's 24 June 2009 Opinion and Award is re-implemented in full.

B. Defendant's Cross-Appeal

Due to our above decision on plaintiff's appeal, we must dismiss defendant's issues on cross-appeal as moot because the order appealed from has been vacated. Also, based on the fact that we are dismissing defendant's cross-appeal, we deny plaintiff's request for attorney fees due to a frivolous appeal, as we are not addressing defendant's cross-appeal.

III. Conclusion

We find that the Full Commission erred in hearing defendant's appeal, as defendant's argument of confusion as its reason for delay does not amount to a showing of excusable neglect. Therefore, we reverse the Full Commission's 26 July 2010 Opinion and Award and dismiss defendant's cross-appeal as moot. As a result, Deputy Commissioner Glenn's 24 June 2009 Opinion and Award becomes the authoritative judgment.

Reversed.

Judges McGEE and ERVIN concur.

STATE OF NORTH CAROLINA v. BERNIS HAROLD FOX

No. COA10-1485

(Filed 4 October 2011)

1. Indictment and Information—two indictments—prosecution on first

A second indictment for felony stalking was not superseding and defendant's prosecution was controlled by the first of two indictments where there was no indication that defendant was ever arraigned on the second indictment, there was no further reference to that file number in the record, and the jury was told that the State was proceeding on the first indictment.

2. Constitutional Law—double jeopardy—felony stalking

A conviction for felony stalking was vacated on double jeopardy grounds because the offense requires proof of multiple acts and the time periods for the course of conduct alleged here overlapped, so that the same acts could result in a conviction under either indictment. Even though the evidence of the earlier conduct might have been offered for other purposes, the evidence was sufficient to establish stalking under the prior indictment.

Appeal by defendant from judgment entered 23 September 2010 by Judge Franklin F. Lanier in Superior Court, Harnett County. Heard in the Court of Appeals 10 May 2011.

Attorney General Roy A. Cooper, III, by Director, Victims and Citizens Services David L. Elliott and Agency Legal Specialist Brian C. Tarr, for the State.

Richard Croutharmel, for defendant-appellant.

STROUD, Judge.

Bernis Harold Fox ("defendant") appeals from a conviction for felony stalking. Because evidence presented in support of defendant's indictment amounted to double jeopardy, we vacate defendant's conviction for felony stalking and attaining the status of habitual felon.

I. Background

On 22 February 2010, defendant was indicted for felony stalking and obtaining the status of habitual felon. Defendant was tried on

these charges at the 20 September 2010 Criminal Session of Superior Court, Harnett County. The State's evidence presented at trial tended to show that on 20 February 2009, defendant assaulted his girlfriend ("the victim") and as a result the victim obtained an *ex parte* domestic violence protection order against defendant, which was in effect from 5 March 2009 until 7 April 2009. Among other prohibitions, the protection order specifically ordered defendant not to commit

> any further acts of abuse or make any threats of abuse. The above-named respondent/defendant shall have no contact with the petitioner/plaintiff. No contact includes defendant-initiated contact, direct or indirect, by means such as telephone, personal contact, email, pager, gift-giving or telefacsimile machine[,] . . . . [and defendant] shall not assault, threaten, abuse, follow, harass, by telephone, visiting the home or workplace or other means or interfere with the plaintiff.

This protection order was extended to 31 March 2010 by consent order. Despite this order, in late February and early March 2009, defendant repeatedly called the victim on her cell phone, threatening to kill her, and was discovered by the victim's son in the victim's apartment while the victim was staying with another family. On 2 June 2009, defendant pled guilty to felony stalking of the victim and was sentenced to 11 to 14 months of imprisonment. The judgment listed the offense date as 5 March 2009. Defendant was incarcerated at Tyrrell Prison Work Farm from 7 July 2009 until 7 February 2010.

In October 2009, the victim received a letter in an envelope stamped "Tyrrell Prison Work Farm[.]" Even though the letter was addressed from "Ronald Ross" the victim believed it was from defendant based on its contents and its handwriting. The letter referenced many things that the victim and defendant had discussed privately, details regarding their sexual relationship, and specifically stated that "I never (hated) [sic] a bitch as much as I do you . . . for what u [sic] did[;]" the writer promised to make the victim "suffer[;]" after a reference to defendant's assault on the victim, it states "[n]ext time u [sic] won't be so lucky, if you don't kill yourself first[;]" and closed with "[s]ee you soon Bitch!" On 7 February 2010, around 7:50 p.m., the victim heard someone beating on the front door of her apartment. The victim looked through her window and saw defendant standing outside in front of her door. The victim then saw defendant raise his foot and kick her front door open. The victim called 911 and defendant left her apartment. Defendant was later apprehended by police approximately fifty yards from the victim's apartment and was

arrested. At trial, defendant denied writing the letter to the victim or going to the victim's apartment and kicking in her front door.

On 23 February 2010, a jury found defendant guilty of felony stalking. Defendant subsequently pled guilty to obtaining the status of habitual felon and the trial court sentenced defendant to a term of 92 to 120 months imprisonment for the consolidated offenses. Defendant gave notice of appeal in open court. On appeal, defendant contends that (1) the trial court violated his federal and state constitution rights by subjecting him to double jeopardy; (2) the trial court abused its discretion in answering a jury deliberation question; (3) the trial court erred in admitting his statements to a prison official; and (4) the trial court erred in admitting into evidence a written report of defendant's confession.

II. Double Jeopardy

Defendant contends that "the trial court violated the double jeopardy clause of the United States and North Carolina Constitutions by allowing the State to prosecute defendant on a 2010 felony stalking indictment that was facially duplicative of defendant's 2009 felony stalking conviction."

1. Preliminary issue

[1] Before addressing the substantive arguments as to double jeopardy, we first note that there is a preliminary issue as to which of two 2010 felony stalking indictments the State proceeded on in this case. Defendant was initially charged for felony stalking for offenses occurring "[o]n or [a]bout March 5, 2009 through February 8, 2010" in an indictment dated 22 February 2010 ("10-CRS-50582"). On 26 April 2010, defendant signed a "waiver/certification of arraignment" acknowledging that he had been arraigned on charge 10-CRS-50582. Again on 8 June 2010, defendant signed another "waiver/certification of arraignment" acknowledging that he had been arraigned on charge 10-CRS-50582 by his attorney. However, on 19 July 2010, defendant was charged for felony stalking by indictment but the date of the offense was changed to "[o]n or [a]bout April 7, 2009 through February 8, 2010[;]" the file number changed to 10-CRS-50582-A; and there is no indication on the indictment that it was a superseding indictment. Defendant contends that this 19 July 2010 second indictment did not supersede the 22 February 2010 first indictment because he was never arraigned on the 19 July 2010 second indictment for felony stalking. N.C. Gen. Stat. § 15A-646 (2009) states that

> [i]f at any time before entry of a plea of guilty to an indictment or information, or commencement of a trial thereof, another indictment or information is filed in the same court charging the defendant with an offense charged or attempted to be charged in the first instrument, the first one is, with respect to the offense, superseded by the second and, *upon the defendant's arraignment upon the second indictment or information*, the count of the first instrument charging the offense must be dismissed by the superior court judge. The first instrument is not, however, superseded with respect to any count contained therein which charged an offense not charged in the second indictment or information.

(Emphasis added.)

Here, there is no indication in the record that defendant was ever arraigned on the 19 July 2010 second indictment. We also note there is no further reference to file number "10-CRS-50582-A" in the record, as the verdict sheet and judgment state that defendant was guilty of felony stalking pursuant to 10-CRS-50582. Further, Judge Lanier informed the jury at the beginning of jury selection: "The defendant has been charged with one count of felony stalking, which is alleged to have occurred on or about March 5th, 2009, through February 8, 2010," indicating that it is was the 22 February 2010 first indictment that the State was proceeding in this case. Therefore, the record shows that the second indictment did not supersede the first, *see id.*, and the indictment dated 22 February 2010 controls ("10-CRS-50582").

2. Substantive analysis

[2] We next turn to address defendant's substantive arguments as to double jeopardy. In evaluating a double jeopardy claim, "[i]t is well established that the Double Jeopardy Clause of the North Carolina and United States Constitutions protect against (1) a second prosecution after acquittal for the same offense, (2) a second prosecution after conviction for the same offense, and (3) multiple punishments for the same offense." *State v. Newman*, 186 N.C. App. 382, 386-87, 651 S.E.2d 584, 587 (2007) (citation and quotation marks omitted), *disc. review denied*, 362 N.C. 478, 667 S.E.2d 234 (2008). "The standard of review for this issue is *de novo*, as the trial court made a legal conclusion regarding the defendant's exposure to double jeopardy." *Id.* at 386, 651 S.E.2d at 587. According to our Supreme Court,

> [t]he test of former jeopardy is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. Hence, the plea of former jeop-

> ardy, to be good, must be grounded on the 'same offense,' both in law and in fact, and it is not sufficient that the two offenses grew out of the same transaction. *If evidence in support of the facts alleged in the second indictment would be sufficient to sustain a conviction under the first indictment, jeopardy attaches, otherwise not.* However, if proof of an additional fact is required in the one prosecution, which is not required in the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same, and the plea of former jeopardy cannot be sustained. . . .

State v. Cameron, 283 N.C. 191, 198, 195 S.E.2d 481, 486 (1973) (quoting 2 Strong, N.C. Index 2d, Criminal Law § 26, pp. 517-18) (emphasis added). This Court has further noted that "[t]he test of former jeopardy is not whether respondent has been tried for the same act, but whether he has been put in jeopardy for the same *offense*." *In re Drakeford*, 32 N.C. App. 113, 118, 230 S.E.2d 779, 782 (1977) (citation omitted and emphasis in original). Defendant contends that "the case meets the Cameron test for double jeopardy: the State's evidence in support of the facts alleged in the 2010 [felony stalking] indictment was sufficient to sustain a conviction under the 2009 [felony stalking] indictment."

The question before us is whether "evidence in support of the facts alleged in the [22 February 2010 felony stalking] indictment would be sufficient to sustain a conviction under the 2009 [felony stalking] indictment[.]" *See Cameron*, 283 N.C. at 198, 195 S.E.2d at 486. Here, the offenses in the 2010 and 2009 indictments were the "same . . . in law[,]" *see id.*, as defendant was charged in both with felony stalking, pursuant to N.C. Gen. Stat. § 14-277.3A(c) (2009), which states:

> A defendant is guilty of stalking if the defendant willfully on more than one occasion harasses another person without legal purpose or willfully engages in a course of conduct directed at a specific person without legal purpose and the defendant knows or should know that the harassment or the course of conduct would cause a reasonable person to do any of the following:
>
> (1) Fear for the person's safety or the safety of the person's immediate family or close personal associates.
>
> (2) Suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

N.C. Gen. Stat. § 14-277.3A(d) further prescribes the punishment and enhanced punishments for a violation of this statute:

> A violation of this section is a Class A1 misdemeanor. A defendant convicted of a Class A1 misdemeanor under this section, who is sentenced to a community punishment, shall be placed on supervised probation in addition to any other punishment imposed by the court. A defendant who commits the offense of stalking after having been previously convicted of a stalking offense is guilty of a Class F felony. A defendant who commits the offense of stalking when there is a court order in effect prohibiting the conduct described under this section by the defendant against the victim is guilty of a Class H felony.

As this statue permits the enhancement of punishment, it appears from the 2009 judgment that defendant pled guilty to felony stalking as a class "H" felony and the offense date was 5 March 2009. Therefore, the 2009 stalking conviction was enhanced from a Class A1 misdemeanor to a class H felony because there was "a court order in effect prohibiting the conduct described under this section by the defendant against the victim." *See* N.C. Gen. Stat. § 14-277.3A(d).

Accordingly, we turn next to determining whether the offenses in the 2010 and 2009 indictments were the "same . . . in fact[.]" *See Cameron*, 283 N.C. at 198, 195 S.E.2d at 486. As noted above, the 22 February 2010 felony stalking indictment was for offenses occurring "[o]n or [a]bout March 5, 2009 through February 8, 2010[.]" From the record before us it appears that the State presented evidence, over defendant's objection, regarding defendant's interactions with the victim from February 2009 until April 2009. The State was permitted to enter into evidence the victim's 23 February 2009 petition for an *ex parte* domestic violence protection order against defendant, and the resulting *ex parte* domestic violence protection order which was in effect until 7 April 2009. The clerk of court was permitted to read the victim's statement from that petition:

> on the night of February 19, we had an argument and I asked him not to disrespect me in my house. He got mad and pushed me to the floor, hit me, started pulling my hair. Took my cell phone and broke it, hit me in the face with it and hit me upside the head. I ran next door to get away. They called the police.

The order prohibited defendant from *inter alia* contacting the victim by phone or going to her house. The State was also allowed to enter

into evidence the 7 April 2009 consent order extending the domestic violence protection order from 7 April 2009 until 31 March 2010. The victim testified that in February 2009, she got in an argument with defendant and he began hitting her multiple times with his fists, broke her cell phone, and spit in her face, while repeating to her "I hate you, you bitch." As defendant was leaving her apartment, he stomped on the side of her leg, while she was lying on the floor bleeding, telling her "see what you made me do, you stupid bitch?" The victim testified that as a result of this assault, she was transported to the hospital by ambulance and her injuries included two black eyes, "a knot on [her] forehead" and on the side of her face, and bruises all over her body. The State entered into evidence pictures of the victim following the assault in February 2009. The victim further testified that even after she obtained the domestic violence protection order defendant continued calling her on her "cell phone every day[,]" calling her a "bitch" and telling her that he was going to kill her, which made her feel "scared." The victim testified that after she obtained the domestic violence protection order she was not living in her apartment because she was scared that defendant would return and several times defendant broke into her apartment. The victim's son also confirmed that after the February 2009 assault by defendant, his mother would not stay in her apartment because she was afraid of defendant. He further testified that on 13 March 2009 he went to his mother's apartment to check on it. He entered and found defendant in the apartment, which caused defendant to exit out the back door, and he called the police.

Even though the State went on to present evidence as to defendant's conduct towards the victim in late 2009 and 2010, the above evidence establishes a conviction for stalking as it shows that defendant, following the protective order, willfully harassed the victim by calling her on her cell phone several times and entered her apartment and "a reasonable person" would have feared for their personal safety, given defendant's history of physically assaulting the victim. *See* N.C. Gen. Stat. § 14-277.3A(c). Thus, this early 2009 evidence "in support of the facts alleged in the [22 February 2010] second indictment would be sufficient to sustain a conviction under the [2009] first indictment[.]" *See Cameron*, 283 N.C. at 198, 195 S.E.2d at 486. Further, there was evidence presented that defendant was in violation of a protection order when he committed this harassment, justifying the increase of defendant's punishment from a Class A1 misdemeanor to a Class H felony. *See* N.C. Gen. Stat. § 14-277.3A(d). Therefore, because of the 22 February 2010 felony stalking indictment

dated "[o]n or [a]bout March 5, 2009 through February 8, 2010[,]" and the presentation of the above evidence in support of the 2010 indictment for actions occurring in March 2009, "jeopardy attache[d]" *Cameron*, 283 N.C. at 198, 195 S.E.2d at 486, which resulted in "multiple punishment[] for the same offense." *See Newman*, 186 N.C. App. at 386-87, 651 S.E.2d at 587. Accordingly, we hold that the trial court erred in allowing this 2009 evidence in violation of defendant's constitutional rights to be free from double jeopardy.

The State argues that "additional facts were required to prove the allegations in the indictment from February 22, 2010, that were not required in the previous [2009] indictment." The State's argument is referencing the portion of *Cameron* which states

> if proof of an additional fact is required in the one prosecution, which is not required in the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same, and the plea of former jeopardy cannot be sustained. . . .

Cameron, 283 N.C. at 198, 195 S.E.2d at 486. The difference between *Cameron* and this case is that *Cameron* dealt with offenses which were committed on one particular occasion, while this offense requires proof of a "course of conduct" or harassment "on more than one occasion[.]" *See* N.C. Gen. Stat. § 14-277.3A(c). In *Cameron*, the defendant possessed and sold heroin on one particular date, and he was properly convicted of two separate crimes arising from this event, both possession and sale of a narcotic drug. *Id.* at 192, 195 S.E.2d at 482. Here, the crime charged requires proof of multiple acts of defendant; this was true for the 2009 conviction just as for the 2010 charge. Because the time periods of the "course of conduct" for both indictments overlapped, the same acts could result in a conviction under either indictment. For this reason, the offenses in the 2010 and 2009 indictments were the "same . . . in law[,]" *see Drakeford*, 32 N.C. App. at 118, 230 S.E.2d at 782, as defendant was charged in both instances with felony stalking, pursuant to N.C. Gen. Stat. § 14-277.3A(c). Even though N.C. Gen. Stat. § 14-277.3A(d) permits the enhancement of the punishment based on whether the defendant had been previously convicted of stalking or had stalked the victim while a court order was in effect prohibiting the conduct described, there is no indication in the statute that these punishment enhancements amount to a completely different crime such that "proof of an additional fact is required" to satisfy the elements of stalking "in the one prosecution, which is not required in the other[.]" *See Cameron*, 283 N.C. at 198, 195 S.E.2d at 486.

The State further argues that the evidence of defendant's interactions with the victim from February 2009 until April 2009 was presented to show that defendant "had been convicted of Felony Stalking prior to the current charge[;]" "the context in which the [domestic violence protection order] was taken out[;]" to establish the victim's "reasonable fear" of defendant; and in any event, the trial court gave the jury instructions that the jury should only consider this evidence of "a prior conviction in passing upon [defendant's] guilt or innocence of the primary charge." This may be true, if the indictment had properly alleged a course of conduct beginning after March 2009, but it did not. As noted above, the punishment for felony stalking can be increased from a Class A1 misdemeanor to a Class F felony if a defendant "commits the offense of stalking after having been previously convicted of a stalking offense[.]" *See* N.C. Gen. Stat. § 14-277.3A(d). Therefore, evidence of defendant's prior conviction for stalking or a jury charge regarding that prior conviction would have been permitted. However, here, the State not only presented evidence of defendant's prior 2009 conviction for felony stalking and the domestic violence protection order in place, it also presented sufficient evidence to establish felony stalking in February 2009 to March 2009, including defendant's repeated calling of the victim on her cell phone and entering in her apartment, as discussed above, and the admission of this evidence in support of his 2010 indictment amounted to double jeopardy. Even though the evidence may have been offered for other purposes and the trial court gave an instruction to the jury, the introduction of the evidence of defendant's interactions with the victim during early 2009 amounted to a violation of defendant's constitutional rights.

Therefore, we hold that the indictment for defendant's 2010 conviction for felony stalking was for offenses occurring "[o]n or [a]bout March 5, 2009 through February 8, 2010" ("10-CRS-50582") and the State put forth sufficient evidence of defendant's interactions with the victim during March 2009 to amount to double jeopardy. Accordingly, we vacate defendant's 2010 conviction for felony stalking. *See State v. Williams*, 201 N.C. App. 161, 174, 689 S.E.2d 412, 419 (2009) (vacating the defendant's convictions on double jeopardy grounds). Because we vacate defendant's underlying felony conviction, we also vacate defend-ant's judgment sentencing defendant as a habitual felon. *See* N.C. Gen. Stat. § 14-7.5 (2009). As defendant's convictions have been vacated, we need not address his other issues on appeal.

VACATED.

Judges McGEE and BEASLEY concur.

STATE OF NORTH CAROLINA v. TERRY A. FOX

No. COA11-273

(Filed 4 October 2011)

1. Sexual Offenders—registration—unreported change of address—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss charges of failing to comply with the sex offender registration reporting requirements in 2009 by not notifying the sheriff of a change of his address.

2. Sexual Offenders—registration—change of address reporting—intent

Although the *mens rea* requirement in the sex offender change of address statute was removed by a 1997 amendment to N.C.G.S. § 14-208.11(a), a 2006 amendment reintroduced intent-based language.

3. Appeal and Error—preservation of issues—void for vagueness challenge—not raised at trial

A constitutional vagueness challenge to the sex offender change of address statutes was not raised at trial and was not considered on appeal.

4. Appeal and Error—preservation of issues—invited error rather than plain error—not reviewed

Defendant's asserted plain error in the instructions in a sex offender change of address prosecution was actually invited error because defendant consented to the manner in which the trial court gave the instruction and adopted language from the instruction in his closing argument. The asserted error was not reviewed.

5. Constitutional Law—effective assistance of counsel—fairness of trial—not affected

Defendant was not denied effective assistance of counsel where his attorney failed to object to testimony in a prosecution where the failure to object did not affect the fairness and integrity of the proceedings or turn defendant's trial into a farce and mockery of justice.

STATE v. FOX

[216 N.C. App. 153 (2011)]

Appeal by defendant from judgment entered 4 November 2010 by Judge Kenneth F. Crow in Carteret County Superior Court. Heard in the Court of Appeals 12 September 2011.

Roy Cooper, Attorney General, by Peter A. Regulski, Assistant Attorney General, for the State.

John T. Hall, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Terry A. Fox appeals from a judgment entered upon a jury verdict finding him guilty of willfully failing to comply with the sex offender registration reporting requirements set forth in N.C.G.S. § 14-208.9. We find no error.

Defendant stipulated at trial and does not dispute on appeal that he was convicted of second-degree rape on 9 February 1996 in Carteret County, North Carolina, and that, as a result of this conviction, defendant was required to register as a sex offender in the county. The record further shows that defendant did register as a sex offender in Carteret County on 2 February 2006 and that he "was required to notify the sheriff of a change of address no later than 3 days after the change."

The evidence presented at trial tended to show that, in 2009, Angela Wall lived in the downstairs apartment of a two-story, two-unit converted garage at 2717 Piney Park Circle in Morehead City, North Carolina. Ms. Wall worked evenings at the Crystal Clean Laundromat, and spent her days at home with her daughter and then-four-year-old grandson. According to Ms. Wall's testimony, when the apartment above hers became vacant, Ms. Wall notified her manager at the laundromat, Katina Teague, of the vacancy, who moved into the upstairs apartment shortly thereafter with her twelve-year-old son, Daren. Because of the open, external staircase leading up to Ms. Teague's apartment, and because the only barrier between the apartments was Ms. Teague's floor, Ms. Wall said that, while she was in her apartment or outside smoking, she was aware of the comings and goings in and out of Ms. Teague's apartment and could "hear[] everything."

According to Ms. Wall, about two months after Ms. Teague moved into the upstairs apartment, defendant—who had recently begun dating Ms. Teague—also moved into the upstairs apartment. Defendant's living arrangement with Ms. Teague continued for several months until the end of December 2009, when Ms. Wall "got the word" that

defendant was a registered sex offender, and reported the information to her landlord and then to the police.

Detective Harold Pendergrass with the Carteret County Sheriff's Department was responsible for overseeing the sex offender registry for Carteret County. Detective Pendergrass testified that, in November 2008, he met with defendant to review defendant's responsibilities to comply with the statutory requirements of registering as a convicted sex offender. During this visit with Detective Pendergrass, defendant completed an acknowledgement form on which defendant affixed his initials more than twenty-five times to affirm that he understood what was required of him to remain in compliance with the sex offender registry program, including the requirement that he must notify the county sheriff when he changes his address. At the time that Ms. Wall contacted the police in December 2009 to report that defendant was living in the apartment above hers in Morehead City, the detective had not been informed that defendant had changed his address from his father's residence at 177 Pagoda Court in Newport, North Carolina, to the Piney Park Circle apartment in Morehead City.

After concluding his investigation of Ms. Wall's complaint, the detective obtained a warrant for defendant's arrest. Defendant was indicted for failing to notify the sheriff of his change of address as required by Article 27A of the General Statutes. *See* N.C. Gen. Stat. §§ 14-208.9, 14-208.11(a)(2) (2009). At trial, defendant moved to dismiss the charge at the close of the State's evidence and at the close of all of the evidence, which the court denied. Defendant was found guilty by a jury of willfully failing to comply with the change of address notification requirements of the sex offender registry and, on 4 November 2010, the court ordered defendant to serve a mitigated sentence of twenty to twenty-four months imprisonment. Defendant appeals.

I.

[1] Defendant first contends the trial court erred by denying his motion to dismiss because he asserts that the State provided insufficient evidence that defendant changed his address. We disagree.

"Upon defendant's motion for dismissal, the question for the Court 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. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98,

261 S.E.2d 114, 117 (1980). "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom . . . ." *Id.* at 99, 261 S.E.2d at 117. "The defendant's evidence, unless favorable to the State, is not to be taken into consideration. However, when not in conflict with the State's evidence, it may be used to explain or clarify that offered by the State." *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971). "[C]ontradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion." *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. "The trial court in considering such motions is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight." *Id.* "The trial court's function is to test whether a *reasonable inference* of the defendant's guilt of the crime charged may be drawn from the evidence." *Id.*

Although the offense for which defendant was convicted is a violation of N.C.G.S. § 14-208.9, this Court has previously determined that, because N.C.G.S. §§ 14-208.9 and 14-208.11 "deal with the same subject matter, they must be construed in *pari materia* to give effect to each." *State v. Holmes*, 149 N.C. App. 572, 576, 562 S.E.2d 26, 30 (2002). N.C.G.S. § 14-208.9(a) provides, in relevant part: "If a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered." N.C. Gen. Stat. § 14-208.9(a); *Holmes*, 149 N.C. App. at 576, 562 S.E.2d at 30. A person required to register in accordance with Article 27A who "willfully . . . [f]ails to notify the last registering sheriff of a change of address as required by this Article" is guilty of a Class F felony. N.C. Gen. Stat. § 14-208.11(a)(2); *Holmes*, 149 N.C. App. at 576, 562 S.E.2d at 30. Read together, the offense of failing to notify the appropriate sheriff of a sex offender's change of address "contains three essential elements: (1) the defendant is a person required . . . to register; (2) the defend-ant change[s] his or her address; and (3) the defendant [willfully[1]] [f]ails to notify the last registering sheriff of [the] change of address, not later than

1. **[2]** We recognize that our Supreme Court determined that "[t]he crime of failing to notify the appropriate sheriff of a sex offender's change of address under N.C.G.S. § 14-208.11(a) is a strict liability offense." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (citing *State v. Bryant*, 359 N.C. 554, 562, 614 S.E.2d 479, 484

the [third] day after the change." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (omission and first, third, and fourth alterations in original) (citations and internal quotation marks omitted). Since defendant only argues that the State presented insufficient evidence that he changed his address, we limit our review accordingly.

In *Abshire*, our Supreme Court examined the definition of "address" as the term is used in N.C.G.S. §§ 14-208.9(a) and 14-208.11(a)(2) of the registration program, *see id.* at 329–32, 677 S.E.2d at 449–51, and concluded that "a sex offender's address indicates his or her residence, meaning the actual place of abode where he or she lives, whether permanent or temporary," "so that law enforcement authorities and the general public know the whereabouts of sex offenders in our [S]tate." *Id.* at 331, 677 S.E.2d at 451; *see also id.* (noting that "a person's residence is distinguishable from a person's domicile[; d]omicile is a legal term of art that denotes one's permanent, established home, whereas a person's residence may be only a temporary, although actual, place of abode" (citation and internal quotation marks omitted)). In other words, "the Supreme Court has concluded that the term 'address' as used in the sex offender registration statutes should be understood as describing or indicating the location where someone lives," *State v. Worley*, 198 N.C. App. 329, 335, 679 S.E.2d 857, 862 (2009) (internal quotation marks omitted), "even if it is a homeless shelter, a location under a bridge or some similar place." *Id.* at 338, 679 S.E.2d at 864. "Determining that a place is a person's residence suggests that certain activities of life occur at the particular location." *Abshire*, 363 N.C. at 332, 677 S.E.2d at 451. "Beyond mere physical presence, activities possibly indicative of a person's place of residence are numerous and diverse, and there are

(2005), *on remand*, 178 N.C. App. 742, 632 S.E.2d 599 (2006) (unpublished)). However, this determination was based on "a 1997 amendment to this provision deleting the statutory *mens rea* requirement," *Bryant*, 359 N.C. at 562, 614 S.E.2d at 484, which had previously provided that a person who was required to register in accordance with Article 27A and failed to do so "knowingly and with the intent to violate the provisions of this Article" would be guilty of certain classes of offenses. 1995 Sess. Laws 2046, 2049, ch. 545, § 1. Nevertheless, when the statute was amended in 2006, subsection (a) was modified to provide that a person who was required to comply with the requirements of Article 27A and "willfully" failed to do so on or after 1 December 2006 would be guilty of a Class F felony. 2006 Sess. Laws 1065, 1070, 1085–86, ch. 247, §§ 8(a), 22. In other words, with its 2006 amendment, the General Assembly re-introduced intent-based language into the provision, effectively reviving the original *mens rea* requirement that had first been removed by the 1997 amendment and had rendered a violation of the statute a strict liability offense. Consequently, we believe that the elements of this offense should reflect the General Assembly's re-introduction of intent-based language into the statute in 2006.

a multitude of facts a jury might look to when answering whether a sex offender has changed his or her address." *Id.*

In the present case, Ms. Wall testified that, beginning about a month or two after Ms. Teague moved into the upstairs garage apartment in Morehead City, during the latter half of 2009, defendant stayed at Ms. Teague's apartment every day and evening. Ms. Wall made the following observations:

> First of all, I saw a duffle bag going up with him toting them. And then at night I'd grill out a whole lot in the summertime. They would come downstairs and commute [sic] with us. I'd see him leave with her, come back with her. In the morning time he would take her to work and come back on [sic] her vehicle at the home upstairs. I've seen him take Daren to school and come back with the vehicle, and he drove around all day, basically, on [sic] her vehicle while she worked and brought her lunch.

She also testified, "You could hear them upstairs and see them up and downstairs, the stairs going in, shut the lights out and go to sleep. You could hear them upstairs." She further testified that defendant and Ms. Teague would drink beer and "hang out" with Ms. Wall "[j]ust about every weekend." Detective Pendergrass then testified that, when he interviewed defendant's father, James Fox, at the end of 2009—with whom defendant was purportedly living during this time—Mr. Fox said that defendant "ha[d] not been living at the 177 Pagoda Court residence on a regular basis but instead was residing with a white female subject in Morehead City, North Carolina." Patrol Officer Tim Quillan further testified that, when he was dispatched to speak with defendant's father after Ms. Wall contacted the police, Mr. Fox "advised [the officer] that his son did not live there, [and that defendant] lived with his girlfriend somewhere in Morehead by the old Belk." Additionally, on cross-examination, Ms. Teague said that "[her] son told [her] that he told [Detective] Pendergrass that [defendant] lives [with them in Morehead City]." Therefore, we conclude that the State presented sufficient evidence to withstand defendant's motion to dismiss. Accordingly, we overrule this issue on appeal.

II.

[3] Defendant next asserts that N.C.G.S. §§ 14-208.9 and 14-208.11 are "unconstitutionally vague" and that N.C.G.S. § 14-208.9 was applied against defendant "in an unconstitutional manner." However, defendant "did not raise his void for vagueness challenge to [N.C.G.S.]

§§ 14-208.9(a) and 14-208.11(a)(2) before the trial court." *See Worley*, 198 N.C. App. at 339, 679 S.E.2d at 864. Thus, "we need not consider [d]efendant's constitutional arguments on the merits and decline to do so." *See id.; State v. Creason*, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985). Accordingly, we overrule this issue on appeal.

III.

[4] Defendant next contends the trial court committed plain error by embellishing the third element of the substantive charge by defining the term "address" and instructing the jury as follows:

> Third thing the State must prove beyond a reasonable doubt is that the defendant willfully changed his address and failed to provide written notice of his new address in person within three business days of receiving it to the sheriff's office listed on the address verification form.
>
> Now, for the purposes of the North Carolina sex offender registry statute, the North Carolina Supreme Court has determined that a person's address has the same meaning as residence. In addition, our North Carolina Supreme Court has determined that a person's address or residence is the act or fact of living in a given place for some given time and that a person's address or residence is defined as a person's place of abode, whether permanent or temporary.

Defendant suggests that the trial court erred because it did not also instruct the jury that "mere physical presence at a location is not the same as establishing a residence." *See Abshire*, 363 N.C. at 332, 677 S.E.2d at 451.

During the charge conference in the present case, the State requested a modification to North Carolina Criminal Pattern Jury Instruction 207.75, which sets out the elements for willfully failing to comply with the sex offender registration law. *See* N.C.P.I. Crim. 207.75 (2009). After a brief discussion with counsel, the court provided copies of the proposed jury instructions and asked both counsel whether they had any objections to the proposed instructions. Neither counsel objected to the charge as written. Moreover, defense counsel incorporated the court's instructional language into his closing argument to the jury.

"It is well established that a defendant who 'causes' or 'joins in causing' the trial court to 'commit error is not in a position to repudiate his action and assign it as ground for a new trial.' " *State v. Jones*, ___ N.C. App. ___, ___, 711 S.E.2d 791, 796 (2011) (quoting *State v.*

Payne, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971)). Additionally, "a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), *supersedeas denied and disc. reviews denied and dismissed as moot*, 355 N.C. 216, 560 S.E.2d 141–42 (2002).

Thus, "[a]lthough defendant labels this [issue on appeal] as 'plain error,' it is actually invited error because, as the transcript reveals, defendant consented to the manner in which the trial court gave the instructions to the jury," *see State v. Wilkinson*, 344 N.C. 198, 235–36, 474 S.E.2d 375, 396 (1996), and adopted the language from this instruction into his closing argument. Accordingly, "[i]f there was error in the charge, it was invited error and we shall not review it." *See id.* at 236, 474 S.E.2d at 396 (internal quotation marks omitted).

IV.

[5] Lastly, defendant contends he was denied effective assistance of counsel because his trial counsel failed to object to testimony that defendant claims was hearsay, and failed to object to testimony that defendant spent thirty days in jail for the offense of driving while his license was revoked. "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985). "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* at 563, 324 S.E.2d at 248.

Here, defendant first suggests he was prejudiced by his counsel's failure to object to his own witness's testimony that he served thirty days for his conviction on a Class 1 misdemeanor. *See* N.C. Gen. Stat. § 20 28(a) (2009). However, in light of defendant's stipulation that he was convicted of the then Class D—now Class C—felony of second-degree rape, *see State v. Lawrence*, 193 N.C. App. 220, 224, 667 S.E.2d 262, 265 (2008), and in the absence of legal argument in support of his assertion, we are not persuaded that defense counsel's failure to object to this testimony affected the "fairness and integrity" of the proceedings in the present case. Defendant also asserts without support that some of the testimony offered by defendant's girlfriend, by Detective Pendergrass, and by Officer Quillan included hearsay, and that defense counsel was ineffective for failing to object to this

testimony and for failing to request that the testimony be stricken. After careful review of defendant's limited argument, we conclude that defense counsel's failure to object to or strike the challenged testimony did not amount to a representation that was "so lacking" as to turn defendant's trial into "a farce and a mockery of justice." *See State v. Sneed*, 284 N.C. 606, 612, 201 S.E.2d 867, 871 (1974). Accordingly, we overrule this issue on appeal.

No Error.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA v. DANNY RAY McDONALD

No. COA11-104

(Filed 4 October 2011)

1. Evidence—crack cocaine—analysis—standards—chemist testifying

The trial court did not abuse its discretion in allowing the State's expert witness to testify about the results of his chemical analysis of a substance seized from defendant. Defendant provided no legal authority establishing that ASCLD/LAB accreditation is required when the forensic chemist who conducted the analysis of the alleged controlled substance testifies at trial. Any doubts as to the validity of the witness's analysis or his conclusions should have been addressed during defendant's cross-examination of the expert witness.

2. Evidence—drug analysis—standards—lab analyst testifying

The trial court did not err in its admission of the expert's laboratory report into evidence where the testing analyst testified at trial. N.C.G.S. § 8-58.20(b) applies when the analyst does not testify and is not controlling here.

Appeal by defendant from judgment entered 25 August 2010 by Judge Theodore S. Royster in Cabarrus County Superior Court. Heard in the Court of Appeals 31 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.

James H. Monroe for defendant-appellant.

HUNTER, Robert C., Judge.

Danny Ray McDonald ("defendant") appeals his conviction for felony possession of cocaine. Defendant argues the trial court committed plain error in allowing the State's expert witness, a forensic chemist, to testify to the results of his chemical analysis of the alleged controlled substance seized from defendant, and in admitting the expert's laboratory report into evidence. Defendant contends the results of the chemical analysis were not admissible, because the testing was not performed by an accredited laboratory and the procedures utilized were not sufficiently reliable. After careful review, we disagree.

Background

The evidence at trial tended to establish the following facts: On 24 May 2008, Sergeant Joe O'Donnell of the Concord Police Department was on patrol in Concord, North Carolina when he observed defendant driving a motorcycle that did not have mirrors. Sergeant O'Donnell followed defendant and observed the motorcycle wobble as defendant was driving. Attempting to stop defendant, Sergeant O'Donnell activated the blue lights on his patrol car, but defendant did not respond. Sergeant O'Donnell then activated his siren and defendant travelled approximately one quarter of a mile before stopping.

While informing defendant why he had been stopped, Sergeant O'Donnell noticed an odor of burnt crack cocaine emanating from defendant's person. Sergeant O'Donnell asked defendant if he had smoked any crack cocaine and defendant denied doing so. When asked if he had been around anyone smoking crack cocaine, defendant stated that he had been at a party the night before where someone had smoked crack cocaine. Sergeant O'Donnell then asked defendant if he had any illegal drugs or weapons on his person. Defendant responded he did not, held out both of his hands and said, " '[Y]ou can check me.' "

Upon searching defendant, Sergeant O'Donnell found a glass tube, which he understood to be commonly used for smoking crack cocaine, and three small white rocks. Defendant stated he had purchased the items for someone else. Sergeant O'Donnell then placed

defendant under arrest for possession of narcotics. The Concord Police Department mailed the three confiscated rocks to NarTest, LLC ("NarTest") in Morrisville, North Carolina for chemical analysis.

The Cabarrus County Grand Jury indicted defendant for possession of cocaine and for having attained habitual felon status. Defendant filed a motion to suppress all evidence resulting from Sergeant O'Donnell's stop and search of defendant, arguing the sergeant did not have reasonable suspicion to stop defendant, did not have probable cause to search defendant, and did not have the right to ask defendant for his consent to be searched. Following a hearing on the matter, the trial court denied the Motion.

Defendant's case came on for trial during the 23 August 2010 Criminal Session of Superior Court of Cabarrus County. The State called as a witness H.T. Raney, Jr. ("Raney"), a forensic chemist employed with NarTest who analyzed the three white rocks seized from defendant. Raney, qualified as an expert in forensic chemistry by the trial court, testified as to the tests and procedures utilized in his analysis of the seized substance, and concluded it was a cocaine base, Schedule II controlled substance.

The jury found defendant guilty of possession of cocaine and defendant pled guilty to attaining habitual felon status. The trial court sentenced defendant to a minimum of 107 months imprisonment and a maximum of 138 months imprisonment. Defendant gave notice of appeal in open court.

Discussion

[1] Defendant argues the trial court committed plain error in allowing Raney to testify as an expert forensic chemist and in admitting Raney's opinion and laboratory report into evidence because the testing of the alleged controlled substance was not conducted by an accredited laboratory and was not sufficiently reliable. We disagree.

We will not disturb a trial court's decision to admit expert testimony absent a finding that the trial court abused its discretion, such that the trial court's decision was arbitrary and not the result of a reasoned decision. *State v. Crandell*, ___ N.C. App. ___, ___, 702 S.E.2d 352, 357 (2010), *disc. rev. denied*, ___ N.C. ___, 710 S.E.2d 34 (2011). Furthermore, we note that because defendant did not object to Raney's testimony regarding the results of his forensic analysis or make a specific objection to the introduction of Raney's laboratory

report,[1] defendant must establish not only that the trial court erred, but that the error amounted to plain error. N.C. R. App. P. 10(a)(4) (2011); *State v. Locklear*, 172 N.C. App. 249, 259, 616 S.E.2d 334, 341 (2005). To establish plain error, defendant must show "the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002). We conclude the trial court did not err in admitting Raney's testimony or his laboratory report, and therefore, did not commit plain error.

Rule 702(a) of the North Carolina Rules of Evidence provides that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2009).[2] As our Supreme Court discussed in *Howerton v. Arai Helmet, Ltd.*, our case law has established a three-prong inquiry by which a trial court may determine the admissibility of expert testimony: "(1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citations omitted).

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1. The record reveals that upon the State's introduction of Raney's laboratory report, defendant requested the trial court note his "previous objection" to the report, and the court admitted the report over defendant's objection. The record does not reveal the basis of defendant's objection. On appeal, defendant argues no "specific objection" was made to the introduction of the laboratory report and seeks plain error review. As it is not the duty of this Court to supplement defendant's brief with argument, *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358, *writ denied*, *rev. denied*, 360 N.C. 63, 623 S.E.2d 582 (2005), we review for plain error.

2. The General Assembly recently amended Rule 702(a) to read as follows:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, *or otherwise, if all of the following apply: (1) The testimony is based upon sufficient facts or data. (2) The testimony is the product of reliable principles and methods. (3) The witness has applied the principles and methods reliably to the facts of the case.*

2011 N.C. Sess. Law ch. 283, § 1.3 (effective Oct. 1, 2011) (emphasis added). The amended statute only applies to actions commenced on or after 1 October 2011 and does not affect our analysis. *Id.*

As to the first prong of the inquiry, determining whether an expert's "method of proof is sufficiently reliable as an area for expert testimony," the trial court may consider an expert's testimony as to the reliability, or may take judicial notice of the matter, or a combination of both. *Howerton*, 358 N.C. at 459, 597 S.E.2d at 686–87. In the absence of precedence on the reliability of the method of proof, "the trial court should generally focus on the following nonexclusive 'indices of reliability' . . . 'the expert's use of established techniques, the expert's professional background in the field, the use of visual aids . . . and independent research conducted by the expert.' " *Id.* at 460, 597 S.E.2d at 687 (quoting *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 853 (1990)).

Furthermore, the *Howerton* Court noted this assessment is a "foundational inquiry" into the adequacy of the expert's methodology and does not require the reliability of the evidence to be conclusively established before it is admitted into evidence. *Id.* Therefore, once the trial court determines the expert's methods are sufficiently reliable, any doubt as to the "quality of the expert's conclusions go to the weight of the testimony rather than its admissibility." *Id.* at 461, 597 S.E.2d at 688. Any perceived deficiencies in the evidence may be brought forth during cross-examination. *See Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 244, 311 S.E.2d 559, 571 (1984) ("It is the function of cross-examination to expose any weaknesses in [expert] testimony . . . .").

In the present case, defendant does not contest the reliability of Raney's qualifications as an expert in forensic chemistry, the relevancy of Raney's testimony, or that the tests he performed in conducting his analysis are generally accepted in the scientific community. Rather, defendant argues that Raney's testing *procedures*, *policies*, and *protocols* were not established by the State to be reliable or generally accepted in the scientific community. Specifically, defendant notes, there was no testimony that the tests were performed in accordance with rules or procedures adopted by the State Bureau of Investigation ("SBI"), or that the tests were conducted by a laboratory accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board ("ASCLD/LAB"). Defendant further argues that because NarTest is not accredited by the ASCLD/LAB or any accrediting organization, it is impossible to know whether the forensic testing conducted at NarTest was sufficiently reliable for the evidence to be admissible. We disagree.

While defendant does not contest Raney's qualifications as a forensic chemist, a brief review of his background is helpful for the context of our discussion. At trial, Raney testified that he holds a bachelor's degree in chemistry and biology, and has trained at the "SBI academy" and the "Drug Enforcement Agency in Quantico." Prior to being hired at NarTest in 2004, Raney was a special agent at the SBI for over 25 years and was assigned to the drug laboratory for the identification of controlled and non-controlled substances. Raney testified that while he was employed at the SBI he worked on the identification of evidence in over 50,000 cases and that he had testified, as an expert, on the analysis of controlled substances more than 900 times in state, federal, and military proceedings.

Raney acknowledged that NarTest is not accredited by ASCLD/LAB, but testified it is licensed by the State of North Carolina to perform analysis of controlled substances and by the Drug Enforcement Administration ("DEA") to perform analytical testing on Schedule I through IV controlled substances. Raney described the process he follows at NarTest when handling a package containing a substance for testing. Raney also described the tests he performed on the evidence at issue in this case, as well as the equipment and procedures used to perform those tests.[3] Raney testified, in detail, as to what each test entailed and the measures he employed to ensure the accuracy of each test; this included the calibration of the equipment and the use of "blank" samples to clean the instruments and prevent cross-contamination between samples of evidence. Significantly, the procedures Raney used at NarTest were the same procedures he used since 1977 while working at the SBI; testing methods that are accepted by the forensic science community worldwide. Additionally, Raney testified that while working at the SBI, he was certified on the same equipment, and trained to perform the same tests, that he utilized at NarTest. Thus, contrary to defendant's assertion, Raney testified to the procedures he used in his analysis of the evidence seized from defendant. We conclude, through Raney's testimony as to his professional background and use of established forensic techniques, the State met its burden of establishing " 'indices of reliability,' " as contemplated in *Howerton*, sufficient to justify the trial court's admission of Raney's testimony.

3. According to Raney's testimony, NarTest has developed a drug-testing device for use by law enforcement agencies. This Court recently noted the "NarTest machine" had not yet been approved for the identification of controlled substances by the State or any agency of the State. *State v. Meadows*, 201 N.C. App. 707, 711, 687 S.E.2d 305, 308, *writ denied*, *rev. denied*, 364 N.C. 245, 699 S.E.2d 640 (2010). However, the NarTest machine was not utilized by Raney in his analysis of the evidence in this case.

Although the NarTest laboratory is not accredited by ASCLD/LAB or another accrediting organization, defendant has provided no legal authority establishing that such accreditation is required when the forensic chemist who conducted the analysis of the alleged controlled substance testifies at trial. Here, the testing analyst's testimony established the laboratory in which the analysis was conducted is licensed both by the State and the DEA to perform analytical testing on Schedule I through IV controlled substances; the tests performed on the substance seized from defendant were the same tests performed at the SBI laboratory when identifying controlled substances; the tests were performed on the same equipment that is used by the SBI laboratory; and the testing methodology used by the analyst is accepted by the forensic community worldwide. Any doubts as to the validity of Raney's analysis or his conclusions should have been addressed during defendant's cross-examination of the expert witness. Defendant's argument is overruled.

[2] Next, Defendant argues the trial court committed plain error in admitting Raney's laboratory report into evidence as it was inadmissible pursuant to section 8-58.20(b) of our General Statutes. Section 8-58.20(b) states, in part, that "[a] forensic analysis, to be admissible under this section, shall be performed in accordance with rules or procedures adopted by the [SBI], or by another laboratory accredited by the [ASCLD/LAB] for the submission, identification, analysis, and storage of forensic analyses." N.C. Gen. Stat. § 8-58.20(b) (2009), *amended by* 2011 N.C. Sess. Laws ch. 19, § 7 (effective March 31, 2011) (requiring accreditation for laboratories performing forensic analysis, if the results are to be admitted without the testimony of the testing analyst).

Defendant's reliance on section 8-58.20(b), however, is misplaced as subsection (a) of the statute indicates the provisions of the statute apply to the admission of laboratory reports in criminal prosecutions where the analyst that prepared the report does not testify at trial. *See* N.C. Gen. Stat. § 8-58.20(a) ("In any criminal prosecution, a laboratory report of a written forensic analysis . . . may be admissible in evidence without the testimony of the analyst who prepared the report in accordance with the requirements of this section."). In the present case, the testing analyst testified at trial and was subject to cross-examination by defendant. Thus, section 8-58.20(b) does not control the admission of Raney's laboratory report and defendant's argument is overruled.

Conclusion

In summary, we conclude the trial court did not abuse its discretion in allowing the State's expert witness to testify as to the results of his chemical analysis of the substance seized from defendant, and did not err in its admission of the expert's laboratory report into evidence. Consequently, defendant's argument that these decisions by the trial court amounted to plain error is without merit.

No error.

Judges STEELMAN and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER MICHAEL SIMS

No. COA11-187

(Filed 4 October 2011)

1. Appeal and Error—preservation of issues—argument not raised at trial—not heard on appeal

A constitutional argument not raised at trial was not heard on appeal.

2. Indecent Liberties—purpose—sufficiency of evidence

There was sufficient evidence from which the jury could infer that the conduct of a defendant charged with indecent liberties was for the purpose of arousing or gratifying sexual desire.

3. Satellite-Based Monitoring—subject matter jurisdiction

Although defendant contended that the trial court did not have subject matter jurisdiction to require defendant to enroll in a satellite-based monitoring system because no complaint was issued and no summons was issued under the Rules of Civil Procedure, the trial court exercised the jurisdiction conferred upon it by N.C.G.S. § 14-208.40A and followed the procedures therein.

4. Satellite-Based Monitoring—indecent liberties—sexually violent crime

The trial court did not err in requiring defendant to enroll in satellite-based monitoring where defendant was convicted of indecent liberties and the trial court erroneously found that this was an offense against a minor. The crime of indecent liberties is a sexually violent offense as defined by N.C.G.S. § 14-208.6(5).

Appeal by defendant from judgment and order requiring defendant to enroll in satellite-based monitoring both entered 11 August 2010 by Judge Jesse B. Caldwell, III in Buncombe County Superior Court. Heard in the Court of Appeals 31 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General R. Kirk Randleman, for the State.

Robert W. Ewing, for defendant-appellant.

STEELMAN, Judge.

Where defendant failed to raise constitutional arguments at trial, we will not review them on appeal. Where evidence was presented that defendant was involved in three separate incidents at a Target store with the victim, that another individual had a similar experience with defendant, and defendant admitted to having an obsession with women's legs, the trial court did not err in holding that the State had presented sufficient evidence for the charge of indecent liberties with a child to be submitted to the jury. N.C. Gen. Stat. § 14-208.40A conferred subject matter jurisdiction upon the trial court to consider whether defendant should be enrolled in satellite-based monitoring. Defendant qualified for lifetime satellite-based monitoring because he committed a "sexually violent offense" as defined in N.C. Gen. Stat. § 14-208.6(5), and was a recidivist.

I. Factual and Procedural History

On 20 July 2009, C.G. and her mother were shopping in a Target store. C.G. was looking at Band-Aids on the clearance aisle when she noticed Christopher Michael Sims (defendant) crouched down a couple of feet away looking at her legs. C.G. began to feel uneasy and left and went to another aisle with her mother. Defendant approached her again, fell into her, touched her belt area, and wrapped his hands around her. After defendant grabbed C.G. he immediately let go and said "Sorry, Sorry." As defendant walked away, C.G. told her mother

that defendant had been following her, and C.G. and her mother left the area and went to another aisle. Defendant approached C.G. a third time as she and her mother looked for toothpaste, and kneeled down approximately six to eight inches from her legs. At this point C.G.'s mother placed herself between C.G. and defendant. Defendant left the area. As C.G. and her mother sought out a manager to report these incidents, they saw defendant leave the store. After speaking with the manager, C.G. and her mother left the store. They later returned to Target, called the police, and identified defendant from Target's security videotapes. On 1 February 2010, defendant was indicted for taking indecent liberties with a child relating to the 20 July 2009 incident.

At trial, Amy McIllwain (McIllwain) testified she encountered defendant at a Target store in the summer of 2009. McIllwain was leaving Target walking along the sidewalk when defendant pulled up next to her in his car, and asked if he could pay her a compliment. He then stated that she had the best looking legs he had seen all day. McIllwain was concerned that if she went to her car defendant might follow her, so she went into another store. Defendant followed her into the store and approached McIllwain several times inside the store, finally cornering her and asking her if he could hug her legs. At that point McIllwain told defendant to back off, and he left the store. McIllwain saw defendant's car the next day, took a picture of his license plate, and reported the incidents to police. McIllwain also identified defendant from a photo located on a government-regulated website.

Anne Benjamin, a detective with the Buncombe County Sheriff's Office, testified that she interviewed defendant as part of her investigation of the incident involving C.G. During this interview, defendant stated that he had admitted to his mom, his dad, and his wife that he had an obsession with women's legs.

On 11 August 2010, a jury found defendant guilty of taking incident liberties with a child. Defendant was sentenced to an active term of nineteen to twenty-three months imprisonment. Based upon defendant being a recidivist, he was required to enroll in satellite-based monitoring (SBM) for the remainder of his natural life, upon his release from prison.

Defendant appeals.

II. Motions to Dismiss

In his first argument, defendant contends the trial court's denial of his motions to dismiss the charge of indecent liberties with a child at the close of the State's evidence and at the close of all the evidence violated his rights pursuant to the Fifth Amendment of the United States Constitution, as applied to the States through the Fourteenth Amendment thereto, and also pursuant to Article I, Section 19 of the North Carolina Constitution. We disagree.

A. Constitutional Argument

[1] The North Carolina Supreme Court has held that "[a] constitutional issue not raised at trial will generally not be considered for the first time on appeal. Because defendant did not raise [this] constitutional issue[] below, we decline to address [it] now." *State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) (quotation and citation omitted), *cert. denied*, ___ U.S. ___, 176 L. Ed. 2d 568 (2010).

The constitutional portion of this argument is dismissed.

B. Non-Constitutional Argument

[2] Defendant's non-constitutional argument focuses entirely upon whether the State produced sufficient evidence that the conduct was "for the purpose of arousing or gratifying sexual desire," an element of the offense of taking indecent liberties with a child under N.C. Gen. Stat. § 14-202.1 (2009). "[T]hat the action was for the purpose of arousing or gratifying sexual desire, may be inferred from the evidence of the defendant's actions." *State v. Rhodes*, 321 N.C. 102, 105, 361 S.E.2d criminal case, "we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citing *State v. Small*, 328 N.C. 175, 180, 400 S.E.2d 413, 415 (1991)).

Considering the evidence in the light most favorable to the State, there were three separate incidents at the Target store: (1) defendant was crouched down looking at the juvenile's legs; (2) defendant "fell into" the juvenile, wrapping his hands around her; and (3) defendant kneeled down, six to eight inches away from the juvenile's legs. The State also presented the testimony of McIllwain, pursuant to Rule 404(b) of the Rules of Evidence which was relevant to defendant's intent and purpose.

Finally, the testimony of Detective Benjamin disclosed that defendant admitted to having an obsession with women's legs. On appeal, defendant does not attack the admissibility of the testimony of either McIllwain or Detective Benjamin.

Defendant relies upon this Court's decision in *State v. Brown*, 162 N.C. App. 333, 590 S.E.2d 433 (2004) to support his argument that the State failed to produce sufficient evidence that the conduct in question was "for the purpose of arousing or gratifying sexual desire." The defendant in *Brown* provided the victim with post-discharge services following her stay at a youth shelter. Defendant contacted the victim by phone. A taped conversation revealed inappropriate comments by defendant, including how she looked, that he would like to see her, his feelings towards her, and how he perceived her feelings towards him. *Id.* at 335, 590 S.E.2d 435.

We held that "the conversations were neither sexually graphic and explicit nor were they accompanied by other actions tending to show defendant's purpose was sexually motivated. [N]othing in the record indicate[d] defendant's actions emanated from a desire or purpose to arouse or gratify sexual desire." *Id.* at 338, 590 S.E.2d at 436-37. The instant case is distinguishable from *Brown*. As discussed above, in addition to defendant's three interactions with C.G. and multiple interactions with McIllwain, defendant admitted to having an obsession with women's legs. This leads to the logical conclusion that defendant engaged in this conduct "for the purpose of arousing and gratifying sexual desire." In *Brown* there was no evidence that defendant had engaged in similar bad acts in the past, or that he had any particular obsession with young girls.

Based upon all of the above-cited testimony, there was sufficient evidence presented by the State of defendant's conduct from which the jury could infer that this conduct was for the purpose of arousing or gratifying sexual desire.

This argument is without merit.

III. Subject Matter Jurisdiction

[3] In his second argument, defendant contends the trial court did not have subject matter jurisdiction to enter the order requiring defendant to enroll in the SBM program because no complaint was filed and no summons was issued. We disagree.

The North Carolina Supreme Court held in, *State v. Bowditch*, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010), *stay denied*, ___ N.C. ___,

703 S.E.2d 151 (2010), that "[t]he SBM program [] was enacted with the intent to create a civil, regulatory scheme to protect citizens of our state from the threat posed by the recidivist tendencies of convicted sex offenders." Defendant argues that since no summons was issued in accordance with North Carolina Rules of Civil Procedure 3 and 4, the trial court had no jurisdiction to enter an order imposing SBM.

> Jurisdiction is "[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." *Black's Law Dictionary* 869 (8th ed.2004). The court must have subject matter jurisdiction, or "[j]urisdiction over the nature of the case and the type of relief sought," in order to decide a case. *Id.* at 870. "A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964).
>
> The General Assembly "within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State." *Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), overruled on other grounds by *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982).

State v. Wooten, 194 N.C. App. 524, 527, 669 S.E.2d 749, 750 (2008), *disc. review denied and cert. dismissed*, 363 N.C. 138, 676 S.E.2d 308 (2009).

The trial court exercised its jurisdiction pursuant to and in accordance with the procedures set forth in N.C. Gen. Stat. § 14-208.40A (2009). N.C. Gen. Stat. § 14-208.40A requires that when an offender is convicted of a reportable conviction under N.C. Gen. Stat. § 14-208.6(4) "during the sentencing phase, the district attorney shall present to the court" evidence relating to the offender's qualification for SBM, the offender shall have an opportunity to refute this evidence, and if the court finds the defendant meets the qualifications for SBM the court shall order the offender to enroll in SBM. The trial court exercised the jurisdiction conferred upon it by N.C. Gen. Stat. § 14-208.40A, and followed the procedures set forth therein.

This argument is without merit.

IV. Satellite-Based Monitoring

[4] In his third and fourth arguments, defendant contends that the trial court's finding of fact number 1(a) in the "Judicial Findings and Order for Sex Offenders;" that defendant was convicted of a reportable conviction because defendant was convicted of an "offense against a minor" was not supported by competent evidence, and the trial court's order and conclusion of law requiring defendant to enroll in SBM was not supported by the competent findings of fact. We disagree.

A. Standard of Review

> This Court stated the standard of review for orders as to SBM in *State v. Kilby*: "[w]e review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found."

State v. Singleton, 201 N.C. App. 620, 626, 689 S.E.2d 562, 566 (2010), (quoting *State v. Kilby*, 198 N.C. App. 363, 366, 679 S.E.2d 430, 432 (2009)), *disc. review allowed*, 364 N.C. 131, 696 S.E.2d 697 (2010) *and disc. review improvidently allowed*, 364 N.C. 418, 700 S.E.2d 226 (2010).

B. Analysis

The trial court made the following oral finding during the SBM hearing, "the court having entered judgment in the above-captioned action, finds that the defendant—in addition, the court finds that the defendant has been convicted of a reportable conviction under GS 14-208.6. And, Madam Clerk, this will be an offense against a minor . . . ." This finding was incorporated into the trial court's order requiring defendant to be enrolled in SBM for his natural life. Box 1(a) was marked on the order finding the defendant to have been convicted of a reportable conviction under N.C. Gen. Stat. § 14-208.6, specifically an "offense against a minor" under N.C. Gen. Stat. § 14-208.6(1i).[1] (Administrative Office of the Courts Form CR-615.).

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1. The statute number defining an offense against a minor has been changed to N.C. Gen. Stat. § 14-208.6(1m).

Further, this statute was amended by 2011 North Carolina General Assembly Session Law 145, House Bill 200. However, this amendment pertained strictly to the way in which the Department of Corrections was referred to, and did not affect the substance of the statute in any way.

The State acknowledges that this finding is not supported by the evidence, and argues that the Assistant District Attorney marked the wrong box on the form. The State goes on to argue that the box indicating that defendant committed a "sexually violent offense" should have been checked. In light of the trial court's explicit instructions to the clerk, set forth above, we hold this argument to be disingenuous.

N.C. Gen. Stat. § 14-208.6(1m) defines "offense against a minor" as:

> any of the following offenses if the offense is committed against a minor, and the person committing the offense is not the minor's parent: G.S. 14-39 (kidnapping), G.S. 14-41 (abduction of children), and G.S. 14-43.3 (felonious restraint). The term also includes the following if the person convicted of the following is not the minor's parent: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.

Defendant's conduct in this case does not fall within the above definition of an "offense against a minor."

The State further argues that this case is controlled by our decision in *State v. Williams*, ___ N.C. App. ___, 700 S.E.2d 774 (2010). In that case, we held that the trial court's finding that the offense was an "offense against a minor" was in error, and that the defendant's conviction for indecent liberties was instead a "sexually violent offense" under N.C. Gen. Stat. § 14-208.6(5). Based upon this holding, this Court held "that the trial court's order enrolling Defendant in lifetime SBM is supported by necessary findings such that the Order itself is not erroneous." *Williams*, ___ N.C. App. at ___, 700 S.E.2d at 776.

We hold that the instant case is indistinguishable from *Williams*. The defendant in this case was convicted of indecent liberties. The trial court erroneously found that this was an "offense against a minor." As in *Williams*, the crime of indecent liberties explicitly is a "sexually violent offense" as defined by N.C. Gen. Stat. § 14-208.6(5).

While we question the wisdom of appellate courts engaging in fact-finding we are bound by the indistinguishable holding in *Williams*. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted).

This argument is without merit.

NO ERROR, in part, AFFIRMED, in part.

Judges HUNTER, Robert C., and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. JULIAN OCHOA GARCIA

No. COA11-262

(Filed 4 October 2011)

1. Criminal Law—jury request—transcript of testimony—judge's discretion

The trial court exercised its discretion when responding to a jury request for a transcript of certain testimony where the court told the jury that the transcript was not available and that it was their duty to recall the evidence. The trial court's remarks to defense counsel indicated the court's awareness that the request could be granted by reading the transcript; it is the court's understanding that is considered, not that of the jury.

2. Search and Seizure—detention pursuant to search warrant—separate room—Miranda warnings

A lawful detention pursuant to the execution of a search warrant was not transformed into an arrest where defendant was moved into a bathroom of his house and read his *Miranda* warnings, and the trial court did not err by denying defendant's motion to suppress.

Appeal by Defendant from order entered 17 June 2010 and judgment entered 1 July 2010 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 14 September 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

James H. Monroe for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

On 27 October 2009, Defendant Julian Ochoa Garcia was indicted on charges of trafficking in cocaine by possession and maintaining a dwelling for the keeping or selling of controlled substances. On 7 May 2010, Defendant moved to suppress, *inter alia*, statements he made to law enforcement officers during a search of Defendant's apartment. Following a hearing, the trial court suppressed money seized during the officers' search, but denied the remainder of Defendant's motion. Subsequently, a jury found Defendant guilty of trafficking in

cocaine by possession. The jury was unable to reach a verdict on the maintaining a dwelling charge, and the trial judge declared a mistrial as to that charge. The court sentenced Defendant to an active term of 35-42 months imprisonment. Defendant appeals.

The evidence at trial tended to show the following: On 11 September 2009, officers with the Raleigh Police Department ("the Department") executed a search warrant for an apartment at 3835-B Brentwood Road in Raleigh. The probable cause affidavit attached to the warrant application, signed by Detective K.J. Patchin, stated that a reliable confidential informant told Patchin that narcotics were being sold from the apartment; Patchin sent the informant to the apartment to buy cocaine with marked money from a suspect known as "Chino"; and the suspect took the money from the informant and appeared to have entered the apartment before returning to deliver cocaine. Defendant's name did not appear on the warrant.

When the warrant was executed, officers found three people inside the apartment: Defendant, his wife, and a small child. Officers handcuffed Defendant and his wife and seated them on the floor against the living room wall. When Patchin entered the apartment, he asked Officer Gory Mendez, a Spanish translator with the Department, to read Defendant and his wife their *Miranda* rights in Spanish. Mendez escorted Defendant into a bathroom, read him his *Miranda* rights in Spanish, and questioned him about drug activities in the apartment. Defendant denied any knowledge of drug activity. Mendez then returned Defendant to the living room and repeated the process with Defendant's wife.

During Mendez's questioning of Defendant's wife, Patchin discovered a digital scale and two plastic bags of a white, powdery substance, later determined to be cocaine, hidden behind the ceiling tiles of the apartment. Defendant gestured that he wanted to speak with Mendez again and stated that the drugs were his and his wife was not involved. Defendant was then arrested.

On appeal, Defendant raises two issues: that the trial court erred in (1) failing to exercise its discretion in responding to the jury request to review the transcript of Mendez's testimony, and (2) denying his motion to suppress the statements he made to Mendez. We find no error in the trial court's response to the jury request and affirm its ruling on the motion to suppress.

Jury Request

[1] The North Carolina General Statutes provide:

> (a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence.

N.C. Gen. Stat. § 15A-1233 (2009). "To comply with this statute, a court must exercise its discretion in determining whether or not to permit the jury to examine the evidence. A court does not exercise its discretion when it believes it has no discretion or acts as a matter of law." *State v. Maness*, 363 N.C. 261, 278, 677 S.E.2d 796, 807 (2009) (citations omitted), *cert. denied*, ___ U.S. ___, 176 L. Ed. 2d 568 (2010).

Here, during deliberations, the jury asked to review Mendez's trial testimony. The trial transcript contains the following exchange, made outside the jury's presence, between the trial court and Defendant's counsel:

> The Court: All right. The jury has sent out a request for a copy of Officer Mendez's testimony. I intend to call them in and tell them it is their duty to recall the testimony in this case, it is not prepared in a form that can be submitted to them at this time.
>
> [Defense Counsel]: Would you consider letting them know that it can be read to them.
>
> The Court: *I don't intend to read it to them or have it read to them.* It's their duty to recall the evidence that they have heard.
>
> It's not prepared in a form that can be submitted to them, so I'll just tell them they need to recall the evidence.

(Emphasis added). After the jury returned to the courtroom, the trial court explained its decision as follows:

> The Court: [Y]ou have indicated in this note that you're requesting a copy of Officer Mendez'[s] testimony.
>
> [Jury Foreperson]: Yes, sir, Your Honor.
>
> The Court: That is not prepared in a form that can be submitted to you. The Court Reporter takes it down, but she is taking it

down for later typing everything, but it's not done immediately, so it is not in a form that could be submitted to you.

It is your duty to recall the evidence based on your recollection of the evidence that you have heard and the testimony that you have heard in this case.

Defendant contends that this response suggests the court believed it was unable to provide the transcript to the jury, a situation we have consistently held is a failure to exercise discretion. *See*, *e.g.*, *State v. Ashe*, 314 N.C. 28, 35-36, 331 S.E.2d 652, 656-57 (1985). While the trial court's comments might have misled the jury about the availability of the transcript, it is the trial court's understanding we consider here, not that of the jury. The court's remarks to defense counsel indicate its awareness that the jury request could be granted by reading the transcript. Thus, the court was aware it had the ability to grant the jury request, but exercised its discretion in declining to do so. Accordingly, we overrule this argument.

Motion to Suppress

[2] Defendant next asserts the trial court erred in denying his motion to suppress the statements he made to Mendez, arguing these statements were obtained as the result of his "unlawful and unconstitutional arrest." We disagree.

"Where a trial court conducts a hearing upon a motion to suppress made prior to trial, the trial court must make findings of fact." *State v. Reid*, 151 N.C. App. 420, 422, 566 S.E.2d 186, 188 (2002) (citing N.C. Gen. Stat. § 15A-977(d)). "In reviewing the denial of a motion to suppress, [an appellate court is] limited to determining whether the trial court's findings of fact are supported by competent evidence and whether the findings of fact in turn support legally correct conclusions of law." *Id.* at 422, 566 S.E.2d at 188 (citation omitted). Thus, in general, a trial court's "[f]indings and conclusions are required in order that there may be a meaningful appellate review of the decision." *State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984). However, "[i]f there is not a material conflict in the evidence, it is not reversible error to fail to make such findings because we can determine the propriety of the ruling on the undisputed facts which the evidence shows." *State v. Lovin*, 339 N.C. 695, 706, 454 S.E.2d 229, 235 (1995).

Here, Defendant's motion sought to suppress, *inter alia*, "any statements that [] Defendant allegedly provided to law enforcement because there was no reasonable suspicion to detain [Defendant and]

there was no probable cause to arrest [Defendant]." Following testimony from Mendez and Patchin at a pretrial hearing, the court denied Defendant's motion in open court and later issued a written order doing the same. The written order, however, does not contain findings of fact or conclusions of law.

The trial judge made the following remarks regarding Defendant's motion:

> The Court does find, however, . . . that [Defendant] was lawfully detained. He was properly advised of his [*Miranda*] rights, even prior to the time that the cocaine was found. He . . . positively indicated his understanding of those rights. And the Court would find based upon that, that any statements that he made subsequent to being advised of his [*Miranda*] rights in Spanish and acknowledging and understanding of those rights, his statements were voluntary and therefore admissible.

The trial court concluded[1] that Defendant was not under arrest at the time of his statement, but rather had been lawfully detained ancillary to execution of the search warrant. The court did not explicitly dictate findings in support of this conclusion but, as noted above, this is not reversible error if the relevant facts are undisputed. *Id.* Thus, the specific issue before us is whether the undisputed facts in the record show that Defendant was lawfully detained at the time of his statement.

"An officer executing a warrant directing a search of premises not generally open to the public . . . may detain any person present for such time as is reasonably necessary to execute the warrant." N.C. Gen. Stat. § 15A-256 (2009). Detentions pursuant to this statute are consistent with Fourth Amendment protections against unreasonable searches. *See State v. Watlington*, 30 N.C. App. 101, 226 S.E.2d 186, *appeal dismissed and disc. review denied*, 290 N.C. 666, 228 S.E.2d 457 (1976). Further, officers may use handcuffs to detain the occupants of a residence being searched and may question them, so long as the questioning does not extend the length of detention beyond that required to complete the search. *Muehler v. Mena*, 544 U.S. 93, 100-01, 161 L. Ed. 2d 299, 308 (2005); *accord State v. Carrouthers*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2011). Neither the use of handcuffs nor questioning by officers transforms a lawful detention incident to a search into an arrest. *Id.*

1. Although the trial court used the word "find" in its remarks, whether a defendant is under arrest is a conclusion of law. *See, e.g.*, *State v. Carrouthers*, 200 N.C. App. 415, 417-18, 683 S.E.2d 781, 783 (2009); *State v. Logner*, 148 N.C. App. 135, 138-39, 557 S.E.2d 191, 193-94 (2001).

Defendant acknowledges this holding, but contends that his lawful detention was transformed into an arrest because Mendez moved him into a bathroom and read him his *Miranda* rights before questioning him. Defendant cites no authority in support of these assertions. Nothing in our case law suggests that officers cannot move occupants into a different room where questioning can take place out of earshot of the other occupants and out of the way of the search itself. Nor are we aware of any case suggesting that the reading of *Miranda* rights to a lawfully detained person transforms his detention into an arrest.

The evidence shows that Defendant was handcuffed during the search, as is permitted, and Mendez's questioning of Defendant occurred during the search and did not extend Defendant's detention. There is no conflict in the testimony on these points. Thus, the trial court's failure to make findings is not reversible error "because we can determine the propriety of the ruling on the undisputed facts which the evidence shows." *Lovin*, 339 N.C. at 706, 454 S.E.2d at 235. We conclude that the trial court's denial of Defendant's motion to suppress his statements was proper. Accordingly, we overrule this argument.

NO ERROR IN PART; AFFIRMED IN PART.

Judges ERVIN and BEASLEY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 OCTOBER 2011)

BAILEY v. ROBERTS PROTECTION & INVESTIGATIONS No. 11-235	Ind. Comm. (704724) (PH1821)	Affirmed
BOJANGLES RESTS., INC. v. TOWN OF PINEVILLE No. 11-202	Mecklenburg (10CVS5566)	Affirmed
COUICK v. COUICK No. 10-1438	Union (08CVD211)	Affirmed in Part, Reversed and Remanded in Part
GREENE v. UPTOWN DAY SHELTER, INC. No. 11-230	Mecklenburg (09CVS19575)	Reversed
GUPTON v. SON-LAN DEV. CO., INC. No. 11-198	Harnett (07CVS1172)	Reversed and Remanded
HINTON-LYNCH v. FRIERSON No. 10-1309	Johnston (08CVS338)	Affirmed
IN RE A.C.G. No. 11-420	Caldwell (09JA14)	Affirmed
IN RE A.S.R. No. 11-402	Greene (10JA28)	Affirmed
IN RE B.N.H. No. 11-447	Nash (10JA148-149)	Affirmed
IN RE BROOKS No. 10-1609	Property Tax Commission (08PTC526)	Affirmed
IN RE C.S.R. No. 11-684	Mecklenburg (04J772-74)	Affirmed
IN RE FORECLOSURE OF STONECREST PARTNERS, LLC No. 11-34	Brunswick (10SP333)	Affirmed
IN RE J.T. No. 11-522	Robeson (07JT378-379)	Affirmed
IN RE W.D.P. No. 11-501	Stokes (10JA23)	Affirmed in Part and Remanded in Part

McCALL v. P.H. GLATFELTER CO. No. 10-1069	Ind. Comm. (005263)	Reversed
ROSENBERGER v. CITY OF RALEIGH No. 10-1331	Ind. Comm. (978106)	Affirmed
STATE v. BRADSHAW No. 10-1247	Cabarrus (07CRS11543) (07CRS11545)	Affirmed
STATE v. GRIFFIN No. 10-795	Buncombe (08CRS62288-89) (09CRS127-128) (09CRS779)	No error in part; vacated in part remanded for resentencing
STATE v. HAYES No. 11-122	Richmond (06CRS4202)	Dismissed
STATE v. LANCASTER No. 10-1336	Wake (02CRS110647)	Affirmed
STATE v. MARTINEZ No. 10-1530	Buncombe (09CRS11996-97) (10CRS196-203)	Remanded
STATE v. McCLELLAN No. 11-265	Mecklenburg (09CRS236545-46)	No Error
STATE v. McNAIR No. 11-219	Edgecombe (09CRS51699) (09CRS51700)	No Error
STATE v. NEAL No. 11-110	Wayne (08CRS3370)	No Error
STATE v. REAVES No. 10-1246	Wake (08CRS6466)	No Error
STATE v. SEAMSTER No. 11-170	Forsyth (08CRS59714) (08CRS59736) (10CRS447)	Reversed and Remanded
STATE v. SIMMONS No. 10-1534	Forsyth (09CRS10354) (09CRS55894) (09CRS56151) (09CRS56154)	Affirmed; no prejudicial error
STATE v. SLEDGE No. 10-1261	Wake (09CRS12368) (10CRS2921)	No Error

STATE v. TUCKER No. 11-154	Guilford (09CRS24529) (09CRS78669)	No Error
STATE v. WILLIAMS No. 11-319	Northampton (08CRS51057) (08CRS51058) (08CRS51065) (08CRS51066) (09CRS83) (09CRS85)	No error in part; vacated in part; and remanded for resentencing.
STATE v. WILSON No. 11-137	Mecklenburg (09CRS250212-13) (10CRS58)	No Error
TEDDER v. CSX TRANSP., INC. No. 10-1497	Edgecombe (08CVS1522)	Affirmed
TRIPP v. TRIPP No. 11-259	New Hanover (09CVS5575)	Affirmed; remanded with instructions
TYSON v. H.K. PORTER CO. No. 10-1288	Ind. Comm. (646983)	Affirmed in Part, Reversed and Remanded in Part
WHITE v. MAXIM HEALTHCARE SERVS., INC. No. 11-192	Mecklenburg (10CVS8117)	Affirmed

DR. YAN-MIN WANG, PETITIONER v. UNC-CH SCHOOL OF MEDICINE AND DR. WILLIAM SNIDER, RESPONDENTS

No. COA10-1021

(Filed 4 October 2011)

1. Public Officers and Employees—Whistleblower Act—EPA non-faculty employee

A *de novo* review revealed that the trial court did not err when it concluded that the Whistleblower Act applied to petitioner, an EPA non-faculty employee.

2. Public Officers and Employees—Whistleblower Act—sufficiency of findings of fact

Although the trial court properly determined that petitioner was entitled to the protections of the Whistleblower Act, it erred by proceeding to determine that petitioner had been subjected to impermissible employment-related retaliation instead of remanding this issue to the Board of Governors (BOG) for appropriate findings of fact. The case was remanded to the superior court for further remand to the BOG.

3. Public Officers and Employees—doctor—failure to show gender, age, and national origin discrimination

The trial court erred by reversing the Board of Governors' (BOG) finding that a doctor had not discriminated against petitioner on the basis of her gender, age, and national origin. However, a remand was not necessary because there was competent, material, and substantial evidence in the record to support the BOG's decision.

4. Constitutional Law—due process—equal protection

The trial court erred by concluding that petitioner established the existence of valid due process or equal protection claims.

Judge ELMORE concurring in part, concurring in result in part, and dissenting in part in separate opinion.

Appeal by respondents from order entered 14 May 2010 by Judge Abraham Penn Jones in Orange County Superior Court. Heard in the Court of Appeals 9 February 2011.

Alan McSurely for petitioner.

Attorney General Roy Cooper, by Special Deputy Attorney General Gary R. Govert for respondents.

ERVIN, Judge.

Respondents UNC-Chapel Hill School of Medicine and Dr. William Snider appeal an order reversing a decision of the Board of Governors of the University of North Carolina to the effect that Petitioner Dr. Yan-Min Wang had not been treated in an impermissible and unlawful manner in connection with her employment and ordering UNC-Chapel Hill to reinstate Petitioner to a position she previously held with the university, to pay Petitioner's attorney's fees, and to revise its grievance procedures. On appeal, Respondents argue that the trial court misapplied the whole record test in evaluating the BOG's decision, erred reviewing the constitutional and other legal issues raised by Petitioner, and erred by reversing the BOG's decision. After careful consideration of Respondents' challenges to the trial court's order in light of the record and the applicable law, we affirm the trial court's order in part and reverse and remand the trial court's order in part.

I. Factual Background

A. Substantive Facts

On 1 August 2004, Dr. William Snider, the director of the Neuroscience Center at the UNC-Chapel Hill School of Medicine, appointed Petitioner to a part-time position as a research scientist. Dr. Snider leads a team that conducts experiments on the nerve processes of genetically modified mice. The funding necessary to support this work comes from grants provided by the National Institutes of Health and private foundations. Petitioner was initially appointed for a one year term, with her employment contingent upon the continued availability of the necessary funding and subject to the need for compliance with the University's Employment Policies for EPA Non-Faculty Employees. In an e-mail sent prior to Petitioner's appointment, Dr. Snider stated that, "if things go well" and the needed funding became available, Petitioner might obtain a full-time appointment as a non-tenure track research assistant professor in the future.

On 27 April 2005, Dr. Snider submitted an application for a "reentry" grant from the NIH to fund Petitioner's position as a full-time research assistant professor. On 1 August 2005, while the grant appli-

cation was still pending, Petitioner was appointed to a second one-year term as a part-time research scientist.

After her reappointment, Petitioner worked for Dr. Snider on a separate funding proposal involving the provision of support for Dr. Snider's work using a line of experimental mice. As part of that process, Petitioner conducted preliminary genotyping tests on the mice[1] used in the lab's experiments for the purpose of confirming that the mice in question were islet1-Cre positive as had been reported in the funding proposal. As a result of the tests that she performed, Petitioner concluded that the mice were not all islet1-Cre positive, a finding that she reported to Dr. Snider. Although the evidence concerning the extent to which there actually were any genotyping problems in the laboratory and what, if any, steps needed to be taken to identify and solve any genotyping problems was conflicting, the record indicates that, in early December 2005, Petitioner and Dr. Snider exchanged a series of e-mails in which they disputed the appropriateness of the tone that each had used in communicating with other during various conversations concerning the genotyping issue and the specifics of what each had said to the other during these conversations.

On 12 December 2005, Dr. Snider learned that the NIH grant had been approved. In January 2006, Dr. Snider sent e-mails to Petitioner stressing the importance that the level of collegiality that she displayed while interacting with others would play in his decision concerning whether to reappoint Petitioner to another term of employment. On 31 January 2006, Dr. Snider informed Petitioner that he had decided not to recommend her for a research faculty appointment due to concerns about her tendency to make "intemperate comments" and engage in "harsh interactions." However, Dr. Snider told Petitioner that, if she could "interact productively around the science," he would set up a "mentoring committee" that would monitor Petitioner's progress and advise him "if and when it is appropriate to make the research faculty appointment."

In February 2006, Petitioner met with Denise Vandervort, a human relations facilitator, for the purpose of expressing her concerns about Dr. Snider's decision to refrain from recommending her for appointment to a full-time position. After discussing the matter with Petitioner and Dr. Snider, Ms. Vandervort and Dr. Snider "agreed that any further interactions between [Dr. Snider and Petitioner]

1. Genotyping is a process used to identify the specific genetic characteristics of genetically altered mice.

should take place in the presence of a third party" and created a mentoring committee for the purpose of assisting in the resolution of the various issues that surrounded Petitioner's employment. On 24 March 2006, the mentoring committee presented Petitioner with a "memorandum of understanding" detailing the terms under which she would be allowed to continue to work at the Center. However, Petitioner did not sign the MOU because she did not agree with its terms.

On 31 March 2006, Petitioner met with Karen Silverburg, the Associate Dean of Human Resources, for the primary purpose of discussing her contention that Dr. Snider had "promised" to promote her to a full-time position. Although Plaintiff asserts in her brief before this Court that she "mentioned" problems with the mouse colony during this meeting, the record contains no indication that issues concerning laboratory procedures were addressed at that time.

In late March and early April, 2006, Petitioner wrote a letter (referred to as the "Dear Dr." letter) in which she complained about Dr. Snider's "broken promises" to hire her as a full-time researcher. In addition, the "Dear Dr." letter included a paragraph discussing Petitioner's concerns about mouse genotyping in Dr. Snider's lab. Petitioner e-mailed or gave this letter to Dr. James Anderson and Dr. Colin Hall, the chairs of the two departments in which Dr. Snider had an appointment; Associate Dean Karen Silverberg; Dr. Albert Collier, the University's Scientific Integrity Officer; Wayne Blair and Dr. Laurie Mesibov, the University's ombudsmen; and Dr. Anthony-Sam Lamantia, a professor in the Neurosciences Center and one of Dr. Snyder's colleagues. According to applicable University policies, Drs. Anderson, Hall, Collier and Mesibov and Mr. Blair were faculty members or administrators to whom a complaint could appropriately be directed. However, Petitioner should not, under established University policy, have sent the "Dear Dr." letter to Dr. Lamantia. After learning that Petitioner had sent a copy of the "Dear Dr." letter to Dr. Lamantia, Dr. Snider decided that he could not work with Petitioner any longer. As a result, on 13 April 2006, Dr. Snider rejected the funding from the NIH grant which would have been used to employ Petitioner in a full-time position, instructed Petitioner to work at an off-campus site for the remainder of her contract, and notified Petitioner that she would not be reappointed.

B. Procedural History

On 23 April 2006, Petitioner filed a grievance with the EPA Non-Faculty Grievance Committee in which she alleged that Dr. Snider

had failed to renew her appointment in retaliation for her decision to report his "broken promises" to promote her to a full-time position and the problems with mouse genotyping in his lab. On 1 June 2006, the Grievance Committee reported to Chancellor James Moeser that it had found "no basis to determine that Dr. Snider has engaged in unfair or retaliatory treatment toward the grievant or to other employees." Petitioner appealed the Grievance Committee's decision to the Chancellor, who rejected her appeal on 22 August 2006. At that point, Petitioner appealed to the Board of Trustees. On 20 December 2006, the BOT's Grievance Panel remanded Petitioner's grievance to the Grievance Committee in order to permit that body to make detailed factual findings concerning Petitioner's grievance on the basis of a *de novo* review of the record and recommended that Petitioner be permitted to submit a new grievance.

On 25 February 2007, Petitioner submitted a new statement of her grievances in which she asserted four claims:

> 1.) On April 13, 2006, Dr. Snider gave me a signed letter informing me that I was to [work off campus for the rest of my appointment.] This action was in retaliation for reports I had made about him to appropriate University administrative officials starting in late March, 2006 . . . concern[ing] matters governed by . . . University policy and [the Whistleblower Act.]
>
> 2.) On April 13, 2006 in the same letter Dr. Snider informed me that my contract would not be renewed and that my reentry grant would be returned to NIH. This action was in retaliation for reports I had made about him to appropriate University administrative officials starting in late March, 2006 . . . concern[ing] matters governed by . . . University policy and [the Whistleblower Act.]
>
> 3.) During the entire period of my employment in his lab, Dr. Snider discriminated against me on the basis of my age (48), sex (female), and national origin (Chinese).

After identifying the issues that it needed to address in order to resolve Petitioner's grievance, the Grievance Committee reviewed documentary evidence, interviewed witnesses and conducted a hearing at which Petitioner and Dr. Snider presented their respective contentions. On 21 May 2007, the Grievance Committee issued a report concluding that it could not "find in favor of any of Dr. Wang's claims."

On 4 June 2007, Petitioner appealed the Grievance Committee's decision to the Chancellor. On 10 October 2007, Chancellor Moeser

rejected Petitioner's appeal. Petitioner appealed the Chancellor's determination to the BOT, which rejected Petitioner's appeal by means of a letter dated 26 February 2008. Petitioner appealed the BOT's decision to the BOG on 11 July 2008.

On 8 January 2009, the BOG's Committee on Personnel and Tenure submitted a report addressing Petitioner's allegations. The report was adopted by the BOG as its decision on the following day. In its decision, the BOG considered Petitioner's arguments on a *de novo* basis. In response to Petitioner's contention that she had been subjected to impermissible discrimination stemming from her age, sex, and national origin, the BOG concluded that, "based upon all of the evidence in the record and the legal precedents," Petitioner had "failed to carry her burden of demonstrating that she was discriminated against." Moreover, the BOG concluded that, given her status as an EPA Non-Faculty employee, Petitioner was not protected by the Whistleblower Act and that Petitioner was not entitled to relief on First Amendment grounds. In addition, the BOG stated that:

> Although we conclude that Dr. Wang does not have an appeal to this Board for retaliation under the whistleblower statute or the First Amendment, we note that the Record on Appeal does not show retaliation by Dr. Snider under either basis. It shows two people who simply could not get along, and a supervisor who finally reached the breaking point and ended the relationship.

Finally, the BOG concluded that:

> in this appeal, Dr. Wang did not meet her burden of proving discrimination or retaliation. She did not show that discrimination or retaliation were the reasons she was not reappointed, the grant application was withdrawn, and/or she was barred from the lab. . . . Therefore, the Committee recommends that the Chancellor's decision not to reappoint should be affirmed.

On 9 February 2009, Petitioner filed a petition seeking judicial review of the BOG's decision in the Orange County Superior Court. In her petition, Petitioner asserted that the BOG had erred in a number of respects, including allegations that:

> 1. The BOG erred by ruling that, as an EPA Non-Faculty employee, Petitioner was not protected by the Whistleblower Act.
>
> 2. The BOG erred by rejecting Petitioner's claim to the protection of the First Amendment and analogous provisions of the North Carolina Constitution.

3. The BOG erred in its reliance on and interpretation of case law and its analysis of salaries paid to other employees in connection with its consideration of Petitioner's discrimination claims[.]

4. The BOG erred by denying Petitioner's request for copies of CD recordings of the witness interviews conducted in connection with the Grievance Committee's investigation.

5. The BOG erred in its analysis of Petitioner's retaliation and discrimination claims by failing to subject the record evidence to "a pretext or mixed motive analysis."

6. The applicable grievance procedures, on their face and as applied to Petitioner, "violated Petitioner's Constitutional rights under Article I of the North Carolina Constitution, particularly Sections 18 and 19, which provide for timely hearings and guaranteeing that the state will provide equal protection and the law of the land to all citizens, which includes the right to a fair, impartial hearing."

In addition, Petitioner asserted that the BOG's decision was arbitrary and capricious and rested upon a misapplication of the applicable law.

Petitioner's petition came on for hearing before the trial court at the 25 January 2010 civil session of Orange County Superior Court. On 14 May 2010, the trial court entered an order reversing the BOG and ruling that:

1. Petitioner, an EPA Non-Faculty employee, was protected by the Whistleblower Act.

2. Dr. Wang's distribution of the "Dear Dr." letter was protected activity, and was "a substantial or motivating factor" in Dr. Snider's decision not to renew her contract.

3. The BOG "arbitrarily and capriciously mis-stated and misapplied the appropriate law" to the evidence concerning Petitioner's claims under the Whistleblower Act by failing to "subject the evidence to the pretext and mixed motive analyses."

4. The BOG violated Petitioner's rights under the North Carolina Constitution by failing to provide her with transcripts of its interviews with witnesses.

5. The applicable grievance procedures, which afford more procedural rights to career State employees who challenge the existence of just cause for an adverse employment action than to

EPA Non-Faculty employees who file a grievance alleging discrimination or retaliation, violated Petitioner's rights to due process and equal protection.

Based upon these determinations, the trial court ordered the UNC School of Medicine to "reinstate, Petitioner in a comparable position with retroactive pay and benefits that she would now be entitled to as if she had been employed since the University banned her from her workplace[,] . . . reimburse her reasonable attorney's fees and costs[,] . . . bring the University's unconstitutional Grievance Procedure into compliance consistent with this Decision and Order, and . . . make available to all parties . . . all testimonial evidence adduced in any grievance[.]" Respondents noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

According to N.C. Gen. Stat. § 150B-43, "[a]ny person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision." N.C. Gen. Stat. § 150B-51(b) authorizes a trial court to reverse or modify an agency's decision if the petitioner's substantial rights have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat. §§] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

"On judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004).

> The first four grounds are "law-based" inquiries warranting *de novo* review. The latter two grounds are "fact-based" inquiries warranting review under the whole-record test. Under *de novo* review, a court "considers the matter anew[] and freely substitutes its own judgment for the agency's." Under the whole-record test, a court "examines all the record evidence . . . to determine whether there is substantial evidence to justify the agency's decision."

Trayford v. N.C. Psychology Bd., 174 N.C. App. 118, 121, 619 S.E.2d 862, 863-64 (2005) (quoting *Carroll*, 358 N.C. at 659-60, 599 S.E.2d at 894-95), *aff'd*, 360 N.C. 396, 627 S.E.2d 462 (2006). "As to appellate review of a superior court order regarding an agency decision, 'the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' " *ACT-UP Triangle v. Commission for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *Amanini v. N.C. Dep't of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994)). In reviewing "an agency decision, the trial court should state the standard of review it applied to resolve each issue." *Zimmerman v. Appalachian State Univ.*, 149 N.C. App. 121, 130, 560 S.E.2d 374, 380 (2002) (citing *In re Appeal of Willis*, 129 N.C. App. 499, 502, 500 S.E.2d 723, 726 (1998)).

B. Whistleblower Act

1. Applicability

[1] N.C. Gen. Stat. Chapter 126, Article 14, §§ 126-84-88, which is commonly known as the "Whistleblower Act," protects State employees who report serious misconduct to their superiors or other appropriate authorities. The determination of whether EPA Non-Faculty employees such as Petitioner are protected by the Whistleblower Act requires interpretation of the relevant statutory provisions. "Questions of statutory interpretation are ultimately questions of law for the courts and are reviewed *de novo*." *In re Summons of Ernst & Young*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citing *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998)). Thus, the appropriateness of the BOG's decision concerning the extent, if any, to which Petitioner is entitled to the protections of the Whistleblower Act is subject to *de novo* review.

According to N.C. Gen. Stat. § 126-5(a)(1), the provisions of the State Personnel Act apply to "[a]ll State employees not herein exempt."

N.C. Gen. Stat. § 126-5(c1)(8) provides that, "[e]xcept as to . . . the provisions of Articles 6 and 7 of this Chapter, the provisions of this Chapter shall not apply to . . . research staff . . . of The University of North Carolina." In the absence of another statutory provision to the contrary, N.C. Gen. Stat. § 126-5(c1)(8) clearly exempts individuals occupying Petitioner's position from the coverage of most provisions of the State Personnel Act. However, N.C. Gen. Stat. § 126-5(c5) specifically states that, "[n]otwithstanding any other provision of this Chapter, Article 14 of this Chapter shall apply to all State employees, public school employees, and community college employees." As we have previously noted, "[t]he legislative intent that the protections of this legislation apply to all state employees is clear." *Caudill v. Dellinger*, 129 N.C. App. 649, 654, 501 S.E.2d 99, 102 (1998), *aff'd in part; disc. review improvidently allowed in part*, 350 N.C. 89, 511 S.E.2d 304 (1999). For that reason, Respondents correctly concede in their brief that "[t]he BOG erred when it stated that the Whistleblower Act did not apply to [Petitioner]."

Our dissenting colleague argues, in reliance upon N.C. Gen. Stat. § 126-5(c)(1), that "the North Carolina Whistleblower Act does not apply to '[a] State employee who is not a career state employee as defined by this Chapter' " and that we should, for that reason, uphold the BOG's determination concerning the applicability of the Whistleblower Act to persons in Petitioner's position. Admittedly, as the dissent correctly notes, Petitioner is not a career State employee as defined in N.C. Gen. Stat. § 126-1.1. Although N.C. Gen. Stat. § 126-5(c)(1) does provide, in pertinent part, that "the provisions of this Chapter shall not apply to" "[a] State employee who is not a career State employee as defined by this Chapter," the language upon which our dissenting colleague relies is subject to the additional caveat set out in N.C. Gen. Stat. § 126-5(c5), which we quoted above. As used in N.C. Gen. Stat. § 126-5(c5), "notwithstanding" means "in spite of," "nevertheless," or "in spite of the fact that," depending upon whether it is used as a preposition, an adverb, or a conjunctive. *New Oxford American Dictionary* 1201 (3d ed. 2010). As a result, N.C. Gen. Stat. § 126-5(c1) essentially means that, "in spite of any other provision of this Chapter," the Whistleblower Act applies "to all State employees, public school employees, and community college employees," including Petitioner. Since the statutory language upon which our dissenting colleague relies in concluding that the protections of the Whistleblower Act is all contained within Chapter 126 of the North Carolina General Statutes, those statutory provisions are clearly "trumped" by N.C. Gen. Stat. § 126-5(c5). Our dissenting col-

league's conclusion to the effect that N.C. Gen. Stat. § 126-5(c5) "is meant to operate as a residuary, or catch-all, provision that is applicable only when the statute does not otherwise provide to the contrary" has no support in the relevant statutory language and would deprive N.C. Gen. Stat. § 126-5(c5) of any real meaning, since N.C. Gen. Stat. § 126-5(c5) would, under this interpretation, only make the protections of the Whistleblower Act available to a particular state employee in the event that some other statutory provision had the same effect. *Wilkins v. N.C. Stat. Univ.*, 178 N.C. App. 377, 380, 631 S.E.2d 221, 224 *disc. review denied*, 360 N.C. 655, 637 S.E.2d 219 (2006) (stating that, "[b]ecause the trial court's interpretation renders the [relevant statutory language] redundant and meaningless, we conclude that the trial court erred in its reading of the statute") (citing *HCA Crossroads Residential Ctrs. v. N.C. Dept. of Human Res.*, 327 N.C. 573, 578, 398 S.E.2d 466, 470 (1990)). As a result, we conclude that the trial court correctly determined that the protections of the Whistleblower Act were available to Petitioner.

2. Validity of Petitioner's Whistleblower Act Claim

[2] According to N.C. Gen. Stat. § 126-84, "State employees shall be encouraged to report verbally or in writing to their supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting:

(1) A violation of State or federal law, rule or regulation;

(2) Fraud;

(3) Misappropriation of State resources;

(4) Substantial and specific danger to the public health and safety; or

(5) Gross mismanagement, a gross waste of monies, or gross abuse of authority."

"[The] Whistleblower Act . . . requires a Petitioner to prove the following three essential elements by a preponderance of the evidence in order to establish a prima facie case: '(1) that the Petitioner engaged in a protected activity, (2) that the Respondent took adverse action against the Petitioner in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the Petitioner.' " *Holt v. Albemarle Reg'l Health Servs. Bd.*, 188 N.C. App. 111, 115, 655 S.E.2d 729, 732 (quoting *Newberne v. Department of Crime Control & Pub. Safety*, 359

N.C. 782, 788, 618 S.E.2d 201, 206 (2005)), *disc. review denied*, 362 N.C. 357, 661 S.E.2d 246 (2008). As a result, the ultimate inquiry required in connection with the consideration of any claim advanced in reliance upon the Whistleblower Act is whether the claimant has demonstrated that he or she engaged in protected conduct and whether any adverse treatment to which the claimant was subjected constituted retaliation for engaging in protected activities.

Petitioner's claim to have engaged in "protected activity" rests on the following language from the "Dear Dr." letter:

> . . . In late 2005 I brought to Dr. Snider's attention a very serious problem with the mouse population that his lab has been using. The mouse colony is filled with mice whose genotypes are incorrectly identified. For close to two years researchers in the lab had used these mice in their experiments without being aware of this fact. Dr. Snider asked me to leave the lab shortly after I brought this to his attention. Again, the reason he gave is "angry conversations" or the use of an "unpleasant tone." I think it is fair to say that his sensitivity to my tone of voice intensified after I brought the mouse problem to his attention.

The BOG did not make any definitive determination as to whether Petitioner engaged in any protected activity during the interval leading up to the events that underlie her complaints or whether Petitioner was subject to employment-related retaliation for engaging in that conduct. Instead, the BOG simply concluded that Petitioner was not entitled to raise a claim under the Whistleblower Act. The BOG did include a single conclusory statement in its order to the effect that Plaintiff had not shown retaliation and that the record simply revealed, instead, the existence of a personality conflict between Petitioner and Dr. Snider. However, the BOG failed to make adequate factual findings explaining what it meant by these statements, the standard that it used in reaching the conclusion that it deemed appropriate, and the facts that led it to find that no retaliation had occurred. In the absence of factual findings addressing these issues, the administrative record is simply not sufficient to permit a determination of the extent, if any, to which Petitioner's Whistleblower's Act claim has substantive merit.

Although the trial court correctly determined that Petitioner was entitled to the protections of the Whistleblower Act, it erred by proceeding to determine that Petitioner had been subjected to impermissible employment-related retaliation because of her protected

activities. In essence, the trial court, in violation of the applicable standard of review, *Vanderburg v. N.C. Dept. of Revenue*, 168 N.C. App. 598, 612, 608 S.E.2d 831, 841 (2005) (stating that "[a] whole record review does not permit us to substitute our judgment for the [agency's] findings of fact") (citing *Savings & Loan Assoc. v. Savings & Loan Comm.*, 43 N.C. App. 493, 497, 259 S.E.2d 373, 376 (1979), resolved disputed questions of fact during the judicial review process instead of remanding this issue to the BOG for appropriate factual development.[2] As a result, even though the trial court correctly resolved the coverage issue, it erred in the course of addressing Petitioner's Whistleblower Act claim on the merits. Thus, the decisions of both the trial court and the BOG with respect to Petitioner's claims under the Whistleblower Act and the First Amendment[3] are reversed and the case is remanded to the BOG for the making of adequate findings and conclusions concerning the Whistleblower Act and First Amendment issues.[4] *Savings & Loan Assoc.*, 43 N.C. App. at 498, 259 S.E.2d at 376 (stating that "[r]emand for further findings was essential upon concluding that the findings of record presented an inadequate basis for review").

C. Discrimination Claims

[3] On appeal, Respondents argue that the trial court erred by reversing the BOG's finding that Dr. Snider had not discriminated against

2. In view of our determination that the Whistleblower Act issue needs to be remanded to the BOG for findings concerning whether Petitioner engaged in protected conduct and, if so, whether she was subjected to retaliation for engaging in such conduct, we need not discuss the trial court's treatment of the merits of Petitioner's claim in any detail.

3. The same errors that are discussed in the text with respect to Petitioner's Whistleblower Act claim were committed by both the BOG and the trial court in connection with Petitioner's First Amendment claim. As a result, our decision to remand this case to the trial court for further remand to the BOG in order to allow the BOG to make appropriate findings applies to both the Whistleblower and First Amendment claims.

4. We also note that the "pretext and mixed motive" analyses upon which Petitioner relied before the trial court and this Court and which the trial court discussed in its order are applicable only in the event that Petitioner has demonstrated that she engaged in protected conduct and that a causal relationship between her protected conduct and the treatment to which she was subjected has been shown to exist. *Newberne*, 359 N.C. at 789-91, 618 S.E.2d at 206-07. Similarly, the legal implications of Petitioner's assertion that Dr. Snider effectively threatened Petitioner when he informed her that the funding for her position was contingent upon his receiving a particular grant depend upon the exact factual findings made by the administrative agency. Each of these issues can be addressed by the BOG on remand and need not detain us further on appeal.

Petitioner on the basis of her gender, age, and national origin. After carefully reviewing the record, we conclude that the trial court should have affirmed the BOG's decision with respect to this issue and erred by concluding otherwise.

In her grievance, Petitioner asserted that, as a 48 year old Chinese woman, she had been the victim of unlawful discrimination on the basis of her gender, age, and nationality during her tenure in Dr. Snider's lab. After inferring, in reliance upon *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991), that Dr. Snider's initial decision to hire Petitioner indicated that he was not biased against persons of Petitioner's age, gender, and national origin, the BOG expressly determined that Petitioner had failed to rebut this inference. More specifically, the BOG stated that:

> In addition to the inference stated above, the salary data does not support Dr. Wang's claim. The heart of Appellant's claim of sex, age, and national origin discrimination is her allegation[] of salary inequity compared with co-workers. The salary information does not support Dr. Wang's claim. . . . Dr. Wang apparently either approached Dr. Snider without any job posting, or applied for a position for which she was overqualified. The result was that Dr. Snider cobbled together a part-time salary until grant funding for her salary could be obtained. By the time funding was obtained, Dr. Wang had destroyed her relationship with him to the point that Dr. Snider was no longer willing to work with her. Dr. Snider had a legitimate nondiscriminatory reason for paying Dr. Wang only a part-time salary originally and for not wanting to continue working with her.
>
> Therefore, based upon all of the evidence in the record and the legal precedents, Dr. Wang failed to carry her burden of demonstrating that she was discriminated against.
>
> . . .
>
> It appears that Dr. Wang has also based her retaliation claim upon her report of sex, age, and national origin discrimination at the end of March 2006. By that time, relations were extremely strained between Dr. Wang and Dr. Snider. The *de novo* review of the Record does not show that Dr. Wang carried her burden of proving by the preponderance of the evidence that Dr. Snider retaliated against her for making a complaint of discrimination.

Based upon these findings, the BOG concluded that:

> [I]n this appeal, Dr. Wang did not meet her burden of proving discrimination or retaliation. She did not show that discrimination or retaliation were the reasons she was not reappointed, the grant application was withdrawn, and/or she was barred from the lab.

We conclude that the BOG's decision with respect to this issue should be upheld on the grounds that it has adequate evidentiary support and that the trial court's decision to the contrary should be reversed.

The trial court's discussion of Petitioner's discrimination claims consists almost exclusively of a narrative describing the record evidence from Petitioner's perspective. However, "where the findings of fact of an administrative agency are supported by substantial competent evidence in view of the entire record, they are binding on the reviewing court, and that court lacks authority to make alternative findings at variance with the agency's." *Carroll* at 663, 599 S.E.2d at 897 (citing *In re Appeal of AMP, Inc.*, 287 N.C. 547, 561, 215 S.E.2d 752, 761 (1975) (other citations omitted)). Unfortunately, that is exactly what the trial court appears to have done in this case. Instead of reviewing the record to determine whether the BOG's findings had adequate evidentiary support, the trial court, in essence, concluded that the BOG had incorrectly analyzed the facts and stated its own position concerning what the record actually established. The trial court is not, given the applicable standard of review, authorized to undertake such an independent exercise in fact-finding. Although this deficiency in the trial court's order would, standing alone, suffice to justify an appellate reversal, " 'we do not believe a remand is necessary, however, because the central issue presented . . . is whether there was competent, material, and substantial evidence to support [the BOG's] decision . . . and the entire record of the hearing is before us.' " *Sack v. N.C. State Univ.*, 155 N.C. App. 484, 493, 574 S.E.2d 120, 128 (2002) (quoting *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 15, 565 S.E.2d 9, 18 (2002)). Having reviewed the BOG's findings in light of the record evidence, we hold that the BOG's determination to the effect that Petitioner failed to prove that she had been subjected to unlawful discrimination on the grounds of age, gender, or national origin or to retaliation for claiming to have been treated in that fashion had ample evidentiary support and that the trial court erred by reaching a contrary conclusion. As a result, we reverse the trial court's decision that Petitioner had been subjected to unlawful discrimination on the basis of her age, gender, or nationality

and that she had been subject to retaliatory treatment because she claimed to have been mistreated in that manner.

D. Constitutional Claims

1. Nature of Petitioner's Claims

[4] In her petition for judicial review, Petitioner made a generalized allegation that the BOG's decision violated her state constitutional rights to due process and equal protection. According to Petitioner:

> . . . The University's EPA Non-Faculty Employee Grievance Procedure does not, on its face, provide for any kind of hearing, much less one with the right to counsel, to confront witnesses, to full disclosure of all evidence to all parties, and the other basic elements of the law of the land for an employee who believed she has been expelled from her workplace and then terminated because of her reports of discrimination based on her gender and national origin, or Constitution Article 1. . . . [The Grievance] Committee provides full due process procedures when a discharge for cause is alleged, but for all Grievances except Grievances Concerning Discharge for Cause, . . . no hearing is provided and the investigation of the Grievance is done by interviews of parties and witnesses, where there is no chance to confront witnesses, provide all testimonial evidence to all parties, and other fundamental aspects of due process hearings. The Procedure fails to provide even minimal due process (law of the land) rights to a state employee who has alleged discrimination or retaliation, and who believes she has lost her employment because of her allegations.

Petitioner's constitutional claims can be described as follows:

> 1. The grievance procedures available to EPA Non-Faculty employees violate her right to due process, in that these procedures do not include the right to discovery of all evidence available to the Grievance Committee, and do not provide for an adversarial hearing at which Petitioner may be represented by counsel and may cross-examine witnesses.
>
> 2. Career State employees who challenge the existence of just cause for termination have the right to an adversarial hearing and other due process protections, while EPA Non-Faculty employees who allege discrimination or retaliation do not have "full due process procedures." Petitioner asserts that the difference in the procedures and rights applicable to these categories of em-

ployees and to their differing claims constitutes a violation of her right to equal protection.

Petitioner is not entitled to relief on the basis of either of these constitutional claims.[5]

2. Due Process Claim

"The Fifth Amendment to the Constitution of the United States, applied to the States through the Fourteenth Amendment, provides in pertinent part: 'No person shall . . . be deprived of life, liberty, or property, without due process of law[.]' " *Chapel Hill Title & Abstract Co. v. Town of Chapel Hill*, 362 N.C. 649, 654, 669 S.E.2d 286, 289 (2008). "At the threshold of any procedural due process claim is the question of whether the complainant has a liberty or property interest, determinable with reference to state law, that is protectable under the due process guaranty. We have consistently held that, '[n]othing else appearing, an employment contract in North Carolina is terminable at the will of either party,' and that such a contract is not a sufficient proprietary interest to require full-scale constitutional protection in the form of a pretermination hearing." *Maines v. City of Greensboro*, 300 N.C. 126, 134, 265 S.E.2d 155, 160 (1980) (citing *Bishop v. Wood*, 426 U.S. 341, 344, 96 S. Ct. 2074, 2077, 48 L. Ed. 2d 684, 690 (1976), and quoting *Presnell v. Pell*, 298 N.C. 715, 723-24, 260 S.E.2d 611, 616 (1979)).

N.C. Gen. Stat. § 126-35 affords career State employees certain procedural rights that must be honored before adverse employment actions may be taken against such employees. For example, N.C. Gen. Stat. § 126-35(a) provides that "[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." "Our Supreme Court

5. Although Petitioner alleges violations of her rights under Article I, §§ 18 and 19 of the North Carolina Constitution, she has not attempted to assert a violation of her rights under the United States Constitution. However, "[t]he words 'the law of the land' as used in section [19], Article I of the North Carolina Constitution are equivalent to the words 'due process of law' required by section 1 of the Fourteenth Amendment to the United States Constitution." *Rice v. Rigsby*, 259 N.C. 506, 518, 131 S.E.2d 469, 477 (1963) (citing *State v. Hedgepeth*, 228 N.C. 259, 266, 45 S.E.2d 563, 568 (1947), *cert. denied*, 334 U.S. 806, 68 S. Ct. 1185, 92 L. Ed. 1739 (1948)). "It is also true that the Equal Protection Clause of Article I, § 19 of the Constitution of North Carolina is functionally equivalent to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States." *White v. Pate*, 308 N.C. 759, 765-66, 304 S.E.2d 199, 203 (1983) (citing *Kresge Co. v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971)). As a result of the similarity between the relevant constitutional provisions and Petitioner's failure to advance a state constitution-specific argument in her brief, we will utilize decisions under the United States Constitution and the North Carolina Constitution to analyze the validity of Petitioner's constitutional claims.

has held that, for the purpose of procedural due process, 'the North Carolina General Assembly created, by enactment of the State Personnel Act, a constitutionally protected property interest in the continued employment of career State employees.' " *Teague v. N.C. Dept. of Transp.*, 177 N.C. App. 215, 220, 628 S.E.2d 395, 399 (quoting *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998)), *disc. review denied*, 360 N.C. 581, 636 S.E.2d 199 (2006).

Petitioner, however, was employed as an EPA Non-Faculty research assistant. " 'EPA' is an abbreviation designating those employees who are exempt from the State Personnel Act. . . . [Petitioner was] exempt from the State Personnel Act . . . [and] cannot establish a property right through the State Personnel Act." *McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 57-58, 542 S.E.2d 227, 235, *disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001); *see also*, *e.g.*, *Privette v. University of North Carolina*, 96 N.C. App. 124, 137, 385 S.E.2d 185, 192 (1989) (holding that a research technician employed by the University lacked a property interest in continued employment and was not entitled to a pre-termination hearing). As a result, we hold that Petitioner lacked a property interest in her continued and future employment sufficient to trigger the protections of the due process clause.[6] Having reached this conclusion, we need not comment on the propriety of the procedures utilized to address Petitioner's grievance. Thus, we hold that the trial court committed an error of law by concluding that Petitioner's right to due process was violated by the applicable University procedures and by ordering that revisions be made to those procedures.[7]

3. Equal Protection Claim

> "The Equal Protection Clause of the Fourteenth Amendment provides that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' The United States Supreme Court has 'explained that the purpose of the equal protection

6. We also note that the mere fact that Petitioner was required to work from home for the last several months of her second term of employment did not result in a deprivation of Petitioner's protected rights or trigger the applicability of any due process protections.

7. Petitioner also contends that she was deprived of a protected liberty interest without due process, with this contention predicated on the assertion that, when she was directed to work from home during the last ten weeks of her term and not reappointed, she thereby suffered "public humiliation and loss of name and reputation." As a result of the fact that Petitioner neither alleged this claim in her grievance nor points to any support for this contention in the record, we hold that Petitioner failed to preserve her "deprivation of liberty" claim for judicial review or to demonstrate its validity.

> clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.' " Thus, while the principle of substantive due process protects citizens from arbitrary or irrational laws and government policies, the right to equal protection guards against the government's use of invidious classification schemes.

Clayton v. Branson, 170 N.C. App. 438, 456-57, 613 S.E.2d 259, 272 (quoting *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074-1075, 145 L. Ed. 2d 1060, 1063 (2000)), *disc. review denied*, 360 N.C. 174, 625 S.E.2d 785 (2005). "Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 2331, 120 L. Ed. 2d 1, 12 (1992).

In its order, the trial court appears to have analyzed Petitioner's due process and equal protection claims jointly and concludes that the fact that career State employees have more extensive procedural and substantive statutory rights than are afforded to non-career State employees, such as EPA Non-Faculty employees like Petitioner, constitutes an equal protection violation.[8] More particularly, the trial court stated that:

> . . . The University's Procedure sets up two classifications of grievants. Class I are those employees who grieve they were discharged without just cause. For this classification, the University provides: The employee shall have the right to counsel, to present the testimony of witnesses and other evidence, to confront and cross-examine adverse witnesses, and to examine all documents and other adverse demonstrative evidence. A written transcript of all proceedings shall be kept; upon request, a copy thereof shall be furnished to the employee at the University's expense. . . .

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8. In ruling that Petitioner's right to equal protection had been violated, the trial court discussed the fact that Petitioner was not provided with recordings of a number of witness interviews. However, Petitioner's claim that she was entitled to discovery of these recordings—or of any other specific materials in the university's possession—is based on her allegation that her due process rights were violated. Having concluded that Petitioner failed to demonstrate a property interest in her employment sufficient to demonstrate an entitlement to procedural due process protections, we necessarily find that Petitioner had no constitutional right to discovery of these recordings.

> For grievants who allege they suffered injuries to their reputation (liberty) and to their contract rights because of their national origin and race, and because they have followed State policy that encourages the reporting of wrongdoing, they are relegated to the back of the grievance bus. They are second-class grievants. The University provides them no hearing, no investigation of the Grievance except interviews of parties and witnesses, no opportunity to confront witnesses, no requirements to provide all evidence to all parties, and the denial of other fundamental aspects of due process hearings.

After carefully reviewing the applicable law, we conclude that Petitioner has failed to properly allege the existence of an equal protection violation, that the analysis employed by the trial court in addressing the equal protection issue was fatally flawed, and that the trial court's decision concerning this issue should be reversed.

"To establish an equal protection violation, [Petitioner] must identify a class of similarly situated persons who are treated dissimilarly." *Geach v. Chertoff*, 444 F.3d 940, 945 (8th Cir. 2006) (citation omitted). Thus, "[i]n addressing an equal protection challenge, we first identify the classes involved and determine whether they are similarly situated." *Matter of S.L.M.*, 287 Mont. 23, 32, 951 P.2d 1365, 1371 (1997). For that reason, Petitioner was required to show as an integral part of her equal protection claim that similarly situated individuals were subjected to disparate treatment. *Mandell v. County of Suffolk*, 316 F.3d 368, 379 (2d Cir. 2003) (stating that "[a] Plaintiff relying on disparate treatment evidence must show that she was similarly situated in all material respects to the individuals with whom she seeks to compare herself"); *see also State v. Waring*, 364 N.C. 443, 490, 701 S.E.2d 615, 645 (2010) (holding that a prosecutor's decision to strike a particular juror did not constitute an equal protection violation where the information obtained during the jury selection process failed to establish that the two jurors were similarly situated); *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 447, 358 S.E.2d 372, 377 (1987) (holding that the adoption of a zoning ordinance equally applicable to all buildings constructed after a specific date did not result in an equal protection violation because pre-existing buildings and post-ordinance buildings were not similarly situated); *Mayfield v. Hannifin*, 174 N.C. App. 386, 397, 621 S.E.2d 243, 251 (2005) (stating that counsel for the defendant and the plaintiff are not similarly situated with respect to their obligation to maintain the confidentiality of a plaintiff's medical records); *State v. Davis*, 96

N.C. App. 545, 549, 386 S.E.2d 743, 745 (1989) (holding that the prosecution of a defendant who intentionally failed to pay taxes as a protest while refraining from taking such action against an individual who failed to pay taxes due to neglect did not constitute an equal protection violation since the two categories of defendants were not similarly situated); *Smith v. Wilkins*, 75 N.C. App. 483, 486, 331 S.E.2d 159, 161 (1985) (holding that drivers who move to North Carolina after their licenses have been revoked in another state are not similarly situated for equal protection purposes with drivers whose licenses have been revoked in North Carolina). Thus, in order to properly assert an equal protection violation, Petitioner was required to allege and demonstrate that she was treated differently than other similarly situated individuals in some relevant way.

Petitioner's equal protection claim seems to hinge on the fact that career State employees have more extensive procedural and substantive rights than other State employees, such as probationary, temporary, or EPA Non-Faculty employees like Petitioner.[9] However, Petitioner fails to identify a specific class of employees with whom she claims to be similarly situated, or to articulate any basis for any such claim of substantial similarity. For example, Petitioner does not allege or demonstrate that all State employees or even all University employees are "similarly situated" in some relevant respect. In addition, Petitioner has not alleged or demonstrated that similarly situated persons within the class of EPA Non-Faculty university employees have been subjected to disparate treatment. At bottom, "[Petitioner has] not identif[ied] any 'classification' upon which [she] was denied equal protection" or "allege[d] that the [rights afforded to different classes of employees] included the use of any inherently suspect criteria, such as race, religion, or disability status." *Clayton*, 170 N.C. App. at 457, 613 S.E.2d at 273. Aside from noting that Petitioner is a member of a larger class of State employees and arguing that equal protection claims stemming from differential treatment based on the exercise of one's free speech rights or an employee's age, gender, or national ori-

9. N.C. Gen. Stat. § 126-1.1 states that, "unless the context clearly indicates otherwise, 'career State employee' means a State employee . . . who: (1) [i]s in a permanent position appointment; and (2) [h]as been continuously employed by the State of North Carolina . . . in a position subject to the State Personnel Act for the immediate 24 preceding months." In addition, as we have already noted, members of the University research staff, such as Petitioner, are expressly excluded from the coverage of the provisions of the State Personnel Act. N.C. Gen. Stat. § 126-5(c1)(8). Aside from the fact that she was a member of the University's research staff, Petitioner occupied a temporary, rather than a permanent, position and had been employed for less than 24 months at the time that Dr. Snider declined to renew her appointment.

gin should be subject to strict scrutiny, neither Petitioner nor the trial court made any effort to articulate the relevant respects in which career State employees and non-career State employees wishing to assert a grievance against their employer are similarly situated for equal protection purposes. Instead, Petitioner and the trial court have simply assumed that all State employees, or all State employees who have asserted a grievance, are similarly situated, an omission which fundamentally undermines Petitioner's equal protection claim. As a result, we conclude that Petitioner failed to assert a valid equal protection claim, find that the trial court committed an error of law in the event that it determined otherwise, and reverse the trial court's order to the extent that it found that Petitioner's equal protection rights had been violated.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court's determination that EPA Non-Faculty employees such as Petitioner are entitled to the protections of the Whistleblower Act is correct and should be affirmed. However, since the BOG failed to make adequate findings concerning the merits of Petitioner's claim under N.C. Gen. Stat. § 126-84 and the First Amendment and since the trial court deviated from the applicable standard of review during its consideration of the merits of those claims, we remand this case to the Orange County Superior Court for further remand to the BOG in order to permit the BOG to make adequate findings of fact addressing Petitioner's Whistleblower Act and First Amendment claims. In addition, we affirm the BOG's determination that Petitioner was not entitled to relief on the basis of her claim to have been subjected to age, gender, or nationality-based discrimination or to have been retaliated against for asserting such a claim on the grounds that the BOG's factual findings have adequate record support and reverse the trial court's decision to the contrary. Finally, we hold that Petitioner has not established the existence of valid due process or equal protection claims and that the trial court erred in reaching a different conclusion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judge STEELMAN concurs.

Judge Elmore concurs in part, concurs in the result in part, and dissents in part by separate opinion.

ELMORE, Judge, concurring in part, concurring in the result in part, and dissenting in part.

I concur with the Court's determination that the UNC-Chapel Hill EPA Non-Faculty Grievance Procedure did not violate petitioner's rights to procedural due process or equal protection of the laws under the North Carolina Constitution. I also concur with the Court's decision to remand this case to the Orange County Superior Court. However, I respectfully dissent from the Court's holding that EPA Non-Faculty employees such as petitioner are entitled to the protections of the Whistleblower Act. As a result, I concur in the Court's decision in part, concur in the result reached in the Court's decision in part, and dissent from the Court's decision in part.

N.C. Gen. Stat. § 126-5(c1) states that the North Carolina Whistleblower Act does not apply to "[a] State employee who is not a career state employee as defined by this Chapter." N.C. Gen. Stat. § 126-5(c1) (2009). A career state employee under this chapter is defined as one who:

> (1) Is in a permanent position appointment; and
>
> (2) Has been continuously employed by the State of North Carolina or a local entity as provided in G.S. 126 5(a)(2) in a position subject to the State Personnel Act for the immediate 24 preceding months.

N.C. Gen. Stat. § 126-1.1 (2009).

Here, petitioner was not in a permanent employment position. Her position was for the term of one year, and it was subject to the continued availability of funds. Furthermore, as the majority has correctly determined, petitioner's position as an EPA Non-Faculty employee was not subject to the State Personnel Act. Therefore, the North Carolina Whistleblower Act did not apply to petitioner.

The majority cites N.C. Gen. Stat. § 126-5(c5) as the basis for protection of petitioner under the Whistleblower Act. However, this section of the statute specifically states that, "[n]otwithstanding any other provision of this Chapter, Article 14 of this Chapter shall apply to all State employees, public school employees, and community college employees." N.C. Gen. Stat. § 126-5(c5) (2009). The very language of this section itself clearly indicates that § 126-5(c5) *only* applies *notwithstanding* any other provision. This language clearly indicates that § 126-5(c5) is meant to operate as a residuary, or catch-all, provision that is applicable only when the statute does not other-

wise provide to the contrary. Here, N.C. Gen. Stat. § 126-5(c1) very clearly articulates that the Whistleblower Act does not apply to a state employee who is not a career state employee. The statute further provides a very precise definition of a career state employee. Here, petitioner clearly does not satisfy either part of the definition of a career state employee. Petitioner was 1) not in a permanent employment position, and 2) her position was not subject to the State Personnel Act.

As a result, I am unable to agree with the Court's determination that petitioner was entitled to the protections of the Whistleblower Act. I agree with the Court's determination that this case should be remanded to the superior court. However, I conclude that remand would be proper only with instructions to the trial court to affirm the final decision of the Board of Governors consistent with this dissent.

NELSON CAMPOS-BRIZUELA, PLAINTIFF v. ROCHA MASONRY, L.L.C., EMPLOYER, AND BUILDERS MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA10-1571

(Filed 4 October 2011)

1. Workers' Compensation—jurisdiction—employee—reasonable belief

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff was, in fact, an employee under N.C.G.S. § 97-2(2) for purposes of the administration of the Workers' Compensation Act. Plaintiff was performing work for the benefit of the employer at the time of his injury. Plaintiff reasonably believed that he had been hired by someone with authority to do so and had no idea that the management took a different position.

2. Workers' Compensation—total disability—sufficiency of findings

The Industrial Commission did not err in a workers' compensation case by concluding as a matter of law that plaintiff has been totally disabled since 16 April 2009. The record contained medical evidence that plaintiff was incapable of work in any employment, as a consequence of the work-related injury. The fact that the record did not address issues relating to the reason-

ableness of any efforts that plaintiff might have made to find other work or the types of work that were available to plaintiff did not undercut the Commission's disability determination.

Appeal by defendants from Opinion and Award entered 31 August 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 August 2011.

Farah & Cammarano, P.A., by N. Victor Farah and Gina E. Cammarano, for Plaintiff-appellee.

Lewis & Roberts, P.L.L.C., by Timothy S. Riordan, J. Timothy Wilson, and Mallory E. Williams, for Defendant-appellants.

ERVIN, Judge.

Defendants Rocha Masonry, L.L.C., and Builders Mutual Insurance Company appeal from an order awarding medical and disability benefits to Plaintiff Nelson Campos-Brizuela. On appeal, Defendants argue that the Commission erred by asserting jurisdiction over Plaintiff's claim and by determining that Plaintiff was disabled. After careful consideration of Defendants' challenges to the Commission's order in light of the record and the applicable law, we conclude that the Commission's order should be affirmed.

I. Background

A. Substantive Facts

Plaintiff was born in El Salvador in 1972. In approximately 2000, Plaintiff moved to Maryland, where he found work as a driver. In 2009, Plaintiff moved to North Carolina in pursuit of greater employment opportunities.

In April 2009, Plaintiff became acquainted with Felipe Quintero. Mr. Quintero worked for Defendant Rocha Masonry, which had a contract to spread concrete at Caleb's Creek Elementary School in Kernersville. After hiring Plaintiff to work at the Caleb's Creek Elementary School site on 15 April 2009, Mr. Quintero gave Plaintiff a ride to that location on the following day. After working for several hours, Plaintiff suffered a "near amputation" injury when his hand was crushed while cleaning a concrete pump. As a result of this injury, Plaintiff had to undergo surgery and was hospitalized for several days. As of 31 March 2010, Plaintiff had not regained the use of his hand, had "no appreciable wrist motion," and had "virtually no motion of the fingers."

B. Procedural History

On 12 May 2009, Defendants filed a Form 19 providing notice of Plaintiff's injury. On the same date, Defendants filed a Form 61 denying Plaintiff's claim for workers' compensation benefits on the grounds that Plaintiff was not employed by Defendant Rocha Masonry at the time of his injury. On 20 May 2009, Plaintiff filed a Form 33 requesting a hearing concerning his claim for workers' compensation benefits.

On 17 February 2010, Deputy Commissioner James C. Gillen issued an Opinion and Award concluding that Plaintiff had failed to prove that he was employed by Defendant Rocha Masonry on 16 April 2009 and that the Commission lacked jurisdiction over Plaintiff's claim for that reason. Plaintiff appealed Deputy Commissioner Gillen's order to the Commission. On 31 August 2010, the Commission, by means of an Opinion and Award issued by Commission Chair Pamela T. Young, with the concurrence of Commissioners Danny Lee McDonald and Staci Meyer, reversed Deputy Commissioner Gillen's order and ruled that Plaintiff was employed by Defendant Rocha Masonry at the time of his injury. As a result, the Commission awarded medical and disability benefits and attorneys' fees to Plaintiff. Defendants noted an appeal to this Court from the Commission's order.

II. Legal Analysis

A. Jurisdiction

1. Standard of Review

[1] "The plaintiff bears the burden of proving each element of compensability . . . by 'a preponderance of the evidence.' " *Everett v. Well Care & Nursing Servs.*, 180 N.C. App. 314, 318, 636 S.E.2d 824, 827 (2006) (quoting *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 234, 581 S.E.2d 750, 752 (2003)). For that reason, "the claimant bears the burden of proving the existence of an employer-employee relationship at the time of the accident." *McCown v. Hines*, 353 N.C. 683, 686, 549 S.E.2d 175, 177 (2001) (citing *Lucas v. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976)).

> [T]he existence of an employer-employee relationship at the time of the injury constitutes a jurisdictional fact. . . . "The finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding. The reviewing court has the right, and the duty,

> to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record."

McCown, 353 N.C. at 686, 549 S.E.2d at 177 (citing *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988), and quoting *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261). Appellate courts decide disputed issues of jurisdictional fact based on the greater weight of the evidence. *Youngblood*, 321 N.C. at 384, 364 S.E.2d at 437.

> In performing our task to review the record de novo and make jurisdictional findings independent of those made by the Commission, we are necessarily charged with the duty to assess the credibility of the witnesses and the weight to be given to their testimony, using the same tests as would be employed by any fact-finder in a judicial or quasi-judicial proceeding.

Morales-Rodriguez v. Carolina Quality, ___ N.C. App. ___, ___, 698 S.E.2d 91, 94 (2010). Although we have not had an opportunity to observe the demeanor of the witnesses, we are, in that respect, in the same position as the Commission, which based its findings on information contained in the written record rather than relying upon testimony provided by live witnesses.

> Whether the full Commission conducts a hearing or reviews a cold record, [N.C. Gen. Stat.] § 97-85 places the ultimate fact-finding function with the Commission—not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony. Consequently, in reversing the deputy commissioner's credibility findings, the full Commission is not required to demonstrate, as *Sanders [v. Broyhill Furniture Industries*, 124 N.C. App. 637, 641, 478 S.E.2d 223, 226 (1996),] states, "that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one." To the extent that *Sanders* is inconsistent with this opinion, it is overruled.

Adams v. AVX Corp., 349 N.C. 676, 681, 509 S.E.2d 411, 413-14 (1998) (quoting *Sanders*, 124 N.C. App. at 641, 478 S.E.2d at 226, *disc. rev. denied*, 346 N.C. 180, 486 S.E.2d 208 (1997), *overruled in part as stated*). In making the necessary credibility determination, we also "consider the [tests enunciated in the] North Carolina pattern jury instructions, which" state that a credibility determination should rest

upon the use of " 'the same tests of truthfulness which you apply in your everyday lives. . . .' " *In re Hayes*, 356 N.C. 389, 404-05, 584 S.E.2d 260, 270 (2002) (quoting N.C.P.I.-Civil 101.15 (1994)). After carefully reviewing the record, we conclude that Plaintiff was, in fact, an employee of Rocha Masonry for purposes of the administration of the Workers' Compensation Act.

2. Factual Analysis

According to the undisputed evidence, Plaintiff was at a job site at which Defendant Rocha Masonry had a contract to pour concrete and was engaged in cleaning a machine used by Defendant Rocha Masonry while performing that contract at the time of his injury. In addition, we find Plaintiff's testimony to the effect that he was cleaning the machine at the direction of Mr. Quintero to be credible. As a result, we find, in accordance with the essentially uncontested evidence, that Plaintiff was performing work for the benefit of Defendant Rocha Masonry at the time of his injury.[1]

In challenging the Commission's jurisdiction over Plaintiff's claim, Defendants argue that, because Plaintiff was hired by an employee of Defendant Rocha Masonry who lacked the authority to make such a decision, Plaintiff was not employed by Defendant Rocha Masonry for workers' compensation purposes at the time of his injury. In essence, Defendants contend that (1) Plaintiff was hired by Mr. Quintero; (2) Mr. Quintero had not been given the authority to hire assistants by the appropriate officials at Defendant Rocha Masonry; (3) Mr. Quintero did not inform Plaintiff of the identity of the company he worked for; and (4), because Plaintiff was hired by an individual who lacked the authority to make employment decisions and did not mention that Plaintiff would be working for Defendant Rocha Masonry, Plaintiff never established that he was employed by Defendant Rocha Masonry for workers' compensation purposes. Defendants' argument lacks merit.

At the hearing, Plaintiff testified that Mr. Quintero "contracted [with him] to go to work with [Mr. Quintero]." On the following day, as Mr. Quintero drove Plaintiff to the job site, he informed Plaintiff that Plaintiff would be earning $9.00 an hour and that Plaintiff would

1. Defendants have not argued that Plaintiff was a trespasser, a volunteer, or an independent subcontractor at the time that he worked at the Caleb's Creek Elementary School. As a result, Defendants appear to concede that Plaintiff was working for someone at the time of his injury and that this work clearly benefitted Defendant Rocha Masonry.

be paid by a company check drawn on the account of Mr. Quintero's employer. "The way [that Mr. Quintero] describe[d] it to [Plaintiff, he] felt that he had authority . . . to hire [Plaintiff] to do work for this company." After arriving at the job site, Plaintiff observed Mr. Quintero "giving orders to a lot of people" and assumed that the others at the job site worked for Mr. Quintero's employer as well.

At first, Mr. Quintero "told [Plaintiff] to work, to help the people that are higher." "After that, since [Mr. Quintero] was [his] immediate boss, [Plaintiff] asked him what [he] should do next." In response, Mr. Quintero directed Plaintiff to clean a machine. As he attempted to perform the requested operation, Plaintiff's hand was crushed.[2]

Plaintiff's testimony was corroborated to some extent by that of other witnesses. Mark Atkinson, an attorney who had previously represented Plaintiff, testified that, during his investigation of Plaintiff's claim, he spoke with Mr. Quintero. At that time, Mr. Quintero told Mr. Atkinson that, when Plaintiff was injured, he had been an employee of Defendant Rocha Masonry. Edwin Guevara, an attorney licensed to practice in El Salvador, served as the interpreter during a conversation between Mr. Quintero and Plaintiff's counsel that occurred on the morning of the hearing held before Deputy Commissioner Gillen. At that time, Mr. Quintero stated that, when it was necessary to provide a certificate of workers' compensation insurance to the general contractor associated with a particular job, the customary practice was for Raoul Rocha, who owned Defendant Rocha Masonry, to give the certificate to Mr. Quintero for transmission to the general contractor's representative. In addition, Mr. Quintero told Mr. Guevara that "he usually gets some helpers for the job site." This testimony corroborates Plaintiff's claim that Mr. Quintero appeared to have a position of responsibility with Defendant Rocha Masonry and provides evidence that he made a practice of hiring employees, including Plaintiff, to work for Defendant Rocha Masonry.

Although Mr. Quintero testified that he worked for Defendant Rocha Masonry on 16 April 2009, he claimed that he did not occupy a managerial or supervisory position and denied having the authority to hire employees for Defendant Rocha Masonry. However, Mr. Quintero admitted that he had hired helpers for other jobs. In addition, Mr. Quintero denied having ever mentioned the name of his employer while speaking with Plaintiff. Mr. Quintero indicated that he owned

2. As a result of the fact that the machine lacked the proper safety guard, Defendant Rocha Masonry was cited by the Occupational Safety and Health Administration and paid a $700.00 fine.

the machine used to pour concrete at the Caleb's Creek Elementary School site and rented it to other contractors on occasion.[3] Initially, Mr. Quintero said that he earned $17.00 an hour and intended to pay Plaintiff $9.00 from his own earnings. On another occasion, however, Mr. Quintero testified that he did not operate an independent business and that he drove Plaintiff to the job site for the purpose of allowing Plaintiff to seek work from other subcontractors. As a result, given these inconsistencies, we conclude that Mr. Quintero's testimony is entitled to little credibility.

Thus, in light of the factual and credibility-related determinations that we have made during our review of the record evidence, we make the following findings of jurisdictional fact, which are substantively identical to the relevant findings made by the Commission:

> 1. It was Plaintiff's understanding that he was being hired by Mr. Quintero on 15 April 2009 to work for Mr. Quintero's employer (later identified as Defendant Rocha Masonry). In light of the way that Mr. Quintero described his relationship with Defendant Rocha Masonry, Plaintiff believed that Mr. Quintero had the authority to hire him to perform work for Defendant Rocha Masonry relating to the concrete project at Caleb's Creek Elementary School.
>
> 2. On the morning of 16 April 2009, Mr. Quintero transported Plaintiff to the job site. On the way, Mr. Quintero told Plaintiff that there was a lot of work to be done on the project and that he would be paid $9.00 an hour for his work by means of a company check drawn on the account of Mr. Quintero's employer.
>
> 3. After Plaintiff and Mr. Quintero arrived at the job site on 16 April 2009, Mr. Quintero began giving orders to other workers. The job in which Defendant Rocha Masonry was engaged involved spreading concrete. Mr. Quintero was in charge of the concrete pump that was present at the job site and was the only person at that location who was authorized to use the machine. In addition, Mr. Quintero appeared to be responsible for supervising and directing individuals involved in working on the Caleb's Creek Elementary School concrete project on behalf of Defendant Rocha Masonry.

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3. Mr. Rocha, on the other hand, testified that Mr. Quintero did not own the machine.

4. In order for Defendant Rocha Masonry to lawfully perform work on the Caleb's Creek Elementary School job site, a certificate of workers' compensation insurance had to be faxed to Ramirez Masonry, the company that subcontracted this concrete project out to Defendant Rocha Masonry. Aside from supervising workers and overseeing the operation of the concrete pump, Mr. Quintero provided Defendant Rocha Masonry's certificate of workers' compensation insurance to the appropriate up-the-line contractor.

5. Defendant Rocha Masonry clothed Mr. Quintero with authority to act on its behalf by allowing Mr. Quintero to work on an unsupervised basis at job sites, to supervise and direct workers on the Caleb's Creek Elementary School concrete project, and to oversee the operation of the concrete machine pump, and by relying on Mr. Quintero to provide Defendant Rocha Masonry's workers' compensation insurance certificate to other contractors. Although the contradictory testimony given by Mr. Quintero and Mr. Rocha leaves the actual ownership of the concrete pump unclear, Mr. Quintero clearly had the authority to operate that piece of equipment on behalf of Defendant Rocha Masonry. It was reasonable for Plaintiff and others to believe that Mr. Quintero's authority encompassed hiring helpers to complete any work associated with the Caleb's Creek Elementary School project.

6. The scope of Mr. Quintero's apparent authority to act on behalf of Defendant Rocha Masonry included the apparent authority to hire workers as necessary in order to complete the projects that Mr. Quintero was responsible for supervising, including the concrete project at issue in this case. While Mr. Rocha and Mr. Quintero claimed that Mr. Quintero was not authorized to hire Plaintiff on behalf of Defendant Rocha Masonry, there is no evidence that Mr. Quintero was reprimanded, disciplined, or terminated for bringing Plaintiff to the job site and putting him to work on the concrete project on 16 April 2009 despite the fact that Plaintiff was severely injured on that occasion. Therefore, we find that the claim that Mr. Quintero lacked the authority to hire workers for Defendant Rocha Masonry is not credible.

7. Mr. Quintero was acting within the scope of his apparent authority to act on behalf of Defendant Rocha Masonry when he hired Plaintiff on 15 April 2009. Plaintiff's belief that Mr. Quintero had the authority to hire him (and his belief that Mr. Quintero did in fact hire him) on behalf of Defendant Rocha Masonry was reasonable. As a result, we find that Plaintiff acted in good faith,

exercised reasonable prudence, and was not on notice of any limitations placed upon Mr. Quintero's authority by Defendant Rocha Masonry.

3. Legal Analysis

"The workers' compensation system is a creature of statute enacted by the General Assembly and is codified in Chapter 97 of the North Carolina General Statutes." *Frost v. Salter Path Fire & Rescue*, 361 N.C. 181, 184, 639 S.E.2d 429, 432 (2007). N.C. Gen. Stat. § 97-2(2) provides, in pertinent part, that "[t]he term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed." "Where . . . the statute, itself, contains a definition of a word used therein, that definition controls." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 203 (1974) (citation omitted). As is discussed in more detail above, we have found that Mr. Quintero hired Plaintiff to work at the Caleb's Creek Elementary School job site, drove Plaintiff to the job, told him that he would be earning $9.00 an hour paid by means of a check drawn on the account of Mr. Quintero's employer, and directed the activities of Plaintiff and of others while at the job site. We conclude that this evidence is more than sufficient to establish that Plaintiff was an "employee" of Defendant Rocha Masonry as that term is used in N.C. Gen. Stat. § 97-2(2).

In seeking to persuade us to reach a contrary conclusion, Defendants have not discussed the statutory definition of an employee set out in N.C. Gen. Stat. § 97-2(2) in any detail. Instead, Defendants argue that, even if Mr. Quintero hired Plaintiff to work in connection with the concrete spreading contract at the Caleb's Creek Elementary school job site, the fact that Defendant Rocha Masonry had not authorized Mr. Quintero to make hiring decisions and that Mr. Quintero never told Plaintiff the name of the company for whom he would be working precludes Plaintiff, as a matter of law, from relying on Mr. Quintero's apparent authority to hire helpers to work on the concrete spreading job. In effect, Defendants argue that, in order to determine whether Plaintiff is an employee for workers' compensation purposes, we must apply certain common law rules developed in connection with the resolution of liability issues arising from interactions between an agent, the principal represented by that agent, and a third party with whom that agent dealt. More specifically, Defendants argue that "there can be no apparent authority created by an undisclosed principal."

The rule upon which Defendants rely has been principally utilized for the purpose of determining the relative liabilities of an agent and a principal in cases in which the agent failed to inform the third party of the principal's existence. *Howell v. Smith*, 261 N.C. 256, 258-59, 134 S.E.2d 381, 383 (1964) (holding that "[a]n agent who makes a contract for an undisclosed principal is personally liable as a party to it unless the other party had actual knowledge of the agency and of the principal's identity") (citing *Walston v. Whitley & Co.*, 226 N.C. 537, 39 S.E.2d 375 (1946) and *Restatement of Agency 2d* § 322) (other citations omitted). According to Defendants, this common law principle is applicable to jurisdictional determinations required under the Workers' Compensation Act, so that an individual is precluded from receiving workers' compensation benefits in the event that he or she is hired by an individual who had not been previously authorized to make hiring decisions or who failed to provide the corporate name of the applicable employer. In Defendants' view, "[t]his Court adopted and relied upon this rule of law to deny an injured worker's action against an alleged principal in *Hughart v. Dasco Transp., Inc.*, 167 N.C. App. 685, 606 S.E.2d 379 (2005)." We are not persuaded by Defendants' argument.

In *Hughart*, a trucking company named Dasco subcontracted the administration of needed payroll and bookkeeping services to a third party named SOI. As we noted in our opinion:

> Defendant SOI provides administrative services to small and medium-sized companies. Dasco and SOI entered into a service agreement under which SOI, in return for a fee, approved prospective Dasco employees and then handled payroll services and insurance, including workers' compensation insurance, for those employees, called "assigned employees." Dasco was exclusively responsible for managing and supervising the assigned employees. In order to meet its staffing needs, Dasco relied not only on the assigned employees, but also on employees of another trucking company and independent contractors.

Hughart, 167 N.C. App. at 687-88, 606 S.E.2d at 381-82. The plaintiff in *Hughart* was hired to work for Dasco as an assistant driver. The Commission found that, because SOI had given a Dasco employee named Shipley the apparent authority to hire helpers, SOI was equitably estopped from denying that the plaintiff was a joint employee of both companies. On appeal, we held that the doctrine of equitable estoppel could not be applied to give Shipley the apparent authority to act on behalf of SOI on the grounds that the record contained no

evidence that the plaintiff was even aware that Dasco had subcontracted some of its administrative responsibilities:

> "The rights and liabilities which exist between a principal and a third party dealing with that principal's agent may be governed by the apparent scope of the agent's authority[, but] . . . the determination of a principal's liability in any particular case must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had . . . conferred upon his agent." . . . Because there is no evidence that [the plaintiff] was aware of SOI or that SOI was aware of [the plaintiff] we hold that the Commission erred in concluding that SOI was estopped from denying that [plaintiff] was its employee.

Hughart at 691-92, 606 S.E.2d at 384 (quoting *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 30-31, 209 S.E.2d 795, 799 (1974)). A careful reading of our *Hughart* opinion establishes that the Court never held that, if the plaintiff had reasonable grounds to believe he was being hired on behalf of the company to whom Dasco had subcontracted administrative work, SOI would have been able to evade responsibility for any workers' compensation benefits to which he was entitled on the grounds that Shipley lacked the actual authority to hire the plaintiff or failed to tell the plaintiff of SOI's identity. Instead, our decision in *Hughart* focused on the fact that the plaintiff never knew that SOI even existed. In this case, Plaintiff was aware that Mr. Quintero was hiring him on behalf of Mr. Quintero's employer and reasonably relied on Mr. Quintero's representations to that effect. Thus, *Hughart* does not support, much less necessitate, a decision in Defendants' favor.

Defendants also rely on *Lucas*, 289 N.C. at 222, 221 S.E.2d at 264, which is readily distinguishable from this case as well. In *Lucas*, the plaintiff was fired from his employment at a convenience store and instructed not to return to its premises. Subsequently, the plaintiff sought workers' compensation benefits stemming from injuries that he suffered while assisting his wife at the convenience store where he had previously worked. The undisputed record evidence showed that, even if the plaintiff had been told by employees assigned to the store in question that he could work there, the plaintiff was aware that his presence in the store violated the express orders of company management. As a result, the Supreme Court held that, because the plaintiff was fully aware that those with authority for making hiring decisions had expressly instructed him not to work at the store, he could not rely on a theory of "apparent authority" in order to obtain work-

ers' compensation benefits. In this case, however, Plaintiff reasonably believed that he had been hired by someone with the authority to do so and had no idea that the management of Defendant Rocha Masonry took a different position.

Any decision on our part to adopt the approach advocated by Defendants would require every job applicant to ascertain, at the risk of losing the ability to obtain workers' compensation benefits, whether the person who hired him on behalf of an employing entity is acting within the scope of his actual authority. The statutory definition of an "employee" set out in N.C. Gen. Stat. § 97-2(2) contains no such requirement, and we see no basis in the applicable rules of statutory construction for imposing one as a matter of judicial fiat. As a result, we reject Defendants' contention that Plaintiff's eligibility for workers' compensation benefits is precluded by the necessity for strict compliance with the common law principle upon which Defendants rely.

In reaching this conclusion, we find the reasoning set out in *Baker v. Rushing*, 104 N.C. App. 240, 248, 409 S.E.2d 108 (1991), persuasive. *Baker* involved a dispute between evicted tenants of a residential hotel and its individual and corporate owners. In reversing the trial court's grant of summary judgment in favor of the defendants, we considered the parties' arguments concerning whether an individual defendant was acting on behalf of an "undisclosed principal" corporate owner of the hotel. In rejecting that contention, we stated that:

> The [Residential Rental Agreements] Act defines a landlord as: "any owner and any rental management company, rental agency, or any other person having the actual or apparent authority of an agent to perform the duties imposed by this Article." [N.C. Gen. Stat.] § 42-40(3) (1984). This broad, statutory definition of landlord makes irrelevant in determining the liability of an agent the common law distinction between disclosed and undisclosed principals. . . . *See Allen v. Standard Crankshaft & Hydraulic Co.*, 210 F. Supp. 844 (W.D.N.C. 1962), *aff'd*, 323 F.2d 29 (4th Cir. 1963) (where the General Assembly has legislated with respect to the subject matter of a common law rule, the statute supplants the common law with respect to the particular rule).

Baker, 104 N.C. App. at 248-49, 409 S.E.2d at 113. Similarly, we conclude that the broad statutory definition of "employee" contained in N.C. Gen. Stat. § 97-2(2) renders it unnecessary for us to finely parse the common law distinctions between disclosed, unidentified, and

undisclosed principals as applied to this case. As we have already concluded, the credible evidence in the record clearly establishes that Mr. Quintero hired Plaintiff to work for Defendant Rocha Masonry at the Caleb's Creek Elementary School site while having the apparent authority to do so. As long as the statutory definition is satisfied, as it is in this case, a plaintiff need not make any additional showing in order to be eligible to receive workers' compensation benefits. Thus, Defendants are not entitled to appellate relief on the basis of their challenge to the Commission's jurisdiction over Plaintiff's claim.

B. Disability

[2] Secondly, Defendants argue that the Commission "erred in concluding, as a matter of law, that [Plaintiff] has been totally disabled since 16 April 2009, given the absence of record evidence and factual findings on the issue." According to Defendants, Plaintiff "offered no evidence regarding his wage earning capacity—before or after the incident—or the reason for his alleged inability to work . . . [and] offered no testimony or other evidence regarding any attempts to return to work . . . [and] no expert medical testimony to support a claim that he is unable to work in any employment." We do not find Defendants' argument persuasive.

1. Definition of "Disability"

"An employee injured in the course of his employment is disabled . . . if the injury results in an 'incapacity . . . to earn the wages which the employee was receiving at the time of the injury in the same or any other employment.' " *Russell v. Lowe's Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (quoting N.C. Gen. Stat. § 97-2(9) (1991)). "Accordingly, 'disability' as defined in the Workers' Compensation Act is the impairment of the injured employee's earning capacity and not physical disablement." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457 (citing *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434, 342 S.E.2d 798, 804 (1986)). "[I]n order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). "The employee seeking compensation under the Act bears 'the burden of proving the existence of [his] disability and its extent.' " *Clark v. Wal-*

Mart, 360 N.C. 41, 43, 619 S.E.2d 491, 493 (2005) (quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986)). "The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, *i.e.*, age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457 (internal citations omitted).

2. Sufficiency of Commission's Disability Determination

In its order, the Commission found, in pertinent part, that:

> 16. On April 16, 2009, Mr. Quintero instructed Plaintiff to clean the Reed B-30 Concrete Pump[.] . . . Plaintiff started cleaning the concrete pump, but something caught his hand and mangled it. When he pulled his hand out of the machine, he only saw his thumb.
>
> 17. At the hospital, Plaintiff was diagnosed with a severe crush injury to the right hand. He had fractures in the second, third, fourth, and fifth metacarpals. He underwent a hand re-plantation at the hospital. Following the surgery, Plaintiff did not receive timely physical therapy and his hand remained immobilized for an extended period of time.
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> . . . .
>
> 21. Plaintiff testified that he has been unable to work in any capacity due to his hand injury since the date of his accident. Plaintiff described the condition of his hand as "very bad" and stated that he had no movement in his fingers. The Deputy Commissioner noted on the record that Plaintiff's hand was disfigured by a large scar, his four fingers seemed not to be mobile, and there was some visible atrophy. Plaintiff's medical records reflect that he has been referred to a hand clinic. As of September 2009, Dr. Richard Meyer of Fort Washington, Maryland, indicated that Plaintiff had a severe injury that would require rehabilitation and that Plaintiff was "not fit for working duty."

Based upon these findings, the Commission concluded that, "[a]s a result of his compensable injury by accident to his hand, Plaintiff has been totally disabled since April 16, 2009, and he is entitled to temporary total disability benefits in the amount of $213.34 per week from April 16, 2009 and continuing until further Order of the Commission."

As the Commission noted, the parties "stipulated into evidence without need for further authentication or verification" various documents, including Plaintiff's medical records, and stated that its findings were "[b]ased upon the competent evidence of record," a body of information which would include the relevant medical records. As a result, Plaintiff's medical records may be appropriately considered in assessing the extent to which the record supports the Commission's conclusion that Plaintiff was entitled to temporary total disability benefits. Thus, in order to determine whether the Commission's findings with respect to the disability issue have adequate record support, our examination will include the contents of Plaintiff's medical records and similar documents.

On 16 April 2009, Dr. James Thompson, the surgeon who operated on Plaintiff after his injury, described Plaintiff's injury as a "near amputation injury." Beginning in May, 2009, Plaintiff sought treatment in Maryland. The medical records relating to Plaintiff's treatment in Maryland reflect that:

> 1. According to the medical records from 24 July 2009, Plaintiff has "no appreciable wrist motion" and the fractures of his fingers "do not appear to be radiographically healed." In addition, the medical notes state that, "for there to be any hope of [Plaintiff] regaining any finger or wrist motion[,] he needs to be started immediately on . . . physical therapy" and that "[h]is prognosis at this point despite aggressive treatment is poor for regaining any useful function of the right hand."
>
> 2. According to the medical records from August, 2009, Plaintiff has "virtually no motion of the fingers with significant pain on any attempted motion." In addition, the relevant records stated that "[t]he patient is going to do very poorly," that "I am not at all optimistic that we will get even a fair result," and that, "[a]t this time[,] [Plaintiff's] hand is basically a post." Finally, under the heading "Work Status," the 18 August 2009 medical records state that Plaintiff "is not capable of working."

4. According to Plaintiff's medical records for 1 September 2009, Plaintiff is "not capable of working" and "will . . . need multiple reconstructive procedures" and "long term treatment."

5. According to medical records from 29 September 2009, Plaintiff needs evaluation for hand surgery and is "obviously not fit for working duty."

In addition, Plaintiff stated, in responding to Defendants' interrogatories, that he had not been released to return to work. As a result, the record evidence tends to show, consistent with the Commission's findings, that Plaintiff suffered a near-amputation of his right hand that required hospitalization and surgery; that he was unable to work in any capacity as the result of his hand injury; that his treating physicians found that Plaintiff had little or no ability to move his right hand; that Plaintiff would require extensive treatment in order to have any hope of regaining the ability to use that appendage; and that his treating physicians believed that Plaintiff was not capable of working. As a result, we conclude that the record contains "medical evidence that [Plaintiff] is physically or mentally, as a consequence of the work related injury, incapable of work in any employment;" that the Commission's factual findings have adequate record support; and that the Commission's findings are sufficient to support its determination that Plaintiff was disabled under the first prong of the test set out in *Russell*.

In urging us to reach a different result, Defendants argue that Plaintiff did not present any evidence tending to show that he had made a reasonable search for other employment, that any attempt to return to work would be futile in light of preexisting conditions, or that any work available to Plaintiff would involve payment of a lower wage. However, given that Plaintiff had not been released to return to work at the time of the hearing held before Deputy Commissioner Gillen, any consideration of the specific types of work which Plaintiff might be qualified to perform was premature. In addition, the methods of proof delineated in *Russell* are stated in the disjunctive. Neither this Court nor the Supreme Court have ever held that a claimant is required to satisfy more than one prong of the *Russell* test, and we now hold that proof of disability under any one of the four prongs of the *Russell* test is sufficient to permit an award of disability benefits. As a result, we conclude that the fact that the record did not address issues relating to the reasonableness of any efforts that Plaintiff might have made to find other work or the types of work that were available to Plaintiff does not in any way undercut the Commission's disability determination.

We have reviewed Defendants' other challenges to the Commission's disability determination and find them equally unpersuasive. For example, we are unable to agree with Defendants that the opinion of Plaintiff's physician to the effect that Plaintiff is "obviously not fit for working duty" lacks clarity, particularly given that physician's additional determination that Plaintiff "is not capable of working." On the contrary, Plaintiff's injury was not obscure or esoteric in nature. Simply put, Plaintiff's right hand was crushed and nearly amputated to such an extent that, at the time of the Commission's decision, Plaintiff had not regained any use of his right hand. The causal relationship between Plaintiff's inability to use his right hand and his inability to work is clear. In addition, Defendants contend that "there is no evidence that Dr. Meyer had an understanding of [Plaintiff's] educational history, work history, or the job requirements of any potential positions of employment which may have been available" to Plaintiff. A claimant's treating physician is qualified to render an opinion as to the physical factors that limit the claimant's ability to work. In this case, based on the fact that Plaintiff had lost any effective ability to use his right hand, Dr. Meyer appropriately opined that Plaintiff was unable to work. We have never held, and decline to hold in this case, that a physician's opinion concerning a claimant's ability to work stemming from physical limitations must incorporate an analysis of the vocational opportunities available to that claimant. Moreover, the undisputed evidence shows that Plaintiff had no education beyond completing the sixth grade in El Salvador and that his work history in this country was limited to the performance of unskilled labor. For that reason, we believe that any consideration of Plaintiff's education and experience in the course of the disability determination would make a physician more likely, rather than less likely, to find Plaintiff disabled. As a result, the Commission did not err by concluding that Plaintiff was disabled.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Plaintiff was employed by Rocha Masonry for purposes of the Workers' Compensation Act and that the Commission did not err by concluding that Plaintiff was temporarily totally disabled. As a result, the Commission's order should be, and hereby is, affirmed.

AFFIRMED.

Judges McGEE and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. LEVY JONES III

No. COA11-149

(Filed 4 October 2011)

1. Identification of Defendants—photos shown by school principal—due process

The trial court did not commit plain error in a misdemeanor breaking and entering, assault on a female, and assault on a child under the age of twelve case by allowing photo identification evidence where two of the victims identified defendant in one of several photographs shown to them by their principal at school on the day after the incident occurred. The principal was not acting as an agent for the State when he presented the photographs, and therefore defendant's due process rights were not implicated. Further, the procedure employed using computer images from the North Carolina Sex Offender Registry did not give rise to a substantial likelihood of irreparable misidentification. Because the photo identification evidence was properly admissible, the in-court identification evidence of defendant by the two victims was also permissible.

2. Constitutional Law—effective assistance of counsel—failure to file motion to suppress—failure to object

Defendant did not receive ineffective assistance of counsel in a misdemeanor breaking and entering, assault on a female, and assault on a child under the age of twelve case based on defense counsel's failure to both file a motion to suppress the photo identification evidence and object to its admission during trial because the photo identification evidence and in-court identifications of defendant by two witnesses were properly admissible.

Judge STEELMAN concurring in result in separate opinion.

Appeal by defendant from judgments entered 4 February 2010 by Judge Wayland J. Sermons, Jr., in Martin County Superior Court. Heard in the Court of Appeals 31 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Jane L. Oliver, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders Mary Cook and Kristen L. Todd, for defendant appellant.

McCULLOUGH, Judge.

On 4 February 2010, a jury convicted defendant Levy Jones III ("defendant") of misdemeanor breaking and entering, assault on a female, and assault on a child under the age of twelve years. On appeal, defendant contends the trial court committed plain error in allowing photo identification evidence, alleging that such evidence violated his right to due process. Defendant also contends he was denied effective assistance of trial counsel. We find no error.

I. Background

On 8 September 2008, Phyllis Ore ("Ore") was living in a house in Hamilton, North Carolina, with her five children. Ore's oldest daughter Shanta ("Shanta") was eighteen years old and attending Roanoke High School at the time. Two of Shanta's younger siblings, R.P. and B.O., were thirteen years old and five years old at the time, respectively.

That afternoon, Ore left the house with a friend to run an errand and placed Shanta in charge of her younger siblings. As Ore was leaving the house, she noticed a yellow-gold pickup truck driving down the street in front of her house. Ore saw that a black male was driving the vehicle, but she did not recognize the driver or the truck.

After their mother left, Shanta and her siblings went into their bedrooms to change their clothes and begin their homework. While working on her homework, Shanta heard a strange squeaking noise coming from the front window of the house. Shanta initially ignored the noise, but she went to investigate after hearing the noise again. Upon entering the living room, Shanta saw a man attempting to come into the house through a window accessible from the front porch. Shanta tried to push the man back outside through the window, but the man managed to get in through the window and into the living room.

Once inside the living room, the man sat on the couch and began to talk to Shanta. Although Shanta did not know the man at the time, the man called Shanta by name and told her that he knew how old she was, where she lived, and where she attended school. The man's face was not covered during the encounter. The man was wearing a gray silk shirt, black pants, and black boots. After approximately thirty

minutes, Shanta asked the man to leave and went back to her bedroom. Five or ten minutes later, Shanta returned to check the living room. Shanta saw that the man was gone but that he had left the living room window open, so she went over to close it before rejoining her younger siblings.

Sometime thereafter, Shanta heard the sound of a foot stomping on the floor coming from the living room. Shanta then ran to the living room and saw the same man inside the house again. R.P. followed her sister into the living room. The man stated that his chest was hurting, and he tried to get Shanta to come to him and sit on his chest. He grabbed for Shanta's arm and held her by the wrist, instructing her to touch his chest. Shanta tried to pull away from the man, and R.P. yelled at the man to leave her sister alone. The man asked R.P. to leave, but R.P. stated she would not leave her sister alone with him. The man then grabbed R.P. by the arms and attempted to force her to touch his chest. Although Shanta managed not to touch the man, he forced R.P.'s hand up and touched it to his chest after lifting his shirt. B.O. then came into the living room to help her sisters. B.O. tried to grab Shanta and pull her away from the man, then began pushing and shoving the man to try to get him away from her sisters. The man pushed B.O. away with his hand, knocking her to the floor. Shanta and R.P. were able to pull away from the man, and all three girls retreated to the hallway.

The man then told the girls that his name was "Jones." He said he knew the girls' mother and that he had known Shanta when she was a baby. The man asked Shanta not to tell anyone about the incident, promising her money and clothes if she did not tell anyone about what had happened. The man then went into the kitchen, rumbled through some kitchen drawers, and wrote a telephone number on a piece of paper. The man gave the piece of paper to R.P. and told her to give it to their mother. Shanta again asked the man to leave, and the man then left the house, driving away in a yellow-gold truck. The second encounter with the man lasted for approximately forty minutes.

Shortly after the man left, Ore returned home. The children were screaming and crying and immediately told their mother about the incident. Ore then called 911 to report the incident. Investigator Brent Council ("Investigator Council") with the Martin County Sheriff's Office responded to the call. Ore informed Investigator Council that a man had broken into her home while she was out and the children were home alone. She gave the piece of paper with the phone number on it to Investigator Council and stated that she did not recognize the

handwriting or the phone number. Investigator Council inspected the window where the break-in had occurred and noted that the screen had been removed. Investigator Council was unable to check for fingerprints, however, due to the amount of dust on the front window. Investigator Council then interviewed both Shanta and R.P. Shanta described the man as wearing a silk gray shirt, black pants and black boots. Shanta stated the man appeared to be between 40 and 50 years old and that he was bald, except on the sides of his head. Shanta informed Investigator Council that the man had said his name was "John Jones." R.P. described the man as having black and gray hair with a bald spot, and he was wearing black pants, black shoes, and a silver shirt.

The following day, the children returned to school. While at school, Shanta began to feel scared and started crying. Shanta's teacher then called Ore to inform her that Shanta was upset. Ore then came to the school with R.P. to pick up Shanta. William Dennis Hart, Jr., principal at Roanoke High School ("Principal Hart"), saw that Shanta was upset and that she was leaving school early. Principal Hart asked Shanta what was wrong, and Shanta responded that someone had broken into their house the previous afternoon. Principal Hart then took Ore, Shanta, and R.P. into his office and proceeded to show them a series of photographs of different individuals. Principal Hart had obtained the images from the North Carolina Sex Offender Registry Website. The two girls indicated that the first two photos they were shown were not the man who entered the house on the previous afternoon. Principal Hart then showed the girls a photo of defendant, and both girls immediately reacted, stating that was the man who had broken into their home. Both girls appeared visibly upset upon seeing the photograph. Principal Hart then showed the girls a few more photos of other individuals, but the girls stated that none of those other individuals were the man who had broken into their house, coming back to the photograph of defendant and stating that he was the man who had broken in. Principal Hart then gave Ore the photograph and information from the North Carolina Sex Offender Registry and advised her to give the photograph and other information to law enforcement.

Ore contacted Investigator Council and told him that Shanta and R.P. had identified a picture of the man who had broken into their home the previous day. Ore then went to the Sheriff's office and gave the picture and information to Investigator Council. Investigator Council asked both girls "were they sure, one hundred percent posi-

tive, that [this] was the person." Both girls responded that they were positive the man in the photograph was the perpetrator. Investigator Council then obtained an arrest warrant for defendant based on the eyewitness identifications.

Upon his arrest, defendant declined to give a statement, but he informed Investigator Council that on 8 September 2008, he was with a friend named Xavier Brown ("Brown"). Investigator Council later questioned Brown, and Brown confirmed that he and defendant had been together on that day. Brown told Investigator Council that he and defendant had driven to Roanoke High School to deliver an instrument for band practice on the afternoon in question. However, upon speaking with the school's band director, the band director informed Investigator Council that the band did not hold practice on the date of the incident.

Upon checking with the Department of Motor Vehicles, Investigator Council learned that neither defendant nor Brown owned a truck matching the description given by the girls. Investigator Council also spoke with some of Ore's neighbors, but none could provide any information about an individual in a yellow-gold truck. Investigator Council did not conduct any further investigation.

On 30 March 2009, defendant was indicted on one count each of breaking and entering, indecent liberties with a child, assault on a female, and assault on a child under twelve years of age. Defendant was then tried before a jury beginning 3 February 2010. During the trial, both Shanta and R.P. identified defendant in court as the man who had broken into their home. Defendant did not present any evidence at trial. On 4 February 2010, the State dismissed the charge of indecent liberties with a child. That same day, the jury returned a verdict of guilty on the three remaining charges. Defendant was sentenced to two consecutive terms of 150 days' imprisonment, but the trial court suspended the second sentence and replaced it with 24 months of supervised probation. Defendant appeals.

II. Plain error in allowing photo identification evidence

[1] Defendant first contends the trial court committed plain error in allowing the evidence of the two girls' identifications of defendant in one of several photographs shown to them by Principal Hart on the day after the incident occurred. Defendant argues that Principal Hart was acting as a government official when he conducted the pretrial photo identification procedure and that such photo identification

procedure was impermissibly suggestive in violation of his due process rights. Defendant also argues that the impermissibly suggestive pretrial photo identification procedure tainted the two girls' in-court identifications of defendant. Defendant argues that because such impermissible identification evidence was the only evidence linking defendant to the crimes, there is a reasonable probability that without such identification evidence, the jury would have reached a different result.

A. Standard of Review

Defendant did not object to the admission of the photo identification evidence at trial. Nonetheless, "defendant is entitled to relief . . . only if he can demonstrate plain error." *State v. Roseboro*, 351 N.C. 536, 552, 528 S.E.2d 1, 12 (2000). Plain error is "a fundamental error so prejudicial that justice cannot have been done." *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602 (2003). " 'In order to prevail under a plain error analysis, defendant must establish not only that the trial court committed error, but that absent the error, the jury probably would have reached a different result.' " *State v. Smith*, ___ N.C. App. ___, ___, 687 S.E.2d 525, 529 (2010) (quoting *State v. Steen*, 352 N.C. 227, 269, 536 S.E.2d 1, 25-26 (2000)).

We note the rule that constitutional arguments not raised at trial are not preserved for appellate review: " '[I]n order for an appellant to assert a constitutional or statutory right on appeal, the right must have been asserted and the issue raised before the trial court.' " *State v. Moses*, ___ N.C. App. ___, ___, 698 S.E.2d 688, 693 (2010) (alteration in original) (quoting *State v. McDowell*, 301 N.C. 279, 291, 271 S.E.2d 286, 294 (1980)). "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error[.]" *State v. Gobal*, 186 N.C. App. 308, 320, 651 S.E.2d 279, 287 (2007) (citations omitted), *aff'd*, 362 N.C. 342, 661 S.E.2d 732 (2008). However, because the constitutional right at issue involves the admissibility of evidence, *see State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (2009) ("Plain error analysis applies to evidentiary matters and jury instructions."), *cert. denied*, 175 L. Ed. 2d 362 (2009), and because defendant has also raised the issue of ineffective assistance of counsel with respect to the admission of the same evidence, we reach the merits of defendant's arguments under a plain error standard of review. *State v. Lawson*, 159 N.C. App. 534, 538, 583 S.E.2d 354, 357 (2003).

B. Due Process Violation: Photo identification evidence

Identification evidence violates a defendant's due process right "where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983). Our analysis of identification procedures for due process violations is comprised of two steps:

> First, the Court must determine whether the pretrial identification procedures were unnecessarily suggestive. If the answer to this question is affirmative, the court then must determine whether the unnecessarily suggestive procedures were so impermissibly suggestive that they resulted in a substantial likelihood of irreparable misidentification. Whether a substantial likelihood exists depends on the totality of the circumstances.

State v. Fisher, 321 N.C. 19, 23, 361 S.E.2d 551, 553 (1987) (citations omitted).

When evaluating the likelihood of irreparable misidentification, our Courts consider the following factors:

> "(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation."

State v. Pulley, 180 N.C. App. 54, 64, 636 S.E.2d 231, 239 (2006) (quoting *Harris*, 308 N.C. at 164, 301 S.E.2d at 95). Furthermore,

> To determine whether a pretrial identification procedure is suggestive, the court should consider: (1) "whether the accused is somehow distinguished from others . . . in a set of photographs"; and (2) "whether the witness is given some extraneous information by the police which leads her to identify the accused as the perpetrator of the offense."

State v. Rainey, 198 N.C. App. 427, 435, 680 S.E.2d 760, 768 (2009) (quoting *State v. Wallace*, 71 N.C. App. 681, 684, 323 S.E.2d 403, 406 (1984)), *disc. review denied*, *appeal dismissed*, 363 N.C. 661, 686 S.E.2d 903 (2009). "The facts and circumstances of each case must be examined to determine whether the pretrial identification procedure was so suggestive as to create a substantial likelihood of misidentifi-

cation." *State v. Wilson*, 313 N.C. 516, 529, 330 S.E.2d 450, 459-60 (1985). "In other words, a suggestive identification procedure has to be unreliable under a totality of the circumstances in order to be inadmissible." *State v. Breeze*, 130 N.C. App. 344, 350, 503 S.E.2d 141, 146 (1998). Moreover, "suggestive pretrial identification procedures that do not result from state action do not violate defendant's due process rights." *Fisher*, 321 N.C. at 24, 361 S.E.2d at 554.

In addition, "[w]hile in-court identifications are generally admitted, they may be excluded if tainted by a prior confrontation in circumstances shown to be unnecessarily suggestive and conducive to irreparable mistaken identification." *State v. Caporasso*, 128 N.C. App. 236, 239, 495 S.E.2d 157, 160 (1998) (internal quotation marks and citations omitted). Nonetheless, "an in-court identification may be admissible despite improper pretrial identification procedures if the in-court identification is reliable and has an origin independent of the improper procedure." *State v. Parks*, 77 N.C. App. 778, 780, 336 S.E.2d 424, 425 (1985). "[A]n in-court identification is considered competent where the identification is independent in origin and based upon the witness' observations at the time and scene of the crime." *State v. Distance*, 163 N.C. App. 711, 717, 594 S.E.2d 221, 226 (2004). In determining whether an in-court identification of the defendant is of independent origin, our Courts consider the same five factors as those considered in evaluating pretrial identifications. *State v. Hammond*, 307 N.C. 662, 668, 300 S.E.2d 361, 365 (1983).

C. Application to the Present Case

We first address defendant's argument that Principal Hart was acting as an agent of the State when he presented the photos to the two girls at the high school. In support of his argument, defendant cites *New Jersey v. T.L.O.*, 469 U.S. 325, 83 L. Ed. 2d 720 (1985), and *In re D.D.*, 146 N.C. App. 309, 554 S.E.2d 346 (2001). Defendant maintains that in these two cases, both the United States Supreme Court and this Court held that public school officials are government actors for purposes of the Fourth Amendment. Defendant asserts that such reasoning is also applicable for purposes of the due process clause under the Fourteenth Amendment of the United States Constitution and Article I, § 19 of the North Carolina Constitution.

Defendant is correct that both the United States Supreme Court and this Court have found public school officials to be state actors, and therefore, the holdings establish that public school officials are bound by constitutional mandates. *See T.L.O.*, 469 U.S. at 336, 83

L. Ed. 2d at 731; *In re D.D.*, 146 N.C. App. at 316, 554 S.E.2d at 351. However, defendant ignores the fact that in all such holdings, school officials are considered state actors for purposes of constitutional guarantees when they are exercising public authority "in furtherance of publicly mandated educational and disciplinary policies." *T.L.O.*, 469 U.S. at 336, 83 L. Ed. 2d at 731; *see also Goss v. Lopez*, 419 U.S. 565, 574, 42 L. Ed. 2d 725, 734-35 (1975) (holding that once a state establishes a public school system and "require[s] its children to attend," public school officials may not take away a student's legitimate entitlement to a public education without adhering to the minimum procedures required under due process); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 21 L. Ed. 2d 731, 737 (1969) (holding that school officials may not limit the first amendment rights of students and teachers to freedom of speech and expression). The central premise in all such holdings is that "young people do not 'shed their constitutional rights' at the schoolhouse door." *Lopez*, 419 U.S. at 574, 42 L. Ed. 2d at 734 (quoting *Tinker*, 393 U.S. at 506, 21 L. Ed. 2d at 737). Therefore, "[i]n carrying out *searches and other disciplinary functions* pursuant to such [publicly mandated educational and disciplinary] policies, school officials act as representatives of the State[.]" *T.L.O.*, 469 U.S. at 336, 83 L. Ed. 2d at 731 (emphasis added); *see also In re D.D.*, 146 N.C. App. at 316, 554 S.E.2d at 351.

Here, when Principal Hart observed Shanta, one of his students, visibly upset and leaving school early, Principal Hart asked her what was wrong. When Shanta informed him that someone had broken into their home, Principal Hart proceeded to show her photographs in an effort to help her determine who had bothered her and her family. Principal Hart was not acting pursuant to any educational or disciplinary policies, nor was he acting as a law enforcement officer conducting an investigation on behalf of the State. Principal Hart was not affiliated with any law enforcement agency, he had no arrest power, and he had no knowledge of any criminal investigation being conducted. *See In re Phillips*, 128 N.C. App. 732, 735, 497 S.E.2d 292, 294 (1998).

Rather, Principal Hart's actions were more akin to that of a parent, friend, or other concerned citizen offering to help the victim of a crime. *See*, *e.g.*, *State v. Williams*, 201 N.C. App. 103, 108, 685 S.E.2d 534, 538 (2009) (holding that the friend of an eyewitness to a robbery who called the witness to view the defendant as he was being arrested by police was not acting as an agent of the State, but rather a private citizen, and therefore, the protections of the Fourth

Amendment and the exclusionary rule for improper identification procedures did not apply to the eyewitness's identification at the showup). The mere fact that Principal Hart was a school official does not make him an agent of the State with respect to every member of the public. To the contrary, " 'it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals.' " *State v. Keadle*, 51 N.C. App. 660, 663, 277 S.E.2d 456, 459 (1981) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 487-88, 29 L. Ed. 2d 564, 595 (1971)). Principal Hart was not a state actor when he presented the photographs to the two girls at school resulting in the girls' identification of defendant as the perpetrator; therefore, defendant's due process rights were not implicated.

In the alternative, defendant maintains that whether Principal Hart was acting as an agent of the State when he presented the photographs to the girls is inapposite, as the State's use of such allegedly inadmissible identification evidence at trial constituted state action and violated his due process rights under the Fifth and Fourteenth Amendments. Defendant's argument is misguided.

As stated previously, our Courts have long held that a defendant's due process rights are implicated by the admission of identification evidence *only* when " 'the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification.' " *State v. Pinchback*, 140 N.C. App. 512, 518, 537 S.E.2d 222, 225-26 (2000) (quoting *Harris*, 308 N.C. at 162, 301 S.E.2d at 94); *see also State v. Powell*, 321 N.C. 364, 368, 364 S.E.2d 332, 335 (1988) ("Identification evidence must be suppressed *on due process grounds* where the facts show that the pretrial identification procedure was so suggestive as to create a very substantial likelihood of irreparable misidentification." (emphasis added)); *State v. Leggett*, 305 N.C. 213, 220, 287 S.E.2d 832, 837 (1982) (" 'The test *under the due process clause* as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice.' " (emphasis added) (quoting *State v. Henderson*, 285 N.C. 1, 9, 203 S.E.2d 10, 16 (1974), *death penalty vacated*, 428 U.S. 902, 49 L. Ed. 2d 1205 (1976))).

We reiterate that "suggestive pretrial identification procedures that do not result from state action do not violate defendant's due process rights." *Fisher*, 321 N.C. at 24, 361 S.E.2d at 554. Further-

more, our Courts have consistently held that evidence obtained by the actions of private citizens with no State involvement do not implicate a defendant's constitutional rights. *See*, *e.g.*, *State v. Sanders*, 327 N.C. 319, 331, 395 S.E.2d 412, 420 (1990); *Keadle*, 51 N.C. App. at 662-63, 277 S.E.2d at 458-59. Because we find no evidence in the present case that Principal Hart was acting in any way as an agent of the State when he presented the series of photographs to the girls at the high school, defendant's arguments that his due process rights were violated by the trial court's admission of the photo identification evidence are without merit.

Even assuming, *arguendo*, that Principal Hart was acting on behalf of the State and that the procedure he used was unnecessarily suggestive because the photos shown to the girls were computer images from the North Carolina Sex Offender Registry, in evaluating the factors enumerated in *Pulley*, 180 N.C. App. at 64, 636 S.E.2d at 239, we fail to see how the procedure employed by Principal Hart " 'gave rise to a substantial likelihood of irreparable misidentification.' " *Fisher*, 321 N.C. at 25, 361 S.E.2d at 554 (quoting *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984)).

Shanta testified that the first encounter with the intruder lasted approximately 30 minutes, while the second encounter with the intruder lasted approximately 40 minutes. R.P. testified that each encounter with the intruder lasted approximately five minutes. Although the girls gave conflicting testimony regarding the time frame of the encounters, the girls nevertheless had between ten and seventy minutes to observe the intruder. The intruder was not wearing any clothing or masks to obstruct the girls' view of his face. During the encounters, the intruder sat on the couch in the home, engaged in conversation with both girls, and grabbed both girls by their arms. Both girls consistently described the intruder's clothing and hair to the investigating officer. Upon seeing a photograph of defendant at the school, both girls were absolutely certain that he was the intruder, and both girls again stated they were absolutely certain that defendant was the intruder when asked by the investigating officer. The girls recognized defendant's photograph as the intruder on the very next day after the crime had occurred, and the girls indicated that other photographs they were shown were not the man who had broken into their home on the previous day. Given these facts, we find the photo identification evidence did not implicate defendant's due process rights and was properly admissible.

Further, because the photo identification evidence was properly admitted, the trial court also properly admitted the in-court identifications of defendant. *State v. Lawson*, 159 N.C. App. 534, 539, 583 S.E.2d 354, 358 (2003).

III. Ineffective Assistance of Counsel

[2] Defendant also argues that he received ineffective assistance of counsel because his trial counsel failed to both file a motion to suppress the photo identification evidence and object to the admission of the photo identification evidence during trial. Because we conclude the photo identification evidence and the in-court identifications of defendant by the two witnesses were properly admissible, defendant's trial counsel did not err in failing to move to suppress or object to such evidence. *State v. Mewborn*, 200 N.C. App. 731, 739, 684 S.E.2d 535, 540 (2009) ("The failure to object to admissible evidence is not error."). Defendant's argument on this issue is therefore without merit.

IV. Conclusion

We hold the photo identification evidence at issue in the present case did not violate defendant's due process rights. Principal Hart, who presented the photographs to the witnesses, was not acting as an agent of the State when he conducted the photo identification procedure at the high school. Further, given the facts of this case, the photo identification procedure used by Principal Hart was not impermissibly suggestive so as to implicate defendant's due process rights. Because the photo identification evidence was properly admissible, the in-court identifications of defendant by the two witnesses were also properly admissible. The trial court did not commit error, let alone plain error, in admitting the identification evidence. In addition, defendant received effective assistance of trial counsel.

No error.

Judge HUNTER (Robert C.) concurs.

Judge STEELMAN concurs in the result with separate opinion.

STEELMAN, Judge concurring in the result.

At trial, defendant did not object to the admission of the identification of defendant from the photograph provided by principal Hart. Neither did he raise the constitutional arguments now raised on appeal.

Constitutional arguments not preserved at trial cannot be raised on appeal. *See State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) ("A constitutional issue not raised at trial will generally not be considered for the first time on appeal." (quotation and alteration omitted)), *cert. denied*, ___ U.S. ___, 176 L. Ed. 2d 568 (2010); *State v. Cummings*, 353 N.C. 281, 292, 543 S.E.2d 849, 856 ("Constitutional questions that are not raised and passed upon in the trial court will not ordinarily be considered on appeal." (citations omitted)), *cert. denied*, 534 U.S. 965, 151 L. Ed. 2d 286 (2001); N.C.R. App. P. 10(a)(1) ("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.").

The majority asserts that defendant's constitutional claims, which were not raised at trial, can be considered on their merits for two reasons: (1) the "constitutional right at issue involves the admissibility of evidence[;]" and (2) defendant has raised a claim of ineffective assistance of counsel. While defendant has a right to plain error review of an evidentiary ruling, he does not have the right to use this to bootstrap an unpreserved constitutional issue before this Court. The majority opinion has the consequence of allowing defendant to appeal what is not appealable. *Veazey v. Durham*, 231 N.C. 357, 364, 57 S.E.2d 377, 383 (1950). Under the rationale of the majority, by combining an evidentiary issue together with a constitutional issue so that they are difficult to separate, a defendant can obtain review of a constitutional issue that was not preserved at trial. N.C.R. App. P. 10(a)(1). The only limitation upon this approach, now sanctioned by the majority, would be the creativity of appellate counsel. The evidentiary ruling should be separated from the constitutional issue, and ruled upon under plain error review. The constitutional issue should be dismissed.

While raising a claim of ineffective assistance of counsel may entitle defendant to the review of the constitutional question in the context of the first prong of an analysis under *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984), it does not entitle defendant to raise the claim upon its merits.

The constitutional arguments of defendant should be dismissed.

STATE OF NORTH CAROLINA v. THOMAS LAMONTE JACKSON

No. COA10-1135

(Filed 4 October 2011)

1. Constitutional Law—right to confrontation—remote broadcast of child sex abuse victim's testimony

The trial court did not violate defendant's right to confrontation in a multiple sexual offenses with a child case by admitting evidence through remote broadcast of the child victim's testimony. While the child was not physically facing defendant, defendant and the jury could see and hear the child on a television monitor without delay as she testified under oath. Defendant had a full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant were able to view the child's body and demeanor by video monitor as she testified. The requirements of § 15A-1225.1 were satisfied by the findings that the child would be traumatized if compelled to testify in front of defendant, that such was specifically due to defendant's presence, and that the child's ability to communicate before the trier of fact would thereby be impaired.

2. Sentencing—presumptive range—no Blakely error

Although defendant contended that the trial court committed a *Blakely* error in a multiple sexual offenses with a child case by allegedly sentencing defendant based on aggravating factors that had not been found by the jury, defendant could not obtain relief because he was sentenced within the presumptive range. Further, the court did not consider the improperly found aggravating factors in sentencing defendant.

Appeal by Defendant from judgments entered 14 April 2010 by Judge W. Erwin Spainhour in Stanly County Superior Court. Heard in the Court of Appeals 9 March 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Celia Grasty Lata, for the State.

Michael E. Casterline, for Defendant.

BEASLEY, Judge.

Thomas Lamonte Jackson (Defendant) appeals from judgment entered on his several convictions of sex offenses committed against child victim, C.G.[1] For the following reasons, we find no prejudicial error.

Where Defendant's arguments as to the guilt phase of trial deal solely with the procedure by which C.G. testified, a brief summary of underlying facts suffices. The evidence showed that Defendant, known as "Blue," sexually abused four-year-old C.G. on 19 April 2008. C.G. told her mother that Blue had "put his privacy part in her mouth and told her to lick and suck," "pulled her pants down," and "mashed really hard" with his fingers; and the nurse practitioners who examined C.G. observed symptoms consistent with child sexual assault. C.G. began wetting the bed, having bad dreams, and displaying a fear of men. On 29 April 2008, C.G. saw child sexual abuse and forensic examiner Amy Yow at the Butterfly House Children's Advocacy Center, and their videotaped interview was reviewed by child psychologist Dr. Mark Everson, who met with C.G. in late 2009. Dr. Everson noted behavior consistent with child sex abuse and, while admitting some variation in C.G.'s statements, stressed the consistency, in light of C.G.'s age at the time of the assault, as to the core elements thereof.

C.G. gave her account of the incident at trial and did so by closed-circuit television (CCTV). Where the State had moved for remote testimony under N.C. Gen. Stat. § 15A-1225.1, C.G.'s mother and Dr. Everson testified at a pre-trial hearing on 6 April 2010. The State urged the trial court to authorize the procedure so C.G. could be an effective witness. Defendant argued insufficient evidence supported the requisite statutory findings, and he also objected on the grounds of *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). Based primarily on Dr. Everson's testimony that C.G. would experience trauma by testifying in Defendant's presence, which would affect her ability to communicate with the jury, the trial court authorized the remote testimony and then found six-year-old C.G. competent to testify. Accordingly, C.G. testified by CCTV on the second day of trial that Blue had taken her into a bathroom, where he "put his priva[te] part in [her] mouth" while wiggling his body and "put his finger in [her] private part."

The jury found Defendant guilty of first degree sex offense with a child, crime against nature, and indecent liberties. The court consoli-

1. This pseudonym is used to protect the minor victim's identity and privacy.

dated the convictions and imposed a presumptive-range prison sentence of 384 to 470 months. On appeal, Defendant challenges the trial court's decision allowing C.G. to testify by CCTV. He also alleges that aggravating factors not found by the jury were improperly considered at sentencing.

I. Remote Testimony

[1] A child witness, a minor under 16 at the time of testimony, may testify outside the defendant's physical presence in a criminal proceeding, but only if certain conditions are met. *See* N.C. Gen. Stat. § 15A-1225.1(a)(1), (3) (2009). Upon a motion for remote testimony, the trial court must "hold an evidentiary hearing," and can permit a child to testify "other than in an open forum" only if it first finds that, otherwise, (1) "the child witness would suffer serious emotional distress, not by the open forum in general, but by testifying in the defendant's presence, and (2) "the child's ability to communicate with the trier of fact would be impaired." N.C. Gen. Stat. § 15A-1225.1(b)-(c) (2009).

After hearing the State's motion, the trial court found that the evidence supported the requisite findings, allowed C.G. to testify by one-way CCTV, and explained that a television camera would be set up in a room next to the judge's chambers. The prosecutor, defense counsel, and C.G.'s mother, who had to keep silent, were allowed in the room with C.G. Defendant would remain in the courtroom, but a telephone system would enable him to speak privately with his attorney during C.G.'s testimony. C.G.'s image would be projected onto screens facing Defendant, the court, and the jury, who would be able to hear and see C.G. but would not be visible to anyone in the room with her. The trial court underscored that this method was intended to allow those in the courtroom to observe C.G.'s demeanor as she testified "in a similar manner as if [she] were in the open forum."[2]

Defendant claims the admission of evidence through remote broadcast violated the Confrontation Clause of the Sixth Amendment. Acknowledging the United States Supreme Court's *Maryland v. Craig*, 497 U.S. 836, 111 L. Ed. 2d 666 (1990), decision that the Confrontation Clause does not categorically prohibit the use of one-way CCTV to procure a child sex offense victim's testimony, he

2. This meets the statute's conditions that the judge, jury, and defendant must be able to observe the child's demeanor as she testifies in a manner similar to the open forum and that the method elected must ensure that defense counsel "is physically present where the child testifies," has a full and fair opportunity to cross-examine the child, and can communicate privately with the defendant during the remote testimony. N.C. Gen. Stat. § 15A-1225.1(e).

argues that *Crawford* so unraveled *Craig's* reasoning that "*Craig* can no longer be seen as good law."[3] Alternatively, he contends that the evidence did not support the statutory findings. We hold the CCTV testimony did not violate Defendant's confrontation rights and that sufficient evidence existed to permit C.G. to testify outside his physical presence.

A. Confrontation Clause Issue

We review *de novo* whether the right to confrontation was violated. *State v. Hurt*, ___ N.C. App. ___, ___, 702 S.E.2d 82, 87 (2010). The Confrontation Clause, applied to the states by the Fourteenth Amendment, protects the fundamental right of an accused "to be confronted with the witnesses against him." U.S. Const. amend. VI; *see also Pointer v. Texas*, 380 U.S. 400, 403, 13 L. Ed. 2d 923 (1965). It aims to ensure the evidence is reliable "by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Craig*, 497 U.S. at 845, 111 L. Ed. 2d at ___. The elements of confrontation include the witness's: physical presence; under-oath testimony; cross-examination; and exposure of his demeanor to the jury. *Id.* at 845–46, 111 L. Ed. 2d at ___. The physical presence, or "face-to-face," requirement embodies the general Confrontation Clause protection of an accused's "right [to] physically face those who testify against him." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 94 L. Ed. 2d 40, ___ (1987). But, this general rule "must occasionally give way to considerations of public policy and the necessities of the case." *Mattox v. United States*, 156 U.S. 237, 243, 39 L. Ed. 409, 411 (1895). One policy area that often arises in the constitutional context is the protection of youth by using witness "shielding" procedures to balance the need for child sex crime victims' testimony against the risk of engendering further emotional distress. *See Coy v. Iowa*, 487 U.S. 1012, 1023, 101 L. Ed. 2d 857, 868 (1988) (O'Connor, J., concurring) (noting child abuse prosecutions are difficult, as the victim may be the only witness, and observing the various "ameliorative measures" taken by states to shield the child from added trauma occasioned by the courtroom atmosphere). The Supreme Court has deemed the interest in safeguarding child abuse victims from further trauma and embarrassment to be a compelling one that, depending on the necessities of the case, may outweigh a defendant's right to face his accusers in court. *See Craig*, 497 U.S. at 852-53, 111 L. Ed. 2d at 683.

3. While Defendant does not craft his argument as an attack on the legality of N.C. Gen. Stat. § 15A-1225.1, we note that the constitutionality of the recently enacted statute has not been challenged or ruled upon. *See* 2009 N.C. Sess. Laws ch. 356, § 2 (making § 15A-1225.1 effective 1 December 2009).

When the Supreme Court first examined witness shielding in this context, however, it held the child victims' testimony from behind an opaque screen violated the Confrontation Clause. *See Coy*, 487 U.S. 1012, 101 L. Ed. 2d 857. But, two years later in *Craig*, the Court was faced with the same policy issue and held the face-to-face element of confrontation was outweighed by necessity, emphasizing significant differences from *Coy*. First, *Craig* involved the use of one-way CCTV, which allowed the child sex offense victims to testify without seeing anyone in the courtroom but permitted the accused to see them on a video monitor. *Craig*, 497 U.S. 836, 111 L. Ed. 2d 666. While denying literal face-to-face confrontation, the method preserved all other elements of confrontation—oath, cross-examination, and the jury's observation of the witness' demeanor—thus subjecting the testimony "to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Id.* at 851, 111 L. Ed. 2d at ___. The trial court in *Craig* also made individualized findings that the child witnesses needed special protection, *id.* at 845, 111 L. Ed. 2d at 678, where *Coy* contained no case-specific findings of necessity, *see Coy*, 487 U.S. 1021, 101 L. Ed. 2d 857 (leaving "for another day" whether there are any exceptions to the Confrontation Clause's "irreducible literal meaning"—namely, an accused's right "to meet face to face" those who give evidence at trial).

Craig elaborated that a finding of necessity is proper only if a trial court likewise finds, upon an evidentiary hearing, that: (1) the "procedure is necessary to protect the welfare of the particular child witness who seeks to testify"; (2) "the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant"; and (3) "the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*." *Id.* at 855–56, 111 L. Ed. 2d at ___. Where a case-specific finding of necessity is thus made, the Confrontation Clause does not bar a court's use of one-way CCTV to receive testimony from a child witness in a child abuse case. *Id.* at 860, 111 L. Ed. 2d at ___. Defendant does not contend that the individualized findings set out in N.C. Gen. Stat. § 15A-1225.1(b) fail to satisfy *Craig's* requirements. Nor does he dispute that the trial court held a hearing, made the statutory findings, and found C.G. competent to testify. Rather, Defendant argues that *Craig's* authorization of the CCTV procedure cannot survive *Crawford v. Washington*, and he urges us to disregard the Court's earlier ruling.

Defendant contends this partial rejection of *Roberts*, upon which *Craig* partially relied, so "destroy[ed] the linchpin" of *Craig* that it is no longer good precedent.

While we have not addressed this issue,[4] we observe an enduring reliance on *Craig* in other jurisdictions. *See State v. Blanchette*, 134 P.3d 19, 29 (Kan. Ct. App. 2006) (citing post-*Crawford* decisions holding CCTV testimony constitutional against Confrontation Clause challenges). In fact, many courts have examined the exact argument advanced here and have explicitly upheld *Craig* as governing whether a child victim's CCTV testimony violates the Confrontation Clause. *See*, *e.g.*, *Horn v. Quarterman*, 508 F.3d 306, 318-19 (5th Cir. 2007); *State v. Arroyo*, 935 A.2d 975, 992 n.18 (Conn. 2007); *Blanchette*, 35 134 P.3d at 29; *State v. Griffin*, 202 S.W.3d 670, 680-81 (Mo. Ct. App. 2006); *State v. Henriod*, 131 P.3d 232, 237-38 (Utah 2006); *State v. Vogelsberg*, 724 N.W.2d 649, 651-55 (Wis. 2006). Moreover, we have found no case which holds *Craig* and *Crawford* cannot co-exist. *See State v. Stock*, 256 P.3d 899 (2011) (finding no court that has "concluded *Crawford* overruled *Craig*."); *Roadcap v. Commonwealth*, 50 V. App. 732, 743, 653 S.E.2d 620, 625 (2007) ("As nearly all courts and commentators have agreed, *Crawford* did not overrule *Craig*."). For the reasons detailed below, we join the weight of authority.

Admittedly, *Craig's* rationale seems inconsistent with some language in *Crawford*. *Compare Craig*, 497 U.S. at 853, 111 L. Ed. 2d at ___ (concluding the right to physically face witnesses may be outweighed by child abuse victim's well-being), *and id.* at 848, 111 L. Ed. 2d at 682 (citing *Roberts* for propositions that: (i) "a literal reading of the Confrontation Clause would 'abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme' "; and (ii) the face-to-face element may be denied if "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured"), *with Crawford*, 541 U.S. at 54, 158 L. Ed. 2d at ___ ("The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts."). Defendant contends that *Crawford's* language imposes a face-to-face requirement for all testimonial hearsay

4. This Court has affirmed the use of one-way CCTV testimony by a child sexual abuse victim only one time and did so in a pre-*Crawford* decision. *See In re Stradford*, 119 N.C. App. 654, 657-58, 460 S.E.2d 173, 175 (1995) (holding child witness's testimony did not violate defendant's confrontation rights and trial court, albeit prior to statutory authorization of remote testimony, properly exercised discretion in allowing the method).

and is thus fatal to *Craig's* holding. But he does not recognize that the face-to-face aspect of confrontation at trial was not at issue in *Crawford*, or that the Court did not hold that such was required in every case. Where "*Crawford* and *Craig* address distinct confrontation questions," *Vogelsberg*, 724 N.W.2d at 654, we may not consider their language in a vacuum apart from the distinct contexts in which it appears.

Defendant's argument regarding C.G.'s testimony by CCTV is thus controlled by *Craig*, not *Crawford*, and we tailor our analysis accordingly.

While C.G. was not physically facing Defendant, he (and the jury) could see and hear her on a television monitor without delay as she testified under oath. Defendant could thereby evaluate her demeanor and perceive the inflections in her voice. He was also able to communicate directly with his lawyer and express any concerns about transmission, volume, perception, or visibility. In fact, when C.G. was not properly positioned so as to be seen by Defendant and the jury, the trial court adequately addressed it. Furthermore, Defendant was able to fully cross-examine C.G. This procedure left all other elements of confrontation intact: C.G. was found competent to testify under oath; Defendant had a full opportunity for contemporaneous cross-examination; and the judge, jury, and Defendant were able to view C.G.'s body and demeanor by video monitor as she testified. *See Craig*, 497 U.S. at 857, 111 L. Ed. 2d at ___ (approving of the CCTV method not only due to the necessity-based findings, but also where child witnesses testified under oath, were subject to full cross-examination, and were observable by the judge, jury, and defendant as they testified). As C.G.'s trial testimony was subjected to rigorous adversarial testing thereby, effective confrontation was preserved, and the use of one-way CCTV to procure her evidence did not offend the Constitution, despite the lack of face-to-face confrontation.

B. Statutory Issue

Defendant argues that even if the Sixth Amendment was not violated, N.C. Gen. Stat. § 15A-1225.1 was. Where C.G. was found competent to testify, § 15A-1225.1(b) permitted her to do so remotely if the trial court determined that testifying in Defendant's presence, not just the open forum generally, would cause her serious emotional distress and impair her ability to communicate with the trier of fact. The trial court heard case-specific evidence as to whether closed-circuit testimony was necessary and found "that the child witness, [C.G.],

would suffer serious emotional distress, based upon the evidence presented to the court today, by testifying in the defendant's presence and that the child's ability to communicate with the—with the jury, the trier of fact, would be impaired."

Defendant challenges the court's authorization of the CCTV procedure on the ground that the evidence did not support the findings. As the standard of review on a trial court's § 15A-1225.1 ruling is not statutorily defined and we have yet to address the statute, our scope of review has not been developed. *But see Stradford*, 119 N.C. App. at 659, 460 S.E.2d at 176 (pre-statute decision reviewing trial court's finding that "children would be traumatized by defendant" for "proper evidentiary support" and holding the testimony "provided adequate support" for decision to authorize use of remote testimony). Defendant suggests, however, and we agree, that a trial court's decision that remote testimony is necessary and its underlying § 15A-1225.1(b) determinations are findings of fact that will not be disturbed on appeal absent competent record evidence in support thereof. Accordingly, we must decide if the hearing testimony, viewed in favor of the moving party, presents any competent evidence in support of the court's particularized findings.

C.G.'s mother testified to the many behavioral changes C.G. exhibited after reporting the incident. In addition to bed wetting, bad dreams, and guardedness around men, C.G. expressed anxiety over the prospect of encountering Blue again. C.G. had inquired several times as to Blue's whereabouts and, after being told that Defendant "was locked up," remained concerned over whether he would "stay there forever." When C.G.'s mother said yes, C.G. appeared "at ease" or at least not "as scared." Dr. Everson, received as an expert "in child psychology and particularly in regard to child trauma or maltreatment," then testified on the basis of his interview with C.G., his review of C.G.'s videotaped forensic interview with Ms. Yow, and C.G.'s mother's reflections. He detailed his late 2009 assessment of C.G., over one and a half years after the alleged incident with Blue, and found that she displayed "behavior symptoms that are often related to stress or traumatic reactions."

Dr. Everson also opined that C.G. would not be capable of effectively testifying in front of Defendant and explained the bases for his expert opinion: first, C.G.'s initial attempt to disclose the traumatic incident she described was met with non-support, as her grandmother had told her not to "talk about that"; C.G. then became "spacy and preoccupied" and began exhibiting regressive behaviors; and the

result is "a kid who was psychologically traumatized at the time" but received no treatment for her trauma "except the passage of time." Dr. Everson further anticipated "that when C.G. is faced with events, people, whatever that remind her of the trauma, that she could very well re-experience it, given that she's not had treatment for it" and believed that a "secondary trauma" could be caused by "having C.G. testify in front of the defendant." He worried about C.G.'s re-experiencing the trauma "when she's around the defendant and certainly, along with that, a closing down in terms of being—as a witness." The "combination of the trauma, the re-experiencing, and the general avoidance [of talking about the trauma]" made it "pretty clear" to the expert that C.G. was "going to close down" and "not be a witness in terms of telling her experiences."

The trial court found that this testimony presented "clear and convincing evidence," that it should permit C.G. to testify "using the closed-circuit television apparatus" in order to "protect [her] from trauma that would be caused by testifying in the physical presence of the defendant where, in the opinion of the court, that such trauma would impair the child's ability to communicate." Defendant argues that any evidence of the emotionally traumatic impact that testifying in front of Defendant would have on C.G. was "vague and speculative" and that her expected ineffectiveness as a trial witness was not adequately linked to Defendant's presence. We disagree.

Initially, we note the Supreme Court's approval of a trial court's reliance on expert testimony in making the factual findings necessary to admit CCTV testimony. *See Craig*, 497 U.S. at 860, 111 L. Ed. 2d at 688 ("The trial court in this case, for example, could well have found, on the basis of the expert testimony before it, that testimony by the child witnesses in the courtroom in the defendant's presence 'will result in [each] child suffering serious emotional distress such that the child cannot reasonably communicate.' "). Viewed in its entirety, and in a light most favorable to the State as the moving party, Dr. Everson's expert testimony sufficiently links Defendant's presence to the emotional trauma that C.G. would suffer if she were forced to testify in the courtroom. This finding is further supported by C.G.'s mother's testimony that C.G. was preoccupied with Defendant's whereabouts and relieved to hear that he would stay in jail forever is significant. Moreover, Dr. Everson specifically connected his projection that C.G. would close down as a witness to her being "around [Defendant]."

We find no merit to Defendant's argument that Dr. Everson's expert emotional distress testimony was "vague and speculative." *See In re Stradford*, 119 N.C. App. at 659, 460 S.E.2d. at 176 (holding testimony of clinical therapist as to victim's further traumatization, based on training, experience and therapy sessions, provided "adequate support for the trial court's decision to authorize the use of remote testimony"). Where Dr. Everson provided a detailed account of his psychological assessment of C.G., it was reasonable for the trial court to believe that C.G. would be further traumatized, and not just anxious or upset, if she had to testify in Defendant's physical presence. Nor are we persuaded by Defendant's contention that the expert failed to identify whether C.G. "would suffer serious and long-lasting emotional consequences if she testified in front of the defendant, or if she'd just be upset for an hour or two." *See Craig*, 497 U.S. at 856-57, 111 L. Ed. 2d at 685-86 (declining to "decide the minimum showing of emotional trauma required for use of the special [CCTV] procedure" but noting that the level of trauma would meet constitutional standards if it "would impair the child's ability to communicate"). In fact, Defendant admits that Dr. Everson "opined that [C.G.] might close down and not be able to share her experiences, if she were asked to testify in front of the defendant."

We thus conclude that the evidence sufficiently supports the trial court's findings that C.G. would be traumatized if compelled to testify in front of Defendant; that such was specifically due to Defendant's presence; and that C.G.'s ability to communicate before the trier of fact would thereby be impaired. The trial court's findings further satisfied the requirements set forth by N.C. Gen. Stat. § 15A-1225.1, and C.G.'s testimony by CCTV was properly allowed.

II. Sentencing

[2] While Defendant challenges his sentence as improperly based on aggravating factors that had not been found by the jury in violation of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), he was sentenced in the presumptive range. It is true that "a new sentencing hearing must be granted when a judge *aggravates* a criminal sentence on the basis of findings made by the judge that are in addition to or in lieu of findings made by a jury," as "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *State v. Shaw*, ___ N.C. App. ___, ___, 700 S.E.2d 62, 63-64 (2010) (emphasis added) (internal quotation marks and citations omitted); *see also Blakely*, 542 U.S. at 303, 159 L. Ed. 2d at 413 (defining "statutory max-

imum" as the maximum sentence that can be imposed "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant"). Although the trial court stated on the record that he had found certain aggravating factors—despite none being offered by the State or found by the jury—it did not impose a sentence outside the statutory maximum. Thus, Defendant cannot obtain relief from the rule that "[w]hen the trial judge errs in finding an aggravating factor and imposes a sentence in excess of the presumptive term, the case must be remanded for a new sentencing hearing." *State v. Wilson*, 338 N.C. 244, 259, 449 S.E.2d 391, 400 (1994) (emphasis added).

Defendant also cites *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977), for its holding that the presumption that a sentence within the statutory limit is valid may be overcome "[i]f the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence." The record, however, reveals that the court did *not* consider the improperly found aggravating factors in sentencing Defendant. The trial judge recognized his mistake and, the day after judgment was entered, ordered *sua sponte* that a re-sentencing hearing be held to correct his "error in stating on the record that aggravating factors would be found after the jury had not been requested to consider aggravating factors." Not only did the order indicate "that notwithstanding the foregoing findings the court did sentence the defendant within the presumptive range," but the trial judge also emphasized at the 20 April 2010 hearing on the court's own motion for appropriate relief that his erroneously found aggravating factors during sentencing "played no role in the sentence announced." Because the trial court had also found mitigating factors, the judge made sure to clarify the record, noting "that at that time, and again now, the court reaffirms that the mitigating factors do not justify and are insufficient to justify a departure from the presumptive range of sentencing." The trial court then reviewed the findings in mitigation, reiterated that a downward departure was not warranted, and reaffirmed the sentence imposed, specifying: "I'm not changing one thing about the time of the length of the sentence that was in the presumptive range. I merely wanted to make it clear as to what had happened." It is thus clear that the improper consideration of aggravating factors had no impact on Defendant's sentence, and we overrule this argument.

No prejudicial error.

Judges CALABRIA and STEELMAN concur.

STATE OF NORTH CAROLINA v. BRADLEY STEVEN COLLINS

No. COA11-207

(Filed 4 October 2011)

1. Evidence—videotape—foundation—authentication—chain of custody

The trial court did not err in a possession of marijuana and drug paraphernalia case by admitting a videotape without volume of a controlled buy as substantive evidence. The camera and taping system were properly maintained and were properly operating when the tape was made, the videotape accurately presented the events depicted, and there was an unbroken chain of custody.

2. Identification of Defendants—lay opinion testimony of officer—person depicted in videotape

The trial court did not commit plain error in a possession of marijuana and drug paraphernalia case by admitting the lay opinion testimony of an officer that defendant was the person depicted in the videotape. The officer had a sufficient level of familiarity with defendant's appearance to aid the jury in its determination and the testimony was not prejudicial to defendant.

Appeal by defendant from judgment entered 27 May 2010 by Judge Allen Cobb in Craven County Superior Court. Heard in the Court of Appeals 31 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Roberta A. Ouellette, for the State.

Lynn Norton-Ramirez for defendant appellant.

McCULLOUGH, Judge.

Bradley Steven Collins ("defendant") appeals from judgment based upon his convictions for possession of marijuana and drug paraphernalia. Based on the following reasons, we find no error.

I. Background

In April 2008, a joint task force of the Havelock Police Department and the Craven County Sheriff's office targeted defendant for a controlled buy situation. A controlled buy is a method whereby the police use a confidential informant to purchase drugs

from a targeted individual. Officer Mike Stewart worked as a criminal investigator on the case and testified at trial. Officer Stewart had experience in drug cases and had worked on over 150 controlled buy situations. Clint Snyder served as the confidential informant and acted on behalf of the police in the videotaped marijuana buy.

The controlled drug buy occurred on 8 April 2008, and immediately prior to the buy, Officer Stewart checked Mr. Snyder's person and vehicle for any possible contraband. Another officer, Chris Drake, attached a hidden video camera to Mr. Snyder. Then the officers gave Mr. Snyder $250.00 to $275.00 in pre-recorded "buy money" and instructed him to purchase one quarter pound of marijuana from defendant. Officer Drake rode with Mr. Snyder to the buy location on Miller Boulevard. Mr. Snyder entered the house and after a few minutes returned with a quarter pound of marijuana. Following the controlled buy, Officers Drake and Stewart conducted a debriefing with Mr. Snyder. The Officers removed the video camera from Mr. Snyder and checked his person for any extraneous money or contraband. Also, not long after the buy, Officers Stewart and Drake viewed the recording.

At trial, defense counsel objected to the admission of the videotape on verbal and non-verbal hearsay grounds and as a violation of defendant's Sixth Amendment rights under the Confrontation Clause, as Mr. Snyder could not be found and no testifying witness had been in the room where the alleged buy took place. The prosecutor suggested that, if the trial court determined that the tape was testimonial and/or hearsay, then it could be played without sound. The trial court ruled that if the tape could be "authenticated and the foundation is laid" it would be allowed without volume. Upon the trial court's decision to allow the tape without volume, defendant withdrew his objection because he anticipated using the audio for an argument in his defense. To authenticate the tape and lay the foundation, Officer Stewart testified he checked the camera prior to Officer Drake's placing it on Mr. Snyder. Officer Stewart had been trained in the operation of the camera and had previously used it. He made sure to check that there were no other recordings on the tape and that the batteries were charged. He also noticed that a light was blinking indicating that the camera was in working condition. Officer Stewart also testified that the tape played for the jury at trial was the same one he viewed on 8 April 2008, without any changes, deletions, or alterations. He did note that a portion of the tape was "blacked out," most likely because of Mr. Snyder's seatbelt.

Also after the playing of the videotape, Officer Stewart testified regarding the images and depictions in the tape. He stated he recognized defendant in the video, as he had prior dealings with him. Defendant did not object to this testimony. Officer Stewart further testified he did not see Mr. Snyder personally hand the money to defendant or receive any controlled substance from defendant. However, he noted it appeared Mr. Snyder spoke directly with defendant regarding whom to pay. The video indicated that the marijuana was in a drawer and Mr. Snyder was to take it from there. The buy money was never recovered. Officer Drake also testified regarding his involvement in the investigation. He placed the camera on Mr. Snyder and accompanied Mr. Snyder in the car, but did not go inside the house on Miller Boulevard. According to Officer Drake, Mr. Snyder was inside for less than ten minutes. He also testified to the contents of the videotape and acknowledged that the blacked out part of the tape was likely caused by Mr. Snyder's seatbelt or clothing. Detective Rachel Hann of the Havelock Police Department testified that she had been looking for Mr. Snyder, but could not locate him.

At the end of the State's evidence, defense counsel made a motion to dismiss which was denied. Defendant did not present any evidence and renewed his motion to dismiss, which was again denied. The trial court instructed the jury on the offenses of possession of marijuana and drug paraphernalia, based on defendant's possession of plastic bags. The jury asked for a clarification of the charge of possession of marijuana and requested to view the videotape without interruption. After deliberation the jury found defendant guilty on the lesser offense of possession of marijuana and drug paraphernalia. Defendant received a consolidated sentence of six to eight months in prison for the Class I offenses of felony possession of marijuana and possession of drug paraphernalia with execution suspended for a 30-month supervised probationary period. Defendant appeals.

II. Analysis

A. Foundation and Authentication of Videotape

[1] Defendant raises two issues on appeal. Defendant first contends the trial court committed reversible error by admitting the videotape as substantive evidence when the State failed to lay proper foundation and authenticate the videotape. For reasons discussed herein, we disagree.

Generally, the rules governing the admissibility of photographs apply to videotapes. *State v. Strickland*, 276 N.C. 253, 258, 173 S.E.2d 129, 132 (1970). Videotapes may be admissible for illustrative and sub-

stantive purposes upon the laying of a proper foundation as noted in N.C. Gen. Stat. § 8-97 (2009), which states in pertinent part:

> Any party may introduce a photograph, video tape [sic], motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. This section does not prohibit a party from introducing a photograph or other pictorial representation solely for the purpose of illustrating the testimony of a witness.

Furthermore, "when a videotape depicts conduct of a defendant in a criminal case, its potential impact requires the trial judge to inquire carefully into its authenticity, relevancy, and competency[.]" *State v. Mason*, 144 N.C. App. 20, 25, 550 S.E.2d 10, 14 (2001) (internal quotation marks and citations omitted). To lay the proper foundation for admission of a videotape, the offeror must meet the standard as articulated in *State v. Cannon*, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-09 (1988), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990), which requires:

> (1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed, (illustrative purposes); (2) "proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape . . . [;]" (3) testimony that "the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing," (substantive purposes); or (4)"testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area 'photographed.' "

Id. (citations omitted).

Our Court applied the *Cannon* standard in a case with a similar foundation to the one *sub judice*. In *State v. Mewborn*, 131 N.C. App. 495, 499, 507 S.E.2d 906, 909 (1998), our Court held the testimony of three witnesses sufficiently "satisf[ied] the test enunciated in *Cannon*" for the admission of a videotape of an armed robbery. In *Mewborn*, the State offered testimony from a store employee and two officers regarding a surveillance tape from the robbed store. *Id.* The store employee testified to the working of the store VCR while the officers testified to having viewed the tape immediately after the robbery, the tape having remained in their custody, and the tape being in the same condition at trial as it was on the night of the robbery. *Id.*

Therefore, we must similarly review the foundation for admissibility of the videotape in our case by analyzing: "(1) whether the camera and taping system in question were properly maintained and were properly operating when the tape was made, (2) whether the videotape accurately presents the events depicted, and (3) whether there is an unbroken chain of custody." *Mason*, 144 N.C. App. at 26, 550 S.E.2d at 15.

First, in the case at hand, the State offered testimony from Officers Stewart and Drake regarding the maintenance and operation of the videotape. Officer Stewart testified, "there's a light on [the video camera] that indicates that [the video camera is] working properly." He further testified, "when you turn it on you know it's working," if the light is blinking. Officer Stewart went on to note that he had previously used the video camera and had been trained in operating it. In being thorough, he checked to see that there was no other recording on the videotape and that the batteries were charged. Officer Drake testified that he placed the camera on the informant. Taking this testimony together, Officers Stewart and Drake properly maintained and operated the camera.

Defendant takes issue with the second part of the test in arguing that by not having Mr. Snyder testify at trial, the State could not prove that the videotape fairly and accurately depicted the events. However, our Supreme Court has held that where photographs are not presented for illustrative purposes, it is not necessary to have a witness testify that the videotape accurately depicts the events. *State v. Gladden*, 315 N.C. 398, 414, 340 S.E.2d 673, 683 (1986); *see State v. Kistle*, 59 N.C. App. 724, 726-27, 297 S.E.2d 626, 627 (1982). Here, the State offered the videotape for substantive purposes as evidence that defendant committed a crime. Defendant objected to the admission of the videotape based on hearsay in that Mr. Snyder did not testify, but the State even offered to present the tape without volume. The trial court agreed that the tape should not be admitted with volume based on hearsay, but it could be admitted without volume for substantive purposes. Upon the trial court's decision, defendant retracted his objection based on his desire to use the audio portion in his defense if the tape was going to be admitted anyway. Based on the reasoning of our Court and the Supreme Court, the videotape was properly admitted for substantive purposes and the State did not need a witness to testify that the tape accurately depicted the events.

Finally, the State adequately established the chain of custody. Officers Stewart and Drake both testified they viewed the videotape on the night of the incident. Both officers also testified the tape played

for the jury was the one they viewed on 8 April 2008, without any changes, additions, or deletions. Each officer even testified the blacked out portion of the tape was likely caused by the informant's clothing or seatbelt while riding in the car. Thus, the State properly laid the foundation for admission of the videotape.

Defendant also contends the trial court erred in failing to conduct a *voir dire* to determine whether any inadmissible or improper aspects of the videotape needed to be deleted or withheld. When a party objects to the admission of taped evidence, the trial court must conduct a *voir dire* and rule on all questions of admissibility. *State v. Gibson*, 333 N.C. 29, 41, 424 S.E.2d 95, 102 (1992) (holding trial court erred in failing to conduct a *voir dire*, but substance of the tape admissible despite the error), *rev'd on other grounds*, *State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993); *see State v. Lynch*, 279 N.C. 1, 17, 181 S.E.2d 561, 571 (1971); *State v. Kamtsiklis*, 94 N.C. App. 250, 257, 380 S.E.2d 400, 403 (1989). Here, it appears the trial court did conduct a *voir dire*, out of the presence of the jury, by entertaining counsels' arguments regarding the admissibility of the videotape and considering admission of the tape without volume. While the trial court did not view the videotape, it conducted enough of a *voir dire* to meet the requirements of *Lynch* and *Kamtsiklis*. This issue was mooted, however, as the objection was ultimately withdrawn.

B. Admissibility of Lay Opinion

[2] In his second argument, defendant contends the trial court committed plain error in admitting the lay opinion testimony of Officer Stewart that defendant was the person depicted in the videotape. Defendant did not object until plaintiff's questioning on redirect. Defendant argues Officer Stewart was in no better position than the jury to identify defendant in the videotape, therefore Officer Stewart's testimony was inadmissible lay opinion. We disagree.

In general, we apply the abuse of discretion standard to reviews of the admissibility of lay opinion testimony. *See State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000). However, "[i]n 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) (2009); *see State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). "It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." N.C.R.

App. P. 10(a)(1). Therefore, where a party does not object at trial, plain error is the proper standard of review. *State v. Odom*, 307 N.C. 655, 656, 300 S.E.2d 375, 376 (1983). Plain error is "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987). Plain error exists "only in exceptional cases where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Hammett*, 361 N.C. 92, 98, 637 S.E.2d 518, 522 (2006) (internal quotation marks and citations omitted).

Defendant argues Officer Stewart's identification of defendant and his interpretation of defendant's comments in the videotape constituted inadmissible lay opinion testimony. In supporting his argument defendant cites to *State v. Belk*, 201 N.C. App. 412, 689 S.E.2d 439 (2009), *disc. review denied*, 364 N.C. 129, 695 S.E.2d 761 (2010), where the defendant received a new trial because a police officer's inadmissible narration of the content of a videotape and testimony identifying the defendant in the tape were the only evidence that the defendant was in the video besides the jury's own viewing of the tape. Our Court held the trial court erred in allowing the officer's testimony because the officer "was in no better position than the jury to identify Defendant as the person in the surveillance video." *Id.* at 414, 689 S.E.2d at 441.

"[A]dmissible lay opinion testimony 'is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.' " *Id.* (quoting N.C. Gen. Stat. § 8C-1, Rule 701 (2007)). "Ordinarily, opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury." *State v. Fulton*, 299 N.C. 491, 494, 263 S.E.2d 608, 610 (1980). In *Fulton*, the officer testified regarding the design of shoe tracks from a crime scene, which should be left for the jury or an expert in latent evidence identification. *Id.* Nonetheless,

> "[t]he current national trend is to allow lay opinion testimony identifying the person, usually a criminal defendant, in a photograph or videotape where such testimony is based on the perceptions and knowledge of the witness, the testimony would be helpful to the jury in the jury's fact-finding function rather than

> invasive of that function, and the helpfulness outweighs the possible prejudice to the defendant from admission of the testimony."

Belk, 201 N.C. App. at 415, 689 S.E.2d at 441 (quoting *State v. Buie*, 194 N.C. App. 725, 730, 671 S.E.2d 351, 354 (2009)). In analyzing the admissibility of lay opinion testimony identifying a defendant as the person in a videotape, courts in the majority trend weigh the following factors:

> "(1) the witness's general level of familiarity with the defendant's appearance; (2) the witness's familiarity with the defendant's appearance at the time the surveillance photograph was taken or when the defendant was dressed in a manner similar to the individual depicted in the photograph; (3) whether the defendant had disguised his appearance at the time of the offense; and (4) whether the defendant had altered his appearance prior to trial."

Id. (quoting *United States v. Dixon*, 413 F.3d 540, 545 (6th Cir. 2005)); *see, e.g.*, *United States v. Henderson*, 68 F.3d 323 (9th Cir. 1995) (allowing admission of testimony where witness knew defendant for 15 years and had seen him often throughout the period); *United States v. Jackson*, 688 F.2d 1121 (7th Cir. 1982) (allowing testimony where witness met defendant only once, but the amount of time witness spent with defendant goes to weight rather than admissibility). We find these federal court cases persuasive as Rule 701 of the Federal Rules of Evidence is indistinguishable from that of Rule 701 of the North Carolina Rules of Evidence. *See* Fed. R. Evid. 701 (2009); *Belk*, 201 N.C. App. at 415-16, 689 S.E.2d at 441-42. These federal courts have also "considered the clarity of the surveillance image and completeness with which the subject is depicted in their analysis." *Belk*, 201 N.C. App. at 416, 689 S.E.2d at 442; *see Dixon*, 413 F.3d at 545.

We find defendant's reliance on *Belk* distinguishable from the case at hand. In *Belk*, the officer had minimal contacts with the defendant, consisting of three brief encounters, with the most recent encounter prior to trial being when the officer merely passed the defendant in her patrol car. *Belk*, 201 N.C. App. at 418, 689 S.E.2d at 443. Alternatively, in the case at hand, Officer Stewart had the following exchange with the prosecutor:

> [Ms. Huskins]: Did you know the defendant before April 8, 2008?
>
> [Officer Stewart]: I had had dealings with him.
>
> [Ms. Huskins]: Hum?
>
> [Officer Stewart]: I had dealt with him before, yes, ma'am.

[Ms. Huskins]: Okay. So in your dealings with him before would you have been able to recognize him if you saw him again?

[Officer Stewart]: Yes, ma'am.

[Ms. Huskins]: When you looked at the video on April 8, 2008, did you recognize anyone that you saw on that video?

[Officer Stewart]: Yes, ma'am.

[Ms. Huskins]: And who did you recognize?

[Officer Stewart]: Mr. Collins.

Here, Officer Stewart had "dealings" with defendant which leads us to believe that Officer Stewart was familiar with defendant and would be in a better position than the jury to identify defendant in the videotape. We believe "dealings" mean more than minimal contacts, as were present in *Belk*; however, we do note defense counsel could have questioned these "dealings," if so desired.

In weighing the factors taken from *Belk*, Officer Stewart had a sufficient level of familiarity with defendant's appearance to aid the jury in its determination. *See id.* at 415, 689 S.E.2d at 441. While there is no evidence defendant wore a disguise or altered his appearance in the videotape, we still find Officer Stewart's testimony to be helpful to the jury and not prejudicial to defendant. Although the clarity of the videotape did not directly come into question, Officer Stewart did testify in regard to the blacked out portion of the tape, which he believed was caused by Mr. Snyder's seatbelt or clothing. Also, in support of its case, the State presented and defense stipulated to the 110 grams of marijuana obtained through the controlled buy. Therefore, in reviewing the evidence as a whole, we find Officer Stewart's testimony did not prejudice defendant and in actuality was helpful to the jury due to Officer Stewart's "dealings" with defendant. Consequently, defendant's argument does not meet the standard of plain error.

III. Conclusion

We find no error on behalf of the trial court. The trial court did not commit reversible error by admitting the videotape as substantive evidence, nor did it commit plain error by admitting the lay opinion testimony of Officer Stewart.

No error.

Judges HUNTER (Robert C.) and STEELMAN concur.

THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, PLAINTIFF v. ANTHONY R. COMBS, KAREN C. COMBS, PARK MERIDIAN BANK, BENEFICIARY, BRYAN F. KENNEDY, III, TRUSTEE, AND ANY OTHER PARTY OF INTEREST, DEFENDANTS

No. COA11-107

(Filed 4 October 2011)

Cities and Towns—condemnation—just compensation—temporary construction easement—valuation must include effect on remainder of property—denial of access

The trial court erred by concluding that defendants were entitled to $5,073.00 as just compensation for the taking of their property by plaintiff City of Charlotte for a temporary construction easement based on the valuation of plaintiff's expert. When the temporary taking is in the form of a temporary construction easement, in addition to paying the fair rental value of the easement area for the time used by the condemnor, the condemnor is liable for additional elements of damages flowing from the use of the temporary construction easement. Plaintiff's expert did not conduct a complete appraisal of the property and did not take into account the impact, if any, of the denial of access. The case was remanded for a new trial.

Appeal by defendants from judgment entered 26 January 2010 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 August 2011.

Office of the City Attorney, by Gretchen R. Nelli, for plaintiff-appellee.

The Odom Law Firm, PLLC, by Thomas L. Odom, Jr. and David W. Murray, for defendants-appellants.

HUNTER, Robert C., Judge.

Defendants Anthony R. Combs and Karen C. Combs appeal from the trial court's judgment entered on the jury's verdict that the Combs were entitled to $5,073.00 as "just compensation" for the taking of their property by plaintiff City of Charlotte for a temporary construction easement from 31 May 2007 through 13 August 2009. We agree with the Combs' main argument that the trial court erred in permitting the City's expert to give his opinion as to the value of the taking because his opinion lacked a sufficiently reliable method of proof. Consequently, we remand for a new trial.

Facts

Since May 1999, the Combs have owned the Biberstein House in Charlotte, North Carolina. The historic property, located at 1600 Elizabeth Avenue near Presbyterian Hospital, consists of .2997 acres as well as the 4,167-square-foot house, which has been converted into an office building. The property has only one entrance, a driveway leading from Elizabeth Avenue to a secured parking lot in the rear of the property with approximately 15 parking spaces.

On 31 May 2007, the City filed a "Complaint, Declaration of Taking and Notice of Deposit and Service of Plat," notifying the Combs that the City intended to take a "temporary construction easement" ("TCE") over their property in connection with the Elizabeth Avenue Business Corridor Project. The TCE consisted of a narrow strip—approximately five feet by 66 feet (totaling 330 square feet) along the front of the Combs' property abutting Elizabeth Avenue. At the time it filed the complaint, the City planned to acquire the TCE over the Combs' property for one year and deposited $2,300.00 with the clerk of superior court as an estimate of compensation for the taking.

Almost a year later, on 30 May 2008, the Combs filed an answer in which they alleged that the taking was unconstitutional and that just compensation for the taking was "greatly in excess" of the $2,300.00 deposited by the City. On 8 June 2009, as the construction project was still ongoing, the City amended its complaint and deposited an additional $2,075.00 with the court clerk, bringing the total amount deposited to $4,375.00.

The City completed the construction project on 13 August 2009, at which time the property subject to the TCE reverted back to the Combs.[1] On 18 November 2009, the Combs moved to amend their answer to allege with more specificity the damages resulting from the TCE. The trial court granted the motion to amend on 7 December 2009.

A jury trial was conducted on 7-11 and 14 December 2009, with the sole issue being: "What amount of just compensation are Anthony and Karen Combs entitled to recover for the taking of their property by the City for temporary construction easement from May 31, 2007, to August 13, 2009[?]" Damon Bidencope, an appraiser, testified as an expert on behalf of the Combs. Believing that the TCE had a "material impact" on the entirety of the Combs' property, not just the 330

1. The parties agree that the takings period was 804 days, 26.5 months, or 2.2083 years.

square feet subject to the TCE, Mr. Bidencope explained that he tried to "quantify" this impact in his "analysis." As a result, Mr. Bidencope testified that the fair market rental value should be based on the entire 4,167 square feet of the property's "net rentable area" rather than just the 330 square feet encompassed by the TCE. He estimated the value of lost rental income for the Combs' property by multiplying the difference between the market rental value of the net rentable area of the property before the TCE and the market rental value of the net rentable area of the property during the taking times the number of months the property was affected by the TCE and discounting for present value. Based on this formula, Mr. Bidencope testified that, in his opinion, the "fair market value of the use by the City of the construction easement on the Combs' property and the effect on the remainder of the property outside of the construction easement" totaled approximately $103,000.00.[2]

Fitzhugh Stout, the appraiser who prepared several appraisal reports for the City regarding the Combs' property, was tendered as an expert real estate appraiser by the City. Prior to his testifying at trial, the Combs requested a *voir dire*, where Mr. Stout indicated, among other things, that he had not appraised the entire property before and after the TCE based on his experience that TCEs do not adversely affect the remainder of the property. At the conclusion of the *voir dire*, the trial court ruled, over the Combs' objection, that Mr. Stout would be allowed to give his expert opinion as to the value of the TCE. Mr. Stout then testified that he estimated the rental value of the TCE by multiplying the product of the "per square foot land value" and the area of the TCE times the annual rate of return on renting the property, and then multiplying that product by the number of years of the TCE. Mr. Stout's opinion was that the rental value of the TCE was $4,569.00, plus $220.00 for the removal of two shrubs and a 20-square-foot concrete slab, for a total valuation of $4,789.00.[3]

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2. In his report, which was admitted at trial, Mr. Bidencope included a table setting out his calculation of the diminished value of the Combs' property during the TCE period. His figures show the following: Year 1: $19.50.00/sq. ft. (market rent before TCE)—$8.00/sq. ft. (market rent during TCE) x 4,167 sq. ft. (net rentable area) x 12 mos. = $47,921.00. Year 2: $20.09/sq. ft.—$8.00/sq. ft. x 4,167 sq. ft. x 12 mos. = $50,358.00. Year 3: $20.69/sq. ft.—$8.00/sq. ft. x 4,167 sq. ft. x 2.5 mos. = $11,014.00. After discounting for present value at 10%, Mr. Bidencope's table shows $102,803.00 as the "total[] . . . in damages over the course of the project."

3. In his calculations, Mr. Stout used $57.00 as the "per square foot land value," 330 sq. ft. as the area of the TCE, 11% as the annual rate of return, and 2.2083 years as the length of the TCE. Based on these figures, Mr. Stout determined the value of the TCE to be $4,569.00 ($57.00 x 330 sq. ft. x .11 x 2.2083 = $4,569.00), plus $220.00 for

The jury awarded the Combs $5,073.00 as just compensation for the TCE. The trial court entered judgment on the jury's verdict on 26 January 2010. The Combs moved for a new trial on 5 February 2010 and, after conducting a hearing on the motion on 1 April 2010, the trial court entered on order on 25 May 2010 denying the Combs' motion. The Combs timely appealed to this Court from the trial court's judgment and subsequent order denying their motion for a new trial.

Temporary Takings

A "taking" is defined as " 'entering upon private property for more than a momentary period, and under warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him [or her] of all beneficial enjoyment thereof.' " *Long v. City of Charlotte*, 306 N.C. 187, 199, 293 S.E.2d 101, 109 (1982) (quoting *Penn v. Coastal Corp.*, 231 N.C. 481, 484, 57 S.E.2d 817, 819 (1950)). A " 'temporary' " taking, which "den[ies] a landowner all use of his [or her] property" for a finite period, is "no[] different in kind from [a] permanent taking[]," and requires just compensation for "the use of the land during th[e] period" of the taking. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 318-19, 96 L. Ed. 2d 250, 266-67 (1987).

Generally, the measure of damages for a temporary taking is the "rental value of the land actually occupied" by the condemnor. *Leigh v. Garysburg Mfg. Co.*, 132 N.C. 167, 170, 43 S.E. 632, 633 (1903); *accord Kimball Laundry Co. v. United States*, 338 U.S. 1, 7, 93 L. Ed. 1765, 1773 (1949) (concluding that "the proper measure of compensation" for temporary taking "is the rental that probably could have been obtained"); *United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 378 (4th Cir. 1995) (explaining that "when the Government takes property only for a period of years, . . . it essentially takes a leasehold in the property[, and] [t]hus, the value of the taking is what rental the marketplace would have yielded for the property taken"); *State v. Sun Oil Co.*, 160 N.J. Super. 513, 527, 390 A.2d 661, 668 (1978) (holding that "[w]here a temporary construction easement is taken[,]" the "rental value of the property taken is the normal measure of dam-

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replacement of two shrubs and a concrete slab ($4,569.00 + $220.00 = $4,789.00). Mr. Bidencope, in his calculations, assessed the land value to be $60.00/sq. ft. and assumed that the TCE was 333 sq. ft. Mr. Stout, substituting Mr. Bidecope's figures into his formula, calculated the value of the TCE to be $4,853.00 ($60.00 x 333 sq. ft. x .11 x 2.2083 = $4,853.00).

ages and is awarded for the period taken"); *see 4 Nichols on Eminent Domain* § 12E.01[4] (rev. 3d ed. 2006) [hereinafter *Nichols*] (citing *Leigh* for proposition that, under North Carolina law, measure of damages for temporary taking is "fair market rental value for the period of time the property is taken"); 9 *Nichols* § G32.08[2][a] ("The most widely accepted measure of compensation for the taking of a temporary easement appears to be the rental value of the property taken.").

Where, as here, the temporary taking is in the form of a temporary construction easement, our Supreme Court has held that, in addition to paying the "[f]air rental value of [the] easement area for [the] time used by [the] condemnor," the condemnor is liable for "additional elements of damages flowing from the use of the temporary construction easement[]," which may include: (1) the "[c]ost of removal of [the] landowner's improvements from the construction easement that are paid by landowner"; (2) the "[c]ost of constructing [an] alternate entrance to [the] property"; (3) the "[c]hanges made in [the] area resulting from [the] use of [the] easement that affect [the] value of [the] area in [the] easement or [the] value of the remaining property of [the] landowner"; (4) the "[r]emoval of trees, crops, [or] improvements from [the] area in [the] easement by [the] condemnor"; and (5) the "[l]ength of time [the] easement [was] used by [the] condemnor." *Colonial Pipeline Co. v. Weaver*, 310 N.C. 93, 107, 310 S.E.2d 338, 346 (1984); *see also* 26 Am. Jur. 2d *Eminent Domain* § 283 ("Where land has been appropriated for a temporary use, the measure of compensation is the fair productive value of the property during the time in which it is held. More specifically, the rental value during the period of the taking, together with any damage sustained by the property, may be awarded as full compensation.").

Admissibility of Expert Opinion

The Combs contend that the trial court erred by allowing Mr. Stout to give his expert opinion regarding the value of the TCE. A trial court's ruling on the admissibility of expert opinion testimony will not be reversed on appeal absent a showing that the court abused its discretion. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004). A trial court abuses its discretion where its ruling is "manifestly unsupported by reason" or is "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Rule 702 of the Rules of Evidence provides that when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. R. Evid. 702(a); *see State v. Evangelista*, 319 N.C. 152, 163, 353 S.E.2d 375, 383 (1987) ("Expert testimony is properly admissible when it can assist the jury in drawing certain inferences from facts and the expert is better qualified than the jury to draw such inferences."). In "considering whether to admit proffered expert testimony" under Rule 702, the trial court "conduct[s] a three-step inquiry to determine: (1) whether the expert's proffered method of proof is reliable, (2) whether the witness presenting the evidence qualifies as an expert in that area, and (3) whether the evidence is relevant." *State v. Morgan*, 359 N.C. 131, 160, 604 S.E.2d 886, 903-04 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005); *accord Howerton*, 358 N.C. at 458, 597 S.E.2d at 686; *State v. Goode*, 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-41 (1995). The party offering the expert testimony—in this case, the City—bears " 'the burden of tendering the qualifications of the expert' and demonstrating the propriety of the testimony under this three-step approach." *State v. Ward*, 364 N.C. 133, 140, 694 S.E.2d 738, 742 (2010) (quoting *Crocker v. Roethling*, 363 N.C. 140, 144, 675 S.E.2d 625, 629 (2009)).

Here, the focus of the parties' dispute concerns the first step—"the reliability of [Mr. Stout]'s methodology" in valuating the TCE. *Crocker*, 363 N.C. at 144, 675 S.E.2d at 629. While our courts have recognized that "expert real estate appraisers should be given latitude in determining the value of property" in eminent domain cases, *Duke Power Co. v. Mom 'n' Pops Ham House, Inc.*, 43 N.C. App. 308, 312, 258 S.E.2d 815, 819 (1979), our courts have also cautioned that an appraiser's expert opinion must nonetheless be based on a reasonably reliable methodology, regardless of professional qualifications, *Department of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 6, 637 S.E.2d 885, 890 (2006). Assessment of the reliability of the appraiser's valuation methodology does not require that the appraiser's basis be "proven conclusively reliable or indisputably valid" before the appraiser is permitted to testify, *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687, but " 'mere conjecture, speculation, or surmise is not allowed by the law to be a basis of proof in respect of damages or compensation[,]' " *N.C. Dep't. of Transp. v. Haywood County*, 360 N.C. 349, 352, 626 S.E.2d 645, 647 (2006) (quoting *Raleigh, Charlotte & S. Ry. Co. v. Mecklenburg Mfg. Co.*, 169 N.C. 156, 160, 85 S.E. 390, 392 (1915)).

The Combs, relying on our Supreme Court's decision in *Haywood County*, contend that the trial court should have excluded Mr. Stout's testimony regarding his valuation of the TCE because, as his testimony on *voir dire* demonstrates, "he relied solely on his personal opinion from experience that the remainder of the property would not be affected by the construction easement without attempting to ascertain . . . the potential effects of the easement during construction[.]" In *Haywood County*, the Department of Transportation, in order to widen a highway running through Haywood County, obtained a right-of-way next to a County building situated along the highway as well as a temporary construction easement that ran parallel to the right-of-way. *Id.* at 350, 626 S.E.2d at 645-46. At trial, the County tendered three experts to give their opinions as to "the value of damages arising from the proximity of the new right of way to the building ('proximity damage') and the rental value of the temporary construction easement ('rental value')." *Id.* at 350, 626 S.E.2d at 646. All three of the appraisers testified that the County's building would depreciate in value as a result of the proximity of the right-of-way, with the appraisers' estimations of depreciation ranging from 30% to 35%. *Id.* at 351, 626 S.E.2d at 646. As for the rental value of the temporary construction easement, the appraisers "assess[ed] it at between $500.00 and $800.00 per month over a three-year period." *Id.*

When questioned about the bases for their opinions regarding the proximity damages and rental value,

> Mr. Mease's response was: "I felt like in my opinion that 30 percent damage worked well with this building." When asked, "Why isn't it 25 percent or 20 percent or 40 percent? Where does the 30 percent come from?", Mr. Mease acknowledged that he did not use any particular mathematical formula in arriving at the figure and repeated that "I just felt like that 30 percent was about what the building would be damaged . . . ." Mr. Dietz explained that his estimate that the building's value would be diminished by thirty-five percent was "my personal opinion based on experience." Although Mr. McClure said his estimate of the depreciation was derived from "my experience of dealing with the real estate," he also testified that he did not have any comparable or similar sales to document that estimate. As to the rental value of the temporary construction easement, each expert conceded that he had not seen a lease of a similar strip of property to use for a comparison in making his appraisal.

Id. at 351-52, 626 S.E.2d at 646-47. The transportation department moved for a directed verdict with respect to the County's evidence of proximity damages and rental value, *id.* at 350, 626 S.E.2d at 646, and the trial court granted the motion, determining that the County's experts' opinions "regarding these elements of damage were 'not based on any reliable methodology that the court could ascertain, that [they were] simply based on subjective hunches and speculation[,]' " *id.* at 352, 626 S.E.2d at 647. The trial court further justified its ruling, explaining:

> I'm sure [the experts] are all very well experienced and have testified to their experience, but I didn't see the necessary connection between their experience and how they arrived at these valuations, particularly with respect to the proximity damage, . . . and I had the same problem with respect to rental value, the numbers were all over the place.

Id.

In upholding the trial court's directed verdict, the Supreme Court addressed the reliability of the County's appraiser's method of proof, holding:

> The trial court heard the opinion of each expert as well as the basis of each opinion. Although each expert had experience in appraising real estate, none articulated any method used to arrive at his figures, even when closely questioned. To the contrary, these experts' testimony about feelings and personal opinions, unsupported by objective criteria, explains and justifies the trial court's concern that their opinions were based on hunches and speculation. Because the trial court's threshold determination that the experts' method of proof lacked sufficient reliability was neither arbitrary nor the result of an unreasoned decision, we hold that the trial court's grant of plaintiff's motion for a directed verdict was not an abuse of discretion.

Id. at 352-53, 626 S.E.2d at 647.

Similarly, here, when asked on *voir dire* about the "methodology" he used in formulating his valuation, Mr. Stout responded that it was his "understanding," based on his 34 years of experience as an appraiser, that "there's no reason to go through th[e] exercise" of appraising the entire property before and after a TCE because the "before" and "after" values remain "constant"; that the use of the TCE does not "adversely affect" the remainder of the property. As for the

Combs' property, although Mr. Stout acknowledged that certain "improvements" had been damaged, specifically two shrubs and a 20-square-foot slab of stamped concrete that had been removed during the construction project, his valuation did not include any assessment of whether the remainder of the Combs' property was affected in any other respect by the temporary taking.

Of particular importance in this case, although the parties dispute the length of time the Combs were prevented from accessing and using their driveway and parking lot as a result of the TCE, there is no dispute that a denial of access actually occurred. Because, however, Mr. Stout did not conduct a complete appraisal of the property, believing, based on his experience, that the TCE would not affect the remainder of the Combs' property, his valuation did not take into consideration the impact, if any, of the denial of access. The Supreme Court's decision in *Colonial Pipeline* indicates, however, that the denial of access constitutes a "[c]hange[] made in [the] area resulting from [the] use of [the] easement that affect[s] . . . [the] value of the remaining property of [the] landowner"—an "element[] of damages" that potentially may "flow[] from the use of [a] temporary construction easement[]." 310 N.C. at 107, 310 S.E.2d at 346; *see also Dep't of Transp. v. Harkey*, 308 N.C. 148, 155, 301 S.E.2d 64, 69 (1983) ("[W]hen all direct access has been eliminated, there has been *pro tanto* a taking; the availability and reasonableness of any other access goes to the question of damages and not to the question of liability for the denial of access.").

We agree with the Combs' position that

> if an expert witness appraiser, in a case where damage to the remainder is disputed, appraises the whole property, and then attributes no diminished value to the remainder because of his experience, that opinion is fundamentally different from one where the appraiser fails to conduct any appraisal of the whole property because of the fact that his experience tells him there is no adverse [a]ffect on the remainder.

In the first scenario, the appraiser's valuation is "[]supported by objective criteria," while the appraiser's valuation in the second scenario is "based on hunches and speculation." *Haywood County*, 360 N.C. at 352, 626 S.E.2d at 647.

Here, as in *Haywood County*, because Mr. Stout based his valuation of the TCE on his experience that such temporary takings do not

affect the remainder of the condemnee's property, rather than an actual assessment that the Combs' property outside of the TCE was not affected, his method of proof lacked sufficient reliability.[4] The trial court, consequently, abused its discretion in failing to exclude Mr. Stout's expert testimony regarding his valuation of the TCE. In light of the erroneously admitted expert testimony, the Combs are entitled to a new trial to determine just compensation. *See* M.M. *Fowler*, 361 N.C. at 15, 637 S.E.2d at 895 (remanding for new trial where trial court erroneously admitted evidence of lost business profits in condemnation case).

New Trial.

Judges STROUD and Robert N. HUNTER, Jr. concur.

4. Mr. Stout also explained on *voir dire* that not appraising the entire property served as a "cost savings to the client"—the governmental entity taking private property pursuant to the power of eminent domain. The fact that the remainder of the Combs' property was not assessed out of concerns for expediency and maximization of resources, particularly when damages to the remainder was a genuinely contested issue in the case, further undermines the reliability of Mr. Stout's valuation methodology. *See Ward*, 364 N.C. at 145, 694 S.E.2d at 745-46 (viewing expert's testimony that SBI lab used visual inspection method for identifying controlled substance, rather than chemical analysis, out of "concerns for expediency and maximizing limited laboratory resources in light of the relative seriousness of the criminal charges" as being "a technique for 'cutting corners' " and "cast[ing] an unsettling shadow of doubt on the reliability of mere visual inspection as a method of proof").

IN RE RELEASE OF THE SILK PLANT FOREST CITIZEN REVIEW COMMITTEE'S REPORT AND APPENDICES, PETITIONER v. MICHAEL N. BARKER, RICHARD E. BEST, ROBERT G. COZART, JOHN GRISMER, BRYAN L. MACY, MICHAEL C. ROWE, MICHAEL L. SHARPE, MICHAEL POE, RANDY PATTERSON, RANDY N. WEAVIL, LONNIE M. MAINES, MARY MCNAUGHT, ET. AL., RESPONDENTS

No. COA10-1516

(Filed 4 October 2011)

Police Officers—examination of confidential personnel files by general public—no trial court authority

The trial court did not have the authority under N.C.G.S. § 160A-168(c)(4) to grant the City's petition for disclosure of transcripts contained in respondent police officers' confidential personnel files.

Appeal by respondents from order entered 4 March 2010 by Judge Richard W. Stone in Forsyth County Superior Court. Heard in the Court of Appeals 17 August 2011.

Alan A. Andrews for petitioner-appellee.

The McGuinness Law Firm, by J. Michael McGuinness, for respondents-appellants.

HUNTER, Robert C., Judge.

Respondent police officers ("the officers" or "respondents") appeal from the trial court's 4 March 2010 order granting the City of Winston-Salem's ("the City") petition for disclosure of transcripts contained in respondents' personnel files.[1] Respondents argue on appeal that: (1) the trial court erred in granting the petition pursuant to N.C. Gen. Stat. § 160A-168(c)(4) (2009), and (2) disclosure of the transcripts would violate respondents' privacy and liberty interests guaranteed under the 9th and 14th Amendments of the United States Constitution and Article I, Sections 1, 19, 35, and 36 of the North Carolina Constitution. After careful review, we reverse the trial court's order.

Background

On 22 October 2007, the City of Winston-Salem City Council adopted a resolution establishing a citizen review committee called the Silk Plant Forest Review Committee ("the Committee"), the pur-

1. Only Michael N. Barker, Richard E. Best, Robert G. Cozart, John Grismer, Michael C. Rowe, Michael L. Sharpe, Michael Poe, and Randy Patterson are listed as respondents-appellants on the notice of appeal in this case.

pose of which was to "conduct a comprehensive fact finding review"of the Winston-Salem Police Department's investigation into the 1995 assault and robbery of Jill Marker.[2] This police investigation ultimately led to the indictment and conviction of Kalvin Michael Smith for the crimes of assault with a deadly weapon with intent to kill inflicting serious injury and armed robbery. According to the City's resolution, the police department's investigation into the attack on Ms. Marker "resulted in questions concerning whether police procedures were properly followed[.]" During the Committee's extensive inquiry into the 1995 police investigation, respondents, who are all current or former Winston-Salem police officers, were interviewed concerning their role in the investigation. The officers were notified in writing that the questioning by the Committee was a "part of an official investigation by the Winston-Salem Police Department" and that refusal to cooperate could result in "dismissal from the Police Department." These interviews were recorded and transcribed.

On 17 March 2009, the Committee, after concluding its inquiry, adopted a resolution which provided in part: "We are aware of no credible evidence that Kalvin Michael Smith was at the location of the Silk Plant Forest Store in Winston-Salem, North Carolina, on 9 December 1995, at or about the time that the crime for which he was charged was committed." The Committee further stated that it did not "have confidence in the investigation . . . or the result of the investigation" and that investigators "failed to follow procedures which, if followed, would have enhanced the reliability and completeness of the information that was provided to the prosecutors and ultimately the court."

On 16 October 2009, the City filed a petition with the Superior Court of Forsyth County requesting, *inter alia*, that the trial court grant "full disclosure" of the officers' transcribed interviews to the general public. The City provided the following rationale for its request:

> The Committee's materials are of great interest to the citizenry. There have been a number of requests both from citizens and the media for all the Committee's materials to be publicly released. The City Council has determined that a full release of the Committee's report, its appendices, and related materials is necessary and essential to maintaining public confidence in the administration of city services.

The City claimed that the transcripts of the officers' interviews were a part of the officers' personnel files, and, therefore, the City was

2. The resolution was amended on 3 March 2008.

required to obtain a court order pursuant to N.C. Gen. Stat. § 160A-168(c)(4) in order to lawfully release the transcripts to the general public.

The trial court deemed the action a special proceeding and conducted a hearing in regards to the petition on 15 January 2010. The trial court entered a written order on 4 March 2010 and found as fact that "despite any personnel privacy protections provided by N.C.G.S. 160A-168, it is necessary and essential to maintaining the public's confidence in the administration of City services, that these interview[] statements, in their entirety, be added to those Committee materials already publicly released." The trial court decreed: "The City is hereby authorized and permitted to make full public disclosure of interview statements, and any summaries or transcripts made therefrom, made by current and former members of the Winston-Salem Police Department . . . ." Respondents timely appealed to this Court. The trial court has stayed its order "until the completion of the appellate process."

Discussion

First, we address respondents' claim that the trial court erred in granting the City's petition under the auspices of N.C. Gen. Stat. § 160A-168(c)(4).[3] N.C. Gen. Stat. § 160A-168 states in pertinent part:

> (a) Notwithstanding the provisions of G.S. 132-6 or any other general law or local act concerning access to public records, personnel files of employees, former employees, or applicants for employment maintained by a city are subject to inspection and may be disclosed only as provided by this section. For purposes of this section, an employee's personnel file consists of any information in any form gathered by the city with respect to that employee and, by way of illustration but not limitation, relating to his application, selection or nonselection, performance, promotions, demotions, transfers, suspension and other disciplinary actions, evaluation forms, leave, salary, and termination of employment. As used in this section, "employee" includes former employees of the city.
>
> . . . .

3. We note that respondents filed a motion to dismiss and a motion for directed verdict prior to the hearing in this matter. The trial court denied those motions in its order; however, the issue before us is whether the trial court erred in granting the City's petition, which was deemed a special proceeding, and not the propriety of the trial court's rulings on respondents' motions.

> (c) All information contained in a city employee's personnel file, other than the information made public by subsection (b) of this section, is confidential and shall be open to inspection only in the following instances:
>
> . . . .
>
> (4) By order of a court of competent jurisdiction, any person may examine such portion of an employee's personnel file as may be ordered by the court.[4]

As a preliminary matter, the City argued before the trial court that the transcripts are, in fact, a part of the officers' personnel files. The City does not contend otherwise on appeal. Consequently, we will assume for purposes of this appeal that the transcripts at issue are a part of the officers' personnel files and are thus confidential and protected by N.C. Gen. Stat. § 160A-168(c).[5] The issue we must decide is whether the trial court had authority under N.C. Gen. Stat. § 160A-168(c)(4) to release the transcripts to the general public.

This Court has never directly addressed the scope of the trial court's authority to allow examination of confidential personnel files pursuant to N.C. Gen. Stat. § 160A-168(c)(4), and the statute itself is silent as to the extent of the trial court's authority. Consequently, the primary issue before us is whether the legislature intended to grant the trial court the authority to release portions of a city employee's confidential personnel file to the general public pursuant to N.C. Gen. Stat. § 160A-168(c)(4).[6] We hold that the trial court was not granted such authority under the statute.

"Questions of statutory interpretation are questions of law, reviewed de novo on appeal." *State v. West*, ___ N.C. App. ___, ___, 689 S.E.2d 216, 221 (2010).

> The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute. The legislative purpose of a statute is first ascertained by examining the statute's plain language. Where the language of a statute is clear and unam-

4. The statute was amended by 2010 N.C. Sess. Law ch. 169, § 18(f) (effective Oct. 1, 2010). This amendment does not apply to the present action.

5. It is undisputed that the deposition transcripts are not a matter of public record pursuant to N.C. Gen. Stat. § 160A-168(b).

6. By disclosing the materials to the general public, the trial court would, in effect, provide the materials to the media, which has expressed an interest in all of the information and documents procured by the Committee.

> biguous, there is no room for judicial construction[,] and the courts must give [the statute] its plain and definite meaning, *and are without power to interpolate, or superimpose, provisions and limitations not contained therein.*

Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 574-75, 573 S.E.2d 118, 121 (2002) (emphasis added) (internal citations and quotation marks omitted). "If the Legislature has used language of clear import, the court should not indulge in speculation or conjecture for its meaning. . . . Courts are not permitted to assume that the lawmaker has used words ignorantly or without meaning[.]" *Nance v. R.R.*, 149 N.C. 366, 371, 63 S.E. 116, 118 (1908). "Nothing else appearing, the legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning." *Wood v. Stevens & Co.*, 297 N.C. 636, 643, 256 S.E.2d 692, 697 (1979).

The plain language of N.C. Gen. Stat. § 160A-168(c)(4) allows, by order of the trial court, "examination" by "any person" the relevant "portion" of a city employee's personnel file. The natural meaning of these terms indicate a clear intent to maintain the privacy of a city employee's personnel file except under limited circumstances where examination of only the relevant portion of the file is allowed. The key term in this subsection is "any person." The legislature did not use the term "general public" or even the word "people." We must presume that the legislature chose "any person" as a limiting mechanism. While we do not read the term "any person" so narrowly as to mean only one individual, we do not read it so broadly as to mean the general public. Certainly, there are circumstances when justice requires that an individual, or perhaps a group of individuals sharing a common goal, be permitted to examine a relevant portion of a city employee's personnel file, but a wholesale publication of even a portion of the file would be contrary to the legislative intent behind N.C. Gen. Stat. § 160A-168(c)(4). Had the legislature intended to grant the trial court the authority to release these protected records to the general public, it would have done so in specific terms, or at least in terms that would render such an interpretation logical. Rather, the legislature chose to grant the trial court *limited authority* to allow "any person" to "examine" a relevant "portion" of the file.

Furthermore, when subsection (c) is read *in pari materia* with the remainder of the statute, the intent to keep these personnel files confidential is clear. In contrast to subsection (c), subsection (b) specifically states what information is deemed public, such as the employee's name, age, salary, and the office to which the employee is

assigned. N.C. Gen. Stat. § 160A-168(b). Thus, there is a clear delineation between what is public and what is confidential. What is confidential is, necessarily, not public information under this statute. Moreover, according to the statute, public records can not only be examined, they can by copied, and, consequently, disseminated to the general public. *Id*. That portion of a City employee personnel file that is not deemed public can only be "examine[d]" when so ordered by the trial court. N.C. Gen. Stat. § 160A-168(c)(4). The use of the word "examine," as opposed to "copy" or another word pertaining to mass publication, indicates the legislature's intent to limit the exposure of these personnel files. In fact, N.C. Gen. Stat. § 160A-168(e) makes it a criminal offense for a "public official or employee . . . [to] permit[] any person to have access to information contained in a personnel file[,]" with the exception of what is made public by subsection (b).[7]

As stated *supra*, this Court has never directly addressed the scope of the trial court's authority under N.C. Gen. Stat. § 160A-168(c)(4); however, *In re Brooks*, 143 N.C. App. 601, 606, 548 S.E.2d 748, 752 (2001), is instructive regarding the legislative intent behind the statute. In *Brooks*, the District Attorney of Orange County sought a court order requiring the disclosure of several police officers' personnel files to special agents of the State Bureau of Investigation for examination. *Id*. at 602-03, 548 S.E.2d at 750. The trial court granted the petition and the officers appealed. *Id*. This Court held that, "[t]he plain language of section 160A-168(c)(4) indicates that the Superior Court . . . being a court of competent jurisdiction, [i]s indeed authorized to allow inspection of the [police] officers' personnel files." *Id*. at 606, 548 S.E.2d at 752. Lacking guidance from the statute on the scope of the trial court's authority, this Court went on to set forth general parameters for the trial court's determination regarding examination of an employee's confidential personnel records:

> The Superior Court should make an independent determination that the interests of justice require disclosure of the confidential employment information. It is further within the Superior Court's inherent power and discretion to implement other procedures *as may be required to effectuate the legislature's intent that the information remain somewhat confidential.* The court could, for example, limit that dissemination and use of disclosed materials

7. We note that N.C. Gen. Stat. § 160A-168(c)(7) pertains to release of information regarding "disciplinary action"; however, this information may only be released if the procedures outlined in that subsection are followed. It does not appear from the record that any disciplinary action was taken against respondents.

> to certain individuals, order an *in camera* inspection, or redact certain information.

Id. at 611, 548 S.E.2d at 755 (emphasis added). The *Brooks* Court recognized the legislative intent behind N.C. Gen. Stat. § 160A-168—to keep a city employee's personnel file confidential except under limited circumstances. *Brooks* does not address whether the trial court is permitted to make confidential personnel records available to the general public; however, the Court acknowledged that even when justice requires disclosure of this information, the disclosure should be narrowly tailored in order to adhere to the legislative intent.[8] *Id.*

Based on the foregoing, we hold that "a court of competent jurisdiction" does not have the authority under N.C. Gen. Stat. § 160A-168 (c)(4) to order the release of any portion of a city employee's confidential personnel file to the general public. Consequently, the trial court erred in granting the City's petition in this case. We must, therefore, reverse the trial court's order. We need not address respondents' remaining arguments, including their claim that the trial court's order violated their constitutional rights. *State v. Dubose*, ___ N.C. App. ___, ___, 702 S.E.2d 330, 335 (2010) ("[I]t is well-established that an appellate court will not decide a constitutional question when the disposition of the case may be resolved on other grounds.").

Reversed.

Judges STROUD and HUNTER, Robert N., Jr. concur.

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8. The City argues that this Court reviews the trial court's determination under N.C. Gen. Stat. § 160A-168(c)(4) for abuse of discretion. Due to our determination that the trial court has no authority to release these protected files to the general public we need not address this matter; however, we note *Brooks* indicates that, in instances where the trial court has authority to allow examination of these records, the trial court has been given "inherent power and discretion" to tailor the method of disclosure. *Brooks*, 143 N.C. App. at 611, 548 S.E.2d at 755. It follows that the trial court's determination would be reviewed for an abuse of that discretion.

STATE OF NORTH CAROLINA v. KENNY BOWDEN

No. COA11-305

(Filed 4 October 2011)

Burglary and Unlawful Breaking or Entering—felonious breaking and entering—larceny after breaking and entering—motion to dismiss—sufficiency of evidence

The trial court did not err by not dismissing for insufficient evidence charges of breaking and entering and larceny where defendant was arrested at the scene of a residential break-in, tried under a theory of acting in concert, and the evidence linking defendant to another who dropped property taken from the house and ran was insufficient.

Appeal by the State from judgments entered 4 October 2010 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for Defendant.

STEPHENS, Judge.

Evidence and Procedural Background

This case arises from a residential break-in and larceny in Charlotte on 17 September 2008. The evidence at trial tended to show the following: On that date, Mariela and Thomas Hernandez lived in a single-family home at 6641 Hampton Way Drive, across the street from Andrew Garvin. That morning, Ms. Hernandez locked the doors when she left for work. Later that morning, Mr. Garvin looked out his front window and observed a man wearing a black hoodie walk from the Hernandez's backyard to their front door. Knowing that Mr. and Ms. Hernandez were usually at work during the day, Mr. Garvin called 911.

Officer John Plyler of the Charlotte Mecklenburg Police Department arrived at the Hernandez home within five minutes of Mr. Garvin's call. Mr. Garvin continued to observe the scene from across the street. Officer Plyler parked his marked patrol car down the street from the Hernandez home, but did not see anyone on the street or in the Hernandez yard. As he walked toward the house, Officer Plyler

noticed that the front door was standing open. Officer Plyler radioed Officer Christopher Chipman, who was en route as backup and then "stood by" at the right front corner of the Hernandez house where he could observe the front yard, the right side yard, and part of the back yard.

At this point, the man in the hoodie came from the back of the Hernandez home toward the front yard again, wearing what appeared to be a white glove[1] and carrying various items, which were later determined to have come from inside the Hernandez home. Suddenly, possibly because he realized that law enforcement had arrived, the man dropped everything in the side yard and began walking away from the home. At this moment, Officer Chipman pulled up to the Hernandez house and the man in the hoodie took off running with Officer Chipman in pursuit.

A second man, later identified as Defendant Kenny Bowden, then emerged from behind the Hernandez home and walked toward the front yard. Officer Daniel C. Jones, who had also arrived at the scene, saw Defendant and called out to alert Officer Plyler to Defendant's presence. Defendant also took off running, and Officers Plyler and Jones gave chase. During the pursuit, Officer Plyler, who was in uniform, repeatedly identified himself as a police officer and ordered Defendant to stop and lie down on the ground. Defendant continued his flight. The officers eventually lost sight of Defendant and radioed for assistance. Defendant was discovered hiding in thick underbrush by a K-9 officer shortly thereafter. The man in the black hoodie was never apprehended.

At trial, Ms. Hernandez testified that her home had been left in disarray and identified jewelry, credit cards and other items from the home which had been found scattered in the yard. Officers Plyler and Jones identified Defendant as the second man who had run from the front yard of the Hernandez residence, although Mr. Garvin was not able to identify Defendant.

On 6 October 2008, the Mecklenburg County Grand Jury indicted Defendant for felonious breaking and entering and larceny after breaking and entering. On 14 January 2009, Defendant was indicted for having attained the status of habitual felon. Defendant was also charged with two counts of resisting a public officer. The cases were joined for trial at the 27 September 2010 criminal session of Mecklenburg County Superior Court. At the close of the State's evi-

1. Testimony at trial established that it was actually a white sock worn over the man's hand.

dence, Defendant moved to dismiss all charges. The trial court dismissed one count of resisting a public officer and denied Defendant's motion as to the remaining count of that offense. The court deferred ruling on the motion as to the other charges.[2] On 29 September 2010, the jury found Defendant guilty of felonious breaking and entering, larceny after breaking and entering, and the remaining count of resisting a public officer. Defendant then admitted his status as an habitual felon. The trial court deferred sentencing until arguments could be heard on Defendant's motion to dismiss the charges of felonious breaking and entering and larceny after breaking and entering.

On 1 October 2010, Defendant again moved to dismiss these charges. On 4 October 2010, the trial court entered judgments notwithstanding the verdicts on the felonious breaking and entering and larceny after breaking and entering charges, and dismissed the habitual felon charge. The court sentenced Defendant to 60 days imprisonment for the resisting a public officer conviction. The State appeals pursuant to N.C. Gen. Stat. § 15A-1445(a)(1) (2009).

Standard of Review

The standard of review on appeal from a trial court's ruling on a motion to dismiss is the same whether the defendant or the State prevailed below and regardless of whether the motion is granted at the close of the State's evidence, at the close of all evidence, or after return of a verdict. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002).

> Upon [a] defendant's motion for dismissal, the question for the Court 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 [the] defendant's being the perpetrator of such offense. If so, the motion is properly denied.
>
> If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.
>
> 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

2. We note that, although N.C. Gen. Stat. § 15A-1227(c) (2009) requires "[t]he judge [to] rule on a motion to dismiss for insufficiency of the evidence before the trial may proceed[,]" neither party has raised an issue regarding the trial court's deferral on appeal.

> 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.

State v. Fritsch, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (internal citations and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

Discussion

The State argues that the trial court erred in dismissing the felonious breaking and entering and larceny after breaking and entering charges against Defendant for insufficiency of the evidence. We disagree.

"The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992) (citing N.C. Gen. Stat. § 14-54(a) (1986)). "The criminal intent of the defendant at the time of breaking or entering may be inferred from the acts he committed subsequent to his breaking or entering the building." *Id.*

"The essential elements of larceny are that [the] defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property." *State v. Coats*, 74 N.C. App. 110, 112, 327 S.E.2d 298, 300, *cert. denied*, 314 N.C. 118, 332 S.E.2d 492 (1985). Further, larceny committed after a breaking or entering is a felony, regardless of the value of the property taken. *State v. Perkins*, 181 N.C. App. 209, 219, 638 S.E.2d 591, 597-98 *disc. review denied*, 361 N.C. 222, 642 S.E.2d 708 (2007).

Here, Defendant was tried on a theory of acting in concert. " 'Under the doctrine of acting in concert, if two or more persons act together in pursuit of a common plan or purpose, each of them, if actually or constructively present, is guilty of any crime committed by any of the others in pursuit of the common plan.' " *State v. McCullers*, 341 N.C. 19, 29-30, 460 S.E.2d 163, 169 (1995) (quoting *State v. Abraham*, 338 N.C. 315, 328-29, 451 S.E.2d 131, 137 (1994)). "This is true even where the other person does all the acts necessary to commit the crime." *Abraham*, 338 N.C. at 329, 451 S.E.2d at 137 (internal citation and quotation marks omitted). In contrast, a defendant's presence at the scene of a crime is not evidence of his guilt, even

if the defendant is in sympathy with the criminal actor and makes no attempt to prevent the crime. *State v. Capps*, 77 N.C. App. 400, 402-03, 335 S.E.2d 189, 190 (1985).

Here, the State presented evidence that an unknown man, who appeared to be concealing his identity with a hoodie, was seen walking around the Hernandez yard and carrying property later determined to have been taken from the Hernandez home. This unknown man fled when he saw police officers and was never apprehended or identified. Defendant was also seen in the Hernandez yard, but was never seen entering or leaving the home or carrying any property belonging to Mr. or Ms. Hernandez. Defendant also fled from law enforcement officers. However, no evidence linked Defendant to the unknown man. In sum, the only evidence that could link Defendant to the break-in was (1) his presence in the back yard of the home just after the unknown man was seen carrying stolen property in the area, and (2) his flight from the crime scene when he saw the police officers.

As noted above, "[a] defendant's mere presence at the scene of the crime does not make him guilty of felonious larceny even if he sympathizes with the criminal act and does nothing to prevent it." *Id.* Thus, Defendant's presence in the Hernandez yard, standing alone, is not evidence of acting in concert. Further, while "[i]ntent to aid [another in commission of a larceny] may be inferred from [a] defendant's actions or from his relation to the perpetrator[,]" *Id.* at 403, 335 S.E.2d at 191, here, Defendant took no action to aid the unknown man and there is no known relationship between them. Finally,

> [w]hile the flight of an accused person may be admitted as a circumstance tending to show guilt, (i)t does not create a presumption of guilt, nor is it sufficient standing alone, but it may be considered in connection with other facts in determining whether the combined circumstances amount to an admission.

State v. Gaines, 260 N.C. 228, 231, 132 S.E.2d 485, 487 (1963) (internal quotation marks and citations omitted).

We agree with the State that *Gaines* is distinguishable from the facts before us. Unfortunately for the State, we conclude that the evidence in *Gaines*, while insufficient to support a larceny charge, was still *stronger* than the evidence presented in Defendant's case. In *Gaines*, the defendant (and another young man, Andrews) were charged with larceny in connection with a jewelry store robbery:

> There was evidence Gaines and Andrews walked into the store with Billy Hill; that they were in the store when Billy Hill stole the box of diamonds; that they, along with Billy Hill, ran from the store when Davis was directed to call the Chief of Police; and that they left Cherryville in a Chevrolet car operated by Billy Hill and owned by Billy Hill's father.
>
> There is no evidence Gaines or Andrews at any time had possession of any part of the diamonds or that they, by word or deed, aided and abetted Billy Hill in the theft of the box of diamonds. In short, the evidence tends to show that Gaines and Andrews were present when Billy Hill stole the box of diamonds and that they accompanied him in his flight from the scene of the crime.
>
> The State offered in evidence the statements made by Billy Hill, Gaines and Andrews to the effect that Gaines and Andrews had nothing to do with the theft and had no knowledge that Billy Hill entered the store with intent to steal.

Id. at 231, 132 S.E.2d at 487. Our Supreme Court held that "[w]hile the[se] circumstances may raise a suspicion or conjecture of the guilt of Gaines and Andrews, this is insufficient to withstand their motions for judgments as of nonsuit." *Id.* at 232, 132 S.E.2d at 487.

Here, we recognize that, in contrast to the defendant in *Gaines*, Defendant was not merely present in a public place such as a jewelry store, but was instead on private property without the express permission of the owners. However, Defendant was not facing a charge of trespassing. In addition, nothing in the evidence at trial tended to show the nature of the Hernandez backyard or the neighborhood as a whole with regard to foot traffic, walking paths, or informal "cut-throughs."

Unlike in *Gaines*, Defendant and the unknown man were never seen together at the Hernandez home and did not flee together. They were never seen to have any interaction and there is no known connection between them, unlike the men in *Gaines* who entered and left the scene of the larceny together and were admitted acquaintances. Overall, the evidence of acting in concert here is weaker than that presented in *Gaines*, which our Supreme Court held was insufficient. Thus, the trial court here properly granted Defendant's motion to dismiss and we affirm, having found

NO ERROR.

Judges ERVIN and BEASLEY concur.

LOVALLO v. SABATO

[216 N.C. App. 281 (2011)]

JOSEPH LOVALLO, PLAINTIFF v. CHRISTINE SABATO, DEFENDANT

No. COA11-203

(Filed 4 October 2011)

Appeal and Error—appealability—untimely appeal dismissed

Although defendant mother contended that the trial court erred by granting special limited visitation rights of the parties' minor child to seven members of plaintiff father's immediate family in New York, defendant's appeal was dismissed as untimely.

Appeal by defendant from order entered 24 March 2010 by Judge Donnie Hoover in Mecklenburg County District Court. Heard in the Court of Appeals 31 August 2011.

No brief filed for plaintiff appellee.

Aylward Family Law, by Ilonka Aylward, for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from an order granting special limited visitation rights of her minor child to seven members of plaintiff's immediate family. We dismiss.

I. Background

Joseph Lovallo ("plaintiff") and Christine Sabato ("defendant") are the natural parents of their minor daughter, S.L. S.L. was born on 4 September 2002 in New York, where she lived with defendant until she was one month old. In October of 2002, defendant moved to Charlotte, North Carolina, with the minor child.

On 19 August 2003, plaintiff filed a complaint against defendant seeking primary care, custody and control of their minor child. On 5 September 2003, a temporary parenting arrangement was entered, granting primary custody of S.L. to defendant during the pendency of the action and granting visitation to plaintiff. On 10 September 2003, defendant filed an answer and counterclaims seeking, *inter alia*, primary and sole custody of S.L. and requesting permission to relocate to New York with the child. Defendant then filed motions on 22 September and 17 October 2003 requesting, *inter alia*, that the court modify the visitation provisions granted to plaintiff in the 5 September 2003 parenting arrangement.

The trial court conducted a three-day trial on 12-13 July 2004 and 10 August 2004 to determine the issue of permanent child custody and to determine the issue of defendant's proposed relocation with S.L. to New York. On 8 March 2005, *nunc pro tunc* 10 August 2004, the trial court entered a child custody order granting primary legal and physical care, custody, and control of S.L. to defendant and allowing defendant to relocate to New York with the minor child. The trial court's order also detailed a visitation schedule for the child with plaintiff.

On 1 March 2006, defendant filed a motion for modification of plaintiff's visitation, stating that she had returned to Charlotte, North Carolina, with the minor child. Plaintiff likewise filed a motion for modification of both custody and visitation, stating that defendant had moved back to Charlotte and purchased a home there. The trial court entered a modified child custody and visitation order on 14 August 2006, which detailed plaintiff's visitations with S.L. in Charlotte.

On 15 December 2008, defendant filed a verified motion to modify the previous child custody order, again seeking permission to relocate to the New York area with the minor child. Defendant's motion was granted by the trial court in an order entered 24 March 2010, allowing defendant to relocate with S.L. to the New York/Connecticut area. The trial court's order further sets forth detailed visitation privileges for plaintiff. One such provision, titled "Special Limited Visitation for Father's Immediate Family," provides that plaintiff's visitation rights may be exercised by certain of his family members living in the New York area. The trial court's order expressly names the seven family members, all New York residents, who may be allowed to exercise plaintiff's visitation rights, should plaintiff not be able to exercise his visitation rights in New York himself.

On 31 March 2010, defendant filed motions under Rules 52, 59, and 60 of the North Carolina Rules of Civil Procedure, seeking to amend the trial court's findings of fact, and requesting a new trial and relief from the trial court's order. Before the trial court ruled on those motions, defendant filed a Notice of Appeal with this Court on 17 August 2010, seeking review of the trial court's 24 March 2010 order. The primary issue raised by defendant both in her motions under Rules 52, 59, and 60 and in this appeal concerns the visitation provision for plaintiff's New York family members.

II. Untimely appeal

Rule 3 of our Rules of Appellate Procedure mandates that a party must file and serve a notice of appeal:

> (1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure; or
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> (2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period[.]

N.C.R. App. P. 3(c)(1), (2) (2011). Appellate Rule 3 further provides:

> [I]f a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2) of this subsection (c).

N.C.R. App. P. 3(c)(3). We note that "[m]otions entered pursuant to Rule 60 do not toll the time for filing a notice of appeal." *Wallis v. Cambron*, 194 N.C. App. 190, 193, 670 S.E.2d 239, 241 (2008).

Here, defendant made a timely motion to the trial court under Rules 52(b) and 59 of the Rules of Civil Procedure, and therefore, the provision of Appellate Rule 3 allowing the tolling of the time for taking appeal would have applied in this case. However, Rule 3(c)(3) clearly contemplates a ruling by the trial court on such motions in order for the tolling period to apply. Rule 3(c)(3) expressly states that the time for taking appeal when motions under Rules 52(b) and 59 are filed with the trial court is tolled and will commence to run upon "entry of an order disposing of the motion." N.C.R. App. P. 3(c)(3). Thus, "[w]hen the period for filing notice of appeal is tolled by the filing of a motion, '[t]he full time for appeal commences to run and is to be computed from the date of . . . entry of an order upon . . . the . . . motions.' " *Stevens v. Guzman*, 140 N.C. App. 780, 782, 538 S.E.2d 590, 592 (2000) (alterations in original) (quoting N.C.R. App. P. 3(c)); *see also Middleton v. Middleton*, 98 N.C. App. 217, 220, 390 S.E.2d 453, 455 (1990) ("The full time for appeal commences to run and is to be computed from the entry of the order granting or denying the motions under Rule 50(b) or Rule 59 [or Rule 52(b)]."). Accordingly,

> upon timely motion under Rule[s 52(b) or] 59, the thirty day period for taking an appeal is tolled until an order disposing of the motion is entered. N.C.R. App. P. 3(c)(3). Thus, in addition to obtaining review of the denial of a Rule [52(b) or] 59 motion, an aggrieved party who gives proper and timely notice of appeal

> from the [motions] ruling may have the underlying judgment or order reviewed on appeal.

Davis v. Davis, 360 N.C. 518, 526, 631 S.E.2d 114, 120 (2006).

In the present case, defendant filed her notice of appeal before the trial court ruled on her pending motions under Rules 52(b), 59, and 60. In fact, defendant states in both her notice of appeal and her appellate brief that she is seeking review of a final order of the trial court entered 24 March 2010 pursuant to N.C. Gen. Stat. § 7A-27(c) (2009). We note that the record does not indicate when defendant was served with a copy of the trial court's 24 March 2010 order; however, defendant must have been served with the trial court's order on or before 31 March 2010, as defendant attached such order to her Rule 52, 59, and 60 motions filed with the trial court. Accordingly, to timely perfect her appeal from the trial court's 24 March 2010 order, defendant's notice of appeal should have been filed, at the very latest, within 30 days from the date of 31 March 2010, when defendant was obviously served with a copy of the trial court's order.

On the other hand, defendant could have allowed the trial court to rule on her pending Rule 52(b) and 59 motions, thereby affording her the opportunity to appeal both the trial court's rulings on her motions, as well as the underlying 24 March 2010 judgment, so long as she filed her notice of appeal within the time limits prescribed by Rule 3(c)(3) following entry of the trial court's rulings on those motions. However, defendant is unable to utilize the tolling provisions in this case, as the trial court never ruled on her Rule 52(b) or Rule 59 motions. Accordingly, and as defendant appears to acknowledge, her appeal of the trial court's final order entered 24 March 2010 is untimely, as her notice of appeal was filed 17 August 2010, well after the thirty-day period for taking appeal had expired. "Appellate Rule 3 is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed." *Currin-Dillehay Bldg. Supply v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, 683 (1990); *see also Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) ("The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal.").

Were we to read our appellate rules differently, an appellant would be afforded the opportunity to circumvent the jurisdictional requirement of filing a timely notice of appeal simply by filing a Rule 52(b) or Rule 59 motion with the trial court and utilizing the time in which the motion is pending before the trial court, which may well exceed 30 days, to otherwise perfect an appeal.

We recognize that we do "have the authority, in the exercise of our discretion, to treat the record on appeal and briefs as a petition for writ of certiorari pursuant to N.C.R. App. P. 21(a)(1), to grant the petition, and to then review [defendant]'s challenge to the [child custody] order on the merits." *In re Will of Durham*, ___ N.C. App. ___, ___, 698 S.E.2d 112, 119 (2010); *see also Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) ("Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner."). Nevertheless, a writ of certiorari should be issued only "in appropriate circumstances." N.C.R. App. P. 21(a)(1) (2011).

Under the circumstances of the present case, upon filing a notice of appeal, defendant improvidently set in motion the appellate review process. Although filing the notice of appeal did not divest the trial court of jurisdiction to hear and rule on defendant's Rule 52(b) motion, *York v. Taylor*, 79 N.C. App. 653, 654-55, 339 S.E.2d 830, 831 (1986), such action did divest the trial court of jurisdiction to hear and rule on her Rule 59 and 60 motions. *Sink v. Easter*, 288 N.C. 183, 197, 217 S.E.2d 532, 541 (1975). "[T]he trial courts have the duty to decide domestic disputes, guided always by the best interests of the child and judicial objectivity. To that end, trial courts possess broad discretion to fashion custodial and visitation arrangements appropriate to the particular, often difficult, domestic situations before them." *Glesner v. Dembrosky*, 73 N.C. App. 594, 598, 327 S.E.2d 60, 63 (1985) (citation omitted). Given the procedural history of this case, we believe the circumstances inappropriate to grant a writ of certiorari, and therefore, we dismiss defendant's appeal.

Dismissed.

Judges HUNTER (Robert C.) and STEELMAN concur.

STATE OF NORTH CAROLINA v. JOHN FRANKLIN HESTER

No. COA11-190

(Filed 4 October 2011)

1. Jury—juror misconduct—motion for mistrial—failure to show prejudice

The trial court did not err in a first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and common law robbery case by denying defendant's motion for a mistrial based upon alleged juror misconduct. There was no evidence of jury misconduct prior to or during deliberations as to defendant's guilt and there was no indication that any juror's misconduct had any potential effect upon the deliberations. Thus, defendant failed to demonstrate any prejudice.

2. Indictment and Information—short form indictment—first-degree murder—constitutional

The short form indictment used to charge defendant with first-degree murder was constitutional.

Appeal by defendant from judgments entered on or about 21 July 2009 by Judge Douglas B. Sasser in Superior Court, Bladen County. Heard in the Court of Appeals 1 September 2011.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Alexander McC. Peters, for the State.

Russell J. Hollers III, for defendant-appellant.

STROUD, Judge.

Defendant was indicted for, *inter alia*, assault with a deadly weapon with the intent to kill and inflicting serious injury, first degree murder, and robbery with a dangerous weapon. Defendant was tried by a jury and found guilty of first degree murder, assault with a deadly weapon with the intent to kill and inflicting serious injury, and common law robbery. The trial court entered judgments on the convictions, and defendant appeals.

I. Motions for Mistrial

On 15 July 2009, the jury rendered its verdict. On 16 July 2009, during the sentencing phase of the trial, the trial court was informed that while two of the jurors were leaving the courthouse for the day

on 15 July 2009, after the verdict was rendered, they saw and heard a man whom they believed to be defendant's brother, cursing and complaining about the outcome of the trial; also on 16 July, the two jurors had informed the other jurors about what they had seen and heard. On 20 July 2009, the trial court was informed that over the course of the weekend, on 18 July 2009, one juror, Mr. Victor McRae, had contact with an individual, Mr. Craig Smith, who had been a spectator at defendant's trial; Juror McRae and Mr. Smith had discussed the trial. The trial court removed Juror McRae from the jury and replaced him with an alternate juror. Defendant made several motions for mistrial based upon the incidents with the jury; all of the motions were denied. Defendant contends that "the trial court erred in denying . . . [his] motions for mistrial." (Original in all caps).

A. Mistrials

[1] Defendant argues that the trial court should have granted his motions for mistrial based upon juror misconduct, which occurred during the sentencing phase of his trial.

> Generally a motion for mistrial is a matter addressed to the sound discretion of the judge, and absent a showing of abuse of discretion the ruling will not be disturbed on appeal. This is so even when the basis of the motion for mistrial is misconduct affecting the jury. A new trial will be granted only where a conversation between a third person and a juror *is of such a character as is calculated to impress the case upon the mind of the juror in a different aspect than was presented by the evidence in the courtroom, or is of such a nature as is calculated to result in harm to a party on trial.* Finally, a trial court is held to have abused its discretion only when its ruling is so arbitrary that it could not have been the result of a reasoned decision.

State v. Gardner, 322 N.C. 591, 593-94, 369 S.E.2d 593, 595 (1988) (emphasis in original) (citations, quotation marks, and brackets omitted). "[A] mistrial is a drastic remedy, warranted only for *such serious improprieties as would make it impossible to attain a fair and impartial verdict.*" *State v. Dye*, ___ N.C. App. ___, ___, 700 S.E.2d 135, 140 (2010) (emphasis added) (citation, quotation marks, and brackets omitted). Pursuant to N.C. Gen. Stat. § 15A-1061,

> Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there

> occurs during the trial an error or legal defect in the proceedings, or *conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.*

N.C. Gen. Stat. § 15A-1061 (2007) (emphasis added).

B. Juror Misconduct

> Article I, Section 24 of the North Carolina Constitution, which guarantees the right to trial by jury, contemplates no more or no less than a jury of twelve persons. . . . [T]he requirement of trial by a jury of twelve is violated where . . . *a juror becomes disqualified during deliberations* as a result of juror misconduct. . . .
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> . . . .
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> . . . [A] violation of a defendant's constitutional right to have the verdict determined by twelve jurors constitute[s] error *per se.*

State v. Poindexter, 353 N.C. 440, 443-44, 545 S.E.2d 414, 416 (2001) (emphasis added).

Defendant directs this Court's attention to *Poindexter*, wherein,

> [i]n the afternoon of 18 November 1999, the jury completed its deliberations and returned a verdict of guilty. After receiving the verdict the trial court instructed the jury to return on Monday, 29 November 1999, and recessed the trial until that date. Within minutes after the jurors were dismissed, juror two, who was the foreperson, approached the courtroom clerk and said he needed to speak with someone about a rumor that "defendant's family was going to get whoever they had to get."
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> . . . .
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> The foreperson indicated that this comment was made during deliberations and that juror eleven was the person who made the statement. The foreperson then expressed his concern that if he did not report the information and something happened to another member of the jury, he would have it on his conscience the rest of his life.
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> . . . .
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> The trial court subsequently removed juror eleven for his misconduct[.]

Poindexter at 441-42, 545 S.E.2d at 414-15. The defendant filed a motion for a mistrial which was subsequently denied. *Id.* at 442-43, 545 S.E.2d at 415. The trial court then held the sentencing proceeding. *Id.* at 443, 545 S.E.2d at 416.

This Court concluded that the denial of the motion for mistrial was in error and granted the defendant a new trial despite the State's argument "that no evidence supports that juror eleven was disqualified during the guilt-innocence phase and that juror eleven was properly removed only for the sentencing proceeding." *Id.* This Court reasoned that the State's argument was "untenable" because

> within an hour after the jury returned its guilty verdict, the trial court determined that it must remove juror eleven; *and the basis was clearly juror misconduct during deliberations.* Under these facts, if this juror was not qualified to continue serving during the sentencing proceeding, then he became disqualified during the guilt-innocence deliberations. The recordation of the verdict and dismissal of the jury for the recess until the capital sentencing proceeding did not absolve the misfeasant juror's misconduct and render him qualified for purposes of the guilt-innocence phase deliberations. Moreover, the gravity of this juror misconduct was compounded by some of the jurors collectively deciding, in direct contravention of the trial court's instructions, not to tell the trial court about this report of alleged potential harm. Thus, *juror eleven's misconduct during jury deliberations resulted in a guilty verdict by a jury composed of less than twelve qualified jurors.*

Id. at 443-44, 545 S.E.2d at 416 (emphasis added). We conclude that *Poindexter* is inapposite to this case. *See id.*, 353 N.C. 440, 545 S.E.2d 414.

C. Analysis

Here, unlike *Poindexter*, there was no evidence of jury misconduct prior to or during deliberations as to defendant's guilt. *Id.* It was only *after* the jury had reached a verdict that the malfeasance took place. Mr. Smith stated in an affidavit that from his conversation with Juror McRae after the verdict was rendered, he learned about specific conversations between the jurors, but there was no evidence that the jurors improperly discussed the case or any other matter before they were instructed to do so by the judge or before the verdict was rendered. Thus, there was no indication that any juror misconduct had any potential effect upon the deliberations. Accordingly, defendant

did not demonstrate prejudice as to the jury's determination of his guilt. *See* N.C. Gen. Stat. § 15A-1061 ("The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, *resulting in substantial and irreparable prejudice to the defendant's case.*" (emphasis added)); *see generally Gardner*, 322 N.C. at 594, 369 S.E.2d at 595-96 ("The verdicts having already been reached and recorded on the verdict sheet, the bailiff's words could not possibly have affected the foreman's view of the evidence presented at trial, nor could the conversation have resulted in harm to the defendant."). Furthermore, defendant cannot demonstrate prejudice as to the sentencing phase of his trial as the jury was only able to choose between "DEATH" or "LIFE IMPRISONMENT" and chose life imprisonment. Thus, the trial court did not abuse its discretion in denying defendant's motions for mistrial. This argument is overruled.

II. Short Form Indictment

[2] On 26 February 2009, defendant filed a motion to dismiss the indictment for first degree murder. Defendant argued that "[t]he indictment purporting to charge the defendant with Murder in this case is a 'short form' indictment, which fails to state all the elements of the offense of First Degree Murder[,]" thus, "[t]he Indictment in this case is . . . only sufficient to charge Second Degree Murder." Defendant's motion was denied. Defendant contends on appeal that it was error for the trial court not to dismiss his first degree murder indictment because "[t]he short-form murder indictment did not allege all of the elements of first-degree murder; it alleged neither felony murder nor that it was committed after premeditation and deliberation." However, defendant concedes in his brief that

> our Supreme Court has upheld the constitutionality of the use of the short-form murder indictment. However, . . . [defendant] asks this court to reexamine these holdings, declare that all of the elements of an offense must be alleged in an indictment and found by a jury beyond a reasonable doubt, and vacate the murder judgment.

Indeed, our Supreme Court has stated, "In North Carolina, the short-form murder indictment has survived over a hundred years as a valid method for charging capital defendants with the crime of first-degree murder. This Court has consistently concluded that such an indictment violates neither the North Carolina nor the United States Constitution." *State v. Hunt*, 357 N.C. 257, 278, 582 S.E.2d 593, 607, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003).

Here, defendant's first degree murder indictment stated in pertinent part that defendant "unlawfully, willfully, and feloniously did . . . of malice aforethought kill and murder Rudolph Hughes. This act was in violation of North Carolina General Statute Section 14-17[,]" and thus it was a valid short form indictment. *See* N.C. Gen. Stat. § 15-144 (2007) ("[I]t is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law[.]") As such, we will not revisit this issue, which has been clearly decided by our Supreme Court. *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (This Court has "no authority to overrule decisions of the Supreme Court and has the responsibility to follow those decisions until otherwise ordered by the Supreme Court." (citation, quotation marks, and brackets omitted)). Accordingly, this argument has no merit.

III. Conclusion

We conclude that the trial court did not err in denying defendant's motions for mistrial and motion to dismiss his short form indictment.

NO ERROR.

Judges GEER and THIGPEN concur.

MICHAEL J. McCRANN, ROBERT C. ANDERSON, KELLY C. McCRANN, HENRY DIRKMAAT, AND LARILYN DIRKMAAT, PETITIONERS v. VILLAGE OF PINEHURST, NORTH CAROLINA, AND THE VILLAGE CHAPEL, INC., RESPONDENTS

No. COA11-291

(Filed 4 October 2011)

Statutes of Limitation and Repose—special use zoning permit—substantial compliance—timeliness—estoppel—waiver

The trial court did not err by denying petitioner's challenge to the issuance of a special use zoning permit based on the petition being time-barred. Petitioners were not in substantial compliance with N.C.G.S. § 160A-388(e2). Further, professional and courteous conduct between counsel does not operate to waive statutory requirements.

Appeal by petitioners from order entered 28 December 2010 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 14 September 2011.

Brough Law Firm, by G. Nicholas Herman, and Michael J. McCrann for Petitioners.

Van Camp, Meacham, & Newman, PLLC, by Michael J. Newman, for Respondent Village of Pinehurst.

Smith Moore Leatherwood LLP, by Bradley M. Risinger, Matthew Nis Leerberg, and Clyde Holt, III, for Respondent The Village Chapel, Inc.

STEPHENS, Judge.

Procedural and Factual Background

This appeal arises from an attempted challenge by Petitioners Michael J. McCrann, Robert C. Anderson, Kelly C. McCrann, Henry Dirkmaat, and Larilyn Dirkmaat to the issuance of a special use zoning permit to Respondent The Village Chapel, Inc. ("Village Chapel") by Respondent Village of Pinehurst ("Pinehurst"). Village Chapel sought the special use permit for construction of a "learning center" on its property. Petitioners, residents of Pinehurst, opposed the permit. Pinehurst held hearings on the permit on 2 and 6 July 2010, and, on 24 August 2010, the Pinehurst Village Council voted unanimously to grant Village Chapel's petition and issue the permit. No written order granting the permit was prepared at this meeting. On 25 August 2010, Petitioner Michael J. McCrann ("McCrann") left a telephone voicemail message requesting a copy of the final order for Michael J. Newman ("Newman"), who had served as counsel for Pinehurst in the matter. The special use permit was granted by written order on 30 August 2010, and on that date, Newman mailed and faxed copies of the order to McCrann.[1] McCrann received the mailed copy on 2 September 2010.

On 30 September 2010, Petitioners filed a "Petition for Writ of Certiorari and for Judicial Review" in the Moore County Superior Court. On 12 October 2010, Respondents filed a "Verified Opposition to Issuance of Writ of Certiorari," contending that the petition was

1. McCrann denied having received the faxed copy on 30 August 2010 or at any other time. However, at the 9 December 2010 hearing on the petition, discussed *infra*, Pinehurst presented evidence that the fax had been sent to McCrann on 30 August 2010.

time-barred under N.C. Gen. Stat. § 160A-388(e2). Following a hearing on 9 December 2010, by order entered 28 December 2010, the trial court denied the petition as untimely. Petitioners appeal, contending that they substantially complied with the requirements of section 160A-388(e2), and that, in the alternative, Respondents are estopped from asserting the statute as a bar to the petition.

Discussion

The sole question before us is whether the trial court erred in denying the petition as time-barred. Because we conclude that the petition was not timely filed, we affirm.

Where, as here, there are no factual disputes, we review a trial court's interpretation of a statute of limitations *de novo*. *N.C. Dep't of Revenue v. Von Nicolai*, 199 N.C. App. 274, 278, 681 S.E.2d 431, 434 (2009). Petitions for judicial review of decisions by a board of adjustment are controlled by section 160A-388(e2), which provides, in pertinent part:

> Any petition for review by the superior court shall be filed with the clerk of superior court within 30 days after the decision of the board is filed in such office as the ordinance specifies, or after a written copy thereof is delivered to every aggrieved party who has filed a written request for such copy with the secretary or chairman of the board at the time of its hearing of the case, whichever is later.

N.C. Gen. Stat. § 160A-388(e2) (2009). As this Court has held, subsection e2 "clearly gives [] petitioners 30 days after the later of delivery of the board's decision to petitioners or the filing of the decision with the office specified in the ordinance, within which to petition for certiorari." *Ad/Mor v. Town of Southern Pines*, 88 N.C. App. 400, 402, 363 S.E.2d 220, 221 (1988).

Here, it is uncontested that the order granting the special use permit was filed on 30 August 2010, and Petitioners did not file their petition until 30 September 2010, 31 days after the order's file date. Further, it is undisputed that Petitioners did not "file[] a written request for such copy with the secretary or chairman of the board at the time of its hearing of the case," which would have tolled the start of the 30-day filing period until Petitioners' receipt of a copy of the order. N.C. Gen. Stat. § 160A-388(e2). Indeed, Petitioners acknowledge that they "did not strictly and 'technically' follow the appeals procedure" under the statute. However, they contend that McCrann's

oral request via voicemail to Newman on 25 August 2010 constituted "substantial compliance" with the statute, such that the 30-day filing period did not begin to run until McCrann received a copy of the order by mail on 2 September 2010. We are not persuaded.

We note that McCrann's request failed to comply with the statute in three ways: it was not made (1) in writing, (2) to "the secretary or chairman of the board[,]" or (3) "at the time of its hearing of the case[.]" Rather, the request was made (1) orally, (2) to counsel who had represented Pinehurst in the hearing, and (3) on the day after the hearing concluded.

This Court has held that "[t]he requirement of timely filing and service of notice of appeal is jurisdictional, and unless the requirements [] are met, the appeal must be dismissed." *Reidy v. Whitehart Ass'n*, 185 N.C. App. 76, 85, 648 S.E.2d 265, 271-72 (quoting *Smith v. Smith*, 43 N.C. App. 338, 339, 258 S.E.2d 833, 835 (1979)), *disc. review denied*, 361 N.C. 696, 652 S.E.2d 651 (2007), *cert. denied*, 552 U.S. 1243, 170 L. Ed. 2d 298 (2008). We see no reason to treat the requirements for timely "appeal" for judicial review under section 160A-388(e2) differently. As our courts have long held:

> "Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all."
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> "The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. *Butler v. Bell*, 181 N.C. 85, 106 S.E. 217. In some instances, it may operate to bar the maintenance of meritorious causes of action. When confronted with such a cause, the urge is strong to write into the statute exceptions that do not appear therein. In such case, we must bear in mind Lord Campbell's caution: 'Hard cases must not make bad laws.' "

Congleton v. City of Asheboro, 8 N.C. App. 571, 573-74, 174 S.E.2d 870, 872 (1970) (quoting *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508 (1957)). In *Congleton*, we held a complaint filed one day late was not timely, even though the trial court had been under an apparent misapprehension which led it to grant a 21-day filing extension rather than the 20-day extension permitted by statute. *Id.* at 573, 174 S.E.2d at 872.

> Plaintiff argues that the matter is still within the discretion of the trial court and that he abused that discretion in failing to enter a *nunc pro tunc* order which would have brought plaintiff's claim within the period of the statute of limitations. We are of the opinion that the court has no discretion when considering whether a claim is barred by the statute of limitations. It is clear that a judge may not, in his discretion, interfere with the vested rights of a party where pleadings are concerned. It is equally clear that the statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense.

Id. (internal citations omitted).

We find the "substantial compliance" cases cited by Petitioners inapposite as each involves application of Rule of Appellate Procedure 7 (regarding transcripts), a non-jurisdictional requirement, and in each case, the appeal was timely filed. *See Spencer v. Spencer*, 156 N.C. App. 1, 575 S.E.2d 780 (2003); *Pollock v. Parnell*, 126 N.C. App. 358, 484 S.E.2d 864 (1997); *Anuforo v. Dennie*, 119 N.C. App. 359, 458 S.E.2d 523 (1995). Petitioners cite no case in which we have applied "substantial compliance" review to a statute of limitations under facts analogous to those here, and we are aware of none. Further, even were we to apply a "substantial compliance" analysis to the requirements of section 160A-388(e2), Petitioners would not prevail. As noted above, Petitioners not only failed to request the order in writing, they made the request to the wrong person and, even then, failed to make the request timely.

We also reject Petitioners' alternative argument that Respondents are estopped from "insisting upon a strictly 'technical' compliance with the statute" because the oral request "was completely consistent with the cooperative relationship" between counsel for the parties during the pendency of the zoning matter. Petitioners appear to suggest that professional and courteous conduct between counsel operates to waive statutory requirements. To be clear: it does not.

> The essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.

Parker v. Thompson-Arthur Paving Co., 100 N.C. App. 367, 370, 396 S.E.2d 626, 628-29 (1990). Respondents are correct that "our courts have permitted, in a broad range of cases, the use of estoppel to bar the dismissal of a case for failure of the petitioner to timely file its action, even in those situations where the time limitation was classified as a condition precedent." *Hayes v. Town of Fairmont*, 130 N.C. App. 125, 128, 502 S.E.2d 380, 382 (1998) (citations omitted), *affirmed per curiam*, 350 N.C. 81, 511 S.E.2d 638 (1999). However,

> [i]n its broadest and simplest sense, the doctrine of estoppel is a means of preventing a party from asserting a legal claim or defense which is contrary to or inconsistent with his prior actions or conduct. The underlying theme of estoppel is that it is unfair and unjust to permit one to pursue an advantage or right which has not been promoted or enforced prior to the institution of some lawsuit. In particular, the rule is grounded in the premise that it offends every principle of equity and morality to permit a party to enjoy the benefits of a transaction and at the same time deny its terms or qualifications.

Godley v. County of Pitt, 306 N.C. 357, 360, 293 S.E.2d 167, 169 (1982) (internal citations, brackets and quotation marks omitted).

Petitioners do not argue that Respondents' cooperative interactions with Petitioners concealed or misrepresented the requirements of section 160A-388(e2), or were undertaken in order to dupe Petitioners into filing their petition outside the permitted time period, and thus they have failed to assert the essential elements of estoppel. We decline to hold that attorneys must take care not to be too cooperative, cordial, or professional in dealing with opposing counsel lest they inadvertently waive their clients' statutory rights or protections. This argument is overruled, and the order of the trial court is

AFFIRMED.

Judges ERVIN and BEASLEY concur.

IN RE ALLISON

[216 N.C. App. 297 (2011)]

IN THE MATTER OF: KENNETH ELDIMOR ALLISON

No. COA11-245

(Filed 4 October 2011)

Mental Illness—involuntary commitment—improper use of local form instead of standard Administrative Office of Courts form—insufficient findings of fact

The trial court erred by committing defendant to involuntary inpatient commitment for a period not to exceed 10 days. The trial court improperly used a locally modified involuntary commitment order form instead of the standard Administrative Office of the Courts form. Further, the trial court failed to make any written findings of fact or incorporate by reference either physician's report. The case was remanded.

Appeal by respondent from involuntary commitment order entered 9 September 2010 by Judge Marvin P. Pope, Jr., in Buncombe County District Court. Heard in the Court of Appeals 31 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Charlene Richardson, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders Mary Cook and Kristen L. Todd, for respondent-appellant.

McCULLOUGH, Judge.

Kenneth Eldimor Allison ("respondent") appeals from an order committing him to involuntary inpatient commitment for a period not to exceed 10 days. For reasons discussed herein, we reverse.

I. Background

Following a standoff with the Asheville Police Department on 31 August 2010, Mission Hospital admitted respondent pursuant to an affidavit by Officer Adam T. Roach and an involuntary commitment order signed by a Buncombe County magistrate. The affidavit alleged that, during the standoff respondent barricaded himself in his car and asked police to shoot him. The affidavit also mentioned that prior to being stopped, respondent ran through stop signs and red lights in downtown Asheville while throwing clothing and items from his car. Attached to the affidavit was a news article regarding a previous

standoff on 19 August 2010, between respondent and the Beaufort County Sheriff's Department in Hilton Head Island, South Carolina.

On 1 September 2010, Dr. Stacia Moore completed an initial evaluation of respondent and determined that respondent was mentally ill and dangerous to himself and others. Dr. Moore recommended that respondent take part in 7-12 days of inpatient treatment. Dr. Moore based her recommendation on her opinion that respondent suffered from paranoid and delusional thoughts and that he was not a reliable reporter. Dr. Moore also noted that respondent believed the police were out to get him because he knew about their dealings and collusion with crack dealers. She further opined that respondent was unable to make a reliable contract for his safety.

On 2 September 2010, Dr. Micah Krempasky evaluated respondent at Mission Hospital. Subsequently, on 6 September 2010, a hearing was held to determine if respondent should be involuntarily committed. No one appeared on behalf of the State, but the trial court questioned Dr. Krempasky regarding her evaluation of defendant. Dr. Krempasky testified that respondent displayed symptoms of mania consistent with bipolar disorder. Dr. Krempasky further testified that respondent was hyper-verbal and unable to maintain appropriate social boundaries and was taking his medicine, but had limited insight as to whether the medicine was helping him. According to Dr. Krempasky, respondent was "unable to handle the boundaries of his unit" because he took a pair of scissors from the arts and crafts room, and hid them in his room. He also took ink pens, which are considered "contraband," and hid them in his boot. Respondent did this a second time after being told they were not allowed. Respondent did not admit to having, and refused to relinquish, the contraband, requiring the staff to conduct a room search. Dr. Krempasky noted respondent did not threaten anyone, but had "possess[ed] the contraband in a manner that [was] [not] forthright." On the day before his hearing, the hospital placed a sitter with respondent for his safety. Dr. Krempasky believed respondent was a danger to himself and others and based on his slow response to medication recommended that he continue inpatient treatment for another 10 days.

At his hearing, respondent testified that he had met with Dr. Krempasky three to four times and that Dr. Krempasky had diagnosed him as manic depressive. He noted that the scissors he took were not sharp and were used to cut his fingernails. He claimed that he returned them to the person in charge of arts and crafts when he was through with them. Respondent did not think he needed inpatient

treatment as he was taking his medication and was willing to do outpatient treatment. He claimed that he did not get out of his car during the police standoff because the police were not following standard operating procedure and he was scared of being shot.

Respondent's attorney argued that respondent should not be committed because he was not a danger to himself or to others. He noted that there was no indication that respondent used the scissors to harm himself or others. He also contended that respondent was able to support and care for himself and that there was no indication that his behavior or mental illness were leading to severe debilitation.

The trial court filled out the locally modified form involuntary commitment order by checking a box indicating that by clear, cogent, and convincing evidence it found that respondent met the requirements for further inpatient treatment. The form further noted that respondent was mentally ill and a danger to himself and others. The trial court committed respondent to inpatient treatment for 10 days. Respondent appeals.

II. Analysis

Respondent first contends that the trial court erred in ordering him to involuntary commitment when the commitment order was not supported by sufficient findings of fact. We agree.

First, we note that even though the term for respondent's involuntary commitment has passed, " 'a prior discharge will not render questions challenging the involuntary commitment proceeding moot.' " *In re Booker*, 193 N.C. App. 433, 436, 667 S.E.2d 302, 304 (2008) (quoting *In re Mackie*, 36 N.C. App. 638, 639, 244 S.E.2d 450, 451 (1978)). "When the challenged order may form the basis for future commitment or may cause other collateral legal consequences for the respondent, an appeal of that order is not moot." *In re Webber*, 201 N.C. App. 212, 217, 689 S.E.2d 468, 472-73 (2009).

In reviewing a commitment order we

> determine whether there was *any* competent evidence to support the "facts" recorded in the commitment order and whether the trial court's ultimate findings of mental illness and dangerous to self or others were supported by the "facts" recorded in the order.

Booker, 193 N.C. App. at 436, 667 S.E.2d at 304 (quoting *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980)). "To support an inpa-

tient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self, . . . or dangerous to others . . . . The court shall record the facts that support its findings." N.C. Gen. Stat. § 122C-268(j) (2009). Further, it is mandatory that the trial court record the facts which support its findings. *In re Koyi*, 34 N.C. App. 320, 321, 238 S.E.2d 153, 154 (1977).

The trial court used a locally modified form involuntary commitment order and in making its findings of fact checked the box stating, "Based on the evidence presented, the Court by clear, cogent and convincing evidence finds these other facts: Court Finds That The Respondent Meets Criteria For Further Inpatient Commitment." The trial court did not make any written findings of fact or incorporate by reference either physician's report. Had the trial court utilized the standard Administrative Office of the Courts form involuntary commitment order and entered the findings of fact required by that form, this remand may not have been necessary as the evidence tends to show that respondent is likely mentally ill and potentially dangerous to himself and to others. But, the trial court's checking of a box on its locally modified form is insufficient to support this determination. Furthermore, we may not determine whether the evidence was sufficient because the trial court failed to make any findings of fact for us to review. *See Booker*, 193 N.C. App. 433, 667 S.E.2d 302. Had the trial court made some written findings of fact or incorporated by reference either physician's report, we would have something to review. However, we must reverse and remand for appropriate findings of fact, and this being a dispositive issue, we need not address respondent's other assignment of error.

III. Conclusion

Based on the foregoing, we reverse and remand.

Reversed and remanded.

Judges HUNTER (Robert C.) and STEELMAN concur.

BALAWEJDER v. BALAWEJDER

[216 N.C. App. 301 (2011)]

WITOLD BALAWEJDER, PLAINTIFF v. ANITA BALAWEJDER, DEFENDANT

No. COA11-184

(Filed 18 October 2011)

1. Child Custody and Support—modification—permanent order

The trial court did not err by treating the 26 March 2009 memorandum as a modification of a permanent child custody order instead of a temporary child custody order.

2. Appeal and Error—preservation of issues—inconsistent arguments—cannot change horses on appeal

The trial court did not abuse its discretion in a child custody modification case by allowing evidence and making findings as to the conditions that existed at the time of the 26 March 2009 memorandum in its 10 June 2010 order modifying custody. This argument was logically inconsistent with plaintiff father's first argument, and plaintiff could not seek to "change horses" on appeal.

3. Child Custody and Support—modification—findings of domestic violence

The trial court did not abuse its discretion in a child custody modification case by including findings as to defendant mother's domestic violence complaint even though defendant had voluntarily dismissed her Chapter 50B complaint in the 26 March 2009 memorandum. If the trial court found that domestic violence had occurred which affected the child, it was bound to consider this fact in making its custody determination.

4. Child Custody and Support—trial court not limited by specific modification requests—best interests of child

The trial court did not err in a child custody modification case by allegedly making changes to the prior custody order without notice to plaintiff father. Trial courts are vested with broad discretion in child custody matters and are not limited by the specific modifications as requested by any party but may make any modifications which they determine are supported by evidence and are in the best interest of the child.

5. Child Custody and Support—failure to impute income—reduction not in bad faith or motivated by desire to avoid obligations

The trial court did not abuse its discretion by failing to impute income to defendant mother for purposes of establishing child support. Defendant mother's reduction in income was not made in bad faith or motivated by a desire to avoid her reasonable support obligations.

6. Child Custody and Support—Child Support Guidelines—extraordinary expenses—tuition—day care—summer camp

The trial court did not abuse its discretion by entering a child support order that allegedly went beyond the Child Support Guidelines in adding additional support requirements to pay 97% of the minor child's tuition, 97% of any unspecified work-related day care expense incurred by defendant, and unspecified summer camp expenses. The trial court did not deviate from the guidelines and these types of extraordinary expenses are specifically allowed by the guidelines.

7. Evidence—demeanor of witnesses—findings of fact based on observations

The trial court did not err in a child custody modification and child support case by its finding of fact 93. The trial court's duty as the finder of fact included observing the demeanor of all witnesses, including plaintiff husband, during the trial and to make appropriate findings of fact based on these observations.

8. Attorney Fees—child custody modification—child support—trial court divested of jurisdiction once notice of appeal filed

The trial court erred in a child custody modification and child support case by awarding attorney fees. After plaintiff filed notice of appeal, the trial court was divested of jurisdiction to enter orders for attorney fees pending the completion of this appeal. The fees were vacated and the issue was remanded for reconsideration.

Appeal by plaintiff from orders entered on or about 10 June 2010 and 1 October 2010 by Judge Becky T. Tin in District Court, Mecklenburg County. Heard in the Court of Appeals 1 September 2011.

Billie R. Ellerbe, for plaintiff-appellant.

Myers Law Firm, PLLC, by Matthew R. Myers, for defendant-appellee.

STROUD, Judge.

Witold Balawejder ("plaintiff") appeals from the trial court's orders modifying child custody, awarding permanent child support, and awarding attorney's fees to Anita Balawejder ("defendant"). For the following reasons, we affirm the trial court's order modifying child custody and awarding child support and vacate the trial court's orders for attorney's fees.

I. Background

Plaintiff and defendant were married on 17 January 1998 in Sweden and moved to Charlotte, North Carolina in 2005. One child was born of the marriage on 26 September 2005. On 9 December 2008, plaintiff filed a complaint against defendant alleging claims for divorce from bed and board, child custody, child support, and equitable distribution. On or about 23 December 2008, defendant filed her answer, raising counterclaims for child custody, child support, post separation support, divorce from bed and board, alimony, attorney's fees, and raising motions for injunctive relief and "sequestration of real property[.]" On 26 December 2008, defendant filed a "Complaint and Motion for Domestic Violence Protection Order" pursuant to N.C. Gen. Stat. Chapter 50B against plaintiff, alleging that plaintiff had grabbed her, pushed her down a flight of stairs, and then tried to prevent her from calling 911. On the same day, the district court issued an "Ex Parte Domestic Violence Order of Protection" against plaintiff, finding that "the minor child was at the residence during the assault and knew the defendant had pushed the plaintiff." On 29 January 2009, the trial court consolidated plaintiff's Chapter 50 complaint with defendant's Chapter 50B domestic violence complaint.

On 26 March 2009, the trial court entered a handwritten "Memorandum of Judgment/Order" ("the 26 March 2009 memorandum") signed by both parties and their attorneys which stated that it resolved the issues of child custody and visitation "as a final order" and provided for temporary child support and sequestration of the marital residence; the memorandum specifically reserved the issues of equitable distribution, alimony, and attorney fees for later determination. On 15 September 2009, the trial court entered an order for temporary child support, post-separation support, temporary injunc-

tive relief, and attorney fees. On 18 December 2009, plaintiff filed a motion for modification of the custody provisions of the 26 March 2009 memorandum. On 20 January 2010, defendant filed her response to plaintiff's motion for modification, requesting that the trial court deny plaintiff's motion and award reasonable attorney fees. On or about 10 June 2010, the trial court entered its "Order for Permanent Child Custody and Support" granting in part and denying in part defendant's motion to modify the 26 March 2009 memorandum and ordering permanent child support. On 13 July 2010, plaintiff filed notice of appeal from the trial court's 26 March 2009 memorandum, the 10 June 2010 "Order for Permanent Child Custody and Child Support[,]" and from the order "entered on July 2010 [sic] that awarded Defendant attorney fees[.]" On 1 October 2010, the trial court filed an order awarding attorney's fees to defendant and a "supplemental order for attorney's fees" awarding further attorney's fees to defendant "for expenses incurred during trial and in preparing the final Custody and Child Support Order[.]" On appeal, plaintiff raises several arguments as to the 10 June 2010 order for permanent custody and child support and the orders awarding attorney fees to defendant.

II. Permanent or Temporary Custody Order

[1] In his first argument, plaintiff contends that the trial court should have treated the 26 March 2009 memorandum as a temporary custody order, instead of considering the matter as a modification of a permanent custody order. If the 26 March 2009 memorandum was a temporary custody order, the trial court should have considered only the best interests of the minor child, and not whether there had been a substantial change of circumstances affecting the best interests of the child since the time of entry of the 26 March 2009 memorandum. We have stated that

> [t]he trial court has the authority to modify a prior custody order when a substantial change in circumstances has occurred, which affects the child's welfare. The party moving for modification bears the burden of demonstrating that such a change has occurred. The trial court's order modifying a previous custody order must contain findings of fact, which are supported by substantial, competent evidence. The trial court is vested with broad discretion in cases involving child custody, and its decision will not be reversed on appeal absent a clear showing of abuse of discretion. In determining whether a substantial change in circumstances has occurred: [C]ourts must consider and weigh all evi-

> dence of changed circumstances which effect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child. In appropriate cases, either may support a modification of custody on the ground of a change in circumstances.

Karger v. Wood, 174 N.C. App. 703, 705-06, 622 S.E.2d 197, 200 (2005) (citations, brackets, and quotation marks omitted), *appeal dismissed*, 360 N.C. 481, 630 S.E.2d 665 (2006).

Despite the fact that plaintiff filed a motion for modification of the 26 March 2009 memorandum, which alleges various substantial changes in circumstances since entry of the memorandum, he claims that the 26 March 2009 memorandum was actually not a permanent order, but he did not have an opportunity to challenge the trial court's decision to treat the 26 March 2009 memorandum as a permanent child custody order because (1) he could not appeal to this Court from that order as he believed the order to be interlocutory, as the order did not dispose of all of the claims and there was no N.C. Gen. Stat. § 1A-1, Rule 54(b) certification from the trial court that it was a "final judgment[;]" (2) by the time the trial court indicated at the hearing that it was considering the 26 March 2009 memorandum as a permanent child custody order "the time for the [plaintiff] to either file a Rule 52 or 59 motion to wet [sic] the order aside, or enter notice of appeal . . . had long since expired[;]" (3) "[s]ince the [plaintiff] and Counsel didn't believe that the memorandum/order constituted a final order, [plaintiff] didn't file for relief pursuant to Rule 60 of the North Carolina Rules of Civil Procedure[;]" and (4) because of its decision to consider the prior order a permanent order, the trial court "informed [plaintiff's] Counsel that it would be necessary for the [plaintiff] to file a Motion for Modification of the memorandum, which was in fact done on 18 December 2010 [sic]." Plaintiff concludes that "[t]he Court's decision to sua sponte treat the 26 March 2009 order [as a permanent child custody order] with no input from the parties was reversible error that eventually subjected the Plaintiff to dual standards of 'substantial change in circumstances' and 'best interest of the child' in the trial of his motion for modification to modify the 26 March 2008 [sic] memorandum/order." Defendant counters that the 26 March 2009 memorandum was a "final order" and plaintiff "should be estopped from challenging its finality."

We first note that the transcript upon which plaintiff's argument regarding the trial court's alleged "sua sponte" determination that the

26 March 2009 memorandum was a permanent order is not in the record before us. Plaintiff argues that this occurred at a court date in July 2009, when "the court informed the parties that she considered the 26 March 2009 memorandum of judgement/order to be a permanent custody order [and] . . . . [t]he Trial Court informed Counsel that it would be necessary for the Appellant to file a Motion for Modification of the memorandum, which was in fact done on 18 December 2010." There is no transcript in the record from July 2009, and thus plaintiff's arguments regarding what the trial court "informed" the parties in July 2009 is in violation of North Carolina Rule of Appellate Procedure Rule 9(a). We have stated that

> "[i]t is the duty of the appellant to ensure that the record is complete." *Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 414 (2003). Rule 9(a)(1)(j) of the Rules of Appellate Procedure requires that the record on appeal in civil actions contain "copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings . . . ."

First Gaston Bank of North Carolina v. City of Hickory, ___ N.C. App. ___, ___, 691 S.E.2d 715, 718 (2010). To the extent that plaintiff's argument is based upon an alleged ruling by the trial court in July 2009, it is dismissed.

Aside from his argument regarding the trial court's alleged July 2009 ruling, plaintiff's argument on appeal is opposite from his position before the trial court. Plaintiff signed the 26 March 2009 memorandum, agreeing with its terms which plainly state that it "resolves *as a final order* the issues of custody and visitation" and, *inter alia*, that "the provisions of this Memorandum are fair and reasonable and [plaintiff] has had ample opportunity to obtain legal advice concerning the legal effect and terms of this Memorandum[.]" (emphasis added.) Additionally, plaintiff's attempt to change his custodial rights as established in the 26 March 2009 memorandum did not occur by filing a notice of hearing for a permanent child custody hearing, as he now argues would have been the proper procedure, but because the 26 March 2009 memorandum was a permanent child custody order, *see id.*, he filed a motion to modify that order, specifically alleging that "there has been a substantial change in circumstances that warrant a modification of the previous [26 March 2009 memorandum.]" In addition, at trial, plaintiff presented evidence of the changes in circumstances which he claimed made modification of custody necessary.

When defendant made a motion for involuntary dismissal of plaintiff's motion to modify custody pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) at the close of defendant's evidence, plaintiff vigorously argued that he had shown changes in circumstances which entitled him to a change of custody. But on appeal plaintiff argues that it was a mistake for the trial court to consider the 26 March 2009 memorandum as a permanent child custody order and to consider the matter as a modification of custody, the very relief that he requested at trial.

> Our Supreme 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 appellate courts. . . . According to Rule of Appellate Procedure 10(b)(1), in order to preserve a question for appellate review, the party must state the specific grounds for the ruling the party desires the court to make. N.C.R. App. P. 10(b)(1) (2002). "The defendant may not change his position from that taken at trial to obtain a steadier mount on appeal."

State v. Holliman, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations and quotation marks omitted). Plaintiff's argument is without merit and is dismissed.

III. Modification of the Custody Order

[2] Plaintiff next argues that in its 10 June 2010 order modifying custody, the trial court abused its discretion in allowing evidence and making findings as to the conditions that existed at the time of the 26 March 2009 memorandum.

We first note that this argument is logically inconsistent with plaintiff's first argument. Above, plaintiff argued that the trial court should have conducted a full custody hearing, which would require evidence as to circumstances existing prior to entry of the 26 March 2009 memorandum and indeed during the marriage, potentially since the child's birth. In addition, at trial plaintiff himself presented evidence as to the circumstances existing prior to entry of the 26 March 2009 memorandum.

Once again, plaintiff is seeking to change horses on appeal, and this is not permitted. *See Holliman*, 155 N.C. App. at 123, 573 S.E.2d at 685. Plaintiff does not argue that the trial court's findings of fact are not supported by the evidence but contends that the trial court abused its discretion in not limiting its findings to the facts which had occurred since the entry of the 26 March 2009 memorandum, as

"[i]nquiry into changed circumstances is generally restricted to events that have transpired since the entry of the order sought to be modified." Defendant responds that "[i]t should have been commonsense to Plaintiff-Appellant that in order for him, the party with the burden of proof, to prove a change of circumstances, the trial court would need to know the circumstances of the initial custody order."

In the 26 March 2009 handwritten "Memorandum of Judgment/Order[,]" the trial court set out the terms of custody and visitation between the parties but made no findings pursuant to N.C. Gen. Stat. § 50-13.2(a) because no evidence was taken at the 29 March 2009 hearing, and both parties "waive[d] findings of fact and conclusions of law in the formal judgment/order memorializing th[e] Memorandum[.]" This Court has held that a memorandum of judgment regarding child custody which is entered by consent need not include finding of fact or conclusions of law. *See Buckingham v. Buckingham*, 134 N.C. App. 82, 90, 516 S.E.2d 869, 875 ("[T]he court should review a consent judgment to ensure that it does not contradict statutory, judicial, or public policy, but it need not make findings of fact or conclusions of law. When parties enter into an agreement and ask the court to approve the agreement as a consent judgment, they waive their right to have the court adjudicate the merits of the case. In the present case, the parties did not wish for the court to adjudicate child custody, having resolved that issue between them. Therefore, the court has no duty to make findings of fact or conclusions of law as to the child's best interest when it approved the parties' agreement."), *disc. review denied*, 351 N.C. 100, 540 S.E.2d 353 (1999). N.C. Gen. Stat. § 50-13.7(a) (2009) states in pertinent part that

> an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.

A "change of circumstances[,]" as applied to N.C. Gen. Stat. § 50-13.7 "means such a change as affects the welfare of the child." *In re Harrell*, 11 N.C. App. 351, 354, 181 S.E.2d 188, 189 (1971) (citations omitted).

In the 10 June 2010 order, the trial court made the following notation before listing its findings of fact as to the conditions that existed before and at the time of the 26 March 2009 memorandum:

> *The following findings of fact provide context for the situation exiting at the time of entry of the March 26, 2009 Consent Custody Memorandum of Judgment:*

(Emphasis in original.) The trial court went on to explain after making these findings of fact:

> 39. The above Findings of Fact constitute the circumstances under which the [Memorandum of Judgment or "MOJ"] was entered into and provide a base line for determining whether Father has sufficiently proven that a substantial and material change in circumstances warrants this Court to modify the MOJ.

Logically, since plaintiff filed a motion for modification, the trial court would have to look back at the facts surrounding the best interests of the child, *see* N.C. Gen. Stat. § 50-13.2(a), at the time of the 26 March 2009 memorandum and make appropriate findings in order to "provide a base line" before it could determine if there had been "a substantial and material change in circumstances" that would warrant a modification in child custody as plaintiff had requested. The trial court appropriately made findings "concern[ing the] physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978). The trial court then compared these findings as to the circumstances in March 2009 with evidence and testimony as to the changes in circumstances since that time. The trial court could not determine whether there had been a substantial change in circumstances without looking at the conditions as they existed before and on 26 March 2009. In cases where a prior permanent custody order includes findings of fact as to the circumstances existing at the time of the order, findings of fact in a subsequent modification order looking back to the former circumstances may be unnecessary, but when the trial court is considering a consent order in which the parties "waive[d] findings of fact and conclusions of law[,]" the trial court has no way of considering a motion for modification without considering the circumstances at the time of entry of the prior order. Of course, plaintiff could have insisted upon findings of fact and conclusions of law when he agreed to the 26 March 2009 memorandum, which would have set the "base line" circumstances for purposes of a motion to modify, but he did not. Therefore, we find no merit in plaintiff's contentions.

[3] In a related argument, plaintiff also contends that the trial court abused its discretion by including findings as to defendant's domestic

violence complaint, as defendant had voluntarily dismissed her Chapter 50B complaint in the 26 March 2009 memorandum and this "wiped the issues of Domestic Violence from the parties [sic] case[.]" Some of the findings of fact which plaintiff claims are barred by dismissal of the Chapter 50B complaint are as follows:

> 24. The parties separated after an incident of domestic violence on December 26, 2008.
>
> 25. In the midst of an argument, Father pushed Mother down the stairs, causing serious bruising. This was the only incident of assaultive conduct presented into evidence between the parties.
>
> 26. The minor child witnessed the event and was crying and distressed.
>
> 27. As Father came down the stairs, Mother called 911 and Father left the home.
>
> . . . .
>
> 29. Mother filed a Complaint for a Domestic Violence Protective Order and obtained an ex parte Protective Order.

Plaintiff does not argue that these findings of fact are not supported by the evidence; plaintiff contends that despite evidentiary support for the findings, the trial court should not have made the findings because the separate Chapter 50B proceeding was dismissed. We also note that the trial court's 10 June 2010 order did not include any provisions of the sort which would be included in a domestic violence protective order entered pursuant to N.C. Gen. Stat. §§ 50B-2 or 50B-3, but addressed only child custody and support.

Plaintiff's argument confuses issues of pleading and procedure with factual circumstances relevant to the child's best interest. Regardless of the defendant's agreement to dismiss her Chapter 50B claim, "acts of domestic violence between the parties" are one of the factors the trial court is to consider pursuant to N.C. Gen. Stat. § 50-13.2(a) in making findings as to the best interest of the child. The trial court's highest duty in a child custody determination is the consideration of the child's interests, not the parents', and if the trial court finds that domestic violence has occurred which affects the child, it is bound to consider this fact in making its custody determination.

> The welfare or best interest of the child is always to be treated as the paramount consideration, to which even parental love must

> yield, and wide discretionary power is necessarily vested in the trial court in reaching decisions in particular cases. *Griffin v. Griffin*, 237 N.C. 404, 75 S.E.2d 133; *Walker v. Walker*, 224 N.C. 751, 32 S.E.2d 318. "The welfare of the child in controversies involving custody is the polar star by which the courts must be guided in awarding custody." *Thomas v. Thomas*, 259 N.C. 461, 130 S.E.2d 871, *quoting Kovacs v. Brewer*, 245 N.C. 630, 97 S.E.2d 96.

Wilson v. Wilson, 269 N.C. 676, 678, 153 S.E.2d 349, 351 (1967). The trial court made appropriate findings, pursuant to N.C. Gen. Stat. § 50-13.2(a), as to the conditions that existed at the time of the 26 March 2009 memorandum, which included the domestic violence which occurred in the presence of the child. Accordingly, we find no abuse of discretion and this argument is overruled.

[4] Plaintiff also argues that "[n]one of [the trial court's] modifications were contemplated by the Plaintiff at the time he filed his Motion to Modify. Clearly the court was without authority to make such wholesale changes to the prior custody order without notice that the Court had intended to go beyond the Plaintiff's filed Motion to Modify Custody." However, contrary to plaintiff's contention, "[o]ur trial courts are vested with broad discretion in child custody matters[,]" *Mitchell v. Mitchell*, 199 N.C. App. 392, 405, 681 S.E.2d 520, 529 (2009) (citation omitted), and in the context of a request for a modification of child custody, the trial court is not limited to the allegations and requests made by the moving party but "[t]he welfare of the children is the determining factor in the custody proceedings[.]" *In re Custody of Poole*, 8 N.C. App. 25, 29, 173 S.E.2d 545, 548 (1970). When a party files a motion to modify custody, if the trial court finds that a substantial change in circumstances affecting the best interests of the child has occurred and thus modification is needed, the trial court is not limited by the specific modifications as requested by any party but may make any modifications which it determines are supported by evidence and are in the best interest of the child. Accordingly, we find no abuse of discretion and plaintiff's argument is overruled.

IV. Imputing Income for Child Support

[5] Next, plaintiff argues that in the 10 June 2010 order, "the failure of the trial court to impute income to the plaintiff for purposes of establishing child support was an abuse of discretion." Defendant counters that the trial court properly concluded that income should not be imputed to defendant as the findings show that she "did not act

in bad faith and had sought higher paying employment." This Court has stated that

> [c]hild support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a "determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Under this standard of review, the trial court's ruling "will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

Biggs v. Greer, 136 N.C. App. 294, 296-97, 524 S.E.2d 577, 581 (2000). "The trial court must make sufficient findings of fact to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Metz v. Metz*, ___ N.C. App. ___, ___, 711 S.E.2d 737, 740 (2011) (citation omitted). Plaintiff makes no challenge to the trial court's findings of fact and therefore, they are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). However, plaintiff points us to findings of fact 95, 98, 99, and 100 and argues that the findings of fact showed that defendant "was intentionally depressing her income" and it was an abuse of the trial court's discretion for the trial court to make "no conclusions other than the statement 'but income cannot be imputed to the [defendant].' "

This Court has set forth the legal and factual bases for imputation of income for purposes of child support as follows:

> [n]ormally, a party's ability to pay child support "is determined by that [party's] income at the time the award is made." *Atwell v. Atwell*, 74 N.C. App. 231, 235, 328 S.E.2d 47, 50 (1985). *See also Askew v. Askew*, 119 N.C. App. 242, 458 S.E.2d 217 (1995). However, capacity to earn may be the basis for an award where the party "deliberately depressed his income or deliberately acted in disregard of his obligation to provide support." *Sharpe v. Nobles*, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997) (citing *Askew*, *id.*). *See also Schroader v. Schroader*, 120 N.C. App. 790, 463 S.E.2d 790 (1995). Before earning capacity may be used as the basis of an award, there must be a showing that the actions which reduced the party's income were taken in bad faith, to avoid family responsibilities. *Bowers v. Bowers*, 141 N.C. App. 729, 732, 541 S.E.2d 508, 510 (2001) (noting rule that absent a finding that defendant deliberately suppressed his income to avoid his support obligation, the trial court could not employ

> defendant's earning capacity in determining child support); *Sharpe*, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (holding that father's failure to look for higher paying job after his position was eliminated was not deliberate suppression of income or other bad faith, and thus, his earning capacity could not be used to impute income to him for determining child support); *see also Cook v. Cook*, 159 N.C. App. 657, 583 S.E.2d 696 (2003), and *King v. King*, 153 N.C. App. 181, 185, 568 S.E.2d 864, 866 (2002). . . . [In imputation of income cases] "the dispositive issue is whether a party is motivated by a desire to avoid his reasonable support obligations." *Wolf v. Wolf*, 151 N.C. App. 523, 527, 566 S.E.2d 516, 519 (2002) (holding the trial court did not err in imputing income where defendant voluntarily remained unemployed "in conscious and reckless disregard" of his duty to provide support to his children); *Wachacha v. Wachacha*, 38 N.C. App. 504, 508, 248 S.E.2d 375, 378 (1978) (holding there was insufficient evidence to support the trial court's decision to impute income where, although defendant voluntarily surrendered his job so that he could return to college, he arranged to meet his support and alimony obligations from his income under the GI bill).

Pataky v. Pataky, 160 N.C. App. 289, 306-07, 585 S.E.2d 404, 415-16 (2003), *affirm per curium*, 359 N.C. 65, 602 S.E.2d 360 (2004).

In addition to findings of fact 95, 98, 99, and 100, the trial court made the following findings as to defendant's income and earning capacity:

> 95. Mother initially picked up more hours as a hostess at McCormick and Schmick's after separation and asked friends to care for [Mary][1] as a favor.
>
> 96. After Mother began receiving [post separation support] and temporary child support payments, she would employ friends to watch [Mary] while she worked.
>
> 97. Mother ended up paying the same amount for child care, $10/hr, as she made at her hostess job.
>
> 98. She no longer works extra shifts and is scheduled to hostess for roughly 10-15 hours every other weekend.
>
> 99. Mother told Father that she was planning to decrease her work hours at the restaurant over time so that he would have to

1. The minor child is identified by a pseudonym.

pay her more child support. Mother admits she made this statement in order to lash out at Father.

100. The Court nonetheless finds that Mother's threat in this regard was an idle one. Whether child support is comput[ed] using Mother's current gross income of $430/month or whether it is computed using her previous gross monthly income around $750/month, when she was working extra shifts back in the Spring of 2009 yields little difference in Father's ultimate child support obligation.

101. Mother has never earned more than minimal income throughout her time in the United States.

102. Mother is highly intelligent and has a degree in Psychology.

103. Mother has sought work extensively during the recession but has not yet secured more lucrative work.

104. Father's counsel argues that Mother is intentionally depressing her income but there is no evidence that a higher salaried job is available for her.

105. Father's counsel argued Mother had not spent sufficient time seeking work but the Court finds that Mother has in fact made significant efforts in that respect.

106. The Court finds that Mother has not yet been successful in finding a higher-salaried position but that she desires to do so.

107. The only available job where Mother could be working more hours is the restaurant where she currently works. If she returned to her previous schedule from the Spring of 2009, Mother could work every weekend and make close to $750/month.

108. This commitment would result in Mother having to sacrifice every weekend with [Mary] and in having to pay for child care on alternate weeks in the same amount she would be earning.

Based on these findings the trial court concluded that "both Father and Mother owe a duty of support to the minor children, [sic] but income cannot be imputed to Mother[.]" As the findings show that defendant's reduction in income was not made in "bad faith" or "motivated by a desire to avoid [her] reasonable support obligations[,]" the trial court had no basis to impute income to defendant. *See Pataky*, 160 N.C. App. at 307, 585 S.E.2d at 415-16. Accordingly, the trial court's

findings of fact support its conclusions of law. Therefore, we find no abuse of discretion and plaintiff's argument is overruled.

V. Extraordinary Expenses

[6] Plaintiff contends that "the trial court abused its discretion by entering the child support order" as the trial court "went beyond the Child Support Guides [sic] and added addition [sic] support requirements to pay 97 percent of the minor child's tuition, 97 percent of any unspecified work related day care expense incurred by the appellant[,]" and "unspecified . . . summer camp outside of the guidelines." Defendant argues that the trial did not abuse its discretion in ordering plaintiff to pay these expenses. The trial court made the following relevant findings of fact:

> 111. [Mary]'s tuition at St. Johns is $320/month. Mother has received a scholarship up to trial, although it is unclear whether [Mary] will or should still qualify for scholarship given Father's income. The parents will no longer incur this expense once [Mary] begins public school. Accordingly, the Court will not enter the St. John's tuition on the Worksheet A as an extraordinary expense and instead orders Father to pay 97% of [Mary]'s tuition at St. Johns directly, with Mother responsible for 3%, in addition to his base child support obligation to Mother, until the parents (and CMS' evaluation regarding [Mary]'s readiness for Pre-K) determine that [Mary] is ready to begin public school.
>
> 112. Mother incurs work-related childcare costs as the rate of $10/hour for some weekends when she works that do not fall on Father's alternate weekend visitation. In the event that Mother incurs such work-related childcare costs, she shall submit a receipt documenting those costs to Father, who shall reimburse Mother for 97% of these expenses within 14 days of the presentation of the receipt.
>
> 113. Based upon Worksheet A of the North Carolina Child Support Guidelines, Father's monthly child support obligation is $1227.76. He should additionally pay 97% of [Mary]'s tuition at St. John's to cover [Mary]'s summer and 2010-11 school year, if [Mary] does not continue to qualify for scholarship and for as long as she incurs those expenses prior to entering public school.
>
> 114. In the event [Mary] attends summer camps, the parents shall share the reasonable costs of summer camp with Father paying for 97% and Mother paying for 3%.

Based on these findings the trial court concluded that

> it would be in the best interest of the minor child for Father to pay Guideline child support for the minor child as set forth herein, which is a reasonable amount of child support based upon the gross income of the parties, the cost of work-related child care expenses, and health insurance premiums paid on behalf of the minor child by Father.

N.C. Gen. Stat. § 50-13.4(c) (2009) states that "[t]he court shall determine the amount of child support payments by applying the presumptive guidelines[.]" The North Carolina Child Support Guidelines allow the court to add to the parties' basic child support obligation based on certain extraordinary expenses, as follows:

> Other extraordinary child-related expenses (including 1. expenses related to special or private elementary or secondary schools to meet a child's particular educational needs, and 2. Expenses for transporting the child between the parents' homes) may be added to the basic child support obligation and ordered paid by the parents in proportion to their respective incomes if the court determines the expenses are reasonable, necessary, and in the child's best interest.

N.C. Child Support Guidelines, 2006 Ann. R. N.C. 53. This Court has further stated that

> "[d]etermination of what constitutes an extraordinary expense is . . . within the discretion of the trial court," *Mackins v. Mackins*, 114 N.C. App. 538, 549, 442 S.E.2d 352, 359, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 527 (1994). Based upon the [above Guideline language], "the court may, in its discretion, make adjustments [in the Guideline amounts] for extraordinary expenses." *Id.* However, incorporation of such adjustments into a child support award does not constitute deviation from the Guidelines, but rather is deemed a discretionary adjustment to the presumptive amounts set forth in the Guidelines. *See* 29 Fam. L. Q. 775, 834 (1996) (citing *Mackins*, 114 N.C. App. at 548-50, 442 S.E.2d at 358-59, as holding that "court's order that defendant pay his share of costs of tutoring, orthodontics, psychologists, and summer camp was not a deviation, but rather a discretionary determination to adjust the guideline amount for extraordinary expenses"). In short, absent a party's request for deviation, the trial court is not required to set forth findings of fact related to

the child's needs and the non-custodial parent's ability to pay extraordinary expenses.

Biggs, 136 N.C. App. at 298, 524 S.E.2d at 581-82 (emphasis in original). Even though the guidelines note two specific extraordinary expenses, school and travel, as previously noted by this Court, "the language of the [above guidelines] 'contemplates that the list of extraordinary expenses . . . is not exhaustive of the expenses that can be included.' " *Doan v. Doan*, 156 N.C. App. 570, 574, 577 S.E.2d 146, 149-50 (2003) (quoting *Mackins*, 114 N.C. App. at 549, 442 S.E.2d at 359). Here, the trial court provided for extraordinary expenses for school tuition, work-related child care costs, and costs for summer camp. First, there is no indication in the record that either party requested a deviation from the guidelines and the trial court in fact did not deviate from the guidelines in its child support order. Thus, findings to support a deviation from the guidelines were not required, *see Biggs*, 136 N.C. App. at 298, 524 S.E.2d at 582, but even so the trial court made findings in support of its decision. The guidelines specifically allow for extraordinary expenses as to "private elementary or secondary schools[;]" and this Court has previously found that extraordinary expenses could include camp fees. *See Mackins*, 114 N.C. App. at 550, 442 S.E.2d at 359 (finding no abuse of discretion in the trial court "ordering defendant to pay for the summer camp expenses" as an extraordinary expense). As to work-related child support, we note that a trial court can consider expenses for child care in its support determination, *see* N.C. Gen. Stat. § 50-13.4(c), and the trial court gave a detailed explanation for this award, noting that defendant was paying as much in child care as she was earning while working at her part-time job. Also, the trial court ordered each party to pay a percentage of these extraordinary expenses based on the party's share of the combined gross incomes pursuant to the guidelines. *See Mackins*, 114 N.C. App. at 550, 442 S.E.2d at 359 (noting "that the trial court properly apportioned payment of the [extraordinary] psychological expenses pursuant to the child support guidelines of defendant's seventy-seven percent share."). Accordingly, the trial court's findings of fact support its conclusions of law and plaintiff's argument is overruled.

VI. Bias

[7] Next, plaintiff argues that the trial court's finding of fact 93 shows that it "was harboring resentment towards" him and because the trial court remained quiet during the trial regarding her observa-

tions, he did not have a chance to file a motion asking her to recuse. Plaintiff concludes that finding 93 "alone is sufficient for this Court to determine that [plaintiff] has been denied a fair trial on his motion to modify the 26 march [sic] 2010 Memorandum and Judgment[.]" Defendant counters that as the finder of fact, the trial court is required to make observations of the parties and committed no abuse of discretion.

The relevant finding states as follows:

> 93. Father's facial expressions during trial were somewhat troubling to the Court. He frequently glared at Mother during her cross examination and particularly reveled when his attorney was being aggressive to Mother in her questioning or through her body language. Father's angry expression made the judge feel uncomfortable. It is clear Father still harbors deep anger regarding Mother's infidelity during the marriage and still desires to strike back.

It is well-settled that "when acting as the finder of fact, the trial court has the opportunity to observe the demeanor of the witnesses and determine their credibility, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Yurek v. Shaffer*, 198 N.C. App. 67, 80, 678 S.E.2d 738, 747 (2009) (citation omitted). Further, "[o]ur trial courts are vested with broad discretion in child custody matters. The discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to 'detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation omitted). In *Matter of Oghenekevebe*, this Court held that the trial court did not err by making findings as to the respondent's attitude that she was being persecuted based upon observations of her testimony at trial:

> Based on respondent's testimony, the trial judge determined that respondent dismisses any theory with which she does not agree, and additionally claims that those who disagree with her are persecuting her because of her race. Sorting through such allegations is a task best left to the determination of the trial court. The function of trial judges in nonjury trials is to weigh and determine the credibility of a witness. *Ingle v. Ingle*, 42 N.C. App. 365, 368, 256 S.E.2d 532, 534 (1979). The demeanor of a witness on the stand is always in evidence. *State v. Mullis*, 233 N.C. 542, 544, 64 S.E.2d 656, 657 (1951). All of the findings of fact regarding respond-

> ent's in-court demeanor, attitude, and credibility, including her willingness to reunite herself with her child, are left to the trial judge's discretion. Therefore, any of the findings of fact regarding the demeanor of any of the witnesses are properly left to the determination of the trial judge, since she had the opportunity to observe the witnesses.

Oghenekevebe, 123 N.C. App. 434, 440-41, 473 S.E.2d 393, 398-99 (1996). Here, the trial court made findings regarding plaintiff's attitude of anger and vengefulness toward defendant, based upon her observations throughout the trial. Findings as to a party's demeanor and attitude, such as finding No. 93, are not only proper but can actually be quite helpful to both this Court, which relies on the "printed record" and does not have the opportunity to observe the parties or witnesses, and also to the trial court, which in the future might be required to rule upon another modification of custody, as this finding establishes a base line as to one of the circumstances existing at the time of the 10 June 2010 order. Therefore, it was the trial court's duty as the finder of fact to observe the demeanor of all of the witnesses, including plaintiff, during the trial and to make appropriate findings of fact as to these observations as it saw fit. Plaintiff cites no law for the proposition that a trial court is required to inform parties of its observations and thoughts as to the demeanor of the parties or other witnesses during a trial, and it would, as a general rule, be entirely inappropriate for the trial court to do so. Accordingly, plaintiff's argument is overruled.

VII. Attorney's Fees

[8] Plaintiff's next two arguments contend that the trial court made specific errors in its orders awarding attorney's fees. In his notice of appeal, filed on 13 July 2010, plaintiff appealed from "the Memorandum of Judgment/Order entered by Rebecca Thorn Tin, District Court Judge, entered on July 2010 [sic] that awarded Defendant attorney fees in this Matter." However, our record does not include any order entered in July 2010, much less an order for attorney fees. The attorney fee orders which plaintiff challenges were actually entered on 1 October 2010. Plaintiff did not give proper notice of appeal as to the attorney fee orders, since the notice of appeal was filed prior to entry of the orders, *see* N.C.R. App. P 3(c), but the attorney fee orders present another issue which was not raised by the parties. We have noted that

> [t]he issue of jurisdiction over the subject matter of an action may be raised at any time during the proceedings, including on appeal. *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006). This Court is required to dismiss an appeal *ex mero motu* when it determines the lower court was without jurisdiction to decide the issues. *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986).

McClure v. County of Jackson, 185 N.C. App. 462, 469, 648 S.E.2d 546, 550 (2007). After plaintiff filed notice of appeal on 13 July 2010, the trial court was divested of jurisdiction to enter orders for attorney fees pending the completion of this appeal. The fact that the trial court reserved the issue of attorney fees for later hearing does not give the trial court jurisdiction to enter the orders after notice of appeal was filed. In *McClure*, this Court thoroughly considered the trial court's jurisdiction to enter an award of attorney fees after the notice of appeal and held that

> [i]t is fundamental that a court cannot create jurisdiction where none exists. *See In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003). N.C. Gen. Stat. § 1–294 specifically divests the trial court of jurisdiction unless it is a matter "not affected by the judgment appealed from." When, as in the instant case, the award of attorney's fees was based upon the plaintiff being the "prevailing party" in the proceedings, the exception set forth in N.C. Gen. Stat. § 1–294 is not applicable.
>
> While we understand that the interests of judicial economy would clearly be better served by allowing the trial court to enter an order on attorney's fees and then having the matter come up to the appellate courts as a single appeal, we cannot create jurisdiction for the trial court to enter the award of attorney's fees in violation of N.C. Gen. Stat. § 1–294.

Id. at 471, 648 S.E.2d at 551.

We must therefore vacate the attorney fee orders entered on 1 October 2010, as the trial court did not have jurisdiction to enter these orders. We remand the issue of attorney fees to the trial court for reconsideration.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges GEER and THIGPEN concur.

STATE OF NORTH CAROLINA v. TIMOTHY ALFRED SWEAT

No. COA11-57

(Filed 18 October 2011)

1. Sexual Offenses—statutory sexual offense—sexual offense with child—motion to dismiss—sufficiency of evidence—fellatio—confession

The trial court did not err by denying defendant's motion to dismiss three of his four charges for first-degree statutory sexual offense and sexual offense with a child. Defendant's extrajudicial confession alone established the elements of fellatio, the minor victim previously informed two different individuals on two different occasions that fellatio had occurred, and defendant was convicted of and did not contest numerous other criminal sexual acts occurring within the same time frame and with the same victim.

2. Sexual Offenses—statutory sexual offense—sexual offense with child—instruction

Although the trial court did not err by instructing the jury they could find defendant engaged in either anal intercourse and/or fellatio with the minor child for the two charges of statutory sexual offense, this same instruction was not proper for the two charges of sexual offense with a child. Defendant was entitled to a new trial for the two charges of sexual offense with a child.

Judge HUNTER, JR., Robert N. dissenting.

Appeal by defendant from judgments entered on or about 2 July 2010 by Judge James U. Downs in Superior Court, Buncombe County. Heard in the Court of Appeals 8 June 2011.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Margaret A. Force, for the State.

Russell J. Hollers III, for defendant-appellant.

STROUD, Judge.

Defendant appeals his convictions for first degree sexual offense and sexual offense with a child arguing that (1) his motion to dismiss should have been granted as there was insufficient evidence of fellatio, and (2) the jury was erroneously instructed on fellatio. We con-

clude that (1) the trial court properly denied defendant's motion to dismiss as there was sufficient evidence of fellatio, but (2) the jury was erroneously instructed as to two of the charges. Therefore, we find no error in part and order a new trial in part.

I. Background

The State's evidence tended to show that when Tammy,[1] then approximately eight or nine years old, was in the third grade between August 2007 and 2008, defendant, her live-in uncle, made her "[t]ouch his private" and touched her "boobs[;]" both incidents happened on more than one occasion. In March 2009, Tammy was in defendant's apartment when he "stuck his private in" Tammy's "private in front." Defendant also put "his private" in Tammy's "butt" and "[s]omething [white] came out." Defendant put "his private in [Tammy's] butt" "[m]ore than once."

On 30 March 2009, defendant told an investigator with the Buncombe County Office of the Sherriff "that he had had sexual contact with the victim[,]" that "he had had sex with [Tammy] on one occasion[,]" and "that there were at least four sexual encounters with the victim." Defendant wrote a statement for the police which read:

> Brickyard Road. She pulled out my p-e-n-d-s and sucked it. I said 'no' but she wanted to t-y-e it. She l-e-n-k-s it. I had s-a-i-n-d 'no,' but she want to, so she did it. For s-u-o-c-d. That happened two times. She put my p-l-a-n-s in her butt. B-e-a-c-k part we play on the bed and [Tammy] put her hand down in my pants, pull it out and t-y-e it or can I s-a-n-d, but she want to. I know she it out again. I s-a-i, 'This is not r-i-n-t' to her. She s-u-i-n-d things. She tried to put it in her butt that day[.]

On or about 3 August 2009, defendant was indicted for two counts of first degree statutory sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1), five counts of indecent liberties with a child under N.C. Gen. Stat. § 14-202.1, two counts of sexual offense with a child under N.C. Gen. Stat. § 14-27.4A(a), and one count of rape of a child under N.C. Gen. Stat. § 14-27.2A(a). Defendant was tried by a jury and found guilty of all of the charges against him. The trial court entered judgments against defendant, and defendant appeals.

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1. A pseudonym will be used to protect the identity of the minor.

II. Motion to Dismiss

[1] Defendant first argues that the trial court erred in denying his motion to dismiss three of his four charges for first-degree statutory sexual offense and sexual offense with a child; defendant contends that the State's evidence only establishes one act of anal intercourse for purposes of one of defendant's four charges and that the other three charges were based upon fellatio. Defendant reasons that pursuant to the *corpus delicti* rule as applied in *State v. Smith*, 362 N.C. 583, 669 S.E.2d 299 (2008), there was insufficient evidence of fellatio for purposes of three of the charges, and thus his motion to dismiss should have been granted as to these charges. Even if assume *arguendo*, that three of defendant's charges were based upon fellatio, we still disagree that defendant's motion to dismiss should have been granted, as *Smith* does not support defendant's argument. *See id.*

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

State v. Johnson, ___ N.C. App. ___, ___, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted).

Pursuant to N.C. Gen. Stat. § 14-27.4(a)(1),

> A person is guilty of a sexual offense in the first degree if the person engages in a sexual act . . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]

N.C. Gen. Stat. § 14-27.4(a)(1) (2007). "A person is guilty of sexual offense with a child if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." N.C. Gen. Stat. § 14-27.4A(1) (2007).

> "Sexual act" means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also

> means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.

N.C. Gen. Stat. § 14-27.1(4) (2007). Here, defendant only challenges the element of the "sexual act" by fellatio. *See generally* §§ N.C. Gen. Stat. 14-27.1(4), -27.4(a)(1), -27.4A(1).

In *State v. Smith*, the defendant was charged with first degree rape, first degree sexual offense, and indecent liberties with a child. 362 N.C. 583, 585, 669 S.E.2d 299, 301 (2008). The evidence showed the defendant confessed to a detective at the sheriff's department that the minor victim, K.L.C, "tried to give him a blow job." *Id.* at 587, 669 S.E.2d at 303. At trial, the defendant testified K.L.C. "attempt[ed] to fellate him." *Id.* at 586, 669 S.E.2d at 302. Conversely, K.L.C., both before and at trial stated that "prior to the alleged rape no sexual or indecent acts occurred between her and defendant" and "no sexual contact between her and defendant occurred after the alleged rape." *Id.* at 588, 669 S.E.2d at 303. Thus, only the defendant's statements could be used to establish fellatio for purposes of his charge for first degree sexual offense. *See id.* at 586-88, 669 S.E.2d at 302-03.

Based upon the facts our Supreme Court discussed the development of the *corpus delicti* rule and stated,

> *Parker* held that in noncapital cases, a conviction can stand if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime. Furthermore, *Parker* emphasizes that when independent proof of loss or injury is lacking, there must be strong corroboration of essential facts and circumstances embraced in the defendant's confession.

Id. at 592, 669 S.E.2d at 306 (citations and quotation marks omitted).

The Court then examined the evidence, first noting that the victim explicitly denied that the defendant had committed a first degree sexual offense upon her:

> In the instant case, a critical fact exists that necessarily bears upon our analysis: the victim twice denied that a first-degree sexual offense ever occurred. When interviewed by Detective Arrowood six weeks after the alleged events tran-

> spired, K.L.C. stated that there was no sexual contact between defendant and her on the night of the first visit. Additionally, K.L.C. testified at trial that during the first visit, she was alone with defendant in Jonathan's, [her brother's,] bedroom, and while defendant made inappropriate comments to her, no sexual contact occurred on the night of the first visit. A victim of sexual violence, especially a minor victim, is not required to testify to the sexual offense in order for a conviction to stand. However, in this unique situation, in which the victim explicitly denies that the offense ever occurred, we believe it is imperative to adhere to *Parker's* emphasis that strong corroboration evidence supporting defendant's extrajudicial confession must be shown when proof of injury or loss is otherwise lacking.

Id. at 593, 669 S.E.2d at 306 (citations and quotation marks omitted).

The Court then examined the corroborative evidence and found that it was not sufficiently trustworthy to show that a first degree sexual offense had occurred, particularly where the defendant's confession itself failed to establish all of the necessary elements of the alleged crime:

> The State argues that under the *corpus delicti* rule, defendant's extrajudicial confession, along with several pieces of corroborative evidence, is sufficient to sustain a conviction for first-degree sexual offense. However, none of the State's evidence is trustworthy to establish the sexual act element of a first-degree sexual offense, that K.L.C.'s lips, tongue, or mouth ever touched defendant's penis. In the extrajudicial confession, defendant stated to Detective Arrowood that K.L.C. unzipped his pants, removed his penis, and attempted fellatio, but that he could not achieve an erection because of his alcohol consumption. From this confession alone a jury could not determine beyond a reasonable doubt that K.L.C.'s mouth ever made contact with defendant's penis, which is a required element in a sexual offense prosecution.

Id. at 593-95, 669 S.E.2d at 306-07. The State's corroborating evidence included: (1) the defendant's trial testimony which the Court determined was vague like the extrajudicial confession, (2) Jonathan's testimony regarding defendant's confession to him which the Court determined was not independent as the statements were basically a report of what happened during defendant's interview with the detective wherein he made his extrajudicial confession, and (3) Jonathan's testimony describing defendant's demeanor when confessing which

the Court again determined was not independent of the extrajudicial confession. *See id.* at 594-95, 306-07.

Finally, the Court considered defendant's opportunity to commit a first degree sexual offense and determined that there was no independent proof of the crime:

> The State last contends that under *Parker*, several pieces of opportunity evidence are sufficient to sustain defendant's conviction for first-degree sexual offense. The State offers testimony from both defendant and K.L.C. that they were alone together in Jonathan's bedroom during the first visit, as well as Jonathan's testimony that he left K.L.C. with defendant during the first visit.
>
> In *Parker*, this Court held that facts tending to show the defendant had the opportunity to commit the crime can be considered as independent evidence to establish the trustworthiness of the defendant's confession. However, the opportunity evidence in *Parker* differs from the case at bar. In *Parker*, the defendant was charged with armed robbery and first-degree murder of two victims. The State was able to produce significant independent evidence of both murders and of armed robbery, including the bodies of both victims and the recovered property stolen from the first victim. However, no evidence of the second armed robbery could be shown, other than the defendant's extrajudicial confession. This Court ruled that evidence showing the defendant had the opportunity to commit the crime was sufficient under the *corpus delicti* rule to sustain the second armed robbery conviction in light of the overwhelming amount and convincing nature of the corroborative evidence of more serious crimes committed against both victims at the time of the robbery. The present case differs from *Parker* because no independent proof, such as physical evidence or witness testimony, of any crime can be shown. Furthermore, in the case at bar, K.L.C., an alleged living victim, gave two statements averring that the sexual offense did not occur. In light of these facts, the opportunity evidence submitted by the State is not strong enough to establish the *corpus delicti* of first-degree sexual offense under *Parker*, namely, that a sexual act occurred between defendant and K.L.C.

Id. at 595-96, 669 S.E.2d at 307-08 (citations, quotation marks, ellipses, and brackets omitted). Thus, we consider whether "the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the

defendant had the opportunity to commit the crime" and whether there is "strong corroboration of essential facts and circumstances embraced in the defendant's confession." *See id.* at 592, 669 S.E.2d at 306.

We first note that the Supreme Court's analysis "necessarily bears upon" "a critical fact": "the victim twice denied that a first-degree sexual offense ever occurred." *Id.* at 593, 669 S.E.2d at 306. Here, though Tammy did not testify to fellatio during defendant's trial she did, prior to defendant's trial, inform Ms. Christine Nicholson, formerly a child protective services investigator for the Buncombe County Department of Social Services, and Ms. Cindy McJunkin of the Mission Children's Clinic that defendant had "made [her] suck his private[,]" pushed her head and told her to "suck it[,]" and put "his private in [her] mouth." While the jury was only allowed to consider Ms. Nicholson's and Ms. McJunkin's testimony and evidence regarding Tammy's statements to the extent that they corroborated Tammy's trial testimony, this evidence clearly shows that Tammy did not consistently deny that fellatio occurred as the victim in *Smith* did; *id.*, here, within a month of the rape, Tammy told two different individuals on two different occasions that fellatio had occurred. As our Supreme Court noted in *Smith*, "A victim of sexual violence, especially a minor victim, is not required to testify to the sexual offense in order for a conviction to stand." *Id.*

In *Smith*, the Court next turns to the defendant's extrajudicial confession focusing on the fact that it only established "attempted fellatio" but not "that K.L.C.'s mouth ever made contact with defendant's penis[.]" *Id.* at 593-94, 669 S.E.2d at 306. Here, unlike the "attempted" language in *Smith*, *id.*, defendant's extrajudicial confession, though poorly spelled, stated: "She pulled out my p-e-n-d-s and sucked it. I said 'no' but she wanted to t-y-e it. She l-e-n-k-s it. I had s-a-i-n-d 'no,' but she want to, so she did it. For s-u-o-c-d. That happened two times." Unlike *Smith*, defendant's extrajudicial confession does establish that Tammy's "mouth . . . made contact with defendant's penis[.]" *Id.* at 594, 669 S.E.2d at 306.

Lastly, the Supreme Court in *Smith* considered defendant's "opportunity" to commit the charged crimes. *Id.* at 595, 669 S.E.2d at 307. In *Smith*, the evidence showed that the victim and defendant had only been alone together on two occasions; they did not live together, nor did the defendant have access to the victim over a long period of time. *Id.* at 585-88, 301-03. The Court determined that in *Smith* there was "no independent proof" of "any crime." *Id.* at 596, 669 S.E.2d at 308. Here, both defendant's extrajudicial statement, Tammy's testi-

mony and statements, and Tammy's aunt's testimony establish that defendant did have an opportunity to commit the charged crimes. Furthermore, here, where defendant has been convicted of, and does not challenge on appeal, his multiple convictions of rape, indecent liberties, and sexual offense based on anal intercourse, which occurred in the same course of sexually abusive conduct with the same victim, there is "independent proof" to support a crime. *Id.*

Smith also analyzed the same evidence which it found was not sufficient to corroborate a first degree sexual offense and found that the evidence would support a charge of indecent liberties with a child. *Id.* at 597-98, 669 S.E.2d at 309. As to the indecent liberties with a child conviction, the Supreme Court determined:

> While the evidence presented at trial was insufficient to sustain the sexual offense conviction, it withstands the *corpus delicti* rule as to the conviction for indecent liberties with a child. . . .
>
> . . . .
>
> . . . Defendant's extrajudicial confession alone establishes all of the elements of indecent liberties with a child; thus, under the *corpus delicti* rule, the question becomes whether independent corroborating evidence is strong enough to prove the trustworthiness of the confession. . . . [A]fter reviewing the entirety of the record, we find there is strong corroborating evidence to establish the trustworthiness of defendant's extrajudicial confession as to the indecent liberties charge.

Id. Here, just as with the indecent liberties conviction with the defendant in *Smith*, "[d]efendant's extrajudicial confession alone establishes all of the elements" of fellatio. *Id.* at 597, 669 S.E.2d at 309.

In summary, this case differs from *Smith* because defendant's extrajudicial confession alone establishes the elements of fellatio; Tammy previously informed two different individuals on two different dates that fellatio had occurred; and defendant was convicted of and does not contest on appeal numerous other criminal sexual acts occurring within the same time frame and with the same victim which were part of the same sexual encounters as the fellatio. We conclude that "the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime" and that there is "strong corroboration of essential facts and circumstances embraced in the defendant's confession." *Id.* at 592,

669 S.E.2d at 306. Accordingly, there was sufficient evidence of fellatio, and the trial court did not err in denying defendant's motion to dismiss. This argument is overruled.

III. Jury Instructions

[2] The trial court instructed the jury that in order to find defendant guilty of the four charges for first-degree statutory sexual offense and sexual offense with a child they could find he engaged in "either anal intercourse and/or fellatio" with Tammy. Defendant contends that the trial court erred in instructing the jury on fellatio in combination with an instruction on anal intercourse. We review instructions to the jury

> contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. Glynn, 178 N.C. App. 689, 693, 632 S.E.2d 551, 554, *disc. review denied and appeal dismissed*, 360 N.C. 651, 637 S.E.2d 180 (2006) (citation, quotation marks, ellipsis, and brackets omitted). "A trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence. When such instructions are prejudicial to the accused he would be entitled to a new trial." *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 699 (1973).

Relying heavily on his first argument defendant contends that the evidence supports only one charge of sexual offense, specifically anal intercourse in March 2009. We have already rejected defendant's first argument, but we do agree that the evidence before the jury established, at most, two instances of fellatio. Jenny testified that she and defendant engaged in anal intercourse "[m]ore than once." Defendant's extrajudicial confession stated, "She pulled out my p-e-n-d-s and sucked it. I said 'no' but she wanted to t-y-e it. She l-e-n-k-s it. I had s-a-i-n-d 'no,' but she want to, so she did it. For s-u-o-c-d. *That happened two times.*" (Emphasis added.) The corroborative evidence admitted through the testimonies of Ms. Nicholson and Ms. McJunkin was not admitted as substantive evidence of fellatio and is vague as to the number of times that fellatio occurred. Thus, the trial court could only properly instruct the jury on two of the four counts that they could find defendant guilty of "anal intercourse and/or fellatio."

As such, instruction on four charges regarding "anal intercourse and/or fellatio" was not only error, but "was likely, in light of the entire charge, to mislead the jury." *Glynn* at 693, 632 S.E.2d at 554. We find no error as to defendant's two convictions for first degree statutory sexual offense pursuant to N.C. Gen. Stat. § 14-27.4(a) (09-CRS-00455 and 09-CRS-00456) as the jury could properly have found either anal intercourse or fellatio and was not required to agree as to which one occurred. *See State v. Lyons*, 330 N.C. 298, 302, 412 S.E.2d 308, 312 (1991) ("There is a critical difference between the lines of cases represented by *Diaz* and *Hartness*. The former line establishes that a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, either of which is in itself a separate offense, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense. *The latter line establishes that if the trial court merely instructs the jury disjunctively as to various alternative acts which will establish an element of the offense, the requirement of unanimity is satisfied.*" (emphasis added)). Accordingly, we order defendant receive a new trial for his two convictions for sexual offense with a child (09-CRS-54272 and 09-CRS-54275).

IV. Conclusion

For the foregoing reasons, we conclude that the trial court properly denied defendant's motion to dismiss, but the jury was erroneously instructed as to two of the charges.

NO ERROR in part; NEW TRIAL in part.

Judge HUNTER, Robert C. concurs.

Judge HUNTER, Jr., Robert N. dissents in a separate opinion.

HUNTER, JR., Robert N., Judge, dissenting.

In North Carolina, "an extrajudicial confession, standing alone, is not sufficient to sustain a conviction of a crime." *State v. Parker*, 315 N.C. 222, 229, 337 S.E.2d 487, 491 (1985). Rather, when the State lacks independent proof of the "body of the crime"—the *corpus delicti*—and relies upon an extra-judicial confession, additional corroborative evidence that establishes the trustworthiness of the confession is required to sustain a conviction. *Id.* at 236, 337 S.E.2d at 495. While jurisdictions vary on the quality and extent of corroborative evidence

required for utilization of extra-judicial confessions in proving the *corpus delicti*, our Supreme Court liberalized North Carolina's approach in *Parker*.

The *Parker* Court considered three versions of the *corpus delicti* rule. The first, which the Court noted was the majority rule, requires "corroborative evidence, independent of the defendant's confession, which tends to prove the commission of the crime charged." *Id.* at 229, 337 S.E.2d at 491. The second approach requires independent evidence tending to establish each element of the crime. *Id.* at 229-30, 337 S.E.2d at 491. The third approach, known as "the 'trustworthiness' version of corroboration," does not require independent proof of the *corpus delicti*. *Id.* at 230, 337 S.E.2d at 492. Rather, " '[p]roof of any corroborating circumstances is adequate which goes to fortify the truth of the confession or tends to prove facts embraced in the confession.' " *Id.* (quoting *Opper v. United States*, 348 U.S. 84, 92 (1954)).

The *Parker* Court reviewed criticisms of the traditional *corpus delicti* rule and adopted the trustworthiness approach. *Id.* at 236, 337 S.E.2d at 495 (citing *State v. Yoshida*, 354 P.2d 986, 990 (Haw. 1960)). The State is no longer required to provide independent evidence of the *corpus delicti* in non-capital cases in order to obtain a conviction:

> We adopt a rule in non-capital cases that when the State relies upon the defendant's confession to obtain a conviction, it is no longer necessary that there be independent proof tending to establish the *corpus delicti* of the crime charged if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime.
>
> We wish to emphasize, however, that when independent proof of loss or injury is lacking, there must be *strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession. Corroboration of insignificant facts or those unrelated to the commission of the crime will not suffice. We emphasize this point because although we have relaxed our corroboration rule somewhat, we remain advertent to the reason for its existence, that is, to protect against convictions for crimes that have not in fact occurred.

Id.

The defendant in *Parker* was convicted of two counts of first-degree murder and two counts of armed robbery. *Id.* at 224, 337 S.E.2d

at 488. Aside from the defendant's confession, there was no evidence of the *corpus delicti* of the armed robbery—missing property—of one of the victims. *Id.* at 227, 337 S.E.2d at 490. The Court concluded the evidence presented at trial established the trustworthiness of the defendant's confession because "[t]he evidence presented by the prosecution at trial mirrored almost precisely the defendant's version of how he committed the other crimes charged"—the murders and the other armed robbery. *Id.* at 238, 337 S.E.2d at 496.

The Supreme Court revisited the *corpus delicti* rule in *State v. Smith*, 362 N.C. 583, 669 S.E.2d 299 (2008), indicating an extra-judicial confession can be sufficiently corroborated for the purpose of one crime, but not another. There, the defendant was found not guilty of first-degree rape, but guilty of first-degree sexual offense and indecent liberties with a child. *Id.* at 584, 669 S.E.2d at 301. Because the State failed to corroborate the extra-judicial confession, the *Smith* Court concluded "the *corpus delicti* of the first-degree sexual offense charge ha[d] not been established, and the conviction c[ould] not be sustained." *Id.* at 596, 669 S.E.2d at 308. However, the defendant's extra-judicial confession statements supporting his indecent liberties conviction were corroborated because trial testimony closely mirrored the defendant's statements. *Id.* at 598, 669 S.E.2d at 309.

Establishing the trustworthiness of the defendant's extra-judicial confession as to some charges does not necessarily establish the trustworthiness of that evidence as to other charges. *Smith* establishes that independent proof of loss or injury attendant to some charges, by itself, does not constitute "*strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession" for *all* charges that might be contained in the defendant's extrajudicial confession. *Id.* at 592, 669 S.E.2d at 306 (quotation marks omitted) (citation omitted).

In this case, I am concerned with whether there was sufficient evidence of the sexual offense charges to survive a motion to dismiss. In police interviews, Defendant admitted having sex with Tammy and engaging in four sexual encounters with her. Investigators then asked Defendant for a written statement. Despite spelling and grammatical errors, Defendant's written statement described three sexual acts. Specifically, his statement said, "She pulled out my p-e-n-d-s [sic] and sucked it . . . . That happened two times." The statement also described one act of anal intercourse, "[s]he put my p-l-a-n-s [sic] in her butt," while also stating that "[s]he tried to put it in her butt that day."

Defendant's confession is muddled and incoherent. However, I conclude it is possible to discern that Defendant stated he engaged in anal intercourse with Tammy *and* that she *tried* to put his penis in her butt. Defendant's confession portrays Tammy as taking an active role in at least one encounter, while Tammy's testimony indicates Defendant forced the acts upon her. Tammy stated she and Defendant viewed pornographic videos together; during an interview with DSS, Defendant specifically denied viewing videos with Tammy. At trial, defense counsel asked Tammy the following: "You talked about what parts of your body Mr. Sweat touched, and you stated that you touched his private with your hands. Did any other part of your body ever touch Mr. Sweat's privates?" Tammy answered, "No." Thus, the substantive evidence at trial and Defendant's confessions establish two versions of events that do not closely resemble each other. And there is a *critical* conflict—the precise type of conflict our Supreme Court emphasized in *Smith*—Tammy denied touching Defendant's penis with anything other than her hands. The State failed to show "*strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession." *Id.* (quotation marks omitted) (citation omitted).

The State also presented a large amount of evidence to corroborate Tammy's testimony. Some of this evidence tends to show Tammy stated she and Defendant engaged in fellatio. However, the trial court admitted this evidence *solely* for the purpose of corroborating Tammy's testimony; the jury was not permitted to consider it as substantive evidence that a crime occurred. Consequently, this case presents a novel question: can unsworn evidence admitted for the limited purpose of corroborating a witness's testimony also corroborate essential facts for the purpose of the *corpus delicti* rule? I conclude it cannot.

In North Carolina, a prior consistent statement may be admitted for the purpose of corroborating a witness's testimony. *See State v. Jones*, 105 N.C. App. 576, 580, 414 S.E.2d 360, 363 (1992). When evidence is admitted only for the purpose of corroboration, it is not substantive evidence; in other words, it cannot establish an element of a crime. *See id.* Consequently, I would hold it cannot establish the elements comprising the *corpus delicti* of a crime. *Parker* states that there must be strong corroboration of essential facts "when independent *proof* of loss or injury is lacking." 315 N.C. at 236, 337 S.E.2d at 495 (emphasis added). Thus, strong corroboration must make up for "proof," which cannot be established through prior-consistent-state-

ment corroborative evidence. *State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 340 (2000) ("[P]rior statements admitted for corroborative purposes may not be used as substantive evidence.") It would be inappropriate to allow the State to substitute limited purpose prior-consistent-statement *corroborative* evidence for *proof* of loss or injury in order to corroborate an extra-judicial confession. I would hold that evidence admitted for the sole purpose of corroborating a witness's testimony cannot corroborate an extra-judicial confession.

In this case, prior out-of-court unsworn statements indicating Defendant and Tammy engaged in fellatio were admitted into evidence along with other out-of-court unsworn statements that corroborated Tammy's testimony at trial. That non-substantive evidence of fellatio was the *only* evidence of fellatio presented at trial other than Defendant's extra-judicial confession. Under the rule announced above, those statements cannot corroborate the portion of Defendant's extra-judicial confession admitting to engaging in fellatio with Tammy. I conclude that, in light of the conflicts between Defendant's extra-judicial confession and Tammy's testimony, and despite Defendant's opportunity to engage in fellatio with Tammy, the State's evidence does not amount to the "*strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession" with respect to acts of fellatio. *Smith*, 362 N.C. at 592, 669 S.E.2d at 306 (quotation marks omitted) (citation omitted).

Viewing the evidence in the light most favorable to the State, the State presented substantial evidence of two incidents of anal intercourse between Defendant and Tammy—one occurring on 5 March 2009 and one occurring while Tammy was in the third grade, sometime from September 2007 to June 2008. However, because the State failed to corroborate the portion of Defendant's confession pertaining to fellatio, there was insufficient evidence to support charges for sexual offenses based on fellatio. As such, the trial court incorrectly denied Defendant's Motion to Dismiss as to those charges. I would reverse the trial court's judgment on the Motion. Reaching this conclusion implicates another error by the trial court, the instructions to the jury.

There is a second problem that the majority opinion fails to properly review. The trial court instructed the jury that it could find Defendant guilty of each sexual offense charge[2] if it found that

2. Our analysis does not distinguish between the first-degree statutory sexual offense convictions under section 15-144.2(b) and the sexual offense with a child convictions under section 14-27.4A, since the age of Defendant is not at issue.

Defendant "engaged in a sexual act with [Tammy], either anal intercourse and/or fellatio." Defendant argues that inclusion of the "and/or" language was erroneous because it permitted the jury to convict Defendant on a theory of fellatio, which was not supported by the State's evidence. I would agree with Defendant.

The appellant contends that the disjunctive jury instructions given to the jury deprive Defendant of his constitutional right to a unanimous jury trial. On our review of this issue, the standard is whether the State can prove that the error was harmless beyond a reasonable doubt. *State v. Boyd*, No. COA10-1072, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2011 WL 3276612 at *6 (August 2, 2011). The State's brief and the majority's opinion do not convince me that the State has met this burden. Neither the State's brief nor the majority opinion discusses this standard of review.

"When a trial court 'erroneously submits the case to the jury on alternative theories, one of which is not supported by the evidence,' and 'it cannot be discerned from the record upon which theory or theories the jury relied [on] in arriving at its verdict, the error entitles [a] defendant to a new trial.' " *Boyd*, No. COA10-1072, ___ N.C. App. at ___, ___ S.E.2d at ___, 2011 WL 3276612 at *4 (alteration in original) (quoting *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990)). This is a constitutional issue implicating the defendant's right to conviction only by "the unanimous verdict of a jury in open court." N.C. Const. art. 1, § 24; *see also Boyd*, ___ N.C. App. at ___, ___ S.E.2d at ___, 2011 WL 3276612 at *4. "Where an error implicates a defendant's right to a unanimous jury verdict under our Constitution, the State bears the burden of demonstrating beyond a reasonable doubt that the error was harmless." *Boyd*, ___ N.C. App. at ___, ___ S.E.2d at ___, 2011 WL 3276612 at *6.

Here, the trial court instructed the jury it could find Defendant guilty of a sexual offense charge if the jury concluded Defendant engaged in "anal intercourse and/or fellatio" with Tammy. As discussed above, because the State failed to corroborate Defendant's confession to acts of fellatio, there was insufficient evidence to support any charge based on fellatio. Thus, the trial court submitted to the jury a theory of sexual offense that had no basis in the evidence.

The State argues Defendant's confession was corroborated under the *corpus delicti* rule, providing sufficient evidence to support a conviction based on acts of fellatio. As such, the "and/or" jury instruction did not implicate a unanimous verdict and the State cites *State v.*

Lawrence, 360 N.C. 368, 627 S.E.2d 609 (2006), for support. In *Lawrence*, our Supreme Court stated that, with respect to indecent liberties, if "one juror might have found some incidents of misconduct and another juror might have found different incidents of misconduct, the jury as a whole found that improper sexual conduct occurred." *Id.* at 374, 627 S.E.2d at 613. The *Lawrence* Court upheld the trial court's disjunctive instruction on multiple theories of establishing sexual misconduct. Significantly, what distinguishes *Lawrence* from this case is that the *Lawrence* jury *heard evidence supporting each theory* submitted to the jury. *See id.* at 374, 627 S.E.2d at 612. *Lawrence* does not stand for the proposition that the trial court may provide a disjunctive instruction, including multiple theories of establishing an element of a crime, when one theory has a basis in the evidence and the others do not. Consequently, *Lawrence* provides no support for the State's argument.

Additionally, by relying solely on its argument that Defendant's confession to acts of fellatio was sufficiently corroborated to satisfy the *corpus delicti* rule, the State has failed to meet its burden of showing the trial court's error was harmless. "Where an error implicates a defendant's right to a unanimous jury verdict under our Constitution, the State bears the burden of demonstrating beyond a reasonable doubt that the error was harmless." *Boyd*, ___ N.C. App. at ___, ___ S.E.2d at ___, 2011 WL 3276612 at *6 (holding the State failed to meet its burden of showing the erroneous jury instruction was harmless beyond a reasonable doubt where it did not address the issue on appeal). While there was substantive evidence of some acts of anal intercourse, I cannot conclude the jury instructions were harmless beyond a reasonable doubt. I am unable able to ascertain which of Defendant's convictions were untainted by the erroneous instruction on fellatio. As our Supreme Court has stated:

> Because the trial court incorrectly instructed the jury regarding one of two possible theories upon which defendant could be convicted and it is unclear upon which theory or theories the jury relied in arriving at its verdict, we must assume the jury based its verdict on the theory for which it received an improper instruction.

State v. Petersilie, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993); *see also State v. Lynch*, 327 N.C. at 219, 393 S.E.2d at 816. Consequently, Defendant should be entitled to a new trial on all the convictions for first-degree statutory sexual offense, under section 15-144.2(b), and the convictions for sexual offense with a child, under section 14-27.4A.

STATE OF NORTH CAROLINA v. RAY LEE ROSS

No. COA10-1503

(Filed 18 October 2011)

1. Criminal Law—joinder of offenses—reconsideration

The trial court properly denied defendant's request for reconsideration of an order joining offenses that was entered by another superior court judge where the denial was properly supported. The record contained no indication that defendant argued any change of circumstances warranting reconsideration and defendant pointed to none on appeal.

2. Constitutional Law—Confrontation Clause—unavailable witness—testimony from probable cause hearing

Defendant's Confrontation Clause rights were not violated by the admission at trial of the testimony of one of his victims from the probable cause hearing. Defendant conceded that the witness was unavailable at trial but contended that he had not had a meaningful opportunity to cross-examine the witness. However, defendant cited no authority suggesting that he lacked a meaningful opportunity to cross-examine because only one of his two trial attorneys was at the probable cause hearing or that discovery must be complete for a cross-examination to be adequate.

3. Appeal and Error—preservation of issues—testimony admitted as agreed by defendant

Defendant did not preserve for appeal the admission of a law enforcement officer's testimony about a missing witness's statement. Defendant asserted at trial that he had no objection if the statement was admitted only for corroborative purposes and the court limited the use of the testimony accordingly.

4. Evidence—unavailable witness—statements to officers—corroborative evidence

The trial court did not abuse its discretion in a prosecution for attempted murder, assault, and other offenses by admitting as corroborative evidence statements made by an unavailable witness to two law enforcement officers. The statements to the officers added some details to the witness's testimony from the probable cause hearing but were substantially similar and not contradictory to the probable cause testimony, and information regarding the victims' criminal activity did not prejudice defendant.

5. Homicide—attempted first-degree murder—premeditation and deliberation—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a charge of attempted first-degree murder where the evidence was sufficient to show premeditation and deliberation. Defendant's argument required the appellate court to accept his version of the facts, but the appellate court was required to view the evidence in the light most favorable to the State.

6. Assault—serious injury—evidence sufficient

The trial court properly denied defendant's motion to dismiss charges of assault with a deadly weapon with intent to kill inflicting serious injury where defendant argued that the victims did not sustain serious injuries. Although the first victim did not suffer pain and only received three stitches, a jury could reasonably find that a bullet lodged in the brain represented a serious injury. Defendant argued that the second victim's injury was not potentially fatal, but did not cite authority suggesting that only potentially fatal injuries can be found to be serious.

7. Sentencing—aggravating factors—not included in indictment

The trial court erred under N.C.G.S. § 15A-1340.16(a4) by submitting aggravating factors to the jury that were not included in the indictment.

Appeal by defendant from judgments entered 9 April 2010 by Judge Paul C. Ridgeway in Rowan County Superior Court. Heard in the Court of Appeals 25 May 2011.

Attorney General Roy Cooper, by Assistant Attorney General Charles E. Reece, for the State.

Haral E. Carlin for defendant-appellant.

GEER, Judge.

Defendant Ray Lee Ross appeals from his convictions of two counts of attempted first degree murder, two counts of assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), one count of attempted robbery with a dangerous weapon, and one count of assault on a female. Defendant primarily contends on appeal that prior statements given by one of the victims were admitted in violation of his right to confrontation. Because this witness was unavailable at trial, and the evidence consisted of testimony from a

probable cause hearing at which defendant's counsel cross-examined the witness, we hold that no violation of the Confrontation Clause occurred. With respect to testimony by law enforcement officers regarding what the witness told them, that evidence was substantially similar to the properly-admitted probable cause testimony and was, therefore, admissible for corroborative purposes only. Accordingly, we find no error as to the guilt-innocence phase of the trial.

Defendant, however, also argues that the trial court lacked authority to submit three non-statutory aggravating factors to the jury because those factors had not been set out in an indictment. We agree. Pursuant to N.C. Gen. Stat. § 15A-1340.16(a4) (2009), such aggravating factors "shall be included in an indictment or other charging instrument . . . ." Because of the violation of N.C. Gen. Stat. § 15A-1340.16(a4), we must remand for resentencing.

Facts

The State's evidence tended to show the following facts. At approximately 5:30 or 6:00 a.m. on 2 February 2007, Pedro Romero Amaro and his wife, Angelica Martinez Besies, were asleep in their mobile home when a knock at their door woke them up. Mr. Amaro got out of bed and went to the front door. When he opened it, he saw defendant carrying something in a black plastic bag. Mr. Amaro knew defendant as a friend of a friend, and defendant had come to Mr. Amaro's residence a day or two earlier and sold Mr. Amaro a Mossberg shotgun.

Mr. Amaro let defendant inside, as he believed defendant was there to sell him another firearm. Mr. Amaro walked towards the kitchen and started to make coffee when he heard a gunshot. Mr. Amaro then felt heat at the back of his head and his vision began to get blurry. The next thing that he heard was his wife screaming in the bedroom and another gunshot.

During the same time frame, Ms. Besies, while she was in the bedroom, heard a noise from the kitchen and then heard her husband scream. Defendant came into the bedroom and pointed his gun at Ms. Besies' head as she lay in bed. The gun was covered with a black plastic bag and had tape around it. Ms. Besies reached for the gun and moved it away from her head just as defendant pulled the trigger. She was shot in the hand and screamed. Defendant then punched her in the face, breaking her nose, and grabbed her by the arm, trying to pull her out of bed.

Mr. Amaro came into the bedroom and saw his wife and defendant struggling. Mr. Amaro began to strike defendant in the face with his fists, and Ms. Besies was able to wrest the rifle from defendant. Mr. Amaro subdued defendant by holding him down on the bathroom floor while Ms. Besies called 911 and took defendant's firearm outside where she waited for the law enforcement officers.

Four officers with the Kannapolis Police Department arrived at the mobile home at approximately 6:15 a.m. The officers found Ms. Besies standing on the porch of the mobile home with her hand bleeding, and she told them that she had been shot. The officers also saw that a long gun inside a garbage bag was lying against the tongue of the trailer. Ms. Besies told the officers that her husband was holding a man down inside the home.

Three of the officers went inside and found Mr. Amaro holding defendant down on the bathroom floor. The floor was covered in blood. The officers saw that defendant had injuries to his head and face, and once he and Mr. Amaro were separated, defendant was secured by the officers and led into the living room. The officers saw that Mr. Amaro had blood on the back and side of his head, and he told them that defendant had shot him in the back of the head.

While the officers waited with defendant for medical personnel to arrive, defendant told the officers that he had come to the residence to collect money that Mr. Amaro owed him from a drug deal and that he had brought the gun in order to frighten Mr. Amaro into giving him the money. He said that Mr. Amaro attacked him, and in the struggle, defendant's gun accidentally discharged, shooting Mr. Amaro. Then, defendant went into the bedroom to get the money from Ms. Besies, but, according to defendant, she grabbed the gun, and it again accidentally discharged. At that point, Mr. Amaro came into the bedroom and began to fight with defendant.

Mr. Amaro and Ms. Besies were transported to the emergency room to have their injuries treated. Diagnostic imaging revealed that Mr. Amaro did in fact have a bullet lodged in his brain, and Mr. Amaro was kept at the hospital for several days for observation. Ms. Besies had been shot through the thumb, and there was gun powder stippling present on her skin that indicated she had been shot at a close range. Lead fragments from the bullet were still present in Ms. Besies' flesh when the doctor treated her injuries. Surgery was required to repair a broken bone in Ms. Besies' thumb.

In the days following the shooting, Mr. Amaro and Ms. Besies were both interviewed repeatedly by law enforcement officers. Upon being released from the hospital, both Mr. Amaro and Ms. Besies were arrested on numerous drug-related charges.

Law enforcement officers collected numerous items of evidence from Mr. Amaro and Ms. Besies' residence, including defendant's rifle, which was a Ruger .22 caliber semi-automatic rifle with a homemade silencer attached. The officers also seized a duffle bag carried by defendant to the house that contained an electric drill, a utility knife, a pillow case, a curtain tieback, and a sock tied into a knot. The officers also located the Mossberg 12 gauge shotgun defendant had sold to Mr. Amaro. Marijuana, electric scales, and various amounts of both real and counterfeit United States currency were also found in the residence. Further investigation uncovered that Ms. Besies had moved a cache of drugs from the residence to another location just prior to the arrival of the police. In his testimony at trial, Mr. Amaro admitted that he sold drugs from his home.

Officers interviewed defendant on the afternoon of the shooting. Defendant again claimed that Mr. Amaro owed him money from a drug deal and that he had gone to the house that morning to collect his money. Defendant stated that he took his .22 caliber Ruger rifle in order to frighten Mr. Amaro into giving him money, and he attached a homemade silencer (constructed from a plastic drink bottle, cotton balls, and duct tape) because he "did not want to make too much noise because if [he] shot the gun in the trailer park the neighbors would hear it and call the police." Defendant claimed that he had taken the duffle bag with him in order to trick Mr. Amaro into believing that he had another gun to sell.

When he arrived at the trailer park, defendant parked his car in front of a different trailer. Once Mr. Amaro let defendant inside his home, defendant claimed that they argued over the money and that the rifle discharged during the ensuing struggle. Defendant believed that Mr. Amaro was unconscious, so he went into the bedroom and demanded money from Ms. Besies while pointing the gun at her legs. Defendant claimed that Ms. Besies grabbed the gun, and that the gun accidentally discharged again during the struggle. Mr. Amaro then came down the hallway, and he and defendant began to fight. Defendant claimed Mr. Amaro attempted to drown him in the bathtub while telling his wife to shoot defendant. Ultimately, Mr. Amaro had subdued defendant by the time law enforcement officers arrived.

That same afternoon, law enforcement officers went to defendant's home, and defendant's wife gave them permission to search the house. In the garage, the officers found a plastic drink bottle that had been cut in half lying near a roll of duct tape. These items were consistent with the homemade silencer on the rifle defendant used to shoot Mr. Amaro and Ms. Besies.

While in custody, Ms. Besies testified at a probable cause hearing in this case on 21 February 2007. In April or May 2007, however, she posted bond and was released from jail. Ms. Besies was last seen by her lawyer in October 2007. Her attorney had no knowledge of her location at the time of trial. Mr. Amaro was still in custody at the time of the trial in this case and testified that in May 2008 he had received a letter from Ms. Besies informing him that she was in Cancun, Mexico.

The Mossberg shotgun that defendant sold to Mr. Amaro on or about 1 February 2007 was evidence in another shooting that occurred just a few days earlier. On Monday, 29 January 2007, Heather Helms discovered the body of her father, Henry Aldridge, on the floor of the living room of his home. He had been shot twice in the back of the head with a .22 caliber weapon. Evidence suggested that the shooting took place early in the morning. Ms. Helms had last seen her father alive on Saturday, two days earlier.

Among the items missing from Mr. Aldridge's home when his body was discovered was a large amount of cash as well as a Mossberg shotgun that Ms. Helms had purchased for her father in November 2006. Mr. Aldridge's neighbor testified that he had last seen the Mossberg shotgun inside Mr. Aldridge's house either the Tuesday or Wednesday before his murder when he had borrowed the shotgun to scare off an animal. On Saturday, 27 January 2007, Mr. Aldridge telephoned the neighbor in the morning to complain that the neighbor had neglected to clear the shell casing from the shotgun after having fired it.

On 1 February 2007, defendant sold the Mossberg shotgun to Mr. Amaro. When interviewed by law enforcement, defendant admitted that he had known Mr. Aldridge and that he had previously been to his house.

Defendant was indicted for two counts of attempted first degree murder, two counts of AWDWIKISI, and one count of attempted robbery with a dangerous weapon. Defendant was also charged with assault on a female although no charging documents appear in the record. All of these charges were in connection with the shootings of Mr. Amaro and Ms. Besies in their home on 2 February 2007. Defend-

ant was also indicted for first degree murder, larceny of a firearm, and robbery with a dangerous weapon, all in connection with the death and robbery of Henry Aldridge on or about 29 January 2007.

The State's motion for joinder of all of the offenses was granted, and, subsequently, defendant's request for rehearing on the motion for joinder and motion for severance was denied. At the trial, the jury found defendant guilty of all the charges relating to the shooting and attempted robbery of Mr. Amaro and Ms. Besies. The jury acquitted defendant of the charges related to Mr. Aldridge.

The jury also found the existence of three aggravating factors: (1) that defendant utilized a firearm equipped with an unregistered silencing device in the commission of these offenses, and he is not charged with violating federal law; (2) that defendant's conduct on this occasion included his involvement in the illegal sale and purchase of narcotics, and he is not charged with a violation of narcotics laws; and (3) that defendant's conduct was part of a course of conduct in which the defendant engaged and which included the commission of other crimes of violence against another person or persons. The trial court found no mitigating factors and sentenced defendant to two consecutive aggravated-range terms of 220 to 273 months imprisonment. Defendant timely appealed to this Court.

I

[1] We first address defendant's argument that the trial court erred when it denied defendant's motion to sever the offenses regarding Mr. Aldridge from the offenses involving Mr. Amaro and Ms. Besies. The order allowing the State's motion for joinder was entered by Judge James E. Hardin. The hearing on defendant's request to rehear the motion for joinder or, alternatively, to allow a motion for severance was heard by Judge Paul C. Ridgeway. Defendant limits his argument on appeal to the denial of "defendant's motion to sever the first-degree murder charge from the attempted first-degree murder charges that involved different victims that occurred seven days apart . . . ."

As this Court has previously stated, "it is well established in our jurisprudence 'that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.' " *State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003) (quoting *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)). There is an exception, however,

when a party shows a " 'substantial change in circumstances.' " *Id.* at 549, 592 S.E.2d at 194 (quoting *State v. Duvall*, 304 N.C. 557, 562, 284 S.E.2d 495, 499 (1981)).

"A substantial change in circumstances exists if since the entry of the prior order, there has been an intervention of new facts which bear upon the propriety of the previous order." *First Fin. Ins. Co. v. Commercial Coverage, Inc.*, 154 N.C. App. 504, 507, 572 S.E.2d 259, 262 (2002) (internal quotation marks omitted). The moving party has the burden of demonstrating a change in circumstances. *Id.*

Judge Ridgeway made the finding that: "The Order Joining Offenses for Trial entered on July 21, 2009 by the Honorable James E. Hardin, Superior Court Judge, is a valid and binding order previously entered in this matter and there has been no substantial change in circumstances warranting modification of that order." This finding was properly supported. The record contains no indication that defendant argued any change of circumstances warranting reconsideration of joinder, and defendant points to none on appeal. Accordingly, we hold that the trial court properly denied the request for rehearing and motion to sever.

II

Defendant next contends that the trial court violated the Confrontation Clause when it admitted into evidence (1) Ms. Besies' testimony given at defendant's probable cause hearing, and (2) statements given by Ms. Besies to law enforcement officers. We disagree.

A. Probable Cause Testimony

[1] "The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203, 124 S. Ct. 1354, 1374 (2004), and *State v. Lewis*, 361 N.C. 541, 545, 648 S.E.2d 824, 827 (2007)).

Defendant concedes that Ms. Besies was "an unavailable witness at trial." With respect to the prior opportunity to cross-examine, defendant not only had an opportunity to cross-examine Ms. Besies at the probable cause hearing, but his counsel did in fact cross-examine her. Nonetheless, he contends that the admission of this testimony was error under *Crawford*.

No North Carolina appellate court has directly addressed the question whether an opportunity to cross-examine a witness at a probable cause hearing is sufficient to meet the requirements of *Crawford*. However, our Supreme Court explained in *State v. Lewis*, 360 N.C. 1, 16, 619 S.E.2d 830, 840 (2005) (emphasis added), *judgment vacated on other grounds*, 548 U.S. 924, 165 L. Ed. 2d 985, 126 S. Ct. 2983 (2006), that "several types of preliminary hearings may afford an opportunity for witness testimony, *such as the probable cause hearing* provided for in N.C.G.S. § 15A-606 and 15A-611, ... Statements by witnesses at all of these hearings are likely to be testimonial under *Crawford* and, if so, are inadmissible at trial unless the defendant had an opportunity to cross-examine the witness and the witness is unavailable at the time of the trial."

This language suggests that the opportunity to cross-examine a witness at a probable cause hearing will render the probable cause testimony admissible if the witness subsequently becomes unavailable. *See also State v. Estrella*, 277 Conn. 458, 475, 476-77, 893 A.2d 348, 359, 360 (2006) (holding that "the defendant had a more than adequate and full opportunity to cross-examine [witness] both generally and specifically to address whether [witness] was giving truthful testimony," and therefore "the trial court properly admitted into evidence at the trial [witness'] transcribed testimony at the probable cause hearing"); *cf. United States v. Doyle*, 621 F. Supp. 2d 337, 344 (W.D. Va. 2009) (holding prior testimony of unavailable witness at bond hearing was properly admitted and did not violate Confrontation Clause because facts showed defendant had opportunity and similar motive to question witness at hearing and subsequent trial).

Defendant contends, however, that he had no *meaningful* opportunity to cross-examine Ms. Besies at the probable cause hearing because the various charges had not yet been joined, defendant's lead trial counsel had not yet been appointed, and his counsel at that time had not yet had an opportunity to review all the discovery. The probable cause hearing took place with respect to the charges involving Ms. Besies and Mr. Amaro, the sole charges on which the jury found defendant guilty. Thus, with respect to the charges on appeal, defendant's motive to cross-examine Ms. Besies would have been the same as his motive at trial. Defendant does not identify any topics that his counsel did not address at the probable cause hearing that would have been covered in cross-examination at the trial. *See State v. Ramirez*, 156 N.C. App. 249, 258, 576 S.E.2d 714, 721 (2003) ("The testimony was taken at a preliminary stage of this case [at a bond hear-

ing], and defendant had the same motive at that time as he would have had at trial, to expand upon and possibly discredit [witness'] testimony.").

At the probable cause hearing, defendant was represented by counsel who was appointed for the Amaro/Besies charges and who was co-counsel at trial. The Confrontation Clause requires that the *defendant* have a meaningful opportunity to cross-examine the witness—defendant has cited no authority suggesting that he lacked a meaningful opportunity to cross-examine when only one of his two trial attorneys was at the prior hearing.

Further, our courts have never held that discovery must be complete for a cross-examination opportunity to be adequate. Here, defendant was represented by counsel at the probable cause hearing (who was one of his trial counsel), he had the same motive to cross-examine Ms. Besies as at trial, and his counsel did in fact cross-examine Ms. Besies. These circumstances are sufficient to establish an adequate opportunity to cross-examine Ms. Besies. The trial court, therefore, did not err in admitting Ms. Besies' probable cause hearing testimony. *See State v. Clark*, 165 N.C. App. 279, 287, 598 S.E.2d 213, 219 (2004) ("At the earlier trial, defendant was present, represented by counsel, had an opportunity to cross-examine [witness], and, through his counsel, did cross-examine her.").

B. Statements to Law Enforcement Officers

[3] In addition to the probable cause testimony, the trial court allowed three law enforcement officers to read to the jury statements that Ms. Besies had given to them. With respect to the first two officers, when the State sought to admit evidence of the statements, defendant objected, and the trial court admitted the statements solely for purposes of corroboration. As for the third law enforcement officer, defense counsel asserted at trial that if the statement was admitted only for corroborative purposes, he had no objection. Since the trial court limited the third statement's use to corroboration, as requested by defendant, and since defendant does not argue plain error on appeal, defendant has not preserved for appellate review any issue as to the admission of the third statement.

[4] With respect to the first two statements, our Court has previously noted that when "evidence is admitted for a purpose other than the truth of the matter asserted," such as when evidence is admitted solely for purposes of corroboration, then "the protection afforded by the Confrontation Clause against testimonial statements is not at

issue." *State v. Walker*, 170 N.C. App. 632, 635, 613 S.E.2d 330, 333 (2005). Defendant argues that the written statements were nonetheless inadmissible because they "went far beyond the testimony the witness presented in the probable cause hearing."

According to our Supreme Court, North Carolina case law establishes "the rule that prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness' in-court testimony." *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992). *See also State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986) ("The victim's prior oral and written statements to [the detective], although including additional facts not referred to in his testimony, tended to strengthen and add credibility to his trial testimony. They were, therefore, admissible as corroborative evidence.").

Here, while defendant contends that the testimony contained " 'significant additional facts,' " he does not specifically identify which facts precluded the statements from being admitted as corroborative evidence. Our review indicates that the statements to the officers added some details to the description in Ms. Besies' probable-cause testimony of the morning of the shooting and her earlier encounter with defendant when he sold a gun to Mr. Amaro. The information contained in these statements regarding the material events was, however, "substantially similar" and not contradictory to that given by Ms. Besies during the probable cause hearing.

The statements also added information regarding Mr. Amaro's and Ms. Besies' drug dealing, counterfeiting activity, and illegal immigration. We fail to see how the jury's hearing information regarding the criminal activity of Mr. Amaro and Ms. Besies prejudiced defendant. We, therefore, hold that the trial court did not abuse its discretion in admitting the additional statements made by Ms. Besies to law enforcement as corroborative evidence.

III

[5] Defendant next contends that the trial court erred when it denied his motion to dismiss the charges of attempted first-degree murder and AWDWIKISI. In considering a motion to dismiss, the Court must ask " '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.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "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." *Id.* at 378-79, 526 S.E.2d at 455.

"The elements of attempted first-degree murder are: (1) a specific intent to kill another; (2) an overt act calculated to carry out that intent, which goes beyond mere preparation; (3) malice, premeditation, and deliberation accompanying the act; and (4) failure to complete the intended killing." *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004). Defendant contends here that there was no evidence he possessed a specific intent to kill Mr. Amaro or Ms. Besies and that there was no evidence of premeditation and deliberation.

As our Supreme Court has explained, "[s]pecific intent to kill is an essential element of first degree murder, but it is also a necessary constituent of the elements of premeditation and deliberation. Thus, proof of premeditation and deliberation is also proof of intent to kill." *State v. Jones*, 303 N.C. 500, 505, 279 S.E.2d 835, 838-39 (1981) (internal citation omitted). Generally, premeditation and deliberation must be proven by circumstantial evidence because they "are not susceptible of proof by direct evidence." *State v. Love*, 296 N.C. 194, 203, 250 S.E.2d 220, 226 (1978). "A defendant's conduct before . . . the killing is a circumstance to be considered in determining whether he acted with premeditation and deliberation." *State v. Leary*, 344 N.C. 109, 121, 472 S.E.2d 753, 760 (1996).

The State's evidence was sufficient to permit the jury to find that defendant acted with premeditation and deliberation when he shot Mr. Amaro and Ms. Besies. Viewed in the light most favorable to the State, the evidence presented at trial showed that defendant went to Mr. Amaro and Ms. Besies' house because defendant had given Mr. Amaro $6,000.00 for cocaine and had not received either cocaine or his money back. Defendant started preparing the day before the shootings by coming up with a plan to gain entry to the house with his gun and by constructing a silencer so that neighbors of Mr. Amaro and Ms. Besies would not hear the gun when it went off. The next day, when he carried out his plan, he shot Mr. Amaro in the back of his head and then walked into the bedroom and pointed a gun at Ms. Besies' face. When the gun went off, it did not strike Ms. Besies in the face only because she pushed the gun aside.

This evidence is sufficient for the jury to find premeditation and deliberation. It showed defendant's planning of the assault, including his prior intent to shoot, and his deliberate aiming of the gun at the

victims' heads, without provocation, suggesting an intent to kill. *See, e.g.*, *State v. Taylor*, 362 N.C. 514, 531, 669 S.E.2d 239, 256-57 (2008) (holding that defendant's entering store he intended to rob with semi-automatic weapon was evidence that he was prepared to fire weapon in event of confrontation and, therefore, was evidence of premeditation and deliberation), *cert denied*, ___ U.S. ___, 175 L. Ed. 2d 84, 130 S. Ct. 129 (2009); *State v. Lawson*, 194 N.C. App. 267, 279, 669 S.E.2d 768, 776 (2008) (holding that evidence defendant hit victim in back of head with post driver that she had brought upstairs earlier was sufficient evidence of premeditation and deliberation), *disc. review denied*, 363 N.C. 378, 679 S.E.2d 837 (2009).

Defendant's argument otherwise requires that we accept his version of the facts—that the shooting occurred during a struggle. We are, however, required to view the evidence in the light most favorable to the State and, under this standard of review, we hold the trial court properly denied defendant's motion to dismiss the attempted first degree murder charges.

[6] Turning to the charges of AWDWIKISI, the State was required to prove "(1) an assault, (2) with a deadly weapon, (3) an intent to kill, and (4) infliction of a serious injury not resulting in death." *State v. Grigsby*, 351 N.C. 454, 456, 526 S.E.2d 460, 462 (2000). Defendant contends that he did not have an intent to kill and that he did not inflict a serious injury.

We have already concluded that the State presented sufficient evidence of an intent to kill. With respect to the element of "serious injury," our Supreme Court has explained:

> Whether a serious injury has been inflicted depends upon the facts of each case and is generally for the jury to decide under appropriate instructions. A jury may consider such pertinent factors as hospitalization, pain, loss of blood, and time lost at work in determining whether an injury is serious. Evidence that the victim was hospitalized, however, is not necessary for proof of serious injury.

State v. Hedgepeth, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991) (internal citations omitted).

Here, defendant shot Mr. Amaro in the head, causing his vision to blur, and he then was "knocked out." He was kept in the hospital for several days for observation because he had a bullet lodged in his brain. Ms. Besies was shot through her thumb. She had lead fragments in her hand and surgery was required to repair a broken bone in her

thumb. Ms. Besies stated that she had to undergo rehabilitation for her thumb and that she did not expect to ever have full use of her thumb.

While defendant argues that Mr. Amaro did not sustain a serious injury because a doctor testified that Mr. Amaro did not suffer any pain and only received three stitches, we believe that a jury could reasonably find that having a bullet lodged in one's brain represented a serious injury. As for Ms. Besies, defendant argues only that her wound was not "potentially fatal." Defendant, however, cites no authority suggesting that only potentially fatal injuries can be found serious, and we know of none. We, therefore, hold that the trial court properly denied the motion to dismiss the charges of AWDWIKISI.

IV

[7] Finally, defendant contends the trial court erred by submitting aggravating factors to the jury when those factors had not been included in an indictment. The trial court submitted three aggravating factors to the jury pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(20), which allows a jury to consider "[a]ny other aggravating factor reasonably related to the purposes of sentencing." These three aggravating factors included: (1) "the [d]efendant utilized a firearm equipped with an unregistered silencing device in the commission of these offenses, and he is not charged with a violation of federal law[;]" (2) "[t]he defendant's conduct on this occasion included his involvement in the illegal sale and purchase of narcotics, and he is not charged with a violation of narcotic laws[;]" and (3) "the [d]efendant's conduct was part of a course of conduct in which the defendant engaged and which included the commission of other crimes of violence against another person or persons."

Pursuant to N.C. Gen. Stat. § 15A-1340.16(a4), "[a]ny aggravating factor alleged under subdivision (d)(20) of this section shall be included in an indictment or other charging instrument, as specified in G.S. 15A-924." The State does not dispute that the three aggravating factors submitted to the jury under N.C. Gen. Stat. § 15A-1340.16 (d)(20) were not included in an indictment or "other charging instrument." N.C. Gen. Stat. § 15A-1340.16(a4). Instead, the State simply served defendant with notice of its intent to prove the existence of those factors. Under N.C. Gen. Stat. § 15A-1340.16(a4), the trial court could not, therefore, submit the three aggravating factors to the jury.

Although defendant specifically relied upon N.C. Gen. Stat. § 15A-1340.16(a4), the State, in arguing that there was no error, does not address the statute at all. Rather, the State asserts: "[B]oth the

North Carolina Supreme Court and this Court have explicitly held that there is no requirement that aggravating factors be submitted to a grand jury in an indictment." The cases cited by the State, however, address only whether a failure to include aggravating factors in an indictment is unconstitutional. They do not address the General Assembly's amendment of our sentencing laws in 2005 N.C. Sess. Laws 145, which included the addition of N.C. Gen. Stat. § 15A-1340.16(a4). *See State v. Hunt*, 357 N.C. 257, 274, 582 S.E.2d 593, 604 (2003) ("*Ring [v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002),] does not require that aggravating circumstances be alleged in state-court indictments."); *State v. Caudle*, 182 N.C. App. 171, 173, 641 S.E.2d 351, 352 (2007) (" '[T]he Fifth Amendment would not require aggravators, even if they were fundamental equivalents of elements of an offense, to be pled in a state-court indictment.' " (quoting *Hunt*, 357 N.C. at 272, 582 S.E.2d at 603)). These cases are, therefore, beside the point.

Because it is undisputed that the aggravating factors were not included in an indictment and the State has suggested no other basis for upholding the sentence below, we hold that the trial court erred under N.C. Gen. Stat. § 15A-1340.16(a4) in submitting the aggravating factors to the jury. We must, therefore, reverse and remand for resentencing.

Affirmed in part; reversed and remanded in part.

Judges BRYANT and BEASLEY concur.

IN THE MATTER OF: C.G.R. AND M.A.C.-R.

No. COA11-263

(Filed 18 October 2011)

1. Termination of Parental Rights—grounds—neglect—failure to obtain stable and appropriate housing

The trial court did not err by concluding a ground existed to terminate respondent mother's parental rights to her minor daughter based on neglect under N.C.G.S. § 7B-1111(a)(1). The findings sufficiently showed that it was unknown how long it would take respondent to obtain stable and appropriate housing.

2. Termination of Parental Rights—neglect—ongoing inability to maintain housing and employment—substantial risk of continued neglect

The trial court did not err in a termination of parental rights case by concluding that respondent mother neglected her minor daughter. In light of respondent's prior neglect of her minor son and her ongoing inability to maintain housing and employment, the minor daughter was at a substantial risk of continued neglect.

3. Termination of Parental Rights—physical, mental, or emotional impairment of juvenile—substantial risk of such impairment—failure to provide proper care, supervision, or discipline

The trial court did not err in a termination of parental rights case by finding physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of respondent mother's failure to provide proper care, supervision, or discipline.

4. Termination of Parental Rights—neglect—risk of future neglect

The trial court did not err by concluding a ground existed to terminate respondent mother's parental rights to her minor son based on neglect. The trial court's findings regarding the risk of future neglect to the minor daughter given respondent's current circumstances applied equally to her minor son.

5. Termination of Parental Rights—findings of fact—likelihood of repetition of neglect

The trial court did not err in a termination of parental rights case by its findings of fact 25 through 29 regarding a substantial risk of physical, mental, or emotional impairment of the minor son as a consequence of respondent mother's failure to provide proper care, supervision, or discipline.

6. Termination of Parental Rights—likelihood of repetition of neglect—findings of fact—unnecessary for determination

The trial court did not err in a termination of parental rights case by its findings of fact 35 regarding respondent mother's statement against her interest, finding 36 regarding her significant contact with co-defendants in a criminal case following her release from jail, finding 38 regarding her difficulty meeting her monthly living expenses, and finding 40 that she had no support

system. These findings were unnecessary to support the trial court's finding of likelihood of repetition of neglect.

Appeal by respondent from orders entered 14 December 2010 by Judge Beverly Scarlett in Chatham County District Court. Heard in the Court of Appeals 26 September 2011.

Northen Blue, LLP, by Carol J. Holcomb and Samantha H. Cabe, for petitioner-appellee Chatham County Department of Social Services.

Mercedes O. Chut, for respondent-appellant mother.

Pamela Newell, for the guardian ad litem.

MARTIN, Chief Judge.

M.R. (respondent) appeals from orders terminating her parental rights to her daughter, M.A.C.-R. (Mary), and her son, C.G.R. (Charlie). For the following reasons, we affirm the trial court's orders.

The Chatham County Department of Social Services (DSS) became involved with respondent in June 2007 when the Chatham County Sheriff's Department executed a search warrant to search the home in which respondent, five-year-old Charlie, respondent's boyfriend, E.S., and E.S.'s mother and brother lived. The officers discovered fifteen kilograms of cocaine, approximately $420,000 in cash, three firearms, ammunition, and numerous other items related to the packaging and sale of cocaine. Respondent was arrested and DSS took custody of Charlie. At the time of her arrest, respondent was about seven months pregnant with Mary.

DSS filed a petition dated 29 June 2007 alleging Charlie was a neglected juvenile and a dependent juvenile. In an order dated 9 August 2007, the trial court adjudicated Charlie as neglected. On 31 August 2007, while she was in jail, respondent gave birth to Mary. DSS took custody of Mary and filed a petition alleging Mary was a depend- ent juvenile. In an order dated 13 September 2007, the trial court adjudicated Mary as dependent. Following a custody review hearing in November, in an order dated 28 February 2008, the trial court relieved DSS of reunification efforts and efforts to prevent or eliminate the need for out-of-home placement.

Respondent was released from jail on 21 April 2008. In a motion dated 22 April 2008, DSS moved to terminate respondent's rights to her children. Following hearings in November and December 2008, by

order entered 14 January 2009, the trial court terminated respondent's parental rights to her children. The trial court found grounds existed to terminate respondent's parental rights to Mary because Mary was a dependent juvenile under N.C.G.S. § 7B-1111(a)(6) and to Charlie because Charlie was a dependent juvenile under N.C.G.S. § 7B-1111(a)(6) and a neglected juvenile under N.C.G.S. § 7B-1111(a)(1). Respondent appealed and, in an opinion filed 1 September 2009, this Court reversed the trial court's order as to both children because DSS had not alleged dependency as a ground to terminate respondent's parental rights to either child, and the trial court had not made the necessary findings to terminate respondent's rights to Charlie on the ground of neglect. *See In re C.R.*, 199 N.C. App. 615, 687 S.E.2d 318 (2009) (unpublished).

On remand, alleging several grounds under N.C.G.S. § 7B-1111(a), DSS filed new motions dated 18 September 2009 to terminate respondent's parental rights to both children. From April to October 2010, the trial court held several hearings on the new motion to terminate respondent's parental rights to Mary. On 14 December 2010, the trial court entered new orders terminating respondent's parental rights to both Mary and Charlie. As to Mary, its grounds were that respondent: (1) neglected Mary under N.C.G.S. § 7B-1111(a)(1); (2) willfully left Mary in foster care for more than twelve months without making reasonable progress in correcting the conditions which led to the removal of Mary from respondent's care under N.C.G.S. § 7B-1111(a)(2); and (3) is incapable of providing for the proper care and supervision of Mary such that Mary is a dependent juvenile under N.C.G.S. § 7B-1111(a)(6). As to Charlie, the trial court amended its previous order terminating respondent's parental rights by making additional findings without taking new evidence, and again concluding that respondent had neglected Charlie under N.C.G.S. § 7B-1111(a)(1).

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[1] On appeal, respondent argues the trial court erred in concluding a ground existed to terminate her parental rights to Mary based on neglect under N.C.G.S. § 7B-1111(a)(1). We disagree.

In reviewing a trial court's order terminating parental rights, this Court must determine whether 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 S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 58-59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009). "The trial court's conclusions of

law are fully reviewable *de novo* by the appellate court." *Id.* at 146, 669 S.E.2d at 59 (internal quotation marks omitted).

Parental rights may be terminated where the parent has neglected the juvenile such that the court finds the juvenile to be a neglected juvenile within the meaning of N.C.G.S. § 7B-101. N.C. Gen. Stat. § 7B-1111(a)(1) (2009). A "neglected juvenile" is defined as

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, *it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to . . . neglect by an adult who regularly lives in the home.*

N.C. Gen. Stat. § 7B-101(15) (2009) (emphasis added).

The trial court's order finding Mary neglected includes the following relevant findings:

> 10. [Mary] was impaired due to Respondent mother's neglect and is at a substantial risk of impairment and continued neglect as a result of Respondent Mother's failure to provide and maintain stable housing and maintain employment to support the minor child as of the time the petition was filed.
>
> 11. [Charlie], another child born to Respondent mother, . . . has been adjudicated a neglected child pursuant to [N.C.G.S. §] 7B-101(15) and was found to be neglected by Respondent mother when he was residing in her home.
>
> 12. [Charlie] was removed by [DSS] from Respondent mother and the father of [Mary] on or about June 29, 2007 after a drug raid occurred at the home where they lived. At the time of the drug raid Respondent mother was pregnant with [Mary] who was born during Respondent mother's incarceration.
>
> . . . .
>
> 17. During the drug raid, the following was found:
>
> a. fifteen (15) kilograms of cocaine which had been compressed into bricks,

b. a bench press which is commonly used to compress cocaine into bricks,

c. cash counters, food wrappers and numerous items commonly used for the sale of drugs,

d. $428,000.00 in U.S. currency,

The majority of the money was found in the master bedroom. Money was also found underneath the cushions of the sofa. Some of the money had been compressed into bricks.

e. Two loaded AR-15 style assault rifles and one loaded .38 caliber revolver. The revolver was located in the master bedroom on top of a piece of furniture.

f. 13 kitchen sized trash bags were located in the laundry room of the home. Each trash bag was filled with empty cocaine kilogram wrappers having a lot of residue left in the wrappers.

18. The middle bedroom of the home was used exclusively for the drug operation and there was no evidence that anyone slept in that room. The house had a strong odor of cocaine inside. After the drug raid, all adult occupants of the . . . home were incarcerated and [Charlie] was placed in the non-secure custody of [DSS].

19. During the drug raid, it was discovered that [Charlie] was sleeping in a closet. . . . Respondent mother allowed [Charlie] to sleep in the closet although there was another bedroom in the home. . . .

20. [Mary] was born on August 31, 2007. [Respondent] saw [her] once at birth and once more while incarcerated . . . .

. . . .

23. Upon her release from . . . [j]ail, Respondent mother resumed residency with [E.S.'s] mother . . . and [E.S.'s] brother . . . in Siler City, North Carolina—both of whom were co-defendants in the drug charges.

. . . .

25. [After living with them for a brief period of time,] Respondent mother . . . move[d] to Pittsboro, North Carolina and moved in with a friend of [E.S.'s mother]. . . . Not long after moving

in with [her], [E.S.'s mother's friend] was arrested on a drug charge and was ultimately deported. For a period of time, Respondent mother lived alone in the home that she [had] shared with [E.S.'s mother's friend].

26. Since her release from jail in April 2008, [respondent] has failed to maintain employment and housing.

27. Since her release from jail in April 2008, [respondent] has had the following different residences:

a. a residence in Sanford with [E.S.'s] brother and mother for about one month[.]

b. a residence in Staley with a friend for about 9-10 months[.]

c. a residence on [street name and city] for about 6 months.

d. a residence on [street name and city] for about 3 months.

e. a residence on [street name and city].

f. [W]hile renting a house on [street name] in Siler City, Respondent mother stated that she had been living in the home of a friend down the street.

g. an unidentified residence in Wisconsin while working there on and off.

h. currently living with a friend in North Carolina.

28. Since her release from jail, Respondent mother has had the following five (5) different jobs:

a. [Name of restaurant] in Siler City for three months;

b. [Name of restaurant] in Ash[e]boro and at [name of restaurant] for about 2 months;

c. [Name of restaurant] in Pittsboro for about 6 months;

d. [Name of industry]

. . . .

31. As of the last date of this hearing, September 24, 2010, [respondent] has been living with a friend in North Carolina and relatives in Wisconsin.

32. Upon losing her most recent job and home in Chatham County, Respondent mother returned to Wisconsin where she reports that she has work on a dairy farm.

33. [Respondent] . . . reports that she is living with relatives there. She now needs the assistance of others to meet her basic housing needs.

. . . .

36. It is unknown how long it will take for Respondent mother to obtain stable and appropriate housing if she returns to Wisconsin.

. . . .

38. Respondent mother likely had a violent relationship with [E.S.] She admitted that he had been physically abusive to her on two (2) occasions. These events occurred while [Charlie], [Mary's] brother, was in the home.

. . . .

40. Respondent mother has continued to make poor choices after her children were removed from her care. Upon being released from jail, she moved back in with the family who operated the cocaine operation that resulted in her arrest and guilty plea and the removal of her son; she then moved in with another friend of the same family who was arrested on drug charges; she has not maintained stable and appropriate housing for any significant period of time.

41. Respondent mother is dependent, and remains dependent, on others to meet her own basic needs.

. . . .

43. Respondent mother has demonstrated a lack of insight into the needs of [Mary] and her brother and into the difficulties [Mary's] brother [Charlie] has experienced as a result of her poor choices. Respondent mother has not shown insight into the needs of [Mary] or what [Mary] may experience if she is removed from the only home she has known and removed from her biological brother to be united with her (Respondent mother). Respondent mother has further failed to demonstrate insight into the ways she has impaired [Mary] by the choices she made that resulted in [Mary] being born while Respondent mother was incarcerated.

. . . .

> 47. The [industry] employment had been obtained by presenting false identification documents and false information on the application. . . .

Based on these findings, the trial court concluded

> 3. Criteria exist[] to terminate Respondent mother's parental rights [to Mary] . . . .
>
> 4. Grounds exist to terminate Respondent mother's parental rights under N.C.G.S. 7B-1111[a](1) in that Respondent mother has neglected the juvenile, and this court finds that the juvenile is a neglected juvenile within the meaning of G.S. 7B-101 in that she does not receive the proper care, supervision, or discipline from the juvenile's parent.

Respondent challenges Findings 26, 33, 36, 40, and 41.[1] We hold Findings 26 and 40 are supported by clear, cogent, and convincing evidence. Since her release from jail in April 2008, respondent has had five jobs and eight residences. Immediately following her release from jail, respondent temporarily lived with E.S.'s mother and brother, two of her co-defendants in the criminal charges stemming from the drug raid, and then, after living with a friend for another brief period, moved in with a friend of E.S.'s mother, who was arrested on drug charges and deported while respondent was living with her. While renting a house in Siler City, respondent stated that she had been living in the home of a friend down the street. Respondent currently lives with a friend while in North Carolina and relatives while in Wisconsin. We note respondent does not actually dispute that her housing and employment have been unstable; instead, she emphasizes she has had steady employment and contends her housing, with the possible exception of the brief period following her release from jail when she resided with E.S.'s mother and brother, has always been appropriate.

Finding 33, that respondent "now needs the assistance of others to meet her basic housing needs," and Finding 41, that respondent "is dependent, and remains dependent, on others to meet her own basic

1. Although respondent lists several findings she challenges from the trial court's order regarding Mary in subheadings throughout her brief, we address only those findings supporting the trial court's conclusion of neglect that respondent has challenged in argument in her brief. The remaining findings supporting the trial court's conclusion of neglect respondent has failed to address in argument, including Findings 19, 23, 25, and 43, are deemed supported by sufficient evidence and are binding on appeal. *See In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009).

needs," are also supported by clear, cogent, and convincing evidence. Since the termination of her employment with the industry, respondent has lived with relatives in Wisconsin and a friend in North Carolina.

Finding 36, that "[i]t is unknown how long it will take for Respondent mother to obtain stable and appropriate housing if she returns to Wisconsin," is also supported by clear, cogent, and convincing evidence. Respondent contends she "has a permanent offer to share a house with her cousin" in Wisconsin and that she had "made arrangements with her employer to rent a house on his farm [in Wisconsin] if she regains custody of [Mary and Charlie]." However, she testified that her cousins were planning to move. She testified that if there was no room for her in their new home, she would have to "rent her own place." She testified that, if there is not enough work for her at the ranch in Wisconsin, she would move to a different ranch, and that "many of [the ranchers] offer a house for the workers to live in." This testimony supports the trial court's finding that it is unknown how long it will take respondent to obtain stable and appropriate housing if she returns to Wisconsin.

[2] Respondent next argues the trial court erred in concluding that she neglected Mary. She argues that the record contains no evidence she could not care for Mary and Charlie at the time of the termination proceedings, that the trial court failed to consider her changed circumstances, and that her lack of stable housing and employment were not the basis for Mary being removed from her custody and were therefore improperly considered in the trial court's order terminating her rights to Mary. She also contends the prior adjudication of neglect of Charlie cannot support a finding of neglect at the time of the termination proceedings in the trial court's order terminating her rights to Mary and that the trial court therefore erred in terminating her parental rights to Mary. These contentions are without merit.

The determinative factors in terminating parental rights are "the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). However, when a child has been removed from the parents' custody before the termination proceeding, "the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect" at the time of the termination proceeding. *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003). In this instance, "evidence of neglect by a parent prior to losing custody of a child—including an adjudica-

tion of such neglect—is admissible in subsequent proceedings to terminate parental rights." *In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232. "The 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." *Id.* "In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to . . . neglect by an adult who regularly lives in the home." N.C. Gen. Stat. § 7B-101(15). Section 7B-101(15) does not require that the juvenile actually "live" in the home; in cases where a child has never lived in the home, in determining whether to adjudicate the child as neglected, the trial court may consider whether there is a substantial risk of future abuse or neglect of the child based on the historical facts of the case. *See In re A.B.*, 179 N.C. App. 605, 610-13, 635 S.E.2d 11, 15-17 (2006). The trial court has " 'discretion in determining the weight to be given . . . evidence [of prior neglect of another child in the home].' " *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999) (quoting *In re Nicholson*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994)).

In its order terminating respondent's parental rights to Mary, the trial court found that Charlie, "another child born to Respondent mother," "has been adjudicated a neglected child pursuant to 7B-101(15) and was found to be neglected by Respondent mother when he was residing in her home." The trial court also made several findings about the drug raid and the living conditions to which Charlie had been subjected. Contrary to respondent's suggestion, the trial court had discretion to consider evidence of respondent's neglect of Charlie. *See* N.C. Gen. Stat. § 7B-101(15). Furthermore, the trial court's finding that Mary was a neglected juvenile was not based only on respondent's prior neglect of Charlie. The trial court made several findings concerning respondent's failure to maintain stable employment and housing and her continued dependence on others. In light of respondent's prior neglect of Charlie and her ongoing inability to maintain housing and employment as found by the trial court, the trial court's finding that Mary "is at a substantial risk of . . . continued neglect as a result of Respondent Mother's failure to provide and maintain stable housing and maintain employment" is supported by the evidence and findings. *See In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232.

[3] Respondent also contends the evidence fails to support a finding of a "physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to

provide proper care, supervision, or discipline." *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (internal quotation marks omitted). This contention is without merit. The trial court found Mary "is at a substantial risk of impairment . . . as a result of Respondent Mother's failure to provide and maintain stable housing and maintain employment to support the minor child." We hold the unchallenged findings that Mary was removed from respondent's care immediately following her birth and that respondent "has not shown insight into the needs of [Mary] or what [Mary] may experience if she is removed from the only home she has known and removed from her biological brother to be united with [respondent]" support this finding. Because the trial court's conclusion that a ground exists to terminate respondent's parental rights is supported by its finding that Mary is a neglected juvenile, it is unnecessary to address the remaining grounds in the trial court's order terminating respondent's parental rights to Mary. *See In re Greene*, 152 N.C. App. 410, 416, 568 S.E.2d 634, 638 (2002) ("[A] valid finding on one statutorily enumerated ground is sufficient to support an order terminating parental rights." (internal quotation marks omitted)).

[4] Respondent also contends the trial court erred in concluding a ground existed to terminate her parental rights to Charlie based on neglect. We disagree.

The following findings in the trial court's order support its finding of neglect as to Charlie:

> 13. A Juvenile Petition was filed on July 2, 2007 and [Charlie] was adjudicated as a neglected Juvenile on August 9, 2007.
>
> 14. [Charlie] came into the care and custody of DSS when his mother and the people with whom she lived were arrested and incarcerated subsequent to a drug raid in the home. [Charlie] was in the home at the time of the drug raid.
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> . . . .
>
> 16. On June 28, 2007, the home . . . was raided. The officers who raided the home found the following: fifteen (15) kilos of cocaine with a street value of $22,000 per kilo, assault weapons, ammunition, ten cell phones, one cash counter, a bench press, digital scales, a food saver wrapping machine, wrapping material, notebooks and miscellaneous documents and approximately four-hundred and twenty thousand dollars ($420,000) in cash.
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> . . . .

23. Respondent mother placed [Charlie] in an injurious environment; she did not properly protect him nor did she properly supervise him. [Charlie] was a member of the household from which a major drug trade operated.

24. Respondent mother failed to provide for [Charlie's] needs by allowing him to sleep on a mattress in the closet of the master bedroom when there was another bedroom in the house that could have been used for the child's bedroom.

25. [Charlie] has been diagnosed with PTSD (Post Traumatic Stress Disorder). [Charlie] visited his mother while she was incarcerated. He experienced significant trauma as a result of this visit.

26. [Charlie] has suffered from nightmares; he is fearful of being taken away from his foster home . . . .

27. When [Charlie] first entered foster care, on a scale from one (1) to ten (10), his level of trauma was nine (9). Currently, his level of trauma is six (6). It will be a year or more before his trauma level is reduced to a two (2) or one (1).

28. The level of [Charlie's] trauma is so severe, that he will need a high level of care and attention, as well as a stable environment for years to come.

29. [Charlie] is impaired and has suffered significant trauma and is at a substantial risk of impairment as a result of respondent[']s[] neglect as of the time the petition was filed.

30. . . . [T]his court finds that it is likely that neglect of the juvenile would repeat if the juvenile were returned to the custody of his mother. In support of this ultimate finding, the court finds the following evidentiary facts:

. . . .

e. Since her release from jail in April 2008, [respondent] has failed to maintain stable housing or employment.

We first note the trial court's 14 December 2010 order from which respondent appeals "amended [its 14 January 2009 order terminating respondent's parental rights] without the receipt of additional evidence." Because a trial court must "make an independent determination of whether neglect authorizing termination of . . . respondent's parental rights existed at the time of the termination hearing," *see In*

re Ballard, 311 N.C. at 716, 319 S.E.2d at 233, the trial court should have considered new evidence on remand from this Court's decision reversing the trial court's prior order terminating respondent's rights to Charlie and Mary. However, the findings in the trial court's order adjudicating Mary as neglected are related to the existing conditions during the 2010 termination proceedings and apply equally to Charlie; we therefore find it unnecessary to remand the trial court's order finding Charlie neglected for consideration of evidence of changed circumstances and entry of additional findings. *Cf. In re Safriet*, 112 N.C. App. at 753, 436 S.E.2d at 902 (holding remand for findings unnecessary where all the evidence supported such findings).

With respect to the trial court's order terminating respondent's parental rights to Charlie, respondent contends the portion of Finding 23, that she "placed [Charlie] in an injurious environment; she did not properly protect him nor did she properly supervise him," is unsupported by the evidence. The trial court's unchallenged Finding 16, stating fifteen kilograms of cocaine, assault weapons, ammunition, and numerous other items related to the packaging and sale of cocaine were discovered in the home where Charlie lived, and unchallenged Finding 24, stating respondent "failed to provide for [Charlie's] needs by allowing him to sleep on a mattress in the closet of the master bedroom," support Finding 23. Furthermore, the evidence indicates respondent voluntarily moved herself and Charlie from Wisconsin to North Carolina with E.S. and chose to remain in E.S.'s mother's home when she suspected E.S. was involved in "something illegal." There is no merit to respondent's contention that Finding 23 is unsupported by the evidence.

Respondent also challenges portions of Finding 30, that, "it is likely that neglect of [Charlie] would repeat if [Charlie] were returned to . . . [respondent's] custody" and that, "[s]ince her release from jail in April 2008, [respondent] has failed to maintain stable housing or employment." As we have previously held with regard to identical findings in the trial court's order finding Mary neglected, the trial court's finding that respondent has failed to maintain stable housing and employment is supported by clear, cogent, and convincing evidence. Furthermore, the trial court's order as to Mary considered respondent's prior neglect of Charlie and found that, given her failure to maintain stable employment and housing and her continued reliance on others to meet her own needs, Mary was at "a substantial risk of . . . continued neglect." As discussed, the trial court's findings regarding the risk of future neglect to Mary given respondent's cur-

rent circumstances apply equally to Charlie. Thus, we hold that Finding 30 is supported by clear, cogent, and convincing evidence.

Respondent also challenges Findings 25, 26, 27, 28, and 29. She contends these findings contradict findings from prior orders of which the trial court's order took judicial notice. However, the orders respondent contends are contradictory do not address Charlie's psychological health. The trial court's August and September 2007 orders make no findings related to this issue and its November 2007 and February 2008 orders make findings related only to Charlie's adjustment to his foster home, including that he has shown tremendous progress since being in foster care and that he is doing well in his foster home. Furthermore, Findings 25, 26, 27, 28, and 29 are based on testimony by Elizabeth Watson, a psychiatric nurse practitioner and clinical specialist in child and adolescent psychiatric nursing, who Charlie had been seeing on a weekly basis for over ten months at the time of the November and December 2008 termination proceedings. Ms. Watson testified that she diagnosed Charlie with PTSD due to the trauma brought about by the drug raid on his house and stated that Charlie was further traumatized during his visit with respondent while she was incarcerated. Ms. Watson also testified to Charlie's high level of trauma and testified that it would take him at least a year to make considerable progress in reducing his level of trauma. She stated that recovery from PTSD requires the patient to feel safe and that this would take a long time. Accordingly, Findings 25, 26, 27, 28 and 29 are supported by clear, cogent and convincing evidence. Moreover, we note respondent's arguments mainly point to what she contends is evidence contradictory to these findings, including testimony from and a lack of psychological diagnosis by a social worker who treated Charlie upon his placement in foster care and testimony from a psychologist. However, "our appellate courts are bound by the trial courts' findings of fact" that are supported by clear, cogent, and convincing evidence "even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984). Respondent's arguments are therefore overruled.

[5] In a related argument, respondent suggests there is no substantial risk of a physical, mental, or emotional impairment of Charlie as a consequence of her failure to provide proper care, supervision or discipline, supporting an adjudication of neglect. However, Findings 25 through 29 and the trial court's finding of the likelihood of a repetition of neglect support such a finding. *See In re Safriet*, 112 N.C. App. at 753, 436 S.E.2d at 902.

[6] Finally, although respondent also challenges Finding 35 regarding a statement of respondent against her interest, Finding 36, that, as of the November and December 2008 hearings, following her release from jail, respondent had had "significant" contact with her co-defendants in the criminal case, Finding 38, that, as of the November and December 2008 hearings, respondent was "barely able to meet her monthly living expenses with income from her employment," and Finding 40, that, as of the November and December 2008 hearings, she had no support system, those findings are unnecessary to support the trial court's finding of likelihood of repetition of neglect in this case, and it is therefore unnecessary to address them.[2] *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006).

Affirmed.

Judges McGEE and CALABRIA concur.

IN THE MATTER OF: J.J., JR.

No. COA11-342

(Filed 18 October 2011)

1. Juveniles—adjudicatory hearing—not separate from other hearings

A juvenile was not prejudiced by the trial court's failure to hold an adjudicatory hearing separate and distinct from the probable cause and transfer hearings. Nothing in the statutes required entirely separate hearings so long as the juvenile's requisite statutory and constitutional rights were safeguarded.

2. Juveniles—adjudication—findings—not written

The trial court erred by not including the requisite findings of fact in a written juvenile adjudication order even though it announced in open court that the juvenile was guilty beyond a reasonable doubt.

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2. Although respondent's brief also lists Findings 24 and 37 from the trial court's order regarding Charlie in subheadings in her brief, she fails to challenge them in argument, and they are therefore binding on appeal. *See In re M.D.*, 200 N.C. App. at 43, 682 S.E.2d at 785.

3. Juveniles—disposition hearing—form of hearing—written findings required

The trial court complied with the substance but not the form of the statutory requirements for a juvenile dispositional hearing where the proceeding was more abbreviated than contemplated by the statutes and the record did not reflect when the predisposition report was received or considered. However, the disposition order was remanded for failure to make the required written findings.

4. Juveniles—release pending appeal—denied—written findings required

An order denying a juvenile release pending appeal was vacated where the trial court did not state in writing any compelling reasons for the denial of release.

Appeal by juvenile from orders entered 14 December 2010 and 21 December 2010 by Judge John W. Dickson in Cumberland County District Court. Heard in the Court of Appeals 14 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Judith Tillman and Special Deputy Attorney General Mabel Y. Bullock, for the State.

Geeta Kapur for juvenile appellant.

McCULLOUGH, Judge.

On 14 December 2010, the trial court adjudicated J.J., Jr. ("the juvenile") delinquent and entered a disposition committing him to a youth development center until his eighteenth birthday.[1] On appeal, the juvenile contends the trial court erred in entering such adjudication and disposition without holding the proper adjudicatory and dispositional hearings. In addition, the juvenile contends the trial court erred in not granting him release during the pendency of his appeal.

1. We note that the trial court entered both a dispositional order and a secure custody order for the juvenile in the present case. The dispositional order being appealed commits the juvenile to a youth development center until his eighteenth birthday, whereas the secure custody order entered on the same date commits the juvenile to a youth development center until his nineteenth birthday. We also note pursuant to N.C. Gen. Stat. § 7B-1602, the trial court may retain jurisdiction over a juvenile until his twenty-first birthday when the juvenile is committed to a youth development center for a first-degree sexual offense as in the present case. However, because the juvenile's arguments on appeal only pertain to the trial court's dispositional order, we address only the terms of that order.

We find no prejudicial error occurred in the trial court's conduct of the delinquency proceedings, but we remand the case to the trial court for entry of written findings of fact to support its adjudication and dispositional orders, and its order denying the juvenile's release pending appeal.

I. Background

On 14 January 2010, the State filed a Juvenile Petition alleging that the juvenile had committed the criminal offense of first-degree sexual offense on a female child under the age of 13. On 21 January 2010, the juvenile was afforded a first appearance before the trial court.

On 25-26 August 2010, a probable cause hearing was held, and on 4 October 2010, *nunc pro tunc* 26 August 2010, the trial court entered an Amended Juvenile Order finding probable cause to believe that the juvenile committed the offense of attempted first-degree sex offense. The State moved for the case to be transferred to superior court, and the trial court ordered that a hearing be conducted on that issue.

On 14 December 2010, the trial court conducted the transfer hearing. At the conclusion of the hearing, the trial court retained jurisdiction over the case in juvenile court, announced its finding "beyond a reasonable doubt that the juvenile is guilty of the offense of attempted first-degree sex offense," and proceeded to enter a disposition for the juvenile. On that same day, the trial court entered a Juvenile Level 3 Disposition and Commitment Order finding the juvenile had committed an attempted first-degree sex offense. The written order provided that the juvenile was to be committed to a youth development center for an indefinite period not to exceed the juvenile's eighteenth birthday. The trial court also entered an order for secure custody of the juvenile, finding direct contempt by the juvenile as grounds for the order. The juvenile gave oral notice of appeal as to all orders entered by the trial court at the conclusion of the 14 December 2010 hearing. The juvenile also gave written notice of appeal on 14 December 2010.

On 21 December 2010, the trial court entered a Juvenile Adjudication Order concluding that the juvenile is a delinquent for having committed the offense of attempted first-degree sex offense. On that same day, the trial court appointed the Appellate Defender's Office to represent the juvenile in his appeal. In its Appellate Entries, the trial court failed to indicate whether the juvenile was to be released pending appeal pursuant to N.C. Gen. Stat. § 7B-2605, and the trial court listed "NA" in the space provided for "compelling rea-

sons release is denied." The juvenile filed an amended notice of appeal on 7 January 2011.

II. Procedure of Adjudicatory and Dispositional Hearings

The juvenile argues that the trial court erred in committing him to a youth development center without holding a proper adjudicatory or dispositional hearing as required by the North Carolina Juvenile Code. The juvenile maintains that, because the trial court held only a probable cause hearing and a transfer hearing before entering an adjudication and disposition in his case, his right to due process was violated and therefore, the trial court's adjudication and dispositional orders should be vacated. The juvenile also maintains that the trial court's adjudication and dispositional orders fail to include the requisite written findings of fact to support the order.

A. Adjudicatory Hearing and Order

[1] We first address the juvenile's contention that the trial court failed to conduct an adjudicatory hearing before adjudicating him a delinquent juvenile.

Section 7B-2202 of our Juvenile Code provides that "[t]he court shall conduct a hearing to determine probable cause in all felony cases in which a juvenile was 13 years of age or older when the offense was allegedly committed." N.C. Gen. Stat. § 7B-2202(a) (2009). "A probable cause hearing is not conducted for the purposes of discovery; its purpose is to determine whether there is probable cause to believe that a crime has been committed and that [the juvenile] committed it." *In re Bass*, 77 N.C. App. 110, 114, 334 S.E.2d 779, 781 (1985). If the trial court finds that probable cause exists and the alleged felony is not a Class A felony, "upon motion of the prosecutor . . . , the court shall either proceed to a transfer hearing or set a date for that hearing." N.C. Gen. Stat. § 7B-2202(e).

"At the transfer hearing, the prosecutor and the juvenile may be heard and may offer evidence[.]" N.C. Gen. Stat. § 7B-2203(a) (2009). "If the court does not transfer the case to superior court, the court shall either proceed to an adjudicatory hearing or set a date for that hearing." N.C. Gen. Stat. § 7B-2203(d).

Construing these statutes in *pari materia*, we determine that nothing in these statutes requires the trial court to conduct entirely separate probable cause, transfer, and adjudicatory hearings. The plain language of the statutes provides that the trial court "shall

either proceed" from one hearing to the next "or set a date for that hearing." N.C. Gen. Stat. §§ 7B-2202(e), -2203(d). Thus, the trial court may conduct all three hearings in one proceeding, so long as the juvenile's requisite statutory and constitutional rights are safeguarded.

Specifically, section 7B-2405 of our Juvenile Code, titled "Conduct of the adjudicatory hearing," provides:

> In the adjudicatory hearing, the court shall protect the following rights of the juvenile and the juvenile's parent, guardian, or custodian to assure due process of law:
>
> (1) The right to written notice of the facts alleged in the petition;
>
> (2) The right to counsel;
>
> (3) The right to confront and cross-examine witnesses;
>
> (4) The privilege against self-incrimination;
>
> (5) The right of discovery; and
>
> (6) All rights afforded adult offenders except the right to bail, the right of self-representation, and the right of trial by jury.

N.C. Gen. Stat. § 7B-2405 (2009). "The adjudicatory hearing shall be a judicial process designed to determine whether the juvenile is undisciplined or delinquent." *Id.* The allegations of a petition alleging that a juvenile is delinquent must be proved beyond a reasonable doubt at adjudication. N.C. Gen. Stat. § 7B-2409 (2009).

In the present case, the trial court conducted a probable cause hearing over the course of two days on 25-26 August 2010. At the hearing, the trial court heard testimony from six witnesses presented by the State and four witnesses presented by the juvenile; the trial court also received exhibits at the hearing. After hearing all of the evidence presented by the State and the juvenile, the trial court found probable cause to believe that the juvenile had committed the offense of attempted first-degree sex offense. The prosecutor then moved for the case to be transferred to superior court and indicated the State was ready to proceed with a transfer hearing. However, the defense requested the transfer hearing be continued so that the juvenile could complete a psychological evaluation. Accordingly, the trial court set a date for the transfer hearing.

On 14 December 2010, the trial court conducted the transfer hearing. At the transfer hearing, the trial court heard additional evidence from both the State and the juvenile. After presenting such evidence,

both the State and the juvenile informed the trial court that they had no further evidence and proceeded to closing arguments, during which both the State and the juvenile requested different dispositional alternatives. Following closing arguments, the trial court ordered that the juvenile's case be retained in juvenile court. Immediately thereafter, the trial court announced its adjudication ruling, finding "beyond a reasonable doubt that the juvenile is guilty of the offense of attempted first-degree sex offense."

On appeal, the juvenile does not argue the trial court erred in conducting the two-day probable cause hearing or the transfer hearing. Rather, the juvenile argues that the trial court erred in announcing its adjudication immediately following the transfer hearing, without actually conducting an adjudicatory hearing at which the juvenile could present evidence and cross-examine witnesses. However, a review of the transcripts in this case reveals that the statutorily mandated protections were afforded to the juvenile throughout both hearings.

First, the juvenile received written notice of the facts alleged in the juvenile petition when he was served with a summons and a copy of the petition on 21 January 2010. The juvenile was represented by counsel throughout both hearings. In addition, at both hearings, the juvenile was present, put forth evidence on his behalf, and cross-examined the State's witnesses. Further, from the time of his first appearance in January 2010 until the date of the first hearing in August 2010, the juvenile had a period of seven months during which to conduct discovery. Aside from his argument that the trial court simply did not conduct a distinct adjudicatory hearing, the juvenile has not argued that any of the rights protected by N.C. Gen. Stat. § 7B-2405 were violated during the conduct of the proceedings in this case.

Moreover, the juvenile has failed to show how he was prejudiced by the trial court's conducting the hearings in the manner that it did. It appears from the transcripts of both hearings that the State presented its entire case at the probable cause hearing. The juvenile likewise presented substantial evidence at the probable cause hearing. Subsequently, at the transfer hearing, both the State and the juvenile presented additional evidence, after which both stated they had no further evidence. Accordingly, it appears the trial court considered all of the evidence having been presented, and made its adjudication. In making its adjudication, the trial court "found beyond a reasonable doubt that [the juvenile] had committed the offense charged in the juvenile petition, applying a standard of proof substantially greater than probable cause." *Bass*, 77 N.C. App. at 114, 334 S.E.2d at 781.

The "judicial process," in its entirety, determined whether the juvenile was delinquent beyond a reasonable doubt, despite that the trial court did not conduct a separate adjudicatory hearing. *See* N.C. Gen. Stat. § 7B-2405. Furthermore, the juvenile has not argued that he had further evidence to present regarding adjudication, nor has he shown how the trial court's adjudication decision might have been different had the trial court conducted a separate adjudicatory hearing. Therefore, we fail to see how the juvenile was prejudiced by the trial court's failure to hold a separate and distinct adjudicatory hearing in this case.

[2] Nonetheless, the juvenile correctly contends, and the State concedes, that the trial court is required to include the standard of proof in its written adjudication order pursuant to section 7B-2411 of our Juvenile Code. Section 7B-2411 provides:

> If the court finds that the allegations in the petition have been proved [beyond a reasonable doubt], the court shall so state in a written order of adjudication, which shall include, but not be limited to, the date of the offense, the misdemeanor or felony classification of the offense, and the date of adjudication.

N.C. Gen. Stat. § 7B-2411 (2009); *see also In re J.V.J.*, ___ N.C. App. ___, ___, 707 S.E.2d 636, 638 (2011) ("[A]t a minimum, section 7B–2411 requires a court to state in a written order that 'the allegations in the petition have been proved [beyond a reasonable doubt].' " (quoting N.C. Gen. Stat. § 7B-2411) (alteration in original)). While the trial court announced in open court that it "finds beyond a reasonable doubt that the juvenile is guilty of the offense of attempted first-degree sex offense," the trial court failed to state this in its written adjudication order. Specifically, the Juvenile Adjudication Order entered by the trial court contains a blank area where the trial court is to state findings of fact which it has found to be proved beyond a reasonable doubt. Instead of addressing any of the allegations in the petition in the blank space, the trial court failed to use the space and made no written findings at all. Thus, the trial court erred by failing to include the requisite findings of fact in its written adjudication order. Accordingly, we must vacate the trial court's adjudication order and remand the matter to the trial court to make the statutorily mandated findings of fact in the juvenile's written adjudication order.

B. Dispositional Hearing and Order

[3] We next address the juvenile's argument that the trial court failed to conduct a dispositional hearing before entering a disposition for the juvenile.

Our Juvenile Code instructs that "[t]he court shall proceed to the dispositional hearing upon receipt of the predisposition report." N.C. Gen. Stat. § 7B-2413 (2009). However, "[n]o predisposition report shall be submitted to or considered by the court prior to the completion of the adjudicatory hearing." *Id.* Regarding the dispositional hearing, our Juvenile Code provides:

> (a) The dispositional hearing may be informal, and the court may consider written reports or other evidence concerning the needs of the juvenile. . . .
>
> (b) The juvenile and the juvenile's parent, guardian, or custodian shall have an opportunity to present evidence, and they may advise the court concerning the disposition they believe to be in the best interests of the juvenile.

N.C. Gen. Stat. § 7B-2501(a), (b) (2009). The trial court must select a disposition for the juvenile that is designed to both protect the public and meet the needs and best interests of the juvenile, based upon the following five factors:

(1) The seriousness of the offense;

(2) The need to hold the juvenile accountable;

(3) The importance of protecting the public safety;

(4) The degree of culpability indicated by the circumstances of the particular case; and

(5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

Id. § 7B-2501(c). At the conclusion of the dispositional hearing, the trial court must enter a written dispositional order that "shall contain appropriate findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-2512 (2009).

In the present case, the juvenile does not challenge the appropriateness of the disposition imposed upon him by the trial court. The juvenile simply contends the trial court failed to follow the statutory procedure for holding a dispositional hearing and entering appropriate written findings of fact in its dispositional order.

We agree with the juvenile that the trial court failed to follow the procedure contemplated by our statutory scheme for dispositional hearings. The statutory language indicates that the trial court must

proceed with the dispositional hearing upon receipt of the predisposition report. N.C. Gen. Stat. § 7B-2413. However, the trial court must not receive and consider the predisposition report prior to the completion of the adjudicatory hearing stage of the proceedings. *Id.* Accordingly, regarding the dispositional hearing, the trial court must conclude the adjudication stage of the proceedings, receive the predisposition report, then proceed to the dispositional hearing. Further, the statutes contemplate that the trial court may receive additional evidence at each stage, directed to the purpose of that stage of the proceeding. *See*, *e.g.*, N.C. Gen. Stat. § 7B-2501(b). Indeed, this Court has directed that " '[t]he dispositional hearing *must* be continued for the [juvenile] to present evidence when he requests such a continuance.' " *In re Lail*, 55 N.C. App. 238, 241, 284 S.E.2d 731, 733 (1981) (quoting *In re Vinson*, 298 N.C. 640, 662, 260 S.E.2d 591, 605 (1979)).

Here, the trial court conducted a more abbreviated proceeding than contemplated by our statutes. As stated previously, following its finding of delinquency beyond a reasonable doubt, the trial court proceeded to announce its disposition, stating the various factors that it considered in making its dispositional determination:

> Prior delinquency history level is low. It's been classified as a violent offense. Level II or III punishment may be imposed. The Court finds that both the best interest of the juvenile and the best interest of the State will be served by a Level III punishment. The Court, specifically considering the seriousness of the offense, the disparity between the ages and the size of the victim and the juvenile, that there is no problem with his intellectual functioning, he is to be placed in the custody of the department of juvenile justice for placement in training school for a period of not less than six months nor greater than his 19th birthday. He is to receive sex offender specific treatment and is to be given all educational and athletic opportunities available.

The record indicates that a predisposition report was submitted in open court at the 14 December 2010 hearing, although neither the record nor the transcript reflects at what point the trial court received and considered such report. Thus, "[i]n substance, though not in form," the trial court complied with the requirements of our Juvenile Code in proceeding to disposition of the juvenile. *In re Bullard*, 22 N.C. App. 245, 249, 206 S.E.2d 305, 308 (1974).

Additionally, the juvenile has failed to show how his disposition might reasonably have been different had the trial court followed the

proper statutory procedure. The juvenile has not stated the existence of any evidence he was not afforded an opportunity to present that would have affected the trial court's dispositional determination. The juvenile also presented no objections at trial following the trial court's announcement of its adjudication and dispositional rulings. Rather, in response to the trial court's question of whether the defense had "anything further" at the close of the hearing, counsel simply responded by entering notice of appeal as to all of the trial court's orders.

Nonetheless, as the juvenile correctly contends, and the State concedes, the trial court was required to make written findings of fact in its dispositional order. "[T]he trial court is required to make findings demonstrating that it considered the N.C.G.S. § 7B-2501(c) factors in a dispositional order entered in a juvenile delinquency matter." *In re V.M.*, ___ N.C. App. ___, ___, 712 S.E.2d 213, 215 (2011). Thus, the trial court erred in failing to include the requisite findings of fact in its dispositional order. Accordingly, we must vacate the trial court's dispositional order and remand the matter to the trial court to make the statutorily mandated findings of fact in the juvenile's written dispositional order.

III. Release of Juvenile Pending Appeal

[4] Next, the juvenile contends the trial court erred in denying his release pending appeal in accordance with N.C. Gen. Stat. § 7B-2605 (2009).

N.C. Gen. Stat. § 7B-2605 provides:

> Pending disposition of an appeal, the release of the juvenile, with or without conditions, should issue in every case unless the court orders otherwise. For compelling reasons which must be stated in writing, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.

Id. "In other words, pending his appeal the juvenile must be released unless the judge enters a written order to the contrary, stating the reasons for commitment pending appeal." *Bass*, 77 N.C. App. at 117, 334 S.E.2d at 783.

In the present case, at the close of the 14 December 2010 hearing, counsel for the juvenile asked the court to grant release of the juvenile pending his appeal. The trial court denied release of the juvenile pending appeal in open court. In the Appellate Entries, the trial court

denoted neither that the juvenile would be released pending appeal nor that the juvenile's release is denied. Neither box is checked on the form. In addition, in the space provided on the Appellate Entries form for listing compelling reasons why release is denied, the trial court simply denoted "NA". Rather, the trial court entered a secure custody order for the juvenile following the 14 December 2010 hearing. However, there are no written compelling reasons stating why the juvenile should not be released pending his appeal denoted on the trial court's order for secure custody. The trial court only checked a box finding direct contempt by the juvenile as grounds for the order. We note there is no evidence in the record to support this finding. Accordingly, the trial court failed to state any compelling reasons in writing why the juvenile should not be released pending his appeal. Therefore, under section 7B-2605, the juvenile should have been released.

We note that "this error by the trial court has no effect on the juvenile's adjudication or disposition." *In re J.L.B.M.*, 176 N.C. App. 613, 628, 627 S.E.2d 239, 249 (2006). In addition, " 'we are aware of the likelihood that the passage of time may have rendered the issue of [the] juvenile's custody pending appeal moot.' " *Id.* (quoting *In re Lineberry*, 154 N.C. App. 246, 256, 572 S.E.2d 229, 236 (2002)). Nonetheless, we must vacate the order denying the juvenile's release pending appeal and remand the matter to the trial court for findings as to the compelling reasons for denying release.

IV. Conclusion

We find no prejudicial error occurred as to the juvenile in the trial court's conduct of the delinquency proceedings in the present case. Although the trial court failed to conduct the delinquency proceeding in a bifurcated manner as contemplated by our Juvenile Code, the trial court nonetheless protected the statutory and constitutional rights of the juvenile during the entire proceeding. The juvenile has not stated the existence of any evidence he was not afforded an opportunity to present that would have affected the trial court's adjudication and dispositional determinations. Further, the juvenile presented no objections at trial following the trial court's announcement of its adjudication and dispositional rulings.

However, because both the adjudication and dispositional orders in the present case fail to state any written findings of fact as mandated by our Juvenile Code, we must remand the case to the trial court for entry of the statutorily mandated written findings of fact in the juvenile's adjudication and dispositional orders. We note that on

remand, the trial court retains the discretion to take additional evidence if the need arises in making the requisite findings of fact in its written adjudication and dispositional orders. In addition, although the issue of the juvenile's custody pending appeal may have been rendered moot, we must likewise remand the matter to the trial court for entry of written findings as to the compelling reasons for denying the juvenile's release pending appeal.

No prejudicial error in part; vacated and remanded in part.

Judges HUNTER (Robert C.) and STEELMAN concur.

STATE OF NORTH CAROLINA v. ANTHONY PIERCE

No. COA10-1588

(Filed 18 October 2011)

1. Homicide—second-degree murder—definition—assaulting and wounding

"Assaulting" and "wounding" are not included in the definition of second-degree murder.

2. Homicide—second-degree murder—high speed chase—malice—death of officer

The trial court did not err by denying's defendant's motion to dismiss a charge of second-degree murder based on the alleged absence of malice where the circumstances of defendant's intentional flight from an officer reflected knowledge that injury or death would likely result. The death of an officer who was en route to join the pursuit was not so far beyond the circumference of defendant's reckless actions as to absolve defendant of liability.

3. Homicide—second-degree murder—proximate cause—officer joining high speed chase

The trial court did not err by denying defendant's motion to dismiss a second-degree murder charge based on insufficient evidence of proximate cause where defendant fled from one officer and another officer who was on his way to join the chase encountered an obstruction in the road and was killed. The evidence was sufficient for a reasonable jury to conclude that the death would

not have occurred if defendant had stopped for the first officer and that a result such as the death of the second officer was reasonably foreseeable under the circumstances.

4. Evidence—high speed chase—officer's death—second-degree murder—officer's negligence—irrelevant

The trial court did not err in a second-degree murder prosecution by excluding evidence of negligence by an officer killed in an automobile chase of defendant. The officer's alleged negligent conduct was relevant only insofar as it could have constituted an intervening or superseding cause that alone produced the injury. That was clearly not the case here.

5. Homicide—fleeing to elude arrest causing death—instructions

The trial court did not err when charging the jury on fleeing to elude arrest causing death because the court was no longer required to refer to material evidence and law in its instructions and the evidence was sufficient to allow a reasonable jury to conclude that defendant's flight proximately caused the officer's death.

6. Firearms and Other Weapons—possession of a firearm by a felon—evidence sufficient

The evidence in a prosecution for possession of a firearm by a felon was sufficient to show that defendant possessed a shotgun found in his house, but not sufficient to show possession of a firearm thrown from defendant's vehicle during a chase.

7. Evidence—police dash cam video—admission not prejudicial

The admission of evidence from video recording devices in cars was not prejudicial where, assuming that admission of the evidence was error, defendant did not show prejudice.

8. Evidence—other crimes—knowledge and motive

The trial court did not err by admitting evidence of other crimes where defendant did not properly object to some of the evidence, other evidence showed defendant's knowledge of the dangers of flight from the police, and still other evidence showed defendant's motive to flee from the police.

Appeal by Defendant from judgments entered 6 May 2010 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 28 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

William H. Dowdy for Defendant.

STEPHENS, Judge.

Factual and Procedural Background

Defendant Anthony Pierce ("Pierce") was indicted on two counts of possession of a firearm by a felon and one count each of second-degree murder, felonious fleeing to elude arrest with a motor vehicle, and possession of marijuana with intent to distribute. Pierce pled not guilty to the charges and was tried before a jury in New Hanover County Superior Court, the Honorable Phyllis M. Gorham presiding.

The evidence presented at trial tended to show the following: In the early morning of 18 February 2009, Corporal William Richards of the Wilmington Police Department ("WPD") was patrolling Wilmington in a marked police vehicle when he observed a silver sport-utility vehicle ("SUV") matching the description of a vehicle sought in connection with an attempted kidnapping. After following the SUV for several blocks, Corporal Richards lost sight of the vehicle, only to find it shortly thereafter parked with another vehicle in the parking lot of a closed business. Thinking the SUV and the other vehicle were conducting a drug transaction, Corporal Richards pulled into a nearby parking lot to further observe the SUV. As soon as Corporal Richards pulled in the lot, however, he observed the SUV "accelerating rapidly" on to the main road. Corporal Richards followed the SUV for roughly a mile until turning on his lights to conduct a traffic stop. The SUV pulled to the side of the road, but before Corporal Richards could get out of his vehicle, the SUV "took off."

As Corporal Richards pursued the SUV, packages of marijuana were thrown from the SUV. Following a roughly three-mile chase, the SUV slowed and stopped on the side of the road. Corporal Richards approached the SUV and ordered the occupants to exit. The driver, Pierce, and the two other occupants exited the SUV and were arrested by WPD officers.

Throughout the pursuit of Pierce's SUV, Corporal Richards communicated with the WPD dispatcher and nearby officers and relayed the locations and details of the pursuit. Officer Richard Matthews, who was only a few miles from the chase, responded to Corporal Richards' communications and drove toward the area of pursuit to

assist Corporal Richards. However, while traveling at high speeds toward the chase, Officer Matthews swerved to avoid debris in the road, lost control of his vehicle, and died when his vehicle went "over the median" and ended up "heavily impacted into the tree line." Officer Matthews was between two and three miles from the location of the onset of the pursuit when he perished.

Other WPD officers who responded to Corporal Richards' communications located the marijuana packages thrown from Pierce's SUV and a firearm subsequently traced to one of the occupants of the SUV along the pursuit route. In a later search of Pierce's residence, police officers discovered a shotgun and ammunition, $1,000 in cash, and a set of digital scales.

At trial, Pierce declined to present any evidence, and, after the trial court denied Pierce's motions to dismiss, the court instructed the jury on the charges of second-degree murder and involuntary manslaughter for the death of Officer Matthews, possession of a firearm by a felon, possession of marijuana, and fleeing to elude arrest causing death. The jury returned verdicts finding Pierce guilty of two counts of possession of a firearm by a felon, and one count each of second-degree murder, possession of marijuana with intent to sell or deliver, and fleeing to elude arrest resulting in death. The trial court sentenced Pierce to 189 to 236 months imprisonment for second-degree murder, 15 to 18 months imprisonment for each charge of possession of a firearm by a felon, 29 to 44 months imprisonment for fleeing to elude arrest, and six to eight months imprisonment for possession of marijuana with intent to sell or deliver. Pierce gave notice of appeal in open court.

Discussion

On appeal, Pierce argues five main issues: (1) that he was improperly convicted of second-degree murder; (2) that he was improperly convicted of speeding to elude arrest causing death; (3) that the trial court erroneously denied his motion to dismiss the charges of possession of a firearm by a felon; (4) that the trial court improperly admitted evidence of video recordings from the WPD squad cars; and (5) that the trial court improperly admitted "other crimes evidence." We address each issue separately below.

I. Second-degree murder

Pierce makes several arguments regarding the alleged impropriety of his second-degree murder conviction for the death of Officer

Matthews: that the murder charge was unconstitutional; that instructing the jury on second-degree murder was plain error; that overruling Pierce's objections to parts of the second-degree murder instruction was error; that the trial court erred by denying Pierce's motions to dismiss the second-degree murder charge; and that Pierce did not receive effective assistance of counsel because trial counsel failed to object to the second-degree murder instruction.

[1] Initially, we note that Pierce predicates several of these arguments on the assertion that "assaulting" and "wounding" of the victim are "essential elements" of second-degree murder. However, as correctly pointed out by the State, these two "elements" are not included in this State's definition of second-degree murder. *See*, *e.g.*, *State v. Bethea*, 167 N.C. App. 215, 218, 605 S.E.2d 173, 177 (2004) ("The elements of second-degree murder are: 1. defendant killed the victim; 2. defendant acted intentionally and with malice; and 3. defendant's act was a proximate cause of the victim's death." (internal quotation marks omitted)), *cert. denied*, 362 N.C. 88, ___ S.E.2d ___ (2007); *see also State v. Wilkerson*, 295 N.C. 559, 581, 247 S.E.2d 905, 917 (1978) (questioning "the universal applicability of the statement[] . . . that 'an intent to inflict a wound which produces a homicide is an essential element of murder in the second degree' "). Accordingly, to the extent Pierce's arguments are based on this misstatement of law, those arguments are overruled.

[2] Pierce also argues that the trial court erred by denying his motion to dismiss the second-degree murder charge because (1) there was insufficient evidence of malice, and (2) there was insufficient evidence that Pierce's flight from Corporal Matthews was the proximate cause of Officer Richards' death.

As for Pierce's first contention, this Court has previously stated that "the very act of fleeing from the police certainly constitutes malice." *State v. Lloyd*, 187 N.C. App. 174, 180, 652 S.E.2d 299, 302 (2007). Furthermore, in *Bethea*, this Court inferred malice from the actions of a defendant who

> [drove] with a revoked license, fled to elude law enforcement officers, sped through a red light and several stop signs, drove at speeds up to one hundred miles per hour, crossed into the oncoming traffic lane several times, and turned his car lights off on dark rural roads, decreasing his own visibility and making his car extremely difficult to see, while traveling at speeds between ninety and ninety-five miles per hour.

167 N.C. App. at 219, 605 S.E.2d at 177. In that case, an officer in a vehicle pursuing the defendant was killed when his vehicle struck the defendant's vehicle and then "impacted a concrete marker and a tree." *Id.* at 217, 605 S.E.2d at 176. The Court reasoned that the defendant's actions, along with a "mind unclouded by intoxicating substances that might have hindered his ability to appreciate the danger of his actions," showed an "intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind." *Id.* at 219-20, 605 S.E.2d at 177. Similarly, in this case, Pierce's intentional flight from Corporal Richards—which included driving 65 miles per hour in a residential area with a speed limit of 25 miles per hour and throwing bags of marijuana out the window of the vehicle—reflected knowledge that injury or death would likely result and manifested depravity of mind and disregard of human life. *Id.* Accordingly, we conclude that the evidence, viewed in the light most favorable to the State, was sufficient to allow the jury to infer malice from Pierce's intentional flight from Corporal Richards.

Nevertheless, Pierce argues that "[t]he State's claim of malice could not be based on [Pierce's] actions during the pursuit, since [Officer] Matthews was not in the pursuit, [] nor on any facts and circumstances of [O]fficer Matthews' death []because [Pierce] was miles away[]." This argument is unpersuasive. While we acknowledge there is some case law to suggest that proximity is a factor in determining malice,[1] we cannot conclude in this case that Officer Matthews—or, more specifically, the harm that befell him—was so far beyond the circumference of Pierce's reckless actions as to absolve Pierce of liability for Officer Matthews' death. Common experience easily permits the inference that Pierce foresaw as a consequence of his flight that nearby officers other than Corporal Richards would attempt to apprehend Pierce during his flight. Clearly, then, the circumstances of this case—specifically Pierce's reckless flight, Officer Matthews' proximity to the chase, and the danger inherent in a motor vehicle pursuit—were sufficient to permit a reasonable jury to infer Pierce's conscious indifference to the reasonably apparent probability of harm to an officer such as Officer Matthews. Accordingly, we conclude that the trial court's denial of Pierce's motion to dismiss was not erroneous based on an alleged absence of malice.

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1. *See State v. Locklear*, 159 N.C. App. 588, 591-92, 583 S.E.2d 726, 729 (2003) (noting our Supreme Court's approval of the following definition of implied malice: "conscious indifference to consequences wherein probability of *harm to another within the circumference of such conduct* is reasonably apparent, though no harm to such other is intended" (emphasis added)), *aff'd per curiam*, 359 N.C. 63, 602 S.E.2d 359 (2004).

[3] Pierce next contends there was insufficient evidence that his flight from Corporal Richards was the proximate cause of Officer Matthews' death. Proximate cause is defined

> as a cause: (1) which, in a natural and continuous sequence and unbroken by any new and independent cause, produces an injury; (2) without which the injury would not have occurred; and (3) from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed.

State v. Hall, 60 N.C. App. 450, 454-55, 299 S.E.2d 680, 683 (1983).

In this case, the evidence, viewed in the light most favorable to the State, shows that Pierce fled from Corporal Richards' attempted lawful stop and, in doing so, created a police exigency; that Officer Matthews, a nearby WPD officer, was informed of the exigency and sped to provide assistance and apprehend Pierce; that on his way, Officer Matthews encountered an obstruction in the road, was unable to safely avoid the obstruction due to his speed, and perished after unsuccessfully attempting to avoid the obstruction. In our view, this evidence was sufficient to allow a reasonable jury to conclude (1) that Officer Matthews' death would not have occurred had Pierce remained stopped after Corporal Richards pulled him over, and (2) that an injurious result such as Officer Matthews' death was reasonably foreseeable under the circumstances. *Cf. Bethea*, 167 N.C. App. at 220, 605 S.E.2d at 178 (holding that the evidence taken in the light most favorable to the State showed that the victim's death "would not have occurred had [the] defendant stopped when [an officer] activated his blue light"). Accordingly, we overrule Pierce's argument that the trial court erred in denying his motion to dismiss the second-degree murder charge on the ground that there was insufficient evidence to show that Pierce's flight proximately caused Officer Matthews' death.

[4] Irrespective of the sufficiency of the evidence supporting that charge, Pierce argues that his conviction for second-degree murder should be overturned because the trial court unconstitutionally barred him from presenting a full defense by excluding evidence allegedly tending to show that Officer Matthews was negligent in speeding to the pursuit and, therefore, was the cause of his own death. However, our Supreme Court has previously held that "contributory negligence [] has no place in the law of crimes," such that Officer Matthews' alleged negligent conduct could only absolve Pierce of criminal liability if Officer Matthews "met [his] death wholly

as a result of [his] own conduct." *State v. Foust*, 258 N.C. 453, 459, 128 S.E.2d 889, 894 (1963). Accordingly, evidence of Officer Matthews' alleged negligence was only relevant insofar as his conduct could have constituted an intervening or superseding cause that so entirely intervened in or superseded "the operation of [Pierce's] negligence that it alone, without [Pierce's] negligence contributing thereto in the slightest degree, produce[d] the injury." *Bethea*, 167 N.C. App. at 222, 605 S.E.2d at 179 (quoting *Cox v. Gallamore*, 267 N.C. 537, 544, 148 S.E.2d 616, 621 (1966)). Clearly that was not the case here. Assuming Officer Matthews' conduct was in some way negligent, no reasonable person could conclude that Officer Matthews' conduct—which was undertaken in response to the exigency created by Pierce—"so entirely intervened in or superseded the operation of [Pierce's] reckless flight . . . as to constitute the sole cause of [Officer Matthews'] death." *Bethea*, 167 N.C. App. at 222, 605 S.E.2d at 179; *see also State v. Hollingsworth*, 77 N.C. App. 36, 39, 334 S.E.2d 463, 466 (1985) (holding that a "*concurring* proximate cause" does not "insulate [a] defendant from criminal liability" (emphasis in original)). Accordingly, we conclude that the trial court's decision to exclude some evidence of Officer Matthews' alleged negligence did not violate Pierce's "right to a full and fair defense."[2] Pierce's argument is overruled.

II. Fleeing to elude arrest

[5] Pierce raises several issues on appeal regarding the charge of fleeing to elude arrest causing death. First, Pierce argues that the conviction should be set aside because the trial court "plainly erred" "by failing to make reference to material evidence and law." As correctly noted by the State, (1) each decision cited by Pierce on this issue was based on a now-superseded or since-repealed statute, *State v. Ward*, 300 N.C. 150, 266 S.E.2d 581 (1980); *State v. Williams*, 284 N.C. 67, 199 S.E.2d 409 (1973); *State v. Merrick*, 171 N.C. 867, 88 S.E. 501 (1916); and (2) a trial court is no longer required to "make reference to material evidence and law" in its instructions to the jury. *See* N.C. Gen. Stat. § 15A-1232 (2009) ("In instructing the jury, the judge . . . shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence."). Pierce's argument is overruled.

In further support of his contention that the fleeing-to-elude-arrest-causing-death conviction should be set aside, Pierce presents

2. We further note, as does the State on appeal, that the issue of Officer Matthews' alleged negligence was raised in Pierce's closing argument and in almost every cross-examination of a State's witness.

two related arguments—that the trial court (1) should have granted his motion to dismiss the charge, and (2) erroneously precluded Pierce from presenting evidence of Officer Matthews' negligence—the intersection of which raises the above-addressed issue of whether Officer Matthews' death was proximately caused by Pierce's flight from Corporal Richards. As discussed *supra*, the evidence, taken in the light most favorable to the State, was sufficient to allow a reasonable jury to conclude that Pierce's flight from Corporal Richards proximately caused Officer Matthews' death.[3] Further, we are unpersuaded by Pierce's argument that the trial court's decision to exclude some evidence of Officer Matthews' alleged negligence violated Pierce's "right to a full and fair defense." Pierce's arguments on this issue are also overruled.

III. Possession of a firearm by a felon

[6] Pierce argues that the trial court erroneously denied his motion to dismiss the charges of possession of a firearm by a felon. The two charges stem from (1) possession of the firearm found along the route of Corporal Richards' pursuit of Pierce, and (2) possession of the shotgun found at Pierce's residence.

The evidence of Pierce's possession of the shotgun tended to show the following: the shotgun was found in Pierce's closet in the residence; also in the closet was a lockbox containing ammunition that could be used in the shotgun, paychecks with Pierce's name on them, and Pierce's parole papers; and Pierce's wife said that Pierce was holding the shotgun for his brother. This evidence, taken in the light most favorable to the State, was sufficient to show that Pierce possessed the shotgun.

The evidence of Pierce's possession of the firearm found by a pedestrian along the SUV's route is as follows: Corporal Richards did not see a firearm thrown from Pierce's SUV; the firearm was found along the route taken by Pierce's SUV several hours after the chase; the firearm was traced to a dealer in Winston-Salem, where the other two occupants of Pierce's SUV lived; and "[t]hrough the course of [WPD] investigation," WPD Detective Christopher Mayo came to believe that one of the other occupants of the SUV was the actual owner. This evidence, taken in the light most favorable to the State, is insufficient to support the conclusion that Pierce possessed the firearm. At most, the evidence suggests that the likely owner of the

3. Under N.C Gen. Stat. § 20-141.5, a defendant is guilty of a Class E felony where his felonious motor-vehicle flight "is the proximate cause of the death of any person." N.C. Gen. Stat. § 20-141.5(b1) (2009).

firearm was riding in Pierce's SUV and that the firearm was thrown from the SUV at some point, but even that conclusion is tenuous considering the lack of any evidence that the firearm was ever actually in the SUV. There is no evidence showing actual possession by Pierce, nor is there any evidence of Pierce's control of the firearm sufficient to show constructive possession. *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) ("Constructive possession exists when the defendant, 'while not having actual possession, . . . has the intent and capability to maintain control and dominion over' the [contraband]."). Accordingly, we conclude that the trial court erred by denying Pierce's motion to dismiss the charge of possession of the firearm found along the SUV's route. As such, we vacate Pierce's conviction on that charge.

IV. Video evidence

[7] Pierce argues that the trial court erroneously admitted evidence from "video recording devices in [WPD] squad cars, which the State used to show the speed and location of vehicles" during the pursuit. Assuming that admission of "this crucial evidence for the State" was error, we cannot conclude that admission of the evidence was prejudicial. Aside from the unsupported assertion that "this error is not harmless beyond a reasonable doubt," Pierce presents no argument to convince this Court of the existence of harm caused by the trial court's admission of the evidence. Pierce's argument is, therefore, overruled.

V. "Other crimes evidence"

[8] Pierce argues that five pieces of "other crimes evidence" was improperly admitted under North Carolina Rule of Evidence 404(b). As correctly noted by the State, regarding three of those pieces of evidence, Pierce did not object on Rule 404(b) grounds, and, therefore, the arguments regarding those pieces of evidence are not properly before this Court.

Pierce argues that the trial court erroneously admitted evidence showing Pierce was involved in a 1994 robbery and police pursuit where Pierce and an accomplice fled on foot from police and Pierce's accomplice was shot and killed by police officers. The trial court admitted the evidence as evidence of implied malice in that it showed Pierce's knowledge—and his disregard of that knowledge—that flight from police was dangerous and could result in death.

On appeal, Pierce contends that the evidence was inadmissible because Rule 404(b) "contains no provision for the introduction of

other crimes or prior bad acts evidence to prove *malice*." (Emphasis in original). This argument is unpersuasive. Rule 404(b) is "a clear general rule of *inclusion*," *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original), which provides that while "[e]vidence 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," such evidence is admissible for other purposes such as proof of knowledge. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2009). Because Rule 404(b) specifically allows evidence of prior acts to show knowledge, and because the evidence admitted in this case tends to show Pierce's knowledge of the dangers of flight from police, we conclude that the trial court did not err in admitting the evidence of Pierce's prior flight from police. Pierce's argument is overruled.

Pierce also argues that the trial court erroneously admitted evidence showing that Pierce and the two other occupants of his SUV stole several pounds of marijuana just before Pierce fled from Corporal Richards.[4] The trial court admitted the evidence as showing Pierce's motive to flee from the police and his "intent or implied malice."

On appeal, Pierce contends that the evidence was inadmissible because motive to flee is not an element of any of the offenses. This argument is unpersuasive. Rule 404(b) provides that evidence of prior bad acts is admissible proof of motive. *Id.* The evidence tended to show Pierce's motive in fleeing to elude arrest—*i.e.*, to avoid being pulled over with several one-pound bags of marijuana in his vehicle. As such, admission of the evidence was not erroneous. Pierce's argument is overruled.

Conclusion

Based on the foregoing, we vacate Pierce's conviction on the charge of possession of a firearm by a felon with respect to the firearm found along the route of pursuit, and we conclude that, as for the remaining charges, Pierce received a fair trial, free of prejudicial error.

NO ERROR in part; NO PREJUDICIAL ERROR in part; VACATED in part.

Judges ERVIN and BEASLEY concur.

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4. The evidence tended to show that Pierce and the occupants of his vehicle conducted a drug transaction earlier that night during which Pierce and the occupants of his vehicle surreptitiously paid for several pounds of marijuana with approximately $170 and some newspaper.

STATE OF NORTH CAROLINA v. EDWARD WATLINGTON

No. COA11-288

(Filed 18 October 2011)

1. Constitutional Law—right to counsel—waiver—failure to make thorough statutory inquiry

The trial court committed reversible error by allowing defendant to represent himself at the habitual felon stage of his trial without making a thorough inquiry under N.C.G.S. § 15A-1242 and obtaining a voluntary, intelligent, and knowing waiver of counsel even though defendant expressed dissatisfaction with his prior counsel and clearly stated his desire to proceed *pro se*. Defendant was entitled to a new trial on his indictment for habitual felon status.

2. Sentencing—habitual felon—prior record level

The trial court committed reversible error in a habitual impaired driving and felony failure to appear case by sentencing defendant as a prior record level VI because the State did not prove by a preponderance of the evidence that his federal felony conviction was substantially similar to a class G felony in North Carolina. The case was remanded for resentencing.

Appeal by defendant from judgments entered 8 September 2010 by Judge Edwin G. Wilson in Superior Court, Rockingham County. Heard in the Court of Appeals 15 September 2011.

Attorney General Roy A. Cooper, III, by Assistant Attorney General William Hugh Bailey, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for defendant-appellant.

STROUD, Judge.

On 27 April 2007, defendant was arrested for driving while impaired and possession of marijuana. He was later charged with driving while license revoked, habitual impaired driving, and being a habitual felon. On 8 March 2010 at the start of his trial on these charges, defendant pled guilty to the charge of driving while license revoked. Following the trial on the remaining charges, on 9 March 2010, the jury returned verdicts finding defendant not guilty of simple possession of marijuana and guilty of driving while impaired. Because defendant had stipulated to the existence of three prior impaired dri-

ving charges for the purposes of the habitual impaired driving charge, the trial court recorded and accepted the verdict as a conviction for habitual driving while impaired. The trial court then proceeded to the habitual felon phase of the trial, but on 10 March 2010, the final day of the trial, defendant failed to appear. The trial proceeded without defendant's presence, but the jury was unable to reach a verdict on the habitual felon charges and the trial court ultimately declared a mistrial. Defendant was then charged with felonious failure to appear on 10 March 2010 for trial on the habitual felon charge. On the same day, prayer for judgment was continued on the driving while license revoked conviction "until defendant is arrested and available for sentencing." On 3 May 2010, prayer for judgment was continued on the conviction for habitual impaired driving until the habitual felon charge could be retried or was dismissed.

Defendant filed a *pro se* motion for appropriate relief and to have his counsel removed, and these motions came on for hearing on 8 April 2010.[1] The trial court found that the relationship between defendant and his counsel, Mr. Bailey, was "irretrievably damaged[,]" allowed Mr. Bailey to withdraw, and appointed Cathy Stroupe to represent defendant. On 1 June 2010, other pending motions filed by defendant came on for hearing. Although these motions are not included in the record on appeal, from the description of the motions by the trial court,[2] it appears that one of these motions was a motion to proceed *pro se* with the assistance of Ms. Stroupe as standby counsel. Defendant stated that he did not believe that his former attorneys had helped him and that he believed that Ms. Stroupe had lied to him. The trial court then conducted the following colloquy with defendant regarding his motion to proceed *pro se*:

> The Court: But nonetheless, you have the benefit of court appointed counsel. You may view it as being a benefit or not, but nobody is required to have counsel. It is as much a constitutional right to represent one's self as it is to have court appointed counsel when one can't afford to hire a lawyer when one wants a lawyer. So, you know, if you're looking now to discharge your counsel and represent yourself—
>
> The Defendant: And continue on with the case.

1. These motions are not included in our record but the record does include the transcript of this hearing.

2. The trial court stated that it would "construe the defendant's pro se Motion to Proceed in Propria Persona, parentheses, cocounsel ,with [sic] the assistance of Ms. Stroupe as an apparent effort to discharge Ms. Stroupe."

The Court: —then that is called a waiver of the right to counsel.

The Defendant: Yes, sir.

The Court: Is that what you want to do?

The Defendant: Yes, sir. I'd like to go along with the court thing they have scheduled for the habitual felon and have that heard and get either guilty or not guilty on that and let the cards fall where they fall.

If I might, Your Honor, when I looked at 15A-334, it said no duty of the State to move for a sentence following the Prayer for Judgment within 30 days and in other words, it seems to me they're saying that I would have to move for an imposition of a sentence within 30 days after the Prayer for Judgment.

It's been 30 days since they did the Prayer for Judgment and it just seemed to this was saying that I needed to get a judgment entered. It wasn't up to them to get it entered. It was up to me to get it entered. If they failed to do it, they didn't lose the jurisdiction to impose the sentence.

The Court: Again, I don't think you're quite understanding what I told you. There cannot be a judgment entered until there is a disposition of the habitual felon indictment.

The Defendant: Okay. So the one I got for the DWI and the Habitual DWI, the convictions for those can't be done until they do the other one. Okay.

The Court: Well, the State can choose to dismiss that indictment and then it would be ripe for judgment.

The Defendant: They offered me a plea bargain for 261 months and that's not a plea bargain at all in my eyes, twenty-two years for something that started out as a misdemeanor DWI. To offer me a 22-year plea bargain, you know, it's really not giving me any options at all.

I plea bargained to everything that I've done. I've been in prison several times, obviously but I've never, you know, not turned down a reasonable plea bargain but right now to offer me 22 years for something that turned out to be a DWI, I just feel like it's making a mockery of the plea bargain system.

But okay, I hear what you're saying. I'd like to proceed by myself. I'd like the case to go on. I got three or four witnesses I'd

like to subpoena to be here and I just had a couple of motions to suppress evidence on that case and I'll be ready to go. I mean, I've done some homework; and I'll just let the cards, as I say, fall where they may.

And then I had read where I could have standby counsel, if the judge so choose to appoint it. I don't want to sit here and do something stupid in the court because I respect the court. I've been in the court—

The Court: Who do you want for standby counsel? You want to be able to choose that?

The Defendant: No, sir. I don't have to choose it but I'm going to be basically trying to present the case as I see it and if they see me not objecting or something so that it can be heard or something or whatever and they cannot let me just make a complete idiot of myself. I feel like I only got one year of college at Elon College, but I did learn to just read things and try to go on what they say. I don't have access to a law library.

But I'm just trying to, you know—I think—like I say, I think I've been hurt more by my first attorney stipulating me to three charges that opened me up to a 22-year sentence, when we didn't even have a chance to present any evidence or make the State prove their case. I think that he did me more harm than good.

And I don't really trust Ms. Stroupe. I did trust her at first but first tell me one thing and come in and do exactly the opposite, then to tell my sister not to even bother to show up because the D.A. has said she's not going to give me a bond, that don't give me a fair shot at having a bond.

And I feel like I would like to have a bond motion because I'm under no bond and only capital murderers would be allowed no bond. I had one failure to appear and I was in jail at the time that happened. So I just don't feel like I've been treated fairly.

But yeah, I'd like to go it by myself and if I can't get a standby counsel, I just have to take my chances, Your Honor. Thank you.

The Court: Anything further from the State?

[The State]: No, Your Honor. Mr. Watlington is still on the current trial calendar. He was number 14 for trial order this morning.

> The Court: All right. In the Court's discretion, the motion which the Court will treat as a motion to discharge counsel and to proceed pro se is granted.

The indictments for attaining the status of a habitual felon charge and for felonious failure to appear came back on for hearing on 7 September 2010, with defendant appearing *pro se*. Prior to the start of the trial, the trial court discussed with defendant some of the motions and letters defendant had sent to the court and whether he wanted an attorney to represent him on his motions for appropriate relief. Although defendant did at one point state that he may want an attorney to represent him, ultimately he informed the court that he did not want another attorney, stating that:

> Each one I have got, they won't represent me, won't come to see me at the jail. So what's the use of wasting the time and have to stay there six more months waiting for him to get it on for trial when I'm already here. I just don't see the sense in it. Just let the cards fall where they may. I know I'm not qualified to do this, but I trust in God, I trust in the system. I've been in the system before. I would just like to be heard on the cases and go from there. I think that's the best thing I can do.

On 7 September 2010, the jury found defendant guilty of being a habitual felon. On 8 September 2010, defendant pled guilty to felony failure to appear. Defendant was sentenced as a prior record level VI for his felony sentencing, with 19 prior record level points. One of the convictions used to calculate the prior record level was a federal conviction for "possess firearm in commer after F conv" in the Middle District of North Carolina in 1991. This conviction was counted as a class G felony, with four record points. Defendant stipulated to the contents of the prior record level worksheet, but the State did not offer any evidence to demonstrate that the federal conviction was substantially similar to a North Carolina class G felony. The trial court consolidated the habitual impaired driving and felony failure to appear conviction, noting the enhancement based on defendant's habitual felon status, and sentenced defendant to a term of 101 to 131 months imprisonment. Defendant gave notice of appeal in open court.

I. Waiver of counsel

[1] Defendant argues that the "trial court committed reversible error by allowing [him] to represent himself at the habitual felon phase of his trial without making a thorough inquiry under N.C. Gen. Stat.

§ 15A-1242 and obtaining a voluntary, intelligent, and knowing waiver of counsel." This Court has stated that

> [a] criminal defendant's right to representation by counsel in serious criminal matters is guaranteed by the Sixth Amendment to the United States Constitution and Article I, §§ 19, 23 of the North Carolina Constitution. *See Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed.2d 799 (1963). A criminal defendant, on the other hand, also "has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes." *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972). The trial court, however, must insure that constitutional and statutory standards are satisfied before allowing a criminal defendant to waive in-court representation. *See State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992).
>
> First, a criminal defendant's election to proceed *pro se* must be "clearly and unequivocally" expressed. *See State v. Carter*, 338 N.C. 569, 581, 451 S.E.2d 157, 163 (1994), *cert. denied*, 515 U.S. 1107, 132 L. Ed.2d 263 (1995). Second, the trial court must make a thorough inquiry into whether the defendant's waiver was knowingly, intelligently and voluntarily made. *Id.*

State v. Hyatt, 132 N.C. App. 697, 702, 513 S.E.2d 90, 94 (1999). N.C. Gen. Stat. § 15A-1242 (2009) provides as follows:

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

Defendant argues that the standard of review for the trial court's ruling permitting defendant to proceed *pro se* is *de novo*, as it raises a question of constitutional rights. The State also argues that the standard of review is *de novo*, as whether the trial judge conducted a "thorough inquiry" is a question of statutory interpretation. Prior cases addressing waiver of counsel under N.C. Gen. Stat. § 15A-1242 have

not clearly stated a standard of review, but they do, as a practical matter, review the issue *de novo*. *See State v. Whitfield*, 170 N.C. App. 618, 620, 613 S.E.2d 289, 291 (2005); *State v. Evans*, 153 N.C. App. 313, 314-15, 569 S.E.2d 673, 674-75 (2002). We will therefore review this ruling *de novo*.

This Court has previously noted that "[t]he inquiry described in G.S. § 15A-1242 is mandatory in every case where the defendant requests to proceed *pro se*." *State v. White*, 78 N.C. App. 741, 746, 338 S.E.2d 614, 616 (1986) (citation omitted). The State argues that despite the fact that the trial court did fail to conduct any inquiry of the type set forth in N.C. Gen. Stat. § 15A-1242, we should defer to the trial court's decision based upon the trial court's interactions with defendant and we should consider "the fact that there is no set standard for making a proper inquiry, the defendant's knowledge of his possible sentence, [and] his familiarity with the court system." Although these factors may be present,[3] similar factors have been present in prior cases in which this Court has held that a proper inquiry was not performed and granted defendant a new trial. For example, in *State v. Cox*, "defendant clearly and unequivocally stated he would represent himself [and] . . . the trial court instructed him to execute a waiver but failed to proceed with the inquiry required under N.C. Gen. Stat. § 15A-1242." 164 N.C. App. 399, 401-02, 595 S.E.2d 726, 728 (2004) (footnote omitted). We held that "[a] written waiver of counsel is no substitute for actual compliance by the trial court with G.S. § 15A-1242 [and concluded] . . . that in the absence of . . . the inquiry required by G.S. § 15A-1242, it was error to permit defendant to go to trial without the assistance of counsel." *Id.* at 402, 595 S.E.2d at 728 (citation and quotation marks omitted). In *State v. Hyatt*, the defendant signed a waiver of counsel which

> asserts that [he] was informed (1) of the charges against him, (2) the nature of the statutory punishment for each charge, and (3) the nature of the proceedings against him" [but] the record disclose[d] that the trial court failed to inform [him] of any of these things. . . . Rather, the record discloses only that the trial court met its mandate of informing [the defendant] that he had the right to appointed counsel. This falls well short of the requirements of

3 Defendant apparently did not understand what his possible sentence may be, as when the trial court began the sentencing hearing and was considering the prior record level worksheet, defendant stated "I didn't understand what the actual sentence was or could be. I mean, the level VI puts me in the—." The trial court then gave defendant an opportunity to discuss his questions with standby counsel.

> N.C. Gen. Stat. § 15A-1242. Accordingly, because it is prejudicial error to allow a criminal defendant to proceed *pro se* without making the inquiry required by N.C. Gen. Stat. § 15A-1242, we must grant this defendant a new trial.

132 N.C. App. 697, 703-04, 513 S.E.2d 90, 94-95 (1999). Likewise, in *State v. White*, the defendant "clearly indicated that he desired to proceed *pro se* when the case was called for trial" and

> the trial court was required at that point to make the inquiry described in G.S. § 15A-1242. Such was not done in this case. We conclude that in the absence of (1) a clear indication by defendant that he wished to proceed *pro se* and (2) the inquiry required by G.S. § 15A-1242, it was error to permit defendant to go to trial without the assistance of counsel.

78 N.C. App. 741, 746, 338 S.E.2d 614, 617 (1986). In *State v. Gordon*, the record also showed no inquiry under N.C. Gen. Stat. § 15A-1242 and although there was

> some evidence that defendant understood that the charges were serious, there is no evidence that he was informed of the nature of the charges and the range of permissible punishments or that he understood and appreciated the consequences of proceeding without counsel. Absent such evidence, the court should not have permitted him to proceed *pro se*.

79 N.C. App. 623, 625-26, 339 S.E.2d 836, 838 (1986) (citations omitted). We must therefore conclude that, despite the defendant's dissatisfaction with his prior counsel and clearly-stated desire to proceed *pro se*, the trial court erred by failing to conduct an inquiry as required by N.C. Gen. Stat. § 15A-1242 and defendant is therefore entitled to a new trial on his indictment for habitual felon status.

II. Sentencing

[2] Defendant argues that the "trial court committed reversible error by sentencing [him] as a prior record level VI because the State did not prove by a preponderance of the evidence that [his] federal felony conviction was substantially similar to a class G felony in North Carolina." Defendant argues, and the State concedes, that if the federal felony conviction had not been counted as a class G felony, defendant would have had fewer than 19 record level points and would be sentenced at record level V. Because we have granted defendant a new trial above, he will necessarily be sentenced again on the convictions for habitual impaired driving and felony failure to

appear, either as an habitual felon or not, so this issue regarding his record level for felony sentencing is likely to arise upon resentencing and we will address it briefly.

Despite defendant's stipulation to the sentencing worksheet[4], the determination that a conviction from another jurisdiction is "substantially similar to an offense in North Carolina" is a question of law which cannot be determined by the defendant's stipulation. *State v. Henderson*, 201 N.C. App. 381, 385-87, 689 S.E.2d 462, 465-66 (2009). The State acknowledges that it did not present "any evidence to support a showing of substantial similarity" between the federal felony conviction and a class G felony in North Carolina, but seeks to demonstrate this similarity before this Court. This Court has previously determined that the State cannot prove for the first time on appeal that a conviction from another jurisdiction is substantially similar to a North Carolina offense, particularly where the record does not include sufficient information regarding the prior conviction. *See id.* at 388, 689 S.E.2d at 467 ("Although we recognize that it may be possible for a record to contain sufficient information regarding an out-of-state conviction for this Court to determine if it is substantially similar to a North Carolina offense, the record before us does not. Accordingly, we will not speculate as to whether the State has for the first time, in its brief on appeal, properly identified the out-of-state statutes for comparison."). Just as in *Henderson*, our record does not include sufficient information to permit us to determine substantial similarity. The federal conviction is identified only by an abbreviated title, case number, and date, and although it may have been perfectly clear to the State and to defendant what federal statute the conviction was based upon, our record does not include that information. Even if we were to assume that the federal statute identified by the State in its brief is the correct statute, as noted by defendant, 18 U.S.C. 922(g) includes multiple subsections which establish several different firearm offenses. The worksheet does not contain enough information for the trial court or this Court to compare defendant's federal conviction to a particular North Carolina crime. Upon resentencing, the trial court must make a determination as to whether defendant's federal conviction is "substantially similar" to a North Carolina crime, determine the level of felony of the North Carolina crime, and assign points accordingly. If the State fails to present sufficient evidence regarding the federal conviction, it must be

4. We note that defendant made this stipulation *pro se*, and we have determined above that he was not properly advised regarding his right to counsel pursuant to N.C. Gen. Stat. § 15A-1242, which would also render his stipulation void.

counted as a Class I felony, for which two points would be assigned. *See* N.C. Gen. Stat. § 15A-1340.14(e) (2009).

For the foregoing reasons, we grant defendant a new trial on his indictment for habitual felon status.

NEW TRIAL.

Judges GEER and THIGPEN concur.

PORTFOLIO RECOVERY ASSOCIATES, LLC, PLAINTIFF v. RICHARD E. FREEMAN, DEFENDANT RICHARD FREEMAN, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, COUNTERCLAIMANT v. PORTFOLIO RECOVERY ASSOCIATES, LLC, DEFENDANT TO COUNTERCLAIM

No. COA11-220

(Filed 18 October 2011)

1. **Appeal and Error—preservation of issues—arbitration agreement not timely contested**

Although defendant contended on appeal that he never agreed to arbitrate before an organization that had a secret conflict of interest, defendant did not contest the existence of the arbitration agreement prior to the arbitration or challenge the award in a timely fashion. The issue of the existence of an arbitration agreement was not properly before the Court of Appeals.

2. **Arbitration and Mediation—confirmation of award—no motion to vacate**

The trial court was required to confirm an arbitration award where defendant did not file a motion to vacate. There was no merit to defendant's argument that the statute of limitations was equitably tolled.

3. **Appeal and Error—preservation of issues—arbitration counterclaims**

Defendant's state law counterclaims to a motion to confirm an arbitration award were not properly before the Court of Appeals. The only counterclaims that are proper responses to motions to confirm an arbitration award are those provided in 9 U.S.C. §§ 10 and 11.

PORTFOLIO RECOVERY ASSOCS., LLC v. FREEMAN

[216 N.C. App. 397 (2011)]

Appeal by defendant from order entered 4 November 2010 by Judge Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 31 August 2011.

Robins, Kaplan, Miller & Ciresi L.L.P., by Christopher W. Madel, Jennifer M. Robbins, and Nicole S. Frank, and Morris, Manning & Martin, LLP, by Caren D. Enloe, for plaintiff-appellee.

Hartzell & Whiteman, L.L.P., by J. Jerome Hartzell, North Carolina Justice Center, by Carlene McNulty and Daniel Rearick, and Martin, Attorney at Law, PLLC, by Angela O. Martin, for defendant-appellant.

STEELMAN, Judge.

Where defendant failed to contest the existence of the arbitration agreement prior to the arbitration hearing and within the time period allowed by federal law after the award, this issue is not properly before this Court. Where defendant failed to file a motion to vacate the arbitration award, the trial court correctly confirmed the award. Where defendant's state law counterclaims did not fall within those permitted under 9 U.C.S. §§ 10 and 11, they were properly dismissed by the trial court.

I. Factual and Procedural History

Richard E. Freeman (defendant) was the holder of a credit card. The terms of the credit card agreement provided that any claims or disputes would be resolved by binding arbitration conducted by the National Arbitration Forum (NAF). Portfolio Recovery Associates, LLC (plaintiff) filed a claim against defendant with NAF. This claim along with a notice of arbitration was served upon defendant. Subsequently, NAF sent defendant a second notice of arbitration, and an arbitration hearing notice.

On 11 July 2008, NAF entered an award in favor of plaintiff and against defendant. The award was for $2,386.35 owed to plaintiff on a credit card debt. NAF served defendant with a copy of the arbitration award. Plaintiff filed this action to confirm the award on 19 January 2010.

On 14 July 2009, the Minnesota Attorney General brought a civil action against NAF and two affiliates, *State ex rel Swanson v. National Arbitration Forum*, Hennepin County, file no. 27-CV-09-18550 (*Swanson* complaint). The *Swanson* complaint "describe[d] the

acquisition of a 40% ownership interest in NAF by a hedge fund with substantial investment and management relationships with the debt collection industry for $42 million. This acquisition of an ownership interest in NAF occurred on June 27, 2007, pursuant to a letter of intent executed January 15, 2007." This ownership interest contrasted sharply with NAF's claims of independence, neutrality, and lack of affiliation with any business that uses its services. On 17 July 2009, "NAF entered into a Consent Judgment with the Minnesota Attorney General whereby it agreed that it would not 'administer or process any new Consumer Arbitration.' "

On 26 March 2010, defendant filed answer to plaintiff's motion to confirm the arbitration award, and asserted class-action counterclaims. The class was alleged to consist of North Carolina residents against whom arbitration awards were entered by NAF in favor of plaintiff at any time after 15 January 2007. At no time in his answer and counterclaims did defendant assert that he did not owe the debt that was the subject of the arbitration award. On 26 April 2010, plaintiff filed a motion to dismiss defendant's counterclaims, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

On 4 November 2010, the trial court entered an order confirming the arbitration award, and granting plaintiff's motion to dismiss defendant's counterclaims. The trial court found that defendant's "First, Second, and Third Claims for Relief fail to state a claim upon which relief may be granted because they are time-barred pursuant to 9 U.S.C. § 12, they are insufficient to support vacatur under 9 U.S.C. § 10, and because [defendant] cannot assert non-statutory reasons for vacatur of the arbitration award under the [Federal Arbitration Act (FAA)]."

Defendant appeals.

II. Timeliness

In his first argument, defendant contends that the trial court erred in dismissing his challenges as untimely because there was no agreement to arbitrate, and that equitable tolling should have been applied to allow him to bring his claims outside of the three month period for challenging an arbitration award. We disagree.

Section 12 of Title 9 of the United States Code, the FAA, states in part: "[n]otice of a motion to vacate, modify, or correct an [arbitration] award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."

A. No Agreement to Arbitrate

[1] There is no factual issue that defendant failed to challenge the arbitration award entered by NAF in favor of plaintiff within the three month time period prescribed by 9 U.S.C. § 12. Defendant contends that he never agreed to arbitrate before an organization that had a secret conflict of interest; and therefore, no agreement to arbitrate existed.

This Court addressed a similar situation in *Advantage Assests, Inc. II v. Howell*, 190 N.C. App. 443, 663 S.E.2d 8 (2008). In *Howell* an arbitration award was entered against the defendant on 4 January 2006. Plaintiff filed a motion to confirm on 2 June 2006. Defendant responded to this motion on 7 July 2006 contending that "he need not file any Motion to Vacate any award, because he never entered into any agreement to arbitrate, or any contract with the Plaintiff." *Id.* at 445, 663 S.E.2d at 9 (internal quotation marks and alterations omitted). This Court in *Howell* held that:

> The FAA allows a party to challenge the existence of a valid arbitration agreement. If a party refuses to arbitrate under an arbitration agreement, the other party may petition a federal district court to issue an 'order directing that such arbitration proceed in the manner provided for in such agreement.' 9 U.S.C. § 4 (2007).

Id. at 446, 663 S.E.2d at 10.

This court went on to hold in *Howell* that:

> [I]t appears that plaintiff provided notice to defendant that it would proceed to arbitration, that defendant did not respond to that notice, and that the arbitration hearing occurred without defendant's participation. Defendant did not avail himself of the proper procedural mechanism to challenge the existence of an arbitration agreement provided by 9 U.S.C. § 4.
>
> . . . .
>
> [Defendant] offers no legal authority to support a reversal of the superior court's order confirming the arbitration award. He does not question the FAA's applicability. It appears that [defendant] received notice of the arbitration hearing and the subsequent award, and chose not to challenge the existence of an arbitration agreement. His response to plaintiff's motion to confirm—that there was no arbitration agreement—was simply not an appropriate response given the procedural posture of the case. The question of the arbitration agreement's exis-

> tence was not properly before the superior court, and the superior court did not have the power to dismiss plaintiff's motion [to confirm the arbitration award].

Id. at 446-47, 663 S.E.2d 10-11.

Howell is controlling authority in the instant case. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Defendant did not contest the existence of the arbitration agreement prior to the arbitration or challenge the award in a timely fashion. The issue of the existence of an arbitration agreement is not properly before this Court.

B. Equitable Tolling

[2] Defendant further contends that his claims are not barred because equitable tolling applies to the three month limitations period set forth in 9 U.S.C. § 12. He asserts that at the time the arbitration award was entered in 2008, he could not have known of NAF's conflicts of interest that were revealed by the litigation conducted by the Attorney General of Minnesota.

> [O]nce the three-month period [provided for in 9 U.S.C. § 12] has expired, an attempt to vacate an arbitration award [can]not be made even in opposition to a later motion to confirm. *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 174-75 (2d Cir.1984). A confirmation proceeding under 9 U.S.C. § 9 is intended to be summary: confirmation can only be denied if an award has been corrected, vacated, or modified in accordance with the Federal Arbitration Act. Under the Act, vacation of an award is obtainable by serving a motion to vacate within three months of the rendering of the award. 9 U.S.C. § 12.

Taylor v. Nelson, 788 F.2d 220, 225 (4th Cir. 1986). A thorough examination of the record reveals that defendant has yet to file a motion to vacate the arbitration award. In his answer, defendant admitted that "[s]aid award is final, and has not been appealed, modified, set aside, vacated or otherwise challenged." Rather, defendant filed an answer and counterclaims to plaintiff's motion to confirm the arbitration award. Plaintiff's motion to confirm cannot be denied because the award has not "been corrected, vacated, or modified." *Id.* Because defendant failed to file a motion to vacate, the trial court was required to confirm the arbitration award.

"The existence of any [due diligence or tolling] exceptions to [9 U.S.C.] § 12 is questionable, for they are not implicit in the language of the statute, and cannot be described as common-law exceptions

because there was no common-law analogue to enforcement of an arbitration award." *Id.* (citations omitted).

This argument is without merit.

III. State Law Claims

[3] The remainder of defendant's arguments are either determined by his failure to file a motion to modify or vacate the arbitration award under 9 U.S.C. §§ 10 and 11 as discussed above, or relate to defendant's state law counterclaims.

In *Booth v. Hume Pub., Inc.*, 902 F.2d 925, 931 (11th Cir. 1990), the United States Court of Appeals for the 11th Circuit "conclude[d] that it would be inconsistent with the language and purpose of the [Arbitration] Act to allow counterclaims [to a motion to confirm an arbitration award], other than counterclaims that fall within the specific defenses permitted under §§ 10 and 11 of the [Arbitration] Act." In reaching this holding the Court in *Booth* held:

> a confirmation of an arbitration award is intended to be summary in nature. Our circuit has noted that "[t]he purpose of the Federal Arbitration Act was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation." *O.R. Securities v. Professional Planning Associates*, 857 F.2d 742, 745-46 (11th Cir.1988) (quoting *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir.1981)). *See also Diapulse Corp. of America v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir.1980) (citing *Wilko v. Swan*, 346 U.S. 427, 431-32, 98 L.Ed. 168, 174 (1953)).
>
> To effectuate its purpose of speedy resolution of disputes, the Federal Arbitration Act allows arbitration to proceed with only a summary hearing and with restricted inquiry into factual issues. *O.R. Securities*, 857 F.2d at 747-48. After arbitration is complete, judicial review of the arbitration process and of the amount of the award is narrowly limited. *Diapulse Corp.*, 626 F.2d at 1110. *See also Amicizia Societa Navegazione v. Chilean Nitrate and Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir.1960) ("[T]he court's function in confirming or vacating an arbitration award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated."), *cert. denied*, 363 U.S. 843, 4 L.Ed.2d 1727 (1960). *Cf. Protective Life Ins. Corp. v. Lincoln National Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir.1989) (construing § 4 of the Act, which

> provides for judicially compelled arbitration, to "narrowly circumscribe[]" the power of the federal courts).

Id. at 932.

This is consistent with language found in *Hall Street Associates v. Mattel*, 552 U.S. 576, 170 L. Ed. 2d 254 (2008), in which the United State Supreme Court held that the FAA's statutory grounds for prompt modification and vacatur of arbitration awards may not be supplemented by contract. In *Hall*, the Supreme Court held:

> Instead of fighting the text, it makes more sense to see the three provisions [of the FAA], §§ 9-11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process," *Kyocera Corp. v. Prudential-Bache*, 341 F.3d 987, 998 (CA9 2003); cf. *Ethyl Corp. v. United Steelworkers of America*, 768 F.2d 180, 184 (CA7 1985), and bring arbitration theory to grief in postarbitration process.

Id. at 588, 170 L. Ed. 2d at 265.

The reasoning of the 11th Circuit in *Booth v. Hume Pub., Inc.*, 902 F.2d 925, is persuasive, and we hold that the only counterclaims that are a proper response to a motion to confirm an arbitration award are those provided for in 9 U.S.C. §§ 10 and 11. Therefore, defendant's state law counterclaims are not properly before this Court. The dismissal of these claims by the trial court was proper.

AFFIRMED.

Judges STEPHENS and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. HEATHER R. SURRATT

No. COA11-239

(Filed 18 October 2011)

Constitutional Law—effective assistance of counsel—failure to challenge witness

A defendant charged with felony child abuse—sexual act, indecent liberties, and first-degree sexual offense with a child received ineffective assistance of counsel where her attorney did not challenge the testimony of a social worker who testified that she had investigated the sexual abuse allegations and removed the children from the home, but did not mention that the children were removed for neglect rather than sexual abuse. There was no physical evidence, no witnesses other than the victim, a long delay between the dates of the crime and the accusation, and it was quite likely that the jury may have reached a different result without this testimony.

Appeal by defendant from judgments and order entered on or about 22 September 2010 by Judge Ronald E. Spivey in Superior Court, Forsyth County. Heard in the Court of Appeals 15 September 2011.

Attorney General Roy A. Cooper, III, by Assistant Attorney General David Gordon, for the State.

Mark Montgomery, for defendant-appellant.

STROUD, Judge.

Defendant appeals her convictions for two counts of felony child abuse—sexual act, two counts of indecent liberties with a child, and two counts of first degree sex offense with a child, arguing that she received ineffective assistance of counsel. For the following reasons, we conclude that defendant did receive ineffective assistance of counsel, and we order she receive a new trial.

I. Background

The State's evidence tended to show that in 2005, defendant forced Jenny[1], her biological minor daughter, to touch inside her vagina with her fingers. On another occasion, defendant also made Jenny lick her vagina. On or about 20 July 2009, defendant was

1. A pseudonym will be used to protect the identity of the child.

indicted for two counts of felony child abuse—sexual act ("child abuse"), two counts of indecent liberties with a child ("indecent liberties"), and two counts of first degree sex offense with a child ("sex offense"). Defendant was tried by a jury and found guilty of all of the charges against her. Defendant was determined to have a prior record level of II and was sentenced consecutively to 24 to 38 months imprisonment for the child abuse and indecent liberties convictions and 250 to 309 months for the sex offense convictions. Defendant was also placed on satellite-based monitoring for the remainder of her life. Defendant appeals.

II. Ineffective Assistance of Counsel

In a previous hearing before the district court regarding a Department of Social Services petition for abuse, neglect, and dependency, the district court concluded that defendant's children were not sexually abused but were neglected.[2] Before testimony in defendant's trial began, the trial court "grant[ed] the [State's] motion in limine excluding specific references to or [sic] the outcome of any previous DSS hearing." Defendant's attorney did not object.

During defendant's trial, Ms. Tina Wallace, "a social worker in Child Protective Services with Davidson County Department of Social Services[,]" testified that she interviewed defendant's family. Ms. Wallace discussed the allegations of sexual abuse made by Jenny and her interview with two of Jenny's siblings regarding what Jenny had told them. Ms. Wallace then testified that DSS removed defendant's children from the home and placed them with another family.

Defendant now contends that she received ineffective assistance of counsel, particularly because "[t]he jury should have . . . heard that th[e] removal was solely on the basis of neglect, not the sexual abuse alleged by" Jenny.

> North Carolina has adopted the federal standard for ineffective assistance of counsel; this standard consists of a two-part test.
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth

2. The district court's decision regarding the abuse, neglect, and dependency proceeding is not part of our record on appeal. However, it is clear from statements of counsel for both the State and defendant to the trial court that the district court concluded that defendant's children were neglected but not sexually abused.

> Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable.

State v. Brown, ___ N.C. App. ___, ___, 713 S.E.2d 246, 248 (2011) (citation, quotation marks, and ellipses omitted).

After a thorough reading of the transcript, it is clear that defendant's children were placed in foster care after the investigation regarding Jenny's allegations; it is also evident that from Ms. Wallace's testimony the jury would have thought that the children were removed from their home due to those allegations; this Court would have believed the same thing, if we did not know that the district court removed the children based upon neglect. The jury did not hear any evidence regarding neglect or why the children were actually removed from their home; they only heard about the sexual abuse allegations.

In *State v. Martinez*, the "[d]efendant first argue[d] the trial court erred in admitting DSS social worker Putney's testimony that she 'substantiated' Nadia's 2006 claim of sexual abuse by Defendant. Defendant contend[ed] the admission of this testimony was an error of law as it unfairly bolstered the victim's credibility." ___ N.C. App. ___, ___, 711 S.E.2d 787, 789 (2011). This Court stated:

> In *State v. Giddens*[, 199 N.C. App. 115, 681 S.E.2d 504 (2009), *aff'd per curiam*, 363 N.C. 826, 689 S.E.2d 858 (2010),] this Court concluded similar testimony to be an impermissible expression of opinion as to the credibility of the accuser. At issue in *Giddens* was the testimony by a DSS investigator that he "substantiated" the victim's sexual abuse allegation after an investigation into the claim. Because the investigator's testimony was based, in part, on the DSS investigation and not solely on the children's accounts of what happened, the Court rejected the State's argument that the testimony was a prior consistent statement and merely corroborated the victims' testimony. Rather, the testimony amounted to an impermissible voucher of the victims' credibility.
>
> The *Giddens* Court concluded the investigator's testimony, that DSS "substantiated" the allegations of sexual abuse, essen-

tially told the jury that DSS determined the defendant was guilty of sexually abusing the victims and the trial court erred in admitting the testimony.

The State argues the present case is distinguishable. In *Giddens*, the State's witness testified to the thorough nature of the investigation that led DSS to conclude the victims' allegation was substantiated. Here, Putney did not testify to the thoroughness of the DSS investigation, but merely stated that DSS "substantiated" the claim after conducting an investigation. On this basis, the State contends it would be disingenuous to equate the present case with the facts of *Giddens*. We cannot agree.

In *Giddens*, the DSS investigator testified that her investigation included a global assessment, in which she inquired about more than the child's specific allegations, but also inquired as to the child's mental needs and supervision. Based on this information, the DSS investigator stated she had no information to substantiate that the child's other caregivers were abusive or neglectful. We cannot conclude the testimony in the present case, that DSS substantiated Nadia's sexual abuse allegations, is any less prejudicial than the testimony in *Giddens*. As we explained in *Giddens*, although the social worker was not qualified as an expert witness, the jury likely gave the witness' opinion more weight than the opinion of a lay person. The trial court erred in admitting Putney's substantiation testimony.

We also note the striking similarity of the evidence in *Giddens* and the present case. Here, as in *Giddens*, there was no physical evidence of sexual abuse. The State's expert medical witness, Dr. St. Claire, testified to Nadia's non-specific genital exam results—she looked like a very typical adolescent. Thus, the State's case rested solely on Nadia's testimony and additional corroborative testimony. In effect, the essential issue for the jury to consider was Nadia's credibility.

Accordingly, we conclude there is a reasonable possibility that had Putney's testimony not been admitted, the jury would have reached a different verdict.

Id. at ___, 711 S.E.2d at 789-90 (citations and quotation marks omitted).

Here, as in *Giddens* and *Martinez*, "there was no physical evidence of sexual abuse" and "[t]hus, the State's case rested solely on [Jenny]'s testimony and additional corroborative testimony." *Id.* at

___, 711 S.E.2d at 790. Furthermore, just as in *Giddens* and *Martinez* "although the social worker was not qualified as an expert witness, the jury likely gave the witness' opinion more weight than the opinion of a lay person." *Id.* Unlike *Giddens* and *Martinez*, Ms. Wallace did not specifically testify that the sexual abuse claims against defendant were "substantiated." *Id.* However, Ms. Wallace's testimony gave the jury the same impression, that the children were removed from their home because of sexual abuse, as the jury was told only that DSS was investigating the sexual abuse allegations and then that the children were removed from their home, without any mention of neglect or any other reason that the children could have been removed from their home. We believe Ms. Wallace's testimony was the functional equivalent of testimony that DSS had "substantiated" Jenny's allegations, thereby bolstering her credibility, which is perhaps even worse in this case than in those cases where DSS or the district court did actually find sexual abuse, as here, the district court did not remove the children based upon sexual abuse. Just as in *Giddens* and *Martinez*, we also conclude that the effect of bolstering the credibility of the one substantive witness was prejudicial. *See id.*

Yet we have not been asked to address Ms. Wallace's testimony substantively, but to consider instead the effectiveness of defendant's counsel in both allowing such testimony and not attempting to clarify the information. As noted above, there was no physical evidence of the crimes, there were no witnesses to the alleged acts other than Jenny, and there was a long delay between the dates of the crimes and Jenny's accusations. Under these circumstances, we believe it quite likely that without Ms. Wallace's testimony which impermissibly bolsters Jenny's testimony, the jury may have reached a different verdict. We conclude that failing to challenge Ms. Wallace's testimony was deficient advocacy on the part of defendant's trial attorney which ultimately had the effect of prejudicing defendant's case. *See Brown* at ___, 713 S.E.2d at 248. As such, we conclude that defendant received ineffective assistance of counsel.

III. Conclusion

As we conclude that defendant received ineffective assistance of counsel, we order she receive a new trial. As defendant is receiving a new trial, we need not address her other issues on appeal.

NEW TRIAL.

Judges GEER and THIGPEN concur.

SHANER v. SHANER

[216 N.C. App. 409 (2011)]

ANNE LOUISE SHANER, PLAINTIFF v. CLIFFORD JOHN SHANER, (AKA JACK SHANER), DEFENDANT

No. COA11-345

(Filed 18 October 2011)

Jurisdiction—personal jurisdiction—insufficient minimum contacts

The trial court erred in a divorce case by concluding that minimum contacts between defendant and North Carolina were sufficient to permit the exercise of personal jurisdiction over defendant by the State's courts.

Appeal by Defendant from order entered 26 October 2010 by Judge L. Dale Graham in Iredell County District Court. Heard in the Court of Appeals 14 September 2011.

David W. Minor for Plaintiff.

Patricia L. Riddick for Defendant.

STEPHENS, Judge.

Procedural and Factual Background

This appeal arises from a divorce proceeding. Plaintiff Anne Louise Shaner and Defendant Clifford John Shaner were married 13 April 1968 in Cuba, New York. They lived continuously together as husband and wife for almost forty-one years. In December 2003, Plaintiff and Defendant moved together to Mooresville, in Iredell County, North Carolina, near where their three adult children were residing. Defendant lived in Mooresville with his wife from December 2003 to March 2004. In March 2004, Defendant returned to New York where the parties continued to own real property. After Defendant's departure, Plaintiff purchased a home in Statesville, North Carolina. Plaintiff returned to New York and resided with Defendant for periods of approximately six months several times between 2004 and 2007. The couple formally separated on 12 November 2007.

On 17 November 2009, Plaintiff filed a complaint for post-separation support, alimony, absolute divorce, equitable distribution, interim allocation of marital property, and attorney's fees in Iredell County (file No. 08 CVD 3665). Defendant answered, moving the court to dismiss for lack of personal and subject matter jurisdiction, and failure to state a claim upon which relief could be granted pur-

suant to Rule 12(b)(6). By order entered 8 October 2009, the trial court denied Defendant's Rule 12(b)(6) motion and found that, while the court had subject matter jurisdiction based on Plaintiff's residency in Iredell County, it lacked personal jurisdiction over Defendant due to improper service of summons. On 9 April 2010, Plaintiff filed a new complaint seeking the same relief. On 18 August 2010, Defendant again filed a motion to dismiss for lack of personal jurisdiction, this time arguing that he lacked sufficient minimum contacts with North Carolina under the relevant long-arm statute. On 26 October 2010, the trial court denied the motion, concluding that the court had personal jurisdiction over Defendant. Defendant appeals.[1]

Discussion

Defendant argues that the trial court's findings of fact[2] do not support its conclusion that the "[m]inimum contacts between [] Defendant and the State of North Carolina are sufficient to" permit the exercise of personal jurisdiction over Defendant by this State's courts. We agree.

"The burden is upon the plaintiff to establish by a preponderance of the evidence that personal jurisdiction exists." *Sherlock v. Sherlock*, 143 N.C. App. 300, 301, 545 S.E.2d 757, 759 (2001). When its exercise of personal jurisdiction over a non-resident is challenged, the trial court must undertake a two-pronged inquiry. *Banc of Am. Secs., LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005). First, the court must determine whether the controversy falls within the language of the relevant long-arm statute. *Id.* Second, the exercise of jurisdiction must not violate the due process clause of the Fourteenth Amendment to the United States Constitution. *Id.* Because Defendant does not dispute the

1. While this appeal is interlocutory, there is a right of immediate appeal from an adverse ruling as to *in personam* jurisdiction under N.C. Gen. Stat. § 1-277(b). *Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 144 (1982). Thus, Defendant's appeal is properly before this Court.

2. As noted by Defendant, findings of fact 5 and 6 state that Defendant lived with Plaintiff in Mooresville for four months, beginning in December 2004 and ending in March 2005, while the undisputed evidence indicates that the correct dates were December 2003 and March 2004. However, this clerical error has no impact on our minimum contacts analysis and, in light of our reversal of the order, Defendant's argument on this point is moot.

3. In unchallenged finding of fact 3, the court cites section 1-75.4(1)(d), which provides that the courts of this State have personal jurisdiction over a party properly served pursuant to Rule 4(j), (j1), or (j3) of the Rules of Civil Procedure if that party has "engaged in substantial activity within this State[.]" N.C. Gen. Stat. § 1-75.4(1)(d) (2009).

applicability of North Carolina's long-arm statute,[3] we consider only whether the trial court's exercise of jurisdiction over Defendant comports with due process.

> To satisfy the requirements of the due process clause, there must exist certain minimum contacts between the non-resident defendant and the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. . . . [I]n each case, there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws . . . . [T]he relationship between the defendant and the forum must be such that he should reasonably anticipate being haled into court there.

Id. at 695-96, 611 S.E.2d at 184 (internal quotation marks, brackets and citations omitted).

Our courts consider the following factors to determine the existence of minimum contacts between a party and this State:

> (1) the quantity of the contacts; (2) nature and quality of the contacts; (3) the source and connection of the cause of action to the contacts; (4) the interest of the forum state; (5) convenience of the parties . . . . The Court must also weigh and consider the interests of and fairness to the parties involved in the litigation.

Filmar Racing, Inc. v. Stewart, 141 N.C. App. 668, 672, 541 S.E.2d 733, 737 (2001). "Whether a defendant's activities satisfy due process depends upon the facts of each case." *Id.*

For example, in *Sherlock*, we concluded that a party had minimum contacts with North Carolina where he had married and purchased real property in the State, used a North Carolina address for important mail such as tax documents, had his paycheck directly deposited in a North Carolina bank, and held a North Carolina driver's license for several years. 143 N.C. App. at 305, 545 S.E.2d at 761. This Court upheld the trial court's conclusion that the defendant had established minimum contacts because

> the record sufficiently establishes that the defendant availed himself of the privilege of conducting activities within [North Carolina], thus invoking the benefits and protections of its laws. We find that the defendant intentionally developed an assortment of financial, legal, and personal connections within North

> Carolina. These endeavors were sustained over a period of years, and appear intended to inure to his benefit.

Id. at 305, 545 S.E.2d at 762 (internal quotation marks and citation omitted). We contrasted Mr. Sherlock's contacts with the State to the facts of other cases, including *Shamley v. Shamley*, 117 N.C. App. 175, 455 S.E.2d 435 (1994). In *Shamley*, the defendant did not work or purchase real property in this State and her "only voluntary contacts with North Carolina were [] a brief visit [to look] at houses with [the plaintiff] and another visit in which she purchased an automobile." *Id.* at 182, 455 S.E.2d at 439. We found that the "defendant could not, on the basis of these contacts, reasonably anticipate being haled into court here." *Id.*

Here, only findings of fact 5 and 6 touch on factors relevant to a minimum contacts analysis. In finding 5, the court found that Defendant "came to North Carolina . . . and began living in Mooresville" for a period of four months. In finding 6, the court found Defendant made only brief visits to the State thereafter. Defendant's limited contacts with North Carolina are more analogous to those in *Shamley* than those in *Sherlock*. Because Defendant could not reasonably anticipate being haled into court on the basis of these contacts, the trial court's exercise of personal jurisdiction over Defendant would violate his due process rights. Accordingly, the order of the trial court is

REVERSED.

Judges ERVIN and BEASLEY concur.

STATE OF NORTH CAROLINA v. KWAME HOLLOWAY

No. COA11-240

(Filed 18 October 2011)

1. Appeal and Error—representation—amendment to brief by defendant

A defendant did not have the right to appear both by himself and by counsel, and a *pro se* amendment to council's brief was not considered.

2. Sentencing—habitual felon—habitual misdemeanor assault

The trial court did not err by sentencing defendant as an habitual felon using convictions that included habitual misdemeanor assault. Although the habitual misdemeanor assault statute, N.C.G.S. § 14-33.2, states that a conviction under that section may not be used as a prior conviction for any other habitual offense statute, the habitual felony statute involves a status rather than a substantive offense.

Appeal by defendant from judgment entered 21 July 2010 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 12 September 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Valerie L. Bateman, for the State.

Hartsell & Williams, P.A., by Christy E. Wilhelm and Benjamin G. Goff, for defendant-appellant.

BRYANT, Judge.

Because defendant was convicted of habitual misdemeanor assault, a class H felony, and attained the status of habitual felon, we affirm the trial court's judgment sentencing defendant pursuant to the habitual felon sentencing statute.[1]

On 15 June 2009, a Wake County Grand Jury indicted defendant Kwame Holloway on two counts of assault on a female and two counts of habitual misdemeanor assault for striking his girlfriend on 4 December 2008 and 23 December 2008. On 28 July 2009, a grand jury indicted defendant on attaining habitual felon status: Defendant's prior felony convictions included second-degree kidnapping (95 CRS 15412), possession of cocaine (00 CRS 36635), and felonious restraint (02 CRS 102997). Prior to trial, defendant admitted to two prior misdemeanor assault convictions. On 21 July 2010, following a trial in Wake County Superior Court, a jury found defendant Kwame Holloway guilty of two counts of assault on a female. After a sentencing hearing, the trial court sentenced defendant to two consecutive sentences of

[1] 1. We note that defendant submitted for our consideration a pro se amendment to the brief submitted by his appellate counsel. We do not consider this amendment. "Having elected for representation by appointed defense counsel, defendant cannot also file motions on his own behalf or attempt to represent himself. Defendant has no right to appear both by himself and by counsel." *State v. Williams*, 363 N.C. 689, 700, 686 S.E.2d 493, 501 (2009) (citation omitted).

108 to 139 months in the custody of the North Carolina Department of Correction. Each sentence was predicated on a consolidated judgment for one count of assault on a female, one count of habitual misdemeanor assault, as well as, attaining habitual felon status. Defendant appeals.

[2] On appeal, defendant argues that the trial court erred in sentencing him as an habitual felon. Defendant contends that habitual felon status cannot be attained based on misdemeanor criminal conduct. Specifically, defendant contends that his convictions for habitual misdemeanor assault, a class H felony, cannot be used as a felony on which to predicate sentencing as a habitual felon. We disagree.

Pursuant to North Carolina General Statutes, section 14-33.2, describing conduct punishable as habitual misdemeanor assault, "[a] conviction under this section shall not be used as a prior conviction for any other habitual offense statute." N.C. Gen. Stat. § 14-33.2 (2009). This Court has previously held N.C.G.S. § 14-33.2, "the habitual misdemeanor statute[,] to be a substantive offense." *State v. Smith*, 139 N.C. App. 209, 214, 533 S.E.2d 518, 520 (2000). In comparison, the habitual felon statute, N.C. Gen. Stat. § 14-7.1, is not a substantive offense. "Rather, being an habitual felon is a status justifying an increased punishment for the principal felony." *Id.* (citing *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977)).

"When any person is charged by indictment with the commission of a felony under the laws of the State of North Carolina and is also charged with being an habitual felon as defined in G.S. 14-7.1, he *must*, upon conviction, be sentenced and punished as an habitual felon . . . ." N.C. Gen. Stat. § 14-7.2 (2009) (emphasis added). "When an habitual felon . . . commits any felony under the laws of the State of North Carolina, the felon must, upon conviction . . . be sentenced as a Class C felon." N.C. Gen. Stat. § 14-7.6 (2009).

Here, defendant was indicted and convicted on two counts of habitual misdemeanor assault, a substantive crime and a class H felony. Defendant was also indicted and convicted on two counts of attaining habitual felon status as defined in N.C.G.S. § 14-7.1. Therefore, based on our statutes, defendant must be sentenced as a Class C felon. *See* N.C.G.S. §§ 14-7.2, 14-7.6.

While defendant's arguments are well taken, we note that the primary purpose of recidivist statutes such as these are "to deter repeat offenders and, at some point in the life of one who repeatedly com-

mits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time." *State v. Aldridge*, 76 N.C. App. 638, 640, 334 S.E.2d 107, 108 (1985) (discussing N.C.G.S. § 14-7.6).

Affirmed.

Chief Judge MARTIN and Judge CALABRIA concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 OCTOBER 2011)

BRYAN v. MATTICK No. 11-427	Mecklenburg (02CVD11074)	Defendant's appeal affirmed in part and remanded in part; Plaintiff's appeal dismissed.
CITIBANK v. GRAUDIN No. 11-77	Nash (08CVD1834)	Reversed and Remanded
CONSOLIDATED ELEC. DISTRIBS., INC. v. WIELTECH ELEC. No. 11-96	Wake (08CVS16825)	Affirmed
DENNING v. N.C. DEP'T OF AGRIC. No. 10-1587	Ind. Comm. (799667)	Affirmed
FITTA v. BURKE No. 11-332	Onslow (08CVS1818)	Affirmed
GMAC MORTG., LLC v. MILLER No. 11-55	Surry (07CVS1501)	Affirmed in Part; Remanded in Part
IN RE C.C. No. 11-401	Durham (10J50)	Affirmed
IN RE J.K. No. 11-626	Cleveland (09JA128) (09JA8-9) (10JA125)	Affirmed
IN RE K.R.M. No. 11-505	Haywood (09JT114)	Affirmed
IN RE K.T. No. 11-761	Wake (09JT5-7)	Affirmed
IN RE S.A.C. No. 11-596	Orange (07JT144-145)	Reversed and Remanded
IN RE S.D.G. No. 11-336	Alamance (09JB68)	Reversed and Remanded
MOONEY v. MOONEY No. 11-178	Henderson (03CVD1581)	Affirmed in part; remanded in part reversed in part
N.C. FARM BUREAU MUT. INS. CO. v. LYNN No. 11-227	Gaston (10CVS2999)	Reversed

STATE v. BRYANT No. 11-372	Franklin (08CRS52219)	Affirmed
STATE v. CHAMBERS No. 11-71	Mecklenburg (08CRS234653)	No Error
STATE v. FORNEY No. 11-352	Mecklenburg (09CRS212480) (09CRS213352) (09CRS213364) (09CRS213379) (09CRS38732)	No prejudicial error at trial, order of restitution affirmed
STATE v. GRAVERAN No. 11-218	Wake (07CRS85880)	Affirmed
STATE v. HARGRAVES No. 11-157	Guilford (09CRS99161) (10CRS24191)	No Error
STATE v. HODGE No. 11-179	Wake (09CRS6970)	No Error
STATE v. JAMES No. 11-244	Mecklenburg (06CRS222499-500)	No Error
STATE v. LASALLE No. 11-275	Lincoln (09CRS2932) (09CRS51777) (09CRS51778)	No Error
STATE v. PARKS No. 11-364	Cabarrus (08CRS7433)	Affirmed
STATE v. PITTMAN No. 11-485	Edgecombe (09CRS51886-88)	No Error
STATE v. PRATT No. 11-358	Forsyth (10CRS53575)	No Error
STATE v. REYES No. 11-389	Guilford (09CRS81094)	No Error
STATE v. SMITH No. 11-81	Guilford (05CRS83485) (05CRS83487)	Affirmed
STATE v. SMITH No. 11-216	Alamance (08CRS59456) (10CRS4776)	No Error
STATE v. SPEAKS No. 11-390	Davidson (09CRS58225) (09CRS58227)	Affirmed

STATE v. TOLER No. 11-5	Lenoir (10CRS50220)	No error in part. Vacated in part.
STATE v. UNDERWOOD-HOWELL No. 11-237	Johnston (09CRS51328)	No error in part; Dismissed in part
STEPP v. OWEN No. 10-1522	Transylvania (07CVS526)	Affirmed
WILLIAMS v. CITY OF WILMINGTON No. 11-260	Ind. Comm. (138809)	Affirmed
WILLIAMS v. LINCOLN CNTY. EMERGENCY MED. SERVS. No. 11-212	Lincoln (10CVS352)	Dismissed and affirmed
WILLIAMS v. LINCOLN CNTY. EMERGENCY MED. SERVS. No. 11-213	Lincoln (08CVS1612)	Dismissed and affirmed

JAMES MICHAEL COLLIER, KIMBERLY COLLIER AND CHERYL DETTE, PLAINTIFFS v. ANGELA COLLIER BRYANT, DANIEL CHRISTOPHER BRYANT, SOUTHERN HOMES, LLC AND CATHE HENDERSON, DEFENDANTS

No. COA10-1579

(Filed 1 November 2011)

1. Collateral Estoppel and Res Judicata—removal of executrix—determination of underlying issue—not estopped

The trial court did not err by denying plaintiffs' motion for summary judgment on the issue of collateral estoppel where the action arose from an executrix's transfer of real property to herself and removal as executrix. Although plaintiffs argued that the issue of breach of fiduciary duty was determined when the executrix was removed, North Carolina recognizes a policy exception to collateral estoppel for civil actions that follow the statutory removal of an executor.

2. Wills—authority of executrix—sale of property—voidable

The sale of real property by an executrix was voidable where she sold the property to her limited liability company and then transferred it to herself without the knowledge of the other beneficiaries. The executrix had the authority to sell the property pursuant to the terms of the will because the beneficiaries had not agreed upon the division of the property, but the act of an executrix in purchasing property from the estate, either directly or indirectly, makes the sale voidable.

3. Accord and Satisfaction—retaining proceeds of sale—protection of proceeds

The trial court erred by accepting a defense of accord and satisfaction in an action arising from an executrix's transfer of property to herself. All of the plaintiffs cashed their checks based on the executrix's misrepresentation of the sale before they discovered the misrepresentation and it was reasonable for them to retain the funds and protect the proceeds of the sale in light of the executrix's actions.

4. Fraud—actual—executrix's sale of property—value of property—issue of fact

The trial court erred by granting summary judgment for defendants on an actual fraud claim arising from an executrix's transfer of real property to herself where there was a genuine

issue of material fact as to the value of the property and whether the executrix sold it for less than its value.

5. Fraud—constructive—executrix transferring property to herself

The trial court erred by granting summary judgment for defendants on a constructive fraud claim arising from an executrix transferring property to herself. The executrix acted in her fiduciary capacity, used that relationship of trust and confidence to arrange the transfer, and received a possible benefit.

6. Damages and Remedies—fraudulent transfer of property—punitive damages and rescission of deed

Plaintiffs were entitled to seek punitive damages in an action for constructive and actual fraud arising from an executrix's transfer of property to herself, even if they also sought rescission of the deed. The purpose of election of remedies is to prevent double redress for a single wrong; if the rescission does not place the injured party in *status quo*, there is no principle of law which prevents him from maintaining his action for damages caused by another's fraud.

7. Fraud—reasonableness of reliance—issue of fact

The reasonableness of plaintiff's reliance on defendant-executrix's misrepresentation in the sale of property was a question of fact for the jury.

Appeal by plaintiffs from order entered 29 September 2010 by Judge John O. Craig III in Guilford County Superior Court. Heard in the Court of Appeals 18 August 2011.

Higgins, Benjamin, Eagles & Adams, PLLC, by Gilbert J. Andia, Jr., for plaintiff-appellants.

Forman Rossabi Black, P.A., by Amiel J. Rossabi and Gavin J. Reardon, for defendant-appellees, Angela Collier Bryant, Daniel Christopher Bryant and Southern Homes, LLC.

No brief filed for defendant-appellee Cathe Henderson.

CALABRIA, Judge.

James Michael Collier ("Michael"), Kimberly Collier ("Kimberly"), and Cheryl Dette ("Dette") (collectively "plaintiffs") appeal from an order granting summary judgment in favor of Angela Collier Bryant

("Ms. Bryant"), Daniel Christopher Bryant ("Mr. Bryant"), Southern Homes, LLC ("Southern") (collectively "defendants") and Cathe Henderson ("Henderson") and denying plaintiffs' motion for partial summary judgment. We affirm in part and reverse and remand in part.

I. Background

James O. Collier ("Mr. Collier") died testate on or about 9 January 2005. His will listed his four children as his beneficiaries. The three plaintiffs are his children and the fourth child, Ms. Bryant, is one of the defendants as well as the Executrix of the Collier Estate.

The will directed the Executrix to sell any owned real estate and divide the proceeds equally among the four children, "unless there is unanimous consent of [the] children to a division of the real estate." Ms. Bryant, as Executrix, had the power to sell the estate property, which included a tract of land, approximately 22.41 acres, located at 1809 Alamance Church Road, Guilford County, North Carolina ("the Farm"). The sale of the Farm is the only estate property that is the subject of the present appeal.

On 3 February 2005, Faye M. Overly, a residential real estate appraiser, performed an appraisal on the Farm ("the Overly appraisal") and estimated the value of the property between $88,000 and $95,000. Since all four children agreed to sell the property and divide the proceeds, early in 2005, Ms. Bryant listed the property with Alicia Hausler ("Hausler"), a real estate agent. Ms. Bryant initially listed the price for the Farm at $1,154,900 even though Greensboro Water Resources estimated the cost to supply water and sewer was $2,664,768. On 2 September 2005, Hausler notified Ms. Bryant that there was some interest but when no offers were submitted after three months, Ms. Bryant reduced the listing price to $800,000.

On 3 January 2006, Articles of Organization were filed in Alabama for Southern, a limited liability company. Mr. and Ms. Bryant were initial members and organizers. Only a month later, on 3 February 2006, the listing agreement for the Farm was terminated.

After the termination of the listing agreement with Hausler, Ms. Bryant contacted plaintiffs. Michael declined to make an offer but Dette offered to purchase the Farm for $100,000. Ms. Bryant was unable to reach Kimberly. According to the settlement statement, dated 17 March 2006, Ms. Bryant, as Executrix of the estate, sold the Farm to Southern for $102,000, yet Ms. Bryant failed to disclose her personal interest in Southern to her siblings. Ms. Bryant signed both the settle-

ment statement and the general warranty deed recorded on 23 March 2006 as the Executrix of the estate. After the sale of the Farm, checks in the amount of $25,347.13 were distributed to each of the plaintiffs.

On 8 August 2006, plaintiffs filed a petition to remove Ms. Bryant as Executrix of the estate. Three days later, unaware of the pending petition and believing the estate was closed, Ms. Bryant sent plaintiffs' final disbursement checks in the amount of $12,063.22. Plaintiffs held these checks rather than cashing them, per their lawyers' instructions. After Ms. Bryant discovered plaintiffs had filed a petition to remove her as Executrix, she requested a stop payment on the checks. Subsequently, Ms. Bryant closed the Collier Estate's bank account with Wachovia Bank and transferred $31,414.87 to another bank account. On 7 September 2006, Dalrypmle Associates, Inc. performed a commercial appraisal ("Dalrypmle appraisal") of the Farm, at plaintiffs' request. According to the Dalrypmle appraisal, the total value of the Farm was $615,000.

On 30 October 2006, Anne P. Ring, Assistant Clerk of Superior Court ("Clerk Ring"), conducted a hearing on the petition to remove Ms. Bryant as Executrix. Clerk Ring concluded Ms. Bryant had violated her fiduciary duty and issued an order on 28 December 2006, revoking the Letters Testamentary that established Ms. Bryant as Executrix. Ms. Bryant appealed Clerk Ring's order. On appeal, Judge Thomas D. Haigwood affirmed Ms. Bryant's removal as Executrix of the Collier Estate. Following Ms. Bryant's removal, Henderson, the public administrator for Guilford County, was appointed the personal representative of the Collier Estate. On 12 September 2006, Southern executed and subsequently recorded a deed transferring ownership of the Farm to Ms. Bryant in her individual capacity.

Plaintiffs filed a complaint on 16 October 2009 requesting a Declaratory Judgment or in the alternative a Claim to Set Aside the Transfer of the Property and alleged Fraud, Fraud in Fiduciary Capacity, Breach of Fiduciary Duty, Civil Conspiracy, and Wrongful Conversion. On 4 February 2010, defendants filed an Answer and Counterclaims alleging Breach of Contract, Conversion, Unjust Enrichment or alternatively Constructive Trust, Abuse of Process, Malicious Filing of *Lis Pendens*, Partition, and Civil Conspiracy. Between 11 March 2010 and 20 July 2010, Ms. Bryant offered to re-sell the Farm to plaintiffs, or the Estate, for essentially the price she had paid in March 2006. Plaintiffs did not accept any of Ms. Bryant's offers. On 7 May 2010, defendants' previously filed Motion to Dismiss was denied.

In July 2010, plaintiffs moved for a partial summary judgment on the claims of breach of fiduciary duty and wrongful conversion. Plaintiffs also moved to set aside the transfer of property. Defendants moved for Summary Judgment alleging plaintiffs had suffered no compensable damages as a result of defendants' acts. On 29 September 2010, the trial court granted summary judgment in favor of defendants and Henderson, denied plaintiffs partial summary judgment, and dismissed all of plaintiffs' claims as well as defendants' counterclaims. Plaintiffs appeal.

II. Standard of Review

Summary judgment is proper when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. *Finova Capital Corp. v. Beach Pharm. II, Ltd.*, 175 N.C. App. 184, 187, 623 S.E.2d 289, 291 (2005). Review of summary judgment on appeal is *de novo*. *Id.* The evidence must be evaluated in the light most favorable to the non-moving party. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

III. Collateral Estoppel

[1] Plaintiffs argue the trial court erred in denying their motion for summary judgment on the issue of collateral estoppel. Specifically, plaintiffs claim that the issue of breach of fiduciary duty cannot be relitigated because it was previously determined at the time Ms. Bryant was removed as Executrix of the Collier Estate. We disagree.

Collateral estoppel bars relitigation of the same issue already decided by administrative or judicial proceedings "provided the party against whom the prior decision was asserted enjoyed a full and fair opportunity to litigate that issue in an earlier proceeding." *Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 268, 488 S.E.2d 838, 840 (1997) (citing *In re McNallen*, 62 F.3d 619, 624 (4th Cir. 1995)). Offensive collateral estoppel occurs when "a plaintiff seeks to foreclose a defendant from relitigating an issue that the defendant has previously litigated unsuccessfully in another action. . . ." *Id.* at 269, 488 S.E.2d at 840.

North Carolina recognizes a policy exception to collateral estoppel for civil actions that follow the statutory removal of an executor. *Shelton v. Fairley*, 72 N.C. App. 1, 5, 323 S.E.2d 410, 414 (1984). In *Jones v. Palmer*, the Court limited the clerk of court's findings and conclusions to the action that removed the executor. 215 N.C. 696, 699, 2 S.E.2d 850, 853 (1939). The Court stated it did "not intend to make the findings of fact and conclusions of the [c]lerk . . . or the

judge reviewing them on appeal effective for *any other purpose*." *Id.* (emphasis added).

In *Shelton*, the plaintiff-beneficiaries attempted to remove the executor but were unsuccessful. *Shelton*, 72 N.C. App. at 2, 323 S.E.2d at 412. Later, the plaintiffs filed a civil action for damages and the defendants contended the action was barred by res judicata and collateral estoppel. *Id.* at 2-3, 323 S.E.2d at 413. This Court held that "orders entered in a proceeding . . . in which an executor must show cause why he should not be removed, do not constitute res judicata as to a later civil action for damages between the parties or collaterally estop the bringing of such an action." *Id.* at 5, 323 S.E.2d at 414. In its reasoning, the Court noted that the removal was "purely statutory, with probate jurisdiction vested in the clerk . . . [a] civil suit for damages involves a full trial with the right to have factual issues resolved by a jury." *Id.* at 8, 323 S.E.2d at 416.

In the instant case, the order revoking letters testamentary included findings of fact and conclusions of law. The court concluded that Ms. Bryant violated her fiduciary duty. Plaintiffs sought to collaterally estop Ms. Bryant from relitigating the breach of fiduciary duty issue. Just as the Court held in *Shelton* and *Jones*, the order entered by Clerk Ring, and affirmed by the Judge, does not bind the trial court on the breach of fiduciary duty issue in a later civil action. In addition, it also does not automatically determine the breach of fiduciary duty issue in plaintiffs' subsequent civil action.

Plaintiffs contend that the policy reasons recognized in *Shelton* are inapplicable here. In *Shelton*, the Court indicated applying collateral estoppel or res judicata in this situation "would either chill exercise of the right to seek statutory removal of an executor or force beneficiaries prematurely to bring civil actions for damages." *Shelton*, 72 N.C. App. at 7, 323 S.E.2d at 415. Yet plaintiffs cite no cases, and we can find none, indicating that the result is different when the plaintiff is the party seeking the protection of the prior proceeding that removed the executor. The result proposed by plaintiffs would be in direct conflict with the holding in *Jones*. 215 N.C. at 699, 2 S.E.2d at 853. Therefore, Ms. Bryant is not collaterally estopped from relitigating the issue of breach of fiduciary duty. We affirm the trial court's denial of plaintiffs' motion for partial summary judgment on that issue.

IV. Ability of Ms. Bryant to Sell Property

[2] Plaintiffs next contend the trial court erred in denying partial summary judgment on the claim to set aside the transfer of the prop-

erty alleging the transfer was void. Specifically, plaintiffs allege that title to the Farm vested in all beneficiaries upon Mr. Collier's death and Ms. Bryant did not have the power to sell the Farm without including plaintiffs as grantors of the fee simple title. We disagree.

When reading a will, the testator's intent guides the trial court's interpretation of the will. *Slater v. Lineberry*, 89 N.C. App. 558, 559, 366 S.E.2d 608, 609-10 (1988). The testator's intent must be given effect unless it is contrary to public policy or some rule of law and the will must be construed according to the "four corners" of the will. *Buchanan v. Buchanan*, ___ N.C. App. ___, 698 S.E.2d 485, 488 (2010) (citations omitted).

In *Slater*, this Court held that a will provision clearly intending to devise land in fee simple would not be limited by further precatory language. *Slater*, 89 N.C. App. at 559, 366 S.E.2d at 609. In that case, the will provision stated:

> ITEM FOUR: I will, devise and bequeath to my three children, to wit: Ola Mae Taylor Lineberry, Gladys Taylor Miller, and Velma Taylor Slater, subject to the life estate of my said wife, all of the lands that I may own at the time of my death, absolutely and in fee simple, and it is my will that my executor sell at public auction for cash the said lands after the death of my said wife, and divide the proceeds among my three children, or in the event that any of them should predecease me, then I want her share to go to her children.

Id. The Court noted that "in construing a will every word and clause must, if possible, be given effect and apparent conflicts reconciled." *Id.* at 559, 366 S.E.2d at 610. However, the Court ultimately determined that the first provision, granting the estate in fee simple equally among the daughters, was the testator's general, dominant purpose and the later clause was only precatory language which "must yield to the general, prevailing purpose." *Id.* at 560, 366 S.E.2d at 610; *see also Montgomery v. Hinton*, 45 N.C. App. 271, 275, 262 S.E.2d 697, 700 (1980) (where the Court gave effect to the first provision in the will, holding that the property had vested in the son upon execution of the will and since the fiduciary had no power of sale granted by the will, he was unable to dispose of the property without court approval.).

In the instant case, ITEM I of the will states: "I further direct my Executrix to sell any Real Estate I may own and the proceeds divided as indicated in ITEM II below, unless there is unanimous consent of

my children to a division of the real estate." In ITEM II of the will, Mr. Collier devised to the beneficiaries "all of my property of every sort, kind and description, of whatever nature, and wherever situated, both real and personal, to be theirs absolutely and in fee simple, share and share alike." ITEM V of the will named Ms. Bryant as Executrix of the Collier estate and gave her the power of sale, which allowed her to sell the property, publicly or privately, according to terms which she deemed "necessary and desirable in the Settlement of" the estate.

Mr. Collier's will must be read to give effect to all clauses in the will. Just as the Court determined in *Slater* that the first provision was the testator's general dominant purpose, the fact that Mr. Collier placed one provision first is indicative of the priority the provisions should be given. Furthermore, Mr. Collier referenced ITEM II in the provision of ITEM I, indicating if the events in ITEM I occurred, *then* ITEM II should be used to divide the proceeds. It is clear from the four corners of the will that if the beneficiaries could not unanimously agree, then the real property should be sold and the proceeds distributed to the beneficiaries. Plaintiffs' interpretation only gives effect to ITEM II, but there is no indication that the property immediately vested in the beneficiaries as tenants in common, and we must give effect to all provisions in the will. The beneficiaries were only to hold the real property as tenants in common if they unanimously agreed to do so. Since plaintiffs and Ms. Bryant agreed to sell the real property and divide the proceeds, the power of sale provision contained in ITEM V gave the Executrix the power to sell the Farm. By reading the will in this way, all provisions of the will are given effect.

Plaintiffs rely on *Slater* and *Montgomery* because in both cases ownership in fee simple was granted and the Court found this provision of the will to be controlling. However, in both cases the provision granting ownership in fee simple came first in the will. In addition, it was clear in those cases that the testator's intent was first to devise the property to the beneficiaries in fee simple and, at that time, the beneficiaries' rights vested in the property.

In the instant case, the primary provision directed the Executrix to sell any real estate and divide the proceeds, unless an agreement could be reached. Mr. Collier wanted plaintiffs and Ms. Bryant to share in the property equally either by a unanimous agreement or by a distribution of the sales proceeds. There is no indication that Mr. Collier intended their rights to vest in fee simple upon his death. In

fact, he directed exactly what should occur if his children could not unanimously agree regarding a division of the real property.

Plaintiffs contend that North Carolina statutes indicate the title to the Farm vested in all four children immediately upon Mr. Collier's death. *See* N.C. Gen. Stat. § 28A-15-2(b) (2009) ("the title to real property of a decedent devised under a valid probated will becomes vested in the devisees and shall relate back to the decedent's death . . ."). However, as we have previously stated, there was a condition in the will. The title would vest only if the beneficiaries all agreed upon the division of the real property. Since there was no unanimous agreement to divide the property, Ms. Bryant had the authority to sell pursuant to N.C. Gen. Stat. § 28A-17-8 (2009) ("sales of real property made pursuant to authority given by will may be . . . on such terms as in the opinion of the personal representative are most advantageous to those interested in the decedent's estate"). Furthermore, there is nothing in the record that indicates plaintiffs contested Ms. Bryant's ability to sell the Farm. Plaintiffs only contested the sale once they realized the circumstances of the transfer.

In the instant case, Ms. Bryant, as Executrix, was given the authority to sell the real property. We therefore hold, that based on the will, Ms. Bryant had the power to sell the Farm and equally divide the proceeds. Consequently, the sale of the Farm was not void. However, because Ms. Bryant, as Executrix, sold the Farm to her limited liability company then later transferred it to herself individually, the sale is voidable. The act of an executrix purchasing property from the estate, either directly or indirectly, makes a sale voidable. *See Thompson v. Watkins*, 285 N.C. 616, 626, 207 S.E.2d 740, 747 (1974); *Morehead v. Harris*, 262 N.C. 330, 335, 137 S.E.2d 174, 180 (1964). Nevertheless, the executrix does have a remedy. Equitable defenses, including accord and satisfaction, ratification, and unclean hands may be available to her and may bar plaintiffs' tort claims for fraud and breach of fiduciary duty. *See Peedin v. Oliver*, 222 N.C. 665, 670, 24 S.E.2d 519, 522 (1943); *Construction Co. v. Coan*, 30 N.C. App. 731, 736, 228 S.E.2d 497, 501 (1976).

V. Equitable Defenses

[3] The trial court denied summary judgment to plaintiffs on their claim to set aside the transfer of property, finding an accord and satisfaction occurred. Plaintiffs contend the trial court erred in accepting defendants' defense of accord and satisfaction. We agree.

"An accord is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute . . . something other than or different from what he is, or considered himself entitled to." *N.C. State Bar v. Gilbert*, 189 N.C. App. 320, 327, 663 S.E.2d 1, 6 (2008) (citations omitted). "The word 'agreement' implies the parties are of one mind—all have a common understanding of the rights and obligations of the others—there has been a meeting of the minds." *Prentzas v. Prentzas*, 260 N.C. 101, 103-04, 131 S.E.2d 678, 680-81 (1963). A satisfaction is "the execution or performance[,] of such agreement. . . ." *N.C. State Bar*, 189 N.C. App. at 327, 663 S.E.2d at 6. Although generally a question of fact, "where the only reasonable inference is existence or non-existence, accord and satisfaction is a question of law and may be adjudicated by summary judgment when the essential facts are made clear of record." *Construction Co.*, 30 N.C. App. at 737, 228 S.E.2d at 501.

In *Cullen v. Valley Forge Life Ins. Co.*, this Court recognized that an accord is voidable by the plaintiff "if, when the accord was purportedly made, it was premised upon a misrepresentation not known to plaintiff at that time." 161 N.C. App. 570, 577, 589 S.E.2d 423, 429 (2003). In *Cullen*, this Court held no accord and satisfaction occurred where defendant insurance company intentionally misrepresented that the plaintiff did not have insurance coverage when he did, and the plaintiff cashed the return of premiums in reliance on the misrepresentation. *Id.* at 576-78, 589 S.E.2d at 429-30. The defense of accord and satisfaction was precluded as a matter of law. *Id.* at 577, 589 S.E.2d at 430.

In the instant case, as to plaintiffs Michael and Dette, the facts fail to meet the parameters of an accord and satisfaction. There is nothing in the record to show there was a disputed claim regarding the Farm at the time Michael and Dette received and cashed the checks from the sale of the Farm. While they believed the Farm was worth more, and requested that Ms. Bryant hold the property until a future time when they could receive a higher price, they did not dispute her authority as Executrix to sell the property. Ms. Bryant insisted that the Farm was only worth $88,000-$95,000, the value stated in the Overly appraisal. Ms. Bryant used her power as Executrix to override her siblings' wishes to hold the Farm, and instead sold it from the estate to her own company in March 2006. Michael and Dette were unaware of the circumstances surrounding the transfer as well as Ms. Bryant's involvement in the purchase of the

Farm. Michael and Dette were also unaware that Ms. Bryant had a real estate license. Since Michael and Dette had no reason to distrust Ms. Bryant's motives or actions, nor did they have a claim against Ms. Bryant, the action of cashing their checks was not the satisfaction of a dispute.

Ms. Bryant's relationship with Kimberly was another matter. There is evidence that Ms. Bryant and Kimberly were in an adversarial stance at the time of the sale of the Farm. Specifically, Kimberly had a pending petition to remove Ms. Bryant as Executrix of the estate. On 17 May 2006, a Withdrawal, Dismissal and Settlement Agreement was filed whereby Ms. Bryant agreed to keep Kimberly informed of the sale of estate property and Kimberly agreed to cooperate with the sale of the property. While Michael and Dette were aware of the petition, there is nothing in the record to show that they supported it. In fact, Michael executed an affidavit supporting Ms. Bryant in the action. Therefore, in light of the dispute between Kimberly and Ms. Bryant, Kimberly's acceptance of the check may qualify as an accord and satisfaction.

Nevertheless, all plaintiffs cashed their checks based on Ms. Bryant's misrepresentation of the terms of the sale, and therefore any accord and satisfaction is voidable. Ms. Bryant concealed the details of the sale and the true identity of the buyer from her siblings. Dette had offered to buy the property for $100,000 prior to the date of settlement. Ms. Bryant's explanation was that she simply outbid Dette. However, there is nothing in the record that Dette had an opportunity to make a counteroffer. Plaintiffs cashed the checks from the sale of the Farm prior to discovering Ms. Bryant's misrepresentation. It was not until July 2006 that plaintiffs discovered Mr. and Ms. Bryant were co-owners of Southern Homes.

Defendants base their argument on the unpublished case of *Greene v. Hicks*, which held that the defense of accord and satisfaction was available to an executrix when the beneficiaries of an estate cashed a check for a property they thought was of greater value than the sales price received and the executrix concealed her involvement in the sale. 169 N.C. App. 455, 612 S.E.2d 448, 2005 LEXIS N.C. App. 788, 2005 WL 757191, (2005) (unpublished). While some of the facts of *Greene* may be similar to the instant case, the opinion was unpublished and its holding is not binding on this Court.

Defendants contend that plaintiffs' failure to return the money after discovering Ms. Bryant's alleged fraud is evidence of ratification

or unclean hands. Ratification occurs when a plaintiff takes and retains the benefit of an allegedly unauthorized act. *See Snyder v. Freeman*, 300 N.C. 204, 213, 266 S.E.2d 593, 599-600 (1980). "The doctrine of clean hands is an equitable defense which prevents recovery where the party seeking relief comes into court with unclean hands." *Ray v. Norris*, 78 N.C. App. 379, 384, 337 S.E.2d 137, 141 (1985). Generally, a plaintiff who seeks to set aside and cancel a deed based on fraud must refund the consideration paid. *Smith v. Smith*, 261 N.C. 278, 280, 134 S.E.2d 331, 333 (1964). However, in *Smith*, the Court held that the deed could be set aside and defendant could later bring an action seeking a refund for consideration paid to the plaintiff, unless the plaintiff voluntarily returned the consideration. *Id.* at 281, 134 S.E.2d at 334.

Plaintiffs cashed the checks for the sale of the Farm before they discovered Ms. Bryant's fraud. After discovering the fraud, they filed a petition with the clerk to revoke her letters testamentary. Although Ms. Bryant sent final disbursement checks to plaintiffs in the amount of $12,063.22, plaintiffs held rather than cash the final disbursement checks. On 24 August 2006, when Ms. Bryant discovered a petition was filed to remove her as Executrix, she requested a stop payment on the checks. Ms. Bryant then used the funds that remained in the estate account for legal fees regarding her removal as Executrix. She also used the funds for estate administration fees that she paid to herself and other estate fees. While plaintiffs could have returned the proceeds from the sale of the Farm in August 2006, the fact that they did not only proves plaintiffs wanted to protect the proceeds. In light of Ms. Bryant's actions, it was reasonable for plaintiffs to protect the proceeds from the sale of the Farm and the retention of the funds does not conclusively prove ratification or unclean hands. Defendants may still seek reimbursement of the consideration paid for the sale of the Farm, if the court rescinds the deed.

VI. Damages

[4] Plaintiffs next argue that the trial court erred in granting summary judgment for defendants on plaintiffs' actual and constructive fraud claims as there were genuine issues of material fact on the issue of damages. We agree.

There are two types of fraud, actual and constructive. *Watts v. Cumberland County Hosp. System*, 317 N.C. 110, 115, 343 S.E.2d 879, 883 (1986). The well-established elements of actual fraud are: "(1) [f]alse representation or concealment of a material fact, (2) reason-

ably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Forbis v. Neal*, 361 N.C. 519, 526-27, 649 S.E.2d 382, 387 (2007) (citation omitted). Fraudulent misrepresentation requires, "as an essential element to a cause of action[,] that plaintiff incur actual damage." *Hawkins v. Hawkins*, 101 N.C. App. 529, 532-33, 400 S.E.2d 472, 474-75 (1991). Damage in a fraud case "is the amount of loss caused by the difference between what was received and what was promised through a false representation." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 256, 507 S.E.2d 56, 65 (1998).

In the instant case, plaintiffs contend that due to Ms. Bryant's false representations, the proceeds from the sale of the Farm was an amount less than its actual value, and therefore plaintiffs incurred damages. Ms. Bryant, as Executrix, sold the property to Southern for $102,000. According to the record, the value of the Farm varied depending on the type of appraisal. In February 2005, the Overly appraisal, a residential appraisal, valued the Farm at $88,000-$95,000. In August 2006, the Guilford County Tax Department indicated the value of the Farm had *decreased* to $111,500. In October 2006, the Dalrymple appraisal, a commercial appraisal, valued the property at $615,000. Ms. Bryant sold the Farm for only $102,000, and two independent sources valued the property higher than the price she paid. Therefore, there is a genuine issue of material fact as to the value of the Farm, and the extent of plaintiffs' damages. We hold that summary judgment was improper as to the actual fraud claim on the issue of damages.

Defendants contend that the Dalrymple appraisal was either incompetent hearsay or incompetent evidence of the Farm's value and was therefore never properly before the trial court. Plaintiffs argue that any inadequacies in the appraisal go to the weight, not the admissibility, of the appraisal. The record indicates that the trial court considered the Dalrymple appraisal, which was attached to Ms. Bryant's affidavit, while ruling on summary judgment, but determined it was incompetent evidence of value.

It is unnecessary for us to determine the propriety of the Dalrymple appraisal because even assuming, *arguendo*, the Dalrymple appraisal was hearsay, other evidence in the record shows that Ms. Bryant sold the Farm for less than its value. Specifically, the tax appraisal listed the value of the Farm as $111,500. Viewed in the light most favorable to plaintiffs, there is enough information in the record to create a genuine issue of material fact on the issue of damages for actual fraud.

[5] Proof of constructive fraud is less exacting than what is required for actual fraud. *Watts*, 317 N.C. at 115-16, 343 S.E.2d at 884. A plaintiff can establish constructive fraud by showing "(1) facts and circumstances creating a relation of trust and confidence; (2) which surrounded the consummation of the transaction in which the defendant is alleged to have taken advantage of the relationship; and (3) the defendant sought to benefit himself in the transaction." *Sullivan v. Mebane Packaging Grp., Inc.*, 158 N.C. App. 19, 32, 581 S.E.2d 452, 462 (2003).

When the parties are engaged in a fiduciary relationship, constructive fraud is presumed when the "superior party obtains a possible benefit." *Id.* (citation omitted). "This presumption arises not so much because [the fiduciary] has committed a fraud, but [because] he may have done so." *Watts*, 317 N.C at 116, 343 S.E.2d at 884 (citing *Atkins v. Withers*, 94 N.C. 581, 590 (1886)). After the plaintiff has established "*a prima facie* case of the existence of a fiduciary duty, and its breach, the burden shifts to the defendant to prove he acted in an 'open, fair and honest' manner, so that no breach of fiduciary duty occurred." *Estate of Smith v. Underwood*, 127 N.C. App. 1, 9, 487 S.E.2d 807, 812 (1997) (citation omitted). For example, the superior party can rebut the presumption by showing "that the confidence reposed in him was not abused, but that the other party acted on independent advice." *Watts*, 317 N.C at 116, 343 S.E.2d at 884 (citation omitted). It is unquestionable that "an executor acts in a fiduciary capacity." *Allen v. Currie, Commiss'r of Revenue*, 254 N.C. 636, 639, 119 S.E.2d 917, 920 (1961).

As Executrix of the Collier estate, Ms. Bryant acted in a fiduciary capacity. Ms. Bryant used that relationship of trust and confidence to arrange the transaction between Southern and the Collier Estate. By selling the Farm to her limited liability company and concealing the buyer's true identity from plaintiffs, Ms. Bryant failed to act in an open, fair and honest manner as Executrix. As the Court established in *Watts*, there is a presumption of constructive fraud if Ms. Bryant received a *possible* benefit from the sale of the Farm. *Watts*, 317 N.C. at 116, 343 S.E.2d at 884.

There is sufficient evidence in the record to show that Ms. Bryant received a possible benefit from the sale. Initially, her actions surrounding the listing and sale of the Farm indicate that she believed the Farm was worth more than the sale price of $102,000. A February 2005 residential appraisal of the Farm indicated the property was

worth $88,000 to $95,000. In March 2005, Ms. Bryant learned that the cost for sewer and water would be $2,664,768. Despite the appraisal and possible expenses, the initial listing price in April 2005 was $1,154,900. In December 2005, Ms. Bryant reduced the price to $800,000. After Mr. and Ms. Bryant created Southern in January 2006, the listing was terminated and Southern bought the Farm for $102,000 in March 2006.

In addition, Ms. Bryant's actions indicate she obtained a possible benefit. Ms. Bryant claimed she intended to sell the Farm and close the estate, yet the record suggests other motives. Michael's affidavit states:

> The period between January 30, 2006 and March 5, 2006, [Ms. Bryant] approached [Dette] and me numerous times via telephone to discuss how we could buy the land through a third party that we trust. She tried to convince [Dette] and me that we could sell the property to a third party that we trust. She could close the probate and divide the proceeds. Then, we could buy back the property, delay filing the deed and HUD-1 statement for up to a year, then sit on the property or divide it amongst the three of us, essentially forcing Kimberly out of the Estate. [Dette] and I were adamantly opposed. We told [Ms. Bryant] that those transactions were not above board or ethical, nor was her idea. She got frustrated because during that time, Kimberly had filed the petition to remove her as Executrix and stopped talking to [Dette] and myself.

It appears that Ms. Bryant, as the superior party, was determined to be the owner of the Farm and abused the confidence plaintiffs placed in her to make sure this happened. Finally, it was unnecessary for Ms. Bryant to sell the Farm in order to pay any of the estate's debts. By transferring the Farm from Southern to herself, she indicated that her true goal was to own the Farm. Therefore, Ms. Bryant's claims of buying the property for the benefit of the estate present an issue of fact.

Constructive fraud is presumed since there is sufficient evidence that Ms. Bryant received a possible benefit from the sale of the Farm. Furthermore, there is nothing in the record showing that plaintiffs sought independent counsel prior to cashing the checks from the sale of the Farm. Plaintiffs did not obtain counsel until July 2006 when they discovered Ms. Bryant's fraudulent actions.[1] Moreover, we have

1. While Kimberly had counsel prior to July 2006, individually, there is nothing in the record to show that Kimberly consulted counsel prior to cashing her check from the sale of the Farm.

already determined that Ms. Bryant's sales tactics were not open and honest and present a genuine issue of material fact as to whether Ms. Bryant paid a fair price. Therefore, the presumption of constructive fraud has not been rebutted. We hold that the trial court improperly granted summary judgment on the issue of constructive fraud.

VII. Punitive Damages

[6] Defendants contend that plaintiffs are not entitled to punitive damages as they cannot prove the elements of actual or constructive fraud and that plaintiffs cannot seek inconsistent remedies of both rescission of the deed and punitive damages. We disagree.

Punitive damages are available, not as an individual cause of action, but as incidental damages to a cause of action. *Hawkins*, 101 N.C. App. at 532, 400 S.E.2d at 474. In North Carolina, punitive damages have been awarded on the basis of the public policy reason to punish intentional wrongdoing, not on the basis of compensating a plaintiff. *Mehovic v. Mehovic*, 133 N.C. App. 131, 136, 514 S.E.2d 730, 733-34 (1999). Therefore, punitive damages can be awarded if either actual or constructive fraud is shown. *See id.; Melvin v. Home Federal Savings & Loan Assn.*, 125 N.C. App. 660, 665, 482 S.E.2d 6, 8 (1997). To justify an award of punitive damages, nominal damages must be recoverable, but there is no requirement that nominal damages actually be recovered. *Hawkins v. Hawkins*, 331 N.C. 743, 745, 417 S.E.2d 447, 449 (1992).

When a party has been fraudulently induced to enter a sale, the remedies are either to repudiate the contract or affirm the contract and recover damages caused by the fraud. *Parker v. White*, 235 N.C. 680, 688, 71 S.E.2d 122, 128 (1952). The plaintiff may elect one or the other but may not seek rescission and maintain an action for fraud. *Id*. However, the purpose of the "doctrine of election of remedies is not to prevent recourse to any remedy, but to prevent double redress for a single wrong." *Smith v. Oil Corp.*, 239 N.C. 360, 368, 79 S.E.2d 880, 885 (1954). "The rule is, if rescission of the contract does not place the injured party *in statu quo*, as where he has suffered damages which cancellation of the contract cannot repair, there is no principle of law which prevents him from maintaining his action for damages caused by the other party's fraud." *Kee v. Dillingham*, 229 N.C. 262, 265, 49 S.E.2d 510, 512 (1948).

In *Mehovic*, the husband convinced his wife to transfer full title to their property to his brother to protect their home from creditors. *Mehovic*, 133 N.C. App. at 133, 514 S.E.2d at 732. At trial, the jury ver-

dict allowed a rescission of the fraudulent deed and granted the plaintiff wife $1.00 in nominal damages for assault and $24,500 in punitive damages. *Id.* at 134, 512 S.E.2d at 732. This Court affirmed the trial court and held that "North Carolina public policy supports an award of punitive damages upon a jury verdict establishing fraud and consequent entitlement, at the plaintiff's election, either to rescission or compensatory damages." *Id.* at 137, 514 S.E.2d at 734.

Just as the plaintiffs in *Mehovic* sought rescission of the deed and received an award of punitive damages, plaintiffs in the instant case can seek both rescission of the transfer to Southern and punitive damages for the fraud as a result of Ms. Bryant's fraudulent actions. Based on the facts available in the record, plaintiffs could have maintained an action for either actual or constructive fraud. Therefore, plaintiffs may be able to recover punitive damages for Ms. Bryant's actions, even if they also seek rescission of the deed in the alternative.

VIII. Reliance

[7] The trial court granted summary judgment on the issue of fraud solely on the basis that plaintiffs failed to allege actual damages. However, on appeal, defendants also contend that plaintiffs failed to meet the reliance element of actual fraud. We disagree.

Reliance must be reasonable. *Forbis*, 361 N.C. at 527, 649 S.E.2d at 387. "The reasonableness of a party's reliance is a question for the jury, unless the facts are so clear that they support only one conclusion." *Id.* When it appears "a plaintiff seeking relief from alleged [fraud] must have known the truth, the doctrine of reasonable reliance will prevent him from recovering for a misrepresentation which, if in point of fact made, did not deceive him." *Johnson v. Owens*, 263 N.C. 754, 758, 140 S.E.2d 311, 314 (1965). Here, plaintiffs relied on Ms. Bryant's misrepresentation that the buyer of the Farm was disinterested and that $102,000 was the highest price they could receive. The reasonableness of plaintiffs' reliance is a jury question.

IX. Conclusion

Based on the specific policy rule allowing relitigation of issues in both a clerk's revocation of letters testamentary and a civil trial, Ms. Bryant is not collaterally estopped from raising the issue of breach of fiduciary duty in a trial on that issue. In addition, since Mr. Collier granted Ms. Bryant the right to sell the property, she had the discretion to sell and the sale of the Farm was not void. However, because Ms. Bryant was a fiduciary and essentially sold the property to her-

self, the sale is voidable. Despite defendants' contentions, although plaintiffs cashed the checks, there was no accord and satisfaction because of Ms. Bryant's misrepresentation. Therefore, plaintiffs may still have the sale nullified. Plaintiffs presented sufficient evidence to create a genuine issue of material fact as to the issue of damages for constructive and actual fraud and may therefore seek punitive damages, even if they also seek rescission of the deed. Finally, plaintiffs relied on Ms. Bryant's misrepresentation; the reasonableness of this reliance is a question for the jury.

Affirmed in part, Reversed and Remanded in part.

Judges ELMORE and STEELMAN concur.

STATE OF NORTH CAROLINA v. CHAD JARRETT BARROW

No. COA10-978

(Filed 1 November 2011)

1. Evidence—time of fatal injuries—harmless error

The trial court's admission of a doctor's testimony that the minor child victim's fatal injuries were inflicted between 8:00 am and 1:00 pm in a felony murder case was harmless error. Defendant failed to demonstrate there was a reasonable possibility that a different result would have been reached at trial absent the alleged error.

2. Homicide—felony murder—submission of lesser-included offense of second-degree murder—child died by violent shaking or blow to head

The trial court did not err by submitting a second-degree murder instruction to the jury in a felony murder case. A defendant can be convicted of second-degree murder when a child dies as a result of violent shaking and/or a blow to the head inflicted by defendant.

3. Sentencing—aggravating factors—victim very young and physically infirm—took advantage of position of trust

The trial court erred in a felony murder case by failing to instruct the jury as provided in N.C.G.S. § 15A-1340.16(d) that evi-

dence necessary to prove an element of the offense shall not be used to prove any factor in aggravation. The State's theory regarding malice was virtually identical to the rationale underlying submission of the aggravating factor that the victim was very young and physically infirm. However, the trial court did not err with respect to the second aggravating factor that defendant took advantage of a position of trust in committing the offense. The case was reversed and remanded for further sentencing proceedings to determine whether the second aggravating factor, standing alone, outweighed the mitigating factors and warranted an aggravated range sentence.

Judge ELMORE dissenting.

Appeal by defendant from judgment entered 7 December 2009 by Judge Nathaniel J. Poovey in Cleveland County Superior Court. Heard in the Court of Appeals 23 February 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Melissa L. Trippe, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

GEER, Judge.

Defendant Chad Jarrett Barrow appeals from his conviction of second degree murder of his son, Jace. The jury was instructed that it could find defendant guilty of felony murder, second degree murder, or involuntary manslaughter, or it could find defendant not guilty. On appeal, defendant primarily argues that the trial court erred in submitting second degree murder to the jury because, according to defendant, the record does not contain evidence that would allow the jury to find him guilty of second degree murder but not guilty of felony murder. In order, however, for defendant to be guilty of felony murder (based on felonious child abuse), the jury was required to find that defendant used a deadly weapon. Since the State's evidence would have permitted the jury to find that defendant did not use a deadly weapon but still killed Jace with malice, we hold that the trial court properly instructed the jury on the offense of second degree murder.

Facts

The State's evidence tended to show the following facts. Jace Barrow was born on 5 March 2007 to Lindsey Kiser and defendant,

who lived together in Shelby, North Carolina. According to Jace's pediatric nurse practitioner, Jace was a healthy child and was growing and developing normally.

On 4 July 2007, Ms. Kiser, defendant, and Jace went to Ms. Kiser's family's lake house to spend the holiday with extended family. While it was defendant's turn to watch Jace, defendant became agitated and angry. Later, when defendant went to put Jace down for a nap, Ms. Kiser's cousin, Angela Alexander, went into the house and heard Jace screaming and crying. She saw defendant holding Jace and shaking him vigorously. Ms. Alexander took Jace and calmed him down. Ms. Kiser, who had also heard Jace crying, ran into the room. Defendant told her that when Jace woke up, he was crying, and defendant could not get the baby to calm down or take his bottle. Defendant was very agitated.

During a visit between defendant and Ms. Kiser's uncle, Keith Blanton, defendant said that caring for Jace was hard and if he could go back and do it over, he would never have had the baby. Defendant told Mr. Blanton, "We're not ready for it, unprepared for a baby." Mr. Blanton observed a change in defendant after Jace was born. While, before, defendant had seemed very happy, afterwards, he was very unhappy and agitated.

On 21 August 2007, defendant brought Jace to the house of Ms. Kiser's aunt, Kay Wallace. Defendant was helping Ms. Wallace's husband fix an attic fan. Ms. Wallace babysat Jace and took photographs of him. The photographs did not show any bruising on Jace's face. Towards the end of the day, Ms. Kiser's best friend, Ashley Pruitt, dropped by defendant and Ms. Kiser's house to visit, arriving before Ms. Kiser had gotten home from work. Immediately after Ms. Pruitt got there, defendant told her to "look what Jace did to his eye. He must have hit himself with a toy." Jace had bruises on his eye and nose and seemed lethargic and fussy.

On 22 August 2007, when Ms. Kiser went to work, she left Jace in defendant's care. Jace was happy, responsive, and in his swing as she left the house. Later that day, Officer Julius Littlejohn of the Shelby Police Department responded to a 911 call about an infant who was unable to breathe. When he arrived at defendant's home, he found defendant holding Jace, asking where EMS was. Officer Littlejohn described defendant as agitated and upset, and Officer Littlejohn took Jace from defendant. Initially, Jace's breathing was very weak, and then his breathing seemed to stop. Officer Littlejohn observed a

bruise under Jace's left eye and possibly bruises on Jace's nose and forehead. The officer performed rescue breathing until EMS arrived.

Paramedic Kenneth Dale Childers arrived at defendant's house at 12:21 p.m. He observed that Jace was cyanotic and only breathing two or three times per minute, which is not enough to sustain life—infants typically breathe 30 to 40 times per minute. Mr. Childers moved Jace into the ambulance and began giving him artificial respiration. Mr. Childers observed that Jace had a bruise over his left eye and across the bridge of his nose as well as an abrasion on the left side of his head above the ear with some swelling. Mr. Childers also observed that Jace had decerebrate posture, meaning that his extremities were posturing inward towards his body and his muscles were tight and flexed. Mr. Childers testified at trial that decerebrate posturing is usually a sign of a head injury.

Defendant told Mr. Childers that he found Jace slumped over in the swing when defendant got up from a nap. Later, Officer Barbie Ledford arrived to assist. She observed bruising around Jace's eye, across the bridge of his nose, on the left side of his forehead, by his ear, on the left side of his neck, and on the side of his rib cage. She asked defendant what had happened. Defendant told her that he had placed Jace in the swing, had turned on cartoons, and had then gone outside to smoke a cigarette. Defendant said that when he came back inside, Jace was slumped over and not breathing. Defendant could not explain the bruising, but said he thought it was from Jace sleeping on his hand.

In the emergency room, Dr. Joseph Mullen ordered a CT scan after observing the bruises on Jace's face. The CT scan showed intracranial bleeding, and Dr. Mullen had Jace transferred by helicopter to Carolinas Medical Center in Charlotte. Defendant told Dr. Mullen that he found Jace slumped over after he returned from smoking a cigarette outside.

Dr. Michael Brian Wilson treated Jace at the pediatric critical care unit of Levine Children's Hospital in Charlotte. At that point, Jace was not making any purposeful movements, and another CT scan showed signs of brain swelling. Despite efforts to relieve the pressure, Jace's condition continued to deteriorate. By the early morning of 23 August 2007, one of his pupils had become fixed and dilated, and another CT scan showed that Jace's brain had herniated, which Dr. Wilson described as "not an injury that you can recover from."

Dr. Wilson concluded that Jace's bilateral subdural bleeding and a retinal hemorrhage in Jace's right eye indicated he suffered significant trauma. According to Dr. Wilson, "[t]here has to be either a . . . blunt force injury[] or . . . an extremely forceful shaking injury to produce bleeding in the back of the eye." Dr. Wilson explained that because a five-month-old's brain and blood vessels are still forming, "[i]f a child is shaken forcefully, the brain slushes back and forth inside the head, and that can produce bleeding" by breaking the "blood vessels that come out of the brain and into the skull" and causing "bleeding at the back of the eye." Dr. Wilson believed that the bruises on Jace's face had occurred within 24 to 48 hours and that whatever trauma caused the bruising could also have caused the injury to Jace's brain.

Defendant was indicted for first degree murder of Jace. A separate indictment alleged two aggravating factors: that, at the time of the killing, (1) the victim was very young and physically infirm, and (2) defendant took advantage of a position of trust to commit the offense.

At trial, the State presented expert testimony that Jace suffered two acute subdural hematomas, cerebral edema, retinal hemorrhages, and bruises and abrasions on his head. Dr. Christopher Gulledge, of the Mecklenburg County Medical Examiner's office, found that the cause of Jace's death was abusive head trauma. He testified that the type of injuries suffered by Jace are immediately symptomatic and that, in his opinion, the injuries therefore happened between 8:00 a.m. and 1:00 p.m. on 22 August 2007.

Dr. Jeremy Jones, a neuroradiologist on staff at Carolinas Medical Center, testified regarding the CT scans taken during the course of Jace's treatment. He concluded that the CT scans were consistent with Jace's injuries having been inflicted between 8:00 a.m. and 12:00 p.m. on 22 August 2007.

Defendant presented expert testimony from an associate medical examiner from Florida; a neurosurgeon; the chief of neuropathology and surgical pathology and director of anatomic pathology services at Duke University Medical Center and School of Medicine; and a clinical neurosurgeon. Defendant's medical experts attributed Jace's injuries to a chronic subdural hematoma that had been present for at least a month and could have been present since birth. Defendant's expert witnesses believed that the chronic subdural hematoma had spontaneously re-bled, causing a seizure, which in turn led to hypoxia and severe brain damage. They also expressed the opinion that shak-

ing alone could not cause subdural hematomas or cerebral edema and that Jace's injuries were not caused by shaking.

Defendant also called Ms. Kiser to testify regarding an incident when Jace was two months old and had rolled off the couch onto a carpeted floor. In addition, however, Ms. Kiser testified that on the morning of 22 August 2007, Jace was very alert and trying to find his toys. Jace had no bruising or abrasions on his face other than the bruising around his eye from the day before. When she tried to wake defendant, he did not want to get up, but Ms. Kiser told him he had to get up to take care of the baby.

On rebuttal, the State presented evidence from a pediatrician with a specialty in child abuse and a pediatric ophthalmologist. The pediatrician testified that it is rare for babies five months old to develop bruises from their own motor actions since they lack the ability to exert enough force to cause bruising. She also testified that violent shaking of a baby causes tears between the top of the brain and the underside of the dura mater that can cause the baby to stop breathing, which leads to a cascade of effects, including a subdural hematoma. Both experts testified that they believed the retinal hemorrhaging in Jace's left eye was indicative of abusive head trauma. On surrebuttal, however, defendant presented testimony from the Forsyth County Medical Examiner that the findings of Jace's retinal hemorrhages could have been the result of a number of different causes and did not necessarily indicate head trauma.

After the close of evidence, the trial court instructed the jury on first degree murder under the felony murder rule with felony child abuse as the underlying felony, as well as second degree murder and involuntary manslaughter. The jury found defendant guilty of second degree murder.

The trial court then submitted to the jury the two aggravating factors of the victim's being young and physically infirm and defendant's taking advantage of a position of trust to commit the offense. The jury found both aggravating factors beyond a reasonable doubt. The trial court found as mitigating factors that defendant supports his family, has a support system in the community, and has a positive employment history or is gainfully employed. After finding that the aggravating factors outweighed the mitigating factors, the trial court sentenced defendant to an aggravated-range term of 196 to 245 months imprisonment. Defendant timely appealed to this Court.

I

[1] Defendant first argues that the trial court erred in admitting Dr. Gulledge's testimony that Jace's fatal injuries were inflicted between 8:00 a.m. and 1:00 p.m. Defendant contends that this testimony failed to meet the reliability standard set out in *State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010), and *Howerton v. Arai Helmet Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004).

Even assuming, without deciding, that this testimony failed to meet the standards for reliability, defendant has failed to demonstrate that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C. Gen. Stat. § 15A-1443(a) (2009). While defendant contends that "Dr. Gulledge's opinion was the State's only evidence that the injuries occurred during this interval" after Ms. Kiser left for work on the morning of 22 August 2007, Dr. Jeremy Jones in fact gave testimony, without objection, that was almost identical to that of Dr. Gulledge.

Dr. Jones testified that the timeframe of 8:00 a.m. through 12:00 p.m. "would be consistent with what we see on the CT scans." He confirmed that his opinion regarding the time frame remained the same after reviewing the third CT taken at 3:35 p.m. on 22 August 2007. Given that this testimony is effectively the same as that of Dr. Gulledge and that defendant has made no objection that Dr. Jones' testimony was unreliable, we cannot conclude that there is a reasonable possibility that the jury would have acquitted defendant or convicted him of involuntary manslaughter had Dr. Gulledge's testimony been excluded. *See State v. Fullwood*, 323 N.C. 371, 384, 373 S.E.2d 518, 526-27 (1988) (holding that admission of expert testimony that defendant's wounds were self-inflicted was harmless error when two other doctors testified to essentially same opinions), *vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602, 110 S. Ct. 1464 (1990); *State v. Henderson*, 182 N.C. App. 406, 416, 642 S.E.2d 509, 515 (2007) (holding that admission of nurse's testimony was harmless error when it substantially reiterated another witness' expert testimony that was not challenged on appeal).

II

[2] Defendant next argues that the trial court erred in submitting an instruction to the jury on second degree murder. It is well established that "when the state proceeds on a theory of felony murder only, the trial court should not instruct on lesser-included offenses '[i]f the evi-

dence as to the underlying felony supporting felony murder is not in conflict and all the evidence supports felony murder.' " *State v. Gwynn*, 362 N.C. 334, 336, 661 S.E.2d 706, 707 (2008) (quoting *State v. Millsaps*, 356 N.C. 556, 565, 572 S.E.2d 767, 774 (2002)).

Defendant contends that the evidence supporting felonious child abuse—the underlying felony—was not in conflict and, therefore, the trial court was barred from instructing on second degree murder. According to defendant, in order to find defendant guilty of second degree murder, the jury would have to make the same factual findings that would dictate a verdict of guilty of felony murder. We disagree.

N.C. Gen. Stat. § 14-17 (2009) provides that a defendant can be convicted of felony murder if the murder was "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, *or other felony committed or attempted with the use of a deadly weapon . . . .*" (Emphasis added.) Because felonious child abuse is not specifically listed in N.C. Gen. Stat. § 14-17, in order to prove felony murder, the State, in this case, was required to show that the child abuse was committed with the use of a deadly weapon. *See State v. Pierce*, 346 N.C. 471, 493, 488 S.E.2d 576, 589 (1997) ("Felony murder on the basis of felonious child abuse requires the State to prove that the killing took place while the accused was perpetrating or attempting to perpetrate felonious child abuse with the use of a deadly weapon.").

In *Pierce*, the Supreme Court explained that "[w]hen a strong or mature person makes an attack by hands alone upon a small child, the jury *may infer* that the hands were used as deadly weapons." *Id.* (emphasis added). The Court concluded that "[t]he evidence that [the defendant] caused a small child's death by shaking her with his hands was sufficient to permit the jury to conclude that defendant committed felonious child abuse and that he used his hands as deadly weapons." *Id.* The Court, therefore, held that "the trial court did not err by refusing to grant defendant's motion to dismiss the charge of first-degree murder under the felony murder rule." *Id.*

Contrary to defendant's suggestion otherwise, *Pierce* does not *require* a jury to find that a defendant who shook a child was using his or her hands as deadly weapons. It simply held that the trial court properly instructed the jury that it could make that finding. This Court in *State v. Stokes*, 150 N.C. App. 211, 225, 565 S.E.2d 196, 205 (2002) (internal quotation marks omitted), *rev'd in part on other grounds*, 357 N.C. 220, 581 S.E.2d 51 (2003), upheld jury instructions

as being properly based on *Pierce* when they "made it clear to the jury that the jury was not compelled to infer anything, and that it was free to decide from all the evidence whether defendant's hands had been used as a deadly weapon."

Here, the trial court similarly instructed the jury that it could find—but was not required to find—that defendant used his hands as a deadly weapon. If the jury decided that defendant's hands were not a deadly weapon, it was required to find defendant not guilty of felony murder.

In that event, the trial court instructed, the jury was required to decide whether defendant was guilty of second degree murder, which the court explained required a finding of the following elements:

> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date Jace Barrow sustained a fatal injury and that this injury proximately caused the death [of] Jace Barrow and that this injury was inflicted intentionally and not by accident and that it was the defendant who intentionally inflicted this injury and that in so doing the defendant acted with malice, it would be your duty to return a verdict of guilty of second degree murder.

With respect to malice, the trial court explained: "To find that the defendant acted with malice, you need not find that he intended to kill Jace Barrow, but you must find beyond a reasonable doubt that his acts were so reckless or wantonly done as to indicate a total disregard of human life."

Our courts have already concluded that evidence of the type submitted by the State in this case is sufficient to support a conviction of second degree murder. *See State v. Smith*, 146 N.C. App. 1, 23, 551 S.E.2d 889, 902 (2001) (Tyson, J., dissenting) (holding that defendant could be convicted of second degree murder when child died as result of violent shaking and/or blow to head inflicted by defendant), *rev'd per curiam for reasons in dissenting opinion*, 355 N.C. 268, 559 S.E.2d 786 (2002); *State v. Qualls*, 130 N.C. App. 1, 10-11, 502 S.E.2d 31, 37 (1998) (holding that sufficient evidence of malice existed for second degree murder when defendant severely shook child, "an act which ultimately led to his death"), *aff'd*, 350 N.C. 56, 510 S.E.2d 376 (1999). *See also State v. Trogden*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2011 N.C. App. LEXIS 2048 (Sept. 20, 2011) (holding that sufficient evidence of malice was shown for purposes of second degree murder in child abuse case because attack of strong adult on young

child is reasonably likely to result in death or serious bodily injury to child).

Consequently, we hold that the jury in this case could rationally find defendant guilty of second degree murder and not guilty of first degree felony murder. The trial court, therefore, properly instructed the jury on the offense of second degree murder. *See Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771.

III

[3] Finally, defendant contends that the trial court erred in failing to instruct the jury, as provided in N.C. Gen. Stat. § 15A-1340.16(d) (2009), that "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation . . . ." Defendant argues that the jury "probably" relied on identical evidence to find both the elements of second degree murder and the aggravating factors that Jace was very young and physically infirm and that defendant took advantage of a position of trust to commit the offense.

The State argues that defendant did not object to the trial court's instruction and, therefore, did not preserve the issue for review. In *State v. Keel*, 333 N.C. 52, 56-57, 423 S.E.2d 458, 461 (1992), however, the Supreme Court held that when the trial court agreed to the State's request (concurred in by the defendant) that the court would give a particular pattern jury instruction but then changed a portion of the pattern instruction, the defendant could challenge the changed portion on appeal. The Court explained: "The State's request, approved by the defendant and agreed to by the trial court, satisfied the requirements of Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure and preserved this question for review on appeal." *Id.*

Here, the trial court advised the parties that it would give the pattern jury instructions applicable in bifurcated proceedings to determine aggravating factors, including N.C.P.I. 204.25, which begins by stating that "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation[.]" The trial court omitted that portion of the pattern instruction although the remainder of the instruction was nearly identical to N.C.P.I. 294.25. Under *Keel*, the omission of this portion of the pattern instruction is properly before this Court.

The trial court has the burden of declaring and explaining the law arising on evidence as it relates to each substantial feature of the case. *State v. Moore*, 339 N.C. 456, 464, 451 S.E.2d 232, 236 (1994).

Because N.C. Gen. Stat. § 15A-1340.16(d) limits what evidence the jury can consider in deciding whether an aggravating factor exists, the trial court was required to instruct the jury in accordance with the statute—as the pattern jury instruction specifies.

However, "it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *Robinson v. Seaboard Sys. R.R., Inc.*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917 (1987). Further, we must determine whether there is a reasonable possibility that had the instruction been given, the jury would have failed to find the existence of the aggravating factors. *See* N.C. Gen. Stat. § 15A-1443(a).

Nothing in the court's actual instructions to the jury would have indicated to the jury that it could not consider all of the evidence presented during the guilt-innocence phase when deliberating on the aggravating factors. Indeed, during the instructions for the aggravating factor phase, the trial court instructed the jury that "[a]ll of the evidence has been presented" and that it was the duty of the jury to decide "from this evidence what the facts" were regarding the aggravating factors. The court directed the jury to "remember all the evidence" and "consider all the evidence" in deciding whether the aggravating factors existed. Given these instructions, it is highly likely that the jury believed that it could consider all of the evidence in reaching a verdict on each aggravating factor.

With respect to the jury's finding of the aggravating factor that the victim was "very young and physically infirm[]," we believe that there is a reasonable possibility that the jury relied upon evidence that was also the basis for its verdict of second degree murder. The underlying purpose of this aggravating factor is "to deter wrongdoers from taking advantage of a victim because of his age or mental or physical infirmity." *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997). Consequently, a victim's age can make " 'a defendant more blameworthy [when] the victim's age causes the victim to be more vulnerable than he or she otherwise would be to the crime committed against him or her, as where age impedes a victim from fleeing, fending off attack, recovering from its effects, or otherwise avoiding being victimized.' " *Id.* at 541, 491 S.E.2d at 686 (quoting *State v. Hines*, 314 N.C. 522, 525, 335 S.E.2d 6, 8 (1985)).

Here, the State's theory regarding second degree murder relied almost exclusively on the fact that because of the vulnerability of a

five-month old child, shaking him is such a reckless act as to indicate a total disregard of human life—the showing necessary for malice. *See State v. Wilkerson*, 295 N.C. 559, 581, 247 S.E.2d 905, 918 (1978) ("An act that indicates a total disregard for human life is sufficient to supply the malice necessary to support the crime of second degree murder."). Thus, the State's theory regarding malice is virtually identical to the rationale underlying submission of the aggravating factor that the victim was "very young and physically infirm[]."

There is, as a result, a reasonable possibility that the jury relied on Jace's age both in finding malice and in finding the aggravating factor, which would violate N.C. Gen. Stat. § 15A-1340.16(d). Further, had the jury been instructed in accordance with N.C. Gen. Stat. § 15A-1340.16(d), a reasonable possibility exists that the jury would have concluded that it could not find the aggravating factor without the evidence that formed the basis for the second degree murder verdict. *See State v. Corbett*, 154 N.C. App. 713, 717, 573 S.E.2d 210, 214 (2002) (holding that when defendant was charged with second degree sexual offense, trial court erred in finding aggravating factor that defendant abused position of trust because State's theory of the case relied upon finding of constructive force based upon parent-child relationship).

We reach a different conclusion, however, with respect to the aggravating factor that defendant took advantage of a position of trust in committing the offense. The State's theory of the case and the trial court's instructions during the guilt-innocence phase did not require that the jury consider, in convicting defendant of second degree murder, whether defendant took advantage of his status as a parent or his being entrusted with his own child's care. The focus with respect to second degree murder was on the actual physical acts that resulted in Jace's death. Defendant has not, therefore, demonstrated that a reasonable possibility exists that had the jury been properly instructed it would not have found the existence of the second aggravating factor.

Consequently, we hold that the trial court erred in failing to give the full pattern jury instruction. Defendant has shown prejudicial error with respect to the first aggravating factor, but not the second. Accordingly, we must reverse and remand for further sentencing proceedings. On remand, the trial court must determine whether the second aggravating factor, standing alone, outweighs the mitigating factors and warrants an aggravated-range sentence.

No error in part; reversed and remanded in part.

Judge BRYANT concurs.

Judge ELMORE dissents in a separate opinion.

ELMORE, Judge, dissenting.

Because I would vacate the judgment below and order a new trial for defendant, I respectfully dissent.

Defendant first argues that the trial court erred by instructing the jury on second-degree murder. I agree, because the evidence would not permit the jury to rationally find defendant guilty of second-degree murder and to acquit him of first-degree murder under the felony murder rule.

The trial court instructed the jury on first-degree murder under the felony murder rule, with felony child abuse as the underlying felony. The trial court also instructed the jury on second-degree murder and involuntary manslaughter as lesser-included offenses. During the charge conference, defense counsel objected to the second-degree murder instruction.

As our Supreme Court has explained, trial courts must not give a lesser-included offense instruction unless the instruction is supported by the evidence:

> Principles of due process "require[] that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." *Hopper v. Evans*, 456 U.S. 605, 611, 72 L. Ed. 2d 367, 373 (1982). Underlying this rule is the realization that instructing the jury on a lesser-included offense that is not supported by the evidence improperly invites a compromise verdict whereby the defendant would be found guilty of an offense, which he did not commit, for the sole reason that some of the jurors believe him guilty of the greater offense.

State v. Worsley, 336 N.C. 268, 276-77, 443 S.E.2d 68, 72 (1994) (additional quotations and citations omitted). "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense *and to acquit him of the greater*." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (citation omitted; emphasis added). In *Millsaps*, the Supreme Court set out the following "standard for deciding

whether the trial court must instruct on and submit second-degree murder as a lesser-included offense of first-degree murder":

> The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

Id. at 560, 572 S.E.2d at 771 (citation omitted).

The trial court summarized the first-degree murder instruction for the jury as follows:

> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant was the parent of Jace Barrow; that Jace Barrow had not yet reached his sixteenth birthday; and that the defendant intentionally inflicted a serious physical injury to the child or intentionally assaulted the child which proximately resulted in a serious physical injury to the child; and that while committing felonious child abuse the defendant killed Jace Barrow; and that the defendant's act was a proximate cause of Jace Barrow's death; and that the defendant committed felonious child abuse with the use of a deadly weapon, it would be your duty to return a verdict of guilty of first degree murder.

The trial court instructed the jury that, if it found that defendant had "made an attack by hands alone upon Jace Barrow," it could "infer that the hands were used as a deadly weapon."

The trial court summarized the second-degree murder instruction, which the jury was only to consider if it did not find all of the elements of first-degree murder, as follows:

> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date Jace Barrow sustained a fatal injury and that this injury proximately caused the death [of] Jace Barrow and that this injury was inflicted intentionally and not by accident and that it was the defendant who intentionally inflicted this injury and that in so doing the defendant acted with malice, it would be your duty to return a verdict of guilty of second degree murder.

The trial court defined proximate cause as

> a real cause, a cause without which Jace Barrow's death would not have occurred. The defendant's act need not have been the only cause nor the last or nearest cause. It is sufficient if it occurred with some other cause acting at the time which in combination with it caused the death of Jace Barrow.

With respect to malice, the trial court explained that, "[t]o find that the defendant acted with malice, you need not find that he intended to kill Jace Barrow, but you must find beyond a reasonable doubt that his acts were so reckless or wantonly done as to indicate a total disregard of human life."

Defendant argues that the State's evidence pointed exclusively to first-degree murder, and his evidence pointed to his not being guilty of any offense; no evidence pointed to defendant being guilty of second-degree murder *but not guilty of first-degree murder*. In other words, finding defendant guilty of second-degree murder required the same factual findings as finding defendant guilty of first-degree murder with the exception of certain facts that were not at issue, such as whether defendant was Jace's father and whether Jace was under the age of sixteen. Thus, no jury could rationally find defendant guilty of second-degree murder but not guilty of first-degree murder. I agree with this reasoning.

To find defendant guilty of second-degree murder, the jury had to reach the following conclusions: (1) "Jace Barrow received a fatal injury"; (2) that "injury was a proximate cause of Jace Barrow's death"; (3) that the "injury was inflicted intentionally and not by accident or misadventure[,]" meaning that "the person who caused it intended to apply the force by which it was caused"; (4) that the person who inflicted this injury was defendant; and (5) that defendant acted with malice, meaning "his acts were so reckless or wantonly done as to indicate a total disregard of human life."

To find defendant guilty of first-degree murder, the jury had to reach the following conclusions: (1) defendant committed felonious child abuse; (2) while committing felonious child abuse, defendant killed Jace; (3) defendant's act was the proximate cause of Jace's death; and (4) the felonious child abuse was committed with the use of a deadly weapon. To conclude that defendant had committed felonious child abuse, the jury had to find that (1) defendant was Jace's parent; (2) at the time of the abuse, Jace was not yet sixteen years old; and (3) "defendant intentionally inflicted a serious physical

injury to the child or intentionally assaulted the child which proximately resulted in serious physical injury to the child," a serious physical injury being "such physical injury as causes great pain and suffering." The State's evidence suggested that if defendant hit or shook Jace, he did so using his hands. The State offered no evidence that defendant used any other weapon or that Jace sustained his injuries by any means other than defendant's hands.

A jury could not rationally conclude that defendant had committed second-degree murder while also concluding that defendant had not committed first-degree murder. The legal findings required for first-degree murder are identical to the findings required for second-degree murder, with the exception of Jace's parentage and age, which were not at issue. This is similar to felony murder cases involving a felonious assault on a single victim. *State v. Jones*, 353 N.C. 159, 170 n.3, 538 S.E.2d 917, 926 n.3 (2000).

> In such cases, the assault on the victim cannot be used as an underlying felony for purposes of the felony murder rule. Otherwise, virtually all felonious assaults on a single victim that result in his or her death would be first-degree murders via felony murder, thereby negating lesser homicide charges such as second-degree murder and manslaughter.

Id. Accordingly, I would hold that the trial court erred by instructing the jury on the lesser-included offense of second-degree murder.

I would also hold that the error was not harmless and, as a result, defendant is entitled to a new trial.

"[S]ome errors of this type are not prejudicial to the defendant because had the jury not had the option of convicting on the lesser offense, it would likely have convicted on the greater offense, subjecting the defendant to harsher penalties." *State v. Arnold*, 329 N.C. 128, 140, 404 S.E.2d 822, 829 (1991) (citation omitted). In *Arnold*, our Supreme Court explained that submitting a lesser-included offense for which there is insufficient evidence violates a defendant's federal due process rights, which we review under N.C. Gen. Stat. § 15A-1443(b). *Id.* Subsection 15A-1443(b) states, in relevant part, that

> [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. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

N.C. Gen. Stat. § 15A-1443(b) (2009). "The State must therefore prove that the error was harmless beyond a reasonable doubt. Overwhelming evidence of defendant's guilt may render constitutional error harmless beyond a reasonable doubt." *Arnold*, 329 N.C. at 140, 404 S.E.2d at 829-30 (citation omitted).

Here, the evidence of defendant's guilt of first-degree murder was not overwhelming. Defendant's experts all opined that Jace died of natural causes and was not killed as a result of abusive head trauma. Even the State's experts agreed that Jace's brain injuries *could* have been caused by seizure-induced hypoxia rather than abusive head trauma. Finally, as the Supreme Court in *Arnold* stated,

> Our conclusion is further demonstrated by the fact that the jury found defendant guilty of murder in the second degree, a charge which was not supported by the evidence. This verdict was also tantamount to a verdict of not guilty as to the [first-degree murder] charge. Had not the inviting verdict of murder in the second degree been available to the jury, and its choice limited to guilty of murder in the first degree or not guilty, the verdict may well have been one of not guilty.

Id. at 141, 404 S.E.2d at 830. The State having failed to prove that the error was harmless beyond a reasonable doubt, I would hold that defendant was prejudiced by the trial court's error and reverse his conviction for murder in the second degree.

Accordingly, I believe that defendant is entitled to a new trial. I would add that, as in *Arnold*, "defendant may not now be retried for first degree murder. Conviction of second degree murder acts as acquittal of first degree murder, and thus retrial would place the defendant in double jeopardy in violation of h[is] rights under the Fifth and Fourteenth Amendments to the Federal Constitution." *State v. Arnold*, 98 N.C. App. 518, 533, 392 S.E.2d 140, 150 (1990), affirmed by 329 N.C. 128, 404 S.E.2d 822 (1991), (citing *Price v. Georgia*, 398 U.S. 323, 26 L. Ed. 2d 300 (1970); additional citations omitted).

STATE OF NORTH CAROLINA v. DAVID ALLEN CARTER

No. COA11-36

(Filed 1 November 2011)

1. Sexual Offenses—first-degree—motion to dismiss—sufficiency of evidence—anal penetration

The trial court did not err by denying defendant's motion to dismiss the first-degree sexual offense charge in 08 CRS 57286 based on alleged insufficient evidence of anal penetration. The testimony of the child victim and a sexual assault nurse examiner provided sufficient evidence.

2. Evidence—social worker testimony—characterization of child sex abuse victim—overly dramatic, manipulative, and attention seeking behavior—not shorthand statement of fact

The trial court did not err in a first-degree sexual offense case by excluding the testimony of a social worker to the effect that during therapy sessions the child victim was overly dramatic, manipulative, and exhibited attention seeking behavior. Defendant failed to cite authority as required by N.C. R. App. P. 28(b)(6) to support his corroboration argument. Further, the social worker's characterizations of the child's behavior did not relate to an expert opinion which the social worker was qualified to deliver. Finally, it was not an admissible shorthand statement of fact.

3. Evidence—hearsay—medical diagnosis exception—state of mind—excited utterance

The trial court did not err in a first-degree sexual offense case by refusing to admit the child victim's comment to the effect that she knew defendant would not do it and that she knew he was coming home. It could not be concluded that the child understood that a social worker was conducting the play-therapy sessions for the purpose of providing medical diagnosis or treatment. Further, the record did not establish that the statement constituted an admissible excited utterance.

4. Criminal Law—jury instructions—referring to child as victim—absence of any impermissible opinion

The trial court did not commit plain error in a first-degree sexual offense case by describing the child as the "victim" during jury instructions given the absence of any other indication that the trial court had expressed an impermissible opinion and the

fact that the trial court properly placed the burden of proof on the State.

5. Appeal and Error—preservation of issues—failure to specifically argue—failure to cite authority

Although defendant contended that the trial court erred in a first-degree sexual offense case by denying defendant's pretrial motion for an independent psychological evaluation of the child victim, defendant did not preserve this argument because he did not advance any specific argument or cite any authority in support of this contention.

6. Sexual Offenses—attempted first-degree sexual offense—jury instruction—guilt

The trial court committed plain error by failing to instruct the jury concerning the issue of defendant's guilt of attempted first-degree sexual offense in 08 CRS 57286 given the sharp conflict in evidence relating to the issue of defendant's guilt, the importance of allowing the jury to consider all relevant issues prior to rendering a verdict, and the absence of any indication that defendant opposed submission of an attempt issue.

7. Satellite-Based Monitoring—enrollment in lifetime satellite-based monitoring—first-degree sexual offense not an aggravating offense

The Court of Appeals treated defendant's appeal as a petition for writ of *certiorari* and concluded that the trial court erred by requiring defendant to enroll in lifetime satellite-based monitoring (SBM). First-degree sexual offense under N.C.G.S. § 14-27.4(a)(1) does not qualify as an aggravated offense. The case was remanded for a proper risk assessment and a new SBM hearing.

Appeal by defendant from judgments entered 27 May 2010 by Judge W. David Lee in Iredell County Superior Court. Heard in the Court of Appeals 16 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Angenette R. Stephenson, for the State.

Mark Montgomery, for defendant-appellant.

ERVIN, Judge.

Defendant David Allen Carter appeals from judgments sentencing him to 192 months to 240 months imprisonment based upon his conviction for first-degree sexual offense in File No. 08 CrS 57285 and to a consecutive term of 192 months to 240 months imprisonment based upon his conviction for first-degree sexual offense in File No. 08 CrS 57286. On appeal, Defendant contends that the trial court erred by (1) denying his motion to dismiss the first-degree sexual offense charge lodged against him in File No. 08 CrS 57286 for insufficiency of the evidence; (2) failing to instruct the jury on the lesser included offense of attempted first-degree sexual offense in File No. 08 CrS 57286; (3) excluding testimony that the complainant was "overly dramatic," "manipulative," and "attention seeking;" (4) limiting the purposes for which the jury could consider certain extrajudicial statements by the complainant; (5) making reference to "the victim" while instructing the jury; (6) denying his motion for an independent psychological evaluation of the complainant; and (7) ordering Defendant to enroll in lifetime satellite-based monitoring. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that Defendant is entitled to a new trial in File No. 08 CrS 57286 and that the trial court's SBM order in File No. 08 CrS 57285 should be vacated and that that case should be remanded to the trial court for further proceedings not inconsistent with this opinion. Otherwise, we find no error in the trial court's judgment in File No. 08 CrS 57285.

I. Factual Background

A. Substantive Facts

1. State's Evidence

Vanessa,[1] who is Defendant's step-daughter, was born on 19 April 2000. When Vanessa asked to use the family's home computer in June 2008, Defendant had her go into the bathroom, where he made her pull down her pants. At that point, Defendant stuck his "doodle" in or on her bottom, which was where her "poop" came out, and made her "suck" on his "doodle." According to Vanessa, similar incidents had occurred on other occasions. Vanessa claimed that Defendant made her suck on his "doodle" at least "one day each month." Vanessa had accused Defendant of engaging in similar behavior a year earlier, when the family lived in South Carolina.

1. Vanessa is a pseudonym that will be used throughout this opinion for the purpose of protecting the complainant's privacy and for ease of reading.

On 4 August 2008, Vanessa told her mother that Defendant was doing things to her, including putting his " 'doodle' on her bum." Eight days later, Vanessa's mother telephoned Sergeant Todd Marcum of the Mooresville Police Department to report Vanessa's allegations. On 14 August 2008, Sergeant Marcum interviewed Defendant, who denied having engaged in any improper behavior with Vanessa. On the same date, Vanessa told Captain Julie Gibson of the Iredell County Sheriff's Department that Defendant had put his penis in her "butt" 50 times. In certain pictures that she drew during this interview, Vanessa depicted Defendant as putting his "doodle" in her bottom and mouth.

Tammy Carroll, a sexual assault nurse examiner at Iredell Memorial Hospital, noted a small anal fissure, which is a tear or an erosion of skin caused by trauma, while examining Vanessa. According to Ms. Carroll, a penis "inside a butt crack or . . . on butt cheeks," "constipation," "a large amount of diarrhea," or "any type of other trauma" could cause an anal fissure.

2. Defendant's Evidence

On the day prior to the earlier occasion on which Vanessa had accused Defendant of molesting her, Vanessa was upset about being punished for wandering too far from home. When asked about her allegations against Defendant on the following day, Vanessa said that she "didn't really mean that" and acknowledged that she was "just angry [and] . . . upset." Similarly, Vanessa threw a "complete tantrum" on 4 August 2010 because a family trip to an amusement park in Charlotte was cut short due to inclement weather. Vanessa had seen Defendant and her mother having sex and watching adult television and had been caught looking at adult magazines. Vanessa's mother claimed that Vanessa was not being "truthful" or "very honest" when she accused Defendant of sexually abusing her.

B. Procedural History

On 13 October 2008, the Iredell County grand jury returned bills of indictment charging Defendant with two counts of first-degree sexual offense and one count of crime against nature. The charges against Defendant came on for trial before the trial court and a jury at the 24 May 2010 criminal session of the Iredell County Superior Court. At the conclusion of all the evidence, the State voluntarily dismissed the crime against nature charge. On 27 May 2010, the jury found Defendant guilty of both counts of first-degree sexual offense. As a result, the trial court sentenced Defendant to consecutive terms

of 192 months to 240 months imprisonment based upon Defendant's convictions for two counts of first-degree sexual offense. In addition, the trial court ordered Defendant to enroll in SBM for the duration of his natural life. Defendant noted an appeal to this Court from the trial court's judgments.

II. Legal Analysis

A. Sufficiency of Evidence of Anal Penetration

[1] On appeal, Defendant contends that the trial court erred by denying his motion to dismiss the first-degree sexual offense charge lodged against him in File No. 08 CrS 57286 on the grounds that the State failed to provide sufficient evidence of anal penetration. We disagree.

When reviewing a challenge to the sufficiency of the evidence to support a conviction, this Court determines "whether [the State presented] substantial evidence (1) of each essential element of the offense charged and (2) that [the] defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990) (citation omitted). "[T]he trial court must examine the evidence in the light most advantageous to the State, drawing all reasonable inferences from the evidence in favor of the State's case." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (citation omitted), *cert. denied*, 537 U.S. 1005, 123 S. Ct. 495, 154 L. Ed. 2d 403 (2002).

According to N.C. Gen. Stat. § 14-27.4(a)(1), "[a] person is guilty of a sexual offense in the first degree if the person engages in a sexual act with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." A "sexual act" includes "cunnilingus, fellatio, analingus, or anal intercourse . . . [and] the penetration, however slight, by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.1. "Anal intercourse requires penetration of the anal opening of the victim by the penis[.]" *State v. DeLeonardo*, 315 N.C. 762, 764, 340 S.E.2d 350, 353 (1986) (citation omitted). As a result, in order to prove Defendant's guilt of first-degree sexual offense in File No. 08 CrS 57286, the State was required to offer evidence tending to show that Defendant's penis penetrated Vanessa's anus. *State v. Norman*, 196 N.C. App. 779, 786, 675 S.E.2d 395, 400, *disc. review denied*, 363 N.C. 587, 683 S.E.2d 382-83 (2009).

The record contains contradictory evidence concerning the extent to which anal penetration actually occurred. Vanessa testified that Defendant's penis was between her "butt cheeks," "on" or "over"

her anus, and pressing on her anal opening. However, when asked if Defendant "stuck . . . his penis . . . in a certain part of [her] body," Vanessa answered "yes." In addition, Vanessa testified that Defendant was "pushing his doodle in really, really hard, and for some reason I'm very, very delicate, and he was pushing it really hard and it would make it feel very sore and stuff [a]nd sometimes it would feel like it would be bleeding." According to Ms. Carroll, Vanessa's anal fissure could have been caused by a penis being placed "inside a butt crack or on a butthole or on butt cheeks" or by "[c]onstipation, a large amount of diarrhea, . . . irritable bowel syndrome . . . [or] any type of other trauma." Finally, a drawing that Vanessa made depicting the Defendant "putting his doodle in [her] bottom" was admitted into evidence.

Defendant analogizes this case to *State v. Hicks*, 319 N.C. 84, 90, 352 S.E.2d 424, 427 (1987), in which the Supreme Court reversed a defendant's first-degree sexual offense conviction. In concluding that testimony that the defendant "put his penis in the back of" the complainant did not establish the necessary penetration, the Supreme Court stated that, "[g]iven the ambiguity of [the victim's] testimony as to anal intercourse, and absent corroborative evidence (such as physiological or demonstrative evidence)," the evidence did not suffice to support a conviction. *Id.* On the other hand, in *State v. Norman*, 196 N.C. App. at 779, 675 S.E.2d at 395, we upheld the defendant's conviction against a sufficiency of the evidence challenge given that the complainant testified that the defendant "[stuck] his ding-a-ling in my back or my bottom," *Id.* at 787, 675 S.E.2d at 400-01; responded affirmatively when asked if the defendant "put [his ding-a-ling] in [the complainant's] butt . . . inside of it," *Id.* at 787, 675 S.E.2d at 401; and stated that "it hurts when [Defendant] sticks his ding-a-ling in my front and in my back." *Id.* After carefully reviewing the record in this case, we believe that the testimony presented at trial is like that in *Norman* and unlike that in *Hicks*.

At its essence, Defendant's challenge to the sufficiency of the evidence to support his conviction for first-degree sexual offense in File No. 08 CrS 57286 rests upon a contention that Vanessa's testimony was "ambiguous" and insufficiently credible. However, the weight and credibility of a witness' testimony are for the jury, and not this Court, to determine. *State v. Moses*, 350 N.C. 741, 767, 517 S.E.2d 853, 869 (1999), *cert. denied*, 528 U.S. 1124, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000). In this case, Vanessa stated on at least one occasion that Defendant's penis penetrated her anus. In addition, Ms. Carroll testified that Vanessa's anal fissure could have resulted from trauma to

the anal area. Such testimony is sufficient, if credited by a jury, to support a finding of anal penetration. As a result, Defendant is not entitled to relief on the basis of this contention.

B. Evidentiary Issues

1. Exclusion of Witness Stivenson's Testimony

[2] Secondly, Defendant contends that the trial court erred by excluding the testimony of Social Worker Erica Stivenson to the effect that, during therapy sessions, Vanessa was "overly dramatic," "manipulative," and exhibited "attention seeking behavior." We do not find Defendant's argument persuasive.

Ms. Stivenson, a Certified Licensed Social Worker, conducted "play therapy" sessions with Vanessa. Ms. Stivenson testified that, while she was not qualified to provide a medical diagnosis, she could provide "diagnostic impressions . . . [relating to] what we suspect is going on with the individual and . . . what we're working towards treating and targeting." On *voir dire*, Ms. Stivenson testified that Vanessa exhibited "acting out [], attention seeking [], and manipulative behaviors" and that such behaviors suggested the existence of an underlying psychological issue for which Vanessa needed to be referred to a specialist. The trial court excluded Ms. Stivenson's testimony concerning whether Vanessa "[had] any sort of mood swings or manipulative behavior or acting out or other matters that would cause [Stivenson] to want to send [Vanessa] to get a psychological evaluation" and limited the scope of Ms. Stivenson's testimony to what she observed and heard.

In his brief, Defendant contends that Ms. Stivenson's testimony was admissible for the purpose of corroborating the testimony of Vanessa's mother to the effect that Vanessa was "manipulative" and "attention seeking." However, Defendant failed to cite any authority in support of this component of his argument. According to N.C.R. App. P. 28(b)(6), "[t]he body of the argument . . . shall contain citations of the authorities upon which the appellant relies." As a result, Defendant is not entitled to appellate relief based on his contention that the challenged portion of Ms. Stivenson's testimony was admissible for corroborative purposes. *Dunton v. Ayscue*, ___ N.C. App. ___, ___, 690 S.E.2d 752, 755 (2010) (holding that the plaintiff's arguments were deemed "abandoned" given his failure to cite any authority in support of his position).

Secondly, Defendant contends that Ms. Stivenson's testimony constituted admissible expert opinion testimony. N.C. Gen. Stat. § 8C-1, Rule 702(a) provides, in pertinent part, that, "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." The admissibility of expert testimony hinges upon the expert's "special expertise[,] . . . that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978). Assuming that a proper foundation has been laid, an expert witness may testify concerning the profiles exhibited by sexually abused children and whether a particular child exhibits symptoms or characteristics consistent with such profiles. *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) (per curiam) (citations omitted).[2]

Defendant never questioned Ms. Stivenson about the profiles of sexually abused children or whether Vanessa's behaviors were consistent with such profiles. On the contrary, Ms. Stivenson testified that she was not qualified to render a medical diagnosis and never made any specific medical diagnosis based upon Vanessa's behavior. As a result, Ms. Stivenson's characterizations of Vanessa's behavior did not relate to an expert opinion which Ms. Stivenson was qualified to deliver. *See State v. Murphy*, 100 N.C. App. 33, 39-40, 394 S.E.2d 300, 304 (1990) (upholding the admission of testimony by a clinical psychologist concerning behavior exhibited by sexually abused children and the extent to which these characteristics were exhibited by the complainant on the grounds that the witness was qualified to render such an opinion and that the challenged testimony could assist the jury in understanding the behavior patterns exhibited by sexually abused children). As a result, the trial court correctly determined that Ms. Stivenson was not entitled to "offer any opinion as to medical treatment."

Finally, Defendant contends that Ms. Stivenson's testimony constituted an admissible "shorthand statement" of fact concerning her "observations of [Vanessa] during the counseling sessions." Although Defendant emphasizes that "[t]he defense was that [Vanessa] fabricated or exaggerated her claims of abuse" and argues that the

2. We review the trial court's rulings concerning the admissibility of expert testimony at trial for an abuse of discretion. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citations omitted).

"excluded testimony would have furthered that defense" by providing the "jury [with] information from which it could determine whether or not [Vanessa] was telling the truth," the relevancy of this testimony hinged upon the extent to which it constituted an inadmissible commentary on Vanessa's credibility. *State v. Hannon*, 118 N.C. App. 448, 450, 455 S.E.2d 494, 496 (1995) (holding that the trial court erred by admitting testimony that "the victim was telling the truth on this particular occasion" regardless of "whether we view her testimony this way[] or as an opinion on the prosecuting witness's credibility"). Thus, we conclude that none of Defendant's challenges to the trial court's decision to exclude Ms. Stivenson's testimony that Vanessa exhibited "acting out [], attention seeking [], and manipulative behaviors" have merit.

2. Vanessa's Statement to Ms. Stivenson

[3] In addition, Defendant contends that the trial court erred by not admitting Vanessa's comment to the effect that "I know [Defendant] wouldn't do it. I know he's coming home" solely for corroborative purposes on the grounds that this statement was admissible for substantive purposes as either a statement made for the purpose of medical diagnosis or treatment or as an excited utterance. Once again, we fail to find Defendant's argument persuasive.

At trial, Ms. Stivenson testified that, during a 31 March 2009 "play therapy" session, Vanessa became tearful and indicated that she "miss[ed Defendant] and want[ed] him to come home [so that] they [could] become a family again." In response, Ms. Stivenson told Vanessa that, if Defendant had done the "things [Vanessa] accused him of he wouldn't be coming home," leading Vanessa to reply, "well, I know he wouldn't do it. I know he's coming home." The trial court admitted Vanessa's statement subject to a limiting instruction that the jury could only consider this statement for the purpose of showing Vanessa's state of mind and not as "evidence of any events that led to that then existing state of mind."[3]

According to well-established North Carolina law, statements made for the purpose of obtaining medical diagnosis or treatment do not constitute inadmissible hearsay. N.C. Gen. Stat. § 8C-1, Rule 803(4). In evaluating whether an extrajudicial statement is admissible

3. A trial court's determination concerning the extent to which an out-of-court statement constitutes inadmissible hearsay is subject to *de novo* review. *State v. Miller*, 197 N.C. App. 78, 87-88, 676 S.E.2d 546, 552, *disc. review denied*, 363 N.C. 586, 683 S.E.2d 216 (2009).

pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(4), the trial court must determine that (1) "the declarant intended to make the statements at issue in order to obtain medical diagnosis or treatment" and that (2) "the declarant's statements were reasonably pertinent to medical diagnosis or treatment." *State v. Hinnant*, 351 N.C. 277, 289, 523 S.E.2d 663, 670-71 (2000), *cert. denied*, 544 U.S. 982, 125 S. Ct. 1846, 161 L. Ed. 2d 737 (2005). In making such a determination, the trial court must consider "all objective circumstances of record surrounding the declarant's statement," including whether any person explained the medical purpose underlying the interview, whether any person explained the importance of giving truthful answers to the child, and whether the interview took place in a medical environment. *Id.* at 287-89, 523 S.E.2d at 669-71. The medical diagnosis exception does not render statements made to non-physicians after the receipt of initial medical treatment admissible because, "[i]f the declarant is no longer in need of immediate medical attention, the motivation to speak truthfully is no longer present." *Id.* at 289, 523 S.E.2d at 670.

We are unable to conclude, in light of all the objective circumstances, that Vanessa understood that Ms. Stivenson was conducting the "play-therapy sessions" for the purpose of providing medical diagnosis or treatment. The "play therapy" sessions began more than two weeks after Vanessa's initial examination by Ms. Carroll, and were conducted at a battered women's shelter in a "very colorful" room filled with "board games, art supplies, Play-Doh, dolls, blocks, cars, [and] all [other types] of things for . . . children to engage in" rather than in a medical environment. *See Hinnant*, 351 N.C. at 290, 523 S.E.2d at 671. Although, Ms. Stivenson did emphasize that it was important for Vanessa to tell the truth, the record contains no indication that she ever told Vanessa that the "play therapy" sessions served a medical purpose or that Vanessa understood that any of her statements might be used for diagnostic or treatment-related purposes. In addition, the record does not tend to show that the statement in question had any relevance to the provision of medical diagnosis or treatment, since Ms. Stivenson clearly admitted that she was not qualified to engage in such activities. As a result, the trial court did not err by refusing to admit Vanessa's statement pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(4).

A statement is admissible as an excited utterance if it "relat[es] to a startling event or condition [and is] made while the declarant was under the stress of excitement caused by the event or condition."

N.C. Gen. Stat. § 8C-1, Rule 803(2). "In order to fall within this hearsay exception, there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985) (citation omitted). The determination as to whether a particular statement constitutes an excited utterance depends upon the surrounding facts and circumstances. *See, e.g., State v. Guice*, 141 N.C. App. 177, 201, 541 S.E.2d 474, 489 (2000), *appeal dismissed, disc. review denied in part and allowed for other purpose in part*, 353 N.C. 731, 551 S.E.2d 112-13 (2001), *modified and aff'd on remand*, 151 N.C. App. 293, 564 S.E.2d 925 (2002).

After examining the surrounding circumstances, we conclude that the trial court did not err by refusing to admit Vanessa's statement pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(2). The record contains no description of Vanessa's behavior or mental state at the time of her conversation with Ms. Stivenson. For that reason, we cannot discern whether Vanessa was excited, startled, or under the stress of excitement at the relevant time. Although she had previously been "tearful", there is no indication that Vanessa remained in such a state at the time that she made the statement in question. As a result, the record does not establish that this statement constituted an admissible excited utterance. *See State v. Wilkerson*, 363 N.C. 382, 417, 683 S.E.2d 174, 195-96 (2009) (holding that a particular statement was admissible as an excited utterance when the record tended to show that the declarant became visibly upset due to defendant's threats prior to making statement), *cert. denied*, ___ U.S. ___, 130 S. Ct. 2104, 176 L. Ed. 2d 734 (2010); *State v. Coria*, 131 N.C. App. 449, 452, 508 S.E.2d 1, 3 (1998) (holding that the declarant's statements were properly admitted as excited utterances given the trial court's finding that the declarant was "very excited and upset"). As a result, neither of Defendant's efforts to establish the admission of Vanessa's statement for substantive purposes has merit.

C. Reference to Vanessa as the "Victim"

[4] Thirdly, Defendant contends that the trial court committed plain error by describing Vanessa as the "victim" in the course of its instructions to the jury. We disagree.

In its jury instructions, the trial court repeatedly referred to Vanessa as the "victim." According to Defendant, these references constituted an improper expression of opinion in violation of N.C. Gen. Stat. § 15A-1222, which prohibits a trial judge from "express[ing] . . .

any opinion in the presence of the jury on any question of fact to be decided by the jury." As a result of Defendant's failure to object to the challenged instructions at trial, we must evaluate this claim utilizing a plain error standard of review. *State v. Richardson*, 112 N.C. App. 58, 66, 434 S.E.2d 657, 663 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 132 (1994). In order to establish plain error, an appealing party must show "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997) (citations omitted).

The Supreme Court rejected a contention indistinguishable from the one that Defendant has advanced here in *State v. McCarroll*, 336 N.C. 559, 565-66, 445 S.E.2d 18, 22 (1994), reasoning that no plain error had been shown despite the delivery of similar instructions given the absence of any other indication that the trial court had expressed an impermissible opinion and the fact that the trial court properly placed the burden of proof on the State. In this case, as in *McCarroll*, the trial court properly placed the burden of proof on the State in its jury instructions. Moreover, the trial court did not engage in any other activity that tended to constitute an impermissible expression of opinion. On the contrary, the trial court specifically told the jury that "[t]he law requires the presiding judge to be impartial" and that it "should not infer from any statement I have made or question I have asked that any of the evidence is to be believed or disbelieved, that a fact has been proved, or what your findings ought to be." As a result, "[w]e cannot hold that the reference to [Vanessa] as the victim was an error so basic and lacking in its elements that justice could not have been done."[4] *McCarroll*, 336 N.C. at 566, 445 S.E.2d at 22.

D. Independent Psychological Evaluation

[5] Fourth, Defendant contends that the trial court erred by denying his pre-trial motion for an independent psychological evaluation of Vanessa. Defendant's argument lacks merit.

On 10 May 2010, Defendant filed a motion seeking an independent psychological and medical examination of Vanessa. Defendant sought the requested examination for the purpose of determining whether Vanessa understood that her statements would be used to

4. For the same reasons, we conclude that Defendant has failed to demonstrate that he received deficient representation because of he failure of his trial counsel to object to these references to the complainant as "the victim." *See State v. Pratt*, 161 N.C. App. 161, 165, 587 S.E.2d 437, 440 (2003).

prosecute the Defendant and whether a reactive attachment disorder might have affected Vanessa's ability to know what she was doing when she made her accusations against Defendant. The trial court denied Defendant's motion.

In his brief, Defendant candidly concedes that the trial court's ruling was consistent with existing North Carolina law. *State v. Horn*, 337 N.C. 449, 451-52, 446 S.E.2d 52, 53 (1994). Even so, Defendant contends that the trial court's ruling violated his federal and state constitutional rights to present a defense and to due process. Defendant has not, however, advanced any specific argument or cited any authority in support of this contention. As a result, Defendant is not entitled to appellate relief based on the denial of this motion.

E. Failure to Submit Attempted First-Degree Sexual Offense

[6] Fifth, Defendant contends that the trial court committed plain error by failing to instruct the jury concerning the issue of his guilt of attempted first-degree sexual offense in File No. 08 CRS 57286. Defendant's contention has merit.

"A trial court is only required to instruct the jury on a lesser included offense when there is evidence presented from which the jury could find that such offense was committed." *State v. Stinson*, 127 N.C. App. 252, 258, 489 S.E.2d 182, 186 (1997). "The determining factor is the presence of evidence to support a conviction of the lesser included offense." *State v. Boykin*, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984) (citations omitted). An attempted first-degree rape instruction is "warranted when the evidence pertaining to the crucial element of penetration conflicts or when, from the evidence presented, the jury may draw conflicting inferences." *State v. Johnson*, 317 N.C. 417, 436, 347 S.E.2d 7, 18 (1986) (citations omitted), *superseded by statute on other grounds*, by N.C. Gen. Stat. § 8C-1, Rule 404(b), *as recognized in State v. Moore*, 335 N.C. 567, 440 S.E.2d 797 (1994). In view of the fact that his trial counsel failed to request that an attempt issue be submitted to the jury, we must utilize the plain error standard of review in evaluating the merits of this claim. *State v. Brunson*, 187 N.C. App. 472, 477, 653 S.E.2d 552, 555 (2007).

Even a cursory examination of the record reveals that the evidence concerning the issue of penetration was in conflict. Although Vanessa answered in the affirmative when asked if Defendant "stuck . . . his penis . . . in . . . her bottom," she also testified that Defendant placed his penis "on [her] butthole" and that Defendant's penis

"would be between my butt cheeks . . . over my butthole or hole in my anus." When asked to clarify her testimony, Vanessa stated that "he would put his doodle between my butt cheeks and it will be sort of pressing on my butthole." Finally, Ms. Carroll testified that a "penis . . . inside a butt crack" or "on a butthole or on butt cheeks" could cause an anal fissure if "enough vigor [is] pressed against the anus" and that other types of trauma, such as "[c]onstipation, a large amount of diarrhea, . . . irritable bowel syndrome . . . [or] any type of other trauma" could have caused Vanessa's anal fissure as well.

In *State v. Couser*, 163 N.C. App. 727, 734, 594 S.E.2d 420, 425 (2004), this Court upheld the delivery of an attempt instruction in a case in which the complainant testified that she was not sure whether the defendant had penetrated her vagina, where she had told others that the defendant had attempted to rape her, and where the abrasions found on her vaginal opening were "not specific to, nor diagnostic of, sexual abuse." Similarly, in *State v. Johnson*, 317 N.C. at 436-37, 347 S.E.2d at 18-19, the Supreme Court held that an attempt instruction should have been given because the victim had made two statements stating that the defendant had attempted, but had been unable, to achieve penetration. We find *Johnson* and *Couser* controlling in this case. Although certain portions of Vanessa's testimony tended to show that anal penetration had occurred, her statements that Defendant put his penis "on" or "between my butt cheeks" or that he "pressed against" her anus with his penis support an inference to the contrary. Moreover, although "evidence that no trauma occurred to [the victim] is not sufficient to establish a conflict of evidence as to penetration," *State v. Thomas*, 187 N.C. App. 140, 146, 651 S.E.2d 924, 928 (2007), Ms. Carroll's testimony indicated that Vanessa's anal fissure could have resulted from attempted, as well as completed, penetration. As a result, a jury could rationally have found Defendant guilty of attempted first-degree sexual offense in File No. 08 CrS 57286. Moreover, given the sharp conflict in the evidence relating to the issue of Defendant's guilt, the importance of allowing the jury to consider all relevant issues prior to rendering a verdict, and the absence of any indication that Defendant opposed submission of an attempt issue, *see State v. Walker*, 167 N.C. App. 110, 117-18 605 S.E.2d 647, 653-54 (2004) (refusing to provide plain error relief in a case in which the defendant specifically opposed the submission of a lesser included offense), *vacated in part on other grounds*, 361 N.C. 160, 695 S.E.2d 750 (2006), we conclude that the trial court's failure to instruct the jury on attempted first-degree sexual offense constituted

plain error, *see State v. Collins*, 334 N.C. 54, 62-63, 431 S.E.2d 188, 193 (1993) (holding that the trial court committed plain error by failing to instruct the jury concerning the issue of the defendant's guilt of attempted murder); *see also State v. Clark*, 201 N.C. App. 319, 327, 689 S.E.2d 553, 559 (2009) (holding that the trial court committed plain error by failing to instruct the jury on the issue of the defendant's guilt of assault on a government official), and that Defendant is entitled to a new trial in File No. 08 CrS 57286.

F. SBM Order

[7] Finally, Defendant argues that the trial court erroneously required him to enroll in lifetime SBM. We agree.[5]

1. Appealability

Prior to reaching the merits of Defendant's challenge to the trial court's SBM order, we must address the extent, if any, to which Defendant's appeal is properly before this Court. Defendant noted his appeal from the trial court's SBM order orally in open court. "[O]ral notice pursuant to N.C.R. App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court" in a case arising from a trial court order requiring a litigant to enroll in SBM. *State v. Brooks*, ___ N.C. App. ___, ___, 693 S.E.2d 204, 206 (2010). Instead, a defendant seeking to appeal an order requiring enrollment in SBM must note his or her appeal in writing pursuant to N.C. R. App. P. 3(a), with any failure to do so necessitating dismissal of the defendant's appeal. *Id.* Thus, we dismiss Defendant's appeal because of his failure to file a written notice of appeal from the trial court's SBM order.

However, "[t]his Court does have the authority pursuant to [N.C. R. App. P.] 21(a)(1) to 'treat the purported appeal as a petition for writ of certiorari' and grant it in our discretion." *Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008) (quoting *State v. SanMiguel*, 74 N.C. App. 276, 277-78, 328 S.E.2d 326, 328 (1985)). Our decision in *Brooks* was filed on 18 May 2010, which was the same day that Defendant's trial began. Defendant's SBM hearing occurred nine days after the filing of our opinion in *Brooks* and eleven days prior to the issuance of the *Brooks* mandate. Thus, "[i]n the interest of justice, and to expedite the decision in the public interest," *Brooks*, ___ N.C. App. at ___, 693 S.E.2d at 206, we exercise our discretion to treat

5. As we have already noted, Defendant is entitled to a new trial in File No. 08 CrS 57286. For that reason, we vacate the trial court's order requiring Defendant to enroll in lifetime SBM based upon that conviction. Thus, the discussion in the text relates solely to the trial court's SBM order in File No. 08 CrS 57285.

Defendant's appeal as a petition for the issuance of a writ of *certiorari*, issue the writ, and consider Defendant's challenges to the trial court's SBM order on the merits. *See State v. Clayton*, ___ N.C. App. ___, ___, 697 S.E.2d 428, 431 (2010).

2. Defendant's Eligiblity for SBM

N.C. Gen. Stat. § 14-208.40(a) subjects two categories of offenders with reportable convictions to SBM: (1) those qualifying for mandatory lifetime SBM based upon a determination that he or she is a sexually violent predator, a recidivist, or was convicted of an aggravated offense and (2) those who have committed an offense involving the physical, mental, or sexual abuse of a minor and, based upon an appropriate risk assessment, require the "highest level of supervision and monitoring." N.C. Gen. Stat. §§ 14-208.40(a)(1) and (2). In view of the fact that first-degree sexual offense is a "sexually violent offense" as defined in N.C. Gen. Stat. § 14-208.6(5), Defendant was clearly convicted of a "reportable" offense. However, the trial court's decision to the contrary notwithstanding, "first-degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.4(a)(1) does not qualify as an aggravated offense." *State v. Treadway*, ___ N.C. App. ___, ___, 702 S.E.2d 335, 347-48 (2010), *disc. review denied*, 365 N.C. 195, 710 S.E.2d 35 (2011). As a result, the trial court erred by concluding that Defendant was subject to lifetime SBM by virtue of having been convicted of an "aggravated offense."

Although the State concedes that first-degree sexual offense is not an "aggravated offense," it argues that this case should be remanded for a new hearing convened for the purpose of determining whether Defendant should be required to enroll in SBM for a period of years pursuant to N.C. Gen. Stat. §§ 14-208.40A(d) and (e). *State v. King*, ___ N.C. App. ___, ___, 693 S.E.2d 168, 172 (2010) (remanding the case in question for additional findings of fact concerning whether the defendant required the highest possible level of supervision and monitoring following a determination that the trial court had erred by ordering defendant to enroll in lifetime SBM). Given that the offense for which Defendant was convicted involved the physical, mental, or sexual abuse of a minor and given that the required risk assessment was never performed, we are unable to determine whether the State's contention that Defendant should be required to enroll in SBM for a term of years has merit. As a result, we reverse the trial court's order compelling Defendant to enroll in lifetime SBM and remand this case to the trial court for a proper risk assessment and a new SBM hearing.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant is entitled to a new trial in File No. 08 CrS 57286. On the other hand, we find no error in the trial court's judgment in File No. 08 CrS 57285. Finally, we vacate the trial court's SBM orders and remand File No. 08 CrS 57285 to the Iredell County Superior Court for further SBM-related proceedings not inconsistent with this opinion.

NO ERROR IN PART, NEW TRIAL IN PART, REVERSED AND REMANDED IN PART.

Judges McGEE and McCULLOUGH concur.

UNIVERSAL INSURANCE COMPANY, PLAINTIFF v. BURTON FARM DEVELOPMENT COMPANY, LLC, DEFENDANT FIRST SPECIALTY INSURANCE COMPANY, PLAINTIFF v. UNIVERSAL INSURANCE COMPANY, DEFENDANT

No. COA10-1554

(Filed 1 November 2011)

1. Insurance—exclusion clause—separation-of-insureds—applied separately

Universal Insurance (Universal) had the duty to defend Burton Farms (Burton) against claims arising from a dispute between the owner of a subdivision (Burton Farms) and a company providing equipment, material, and labor for development (White). Burton's project manager was Mr. Mancuso, Universal's policy listed Mancuso Development as it's named insured, and Burton was listed as an additional insured. The separation-of-insureds exclusion clause relied upon by Universal required that the exclusion be applied separately since it referred to *the* insured rather than to *any* insured.

2. Insurance—exclusion—construction manager—not applicable to project manager

An insurance exclusion for injury arising from supervision of a construction project by a construction manager did not apply where the person in issue was identified as a project manager. The insurance company (Universal) did not show that "construction manager" and "project manager" were synonymous.

3. Insurance—duty to defendant—not dependent on viable claim

Although Universal Insurance argued that it did not have a duty to defend Burton Farms because employers are generally not liable for the acts of independent contractors, the argument went to the issue of whether Burton Farm would ultimately be found liable and whether Universal Insurance would ultimately have to pay, not to whether Universal Insurance had a duty to defend.

4. Insurance—other insured clauses—not mutually repugnant

"Other insurance" clauses that were identically worded were not mutually repugnant where the named insureds differed. Universal Insurance's policy provided primary coverage and the trial court properly denied Universal Insurance's motion for summary judgment.

Appeal by Universal Insurance Company from order entered 17 September 2010 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 25 May 2011.

Burton & Sue, L.L.P., by Gary K. Sue and Andrea Dancy Harrell, for Universal Insurance Company, appellant.

Forman Rossabi Black, P.A., by Amiel J. Rossabi and Jennifer L. Reutter, for First Specialty Insurance Company, appellee; and Poyner Spruill, LLP, by J. Nicholas Ellis, for Burton Farm Development Company, LLC, appellee.

GEER, Judge.

Universal Insurance Company appeals from an order denying its motion for summary judgment, granting First Specialty Insurance Company's motion for summary judgment, and declaring that Universal Insurance has a duty to defend Burton Farm Development Company, LLC, with respect to a complaint filed in Pamlico County Superior Court ("the underlying complaint"). Universal Insurance primarily argues that coverage sought by Burton Farm under the personal and advertising injury portion of its policy was barred by the policy exclusion for injury "done by or at the direction of the insured with knowledge of its falsity."

We agree with First Specialty Insurance and Burton Farm that given the separation of insureds provision in Universal Insurance's policy, that exclusion would only apply if the underlying complaint

alleged personal and advertising injury "done by or at the direction of" Burton Farm—as opposed to another defendant also insured under the Universal Insurance policy—with Burton Farm's having "knowledge of its falsity." The underlying complaint contains no such allegations, and, therefore, this exclusion does not preclude coverage for Burton Farm under the Universal Insurance policy.

We also agree that a second policy exclusion is likewise inapplicable and that the plain language of the policies establishes that the Universal Insurance policy provides primary coverage while the First Specialty Insurance policy provides excess coverage. We, therefore, affirm the order below.

Facts

On 5 September 2008, W.O. White, LLC ("White") filed suit against Bernard Mancuso, Jr., Mancuso Development, Inc., and Burton Farm. The White complaint contained causes of action for breach of contract, unfair and deceptive trade practices, and defamation. Subsequently, White filed an amended complaint ("the White complaint") that was substantially the same as the original complaint but added a claim for relief alleging, in the alternative, that White was entitled to recover in *quantum meruit*.

In pertinent part, the amended complaint alleged that White—which was in the business of providing equipment, material, and labor for the purpose of developing subdivisions—entered into a series of contracts with Burton Farm beginning in April 2007. The contracts called for White to perform site grading, pave roads, install storm drains, and perform work related to the installation of water lines at a subdivision owned by Burton Farm.

In April 2008, Burton Farm replaced its existing on-site manager with a new project manager, Mr. Mancuso, who was President of Mancuso Development. Mr. Mancuso, the White complaint alleged, began making unreasonable demands on White that went outside the scope of White's contracts with Burton Farm. In addition, Mr. Mancuso began a "campaign to smear the integrity of White" intended to convince Burton Farm executives that White's work was unsatisfactory and not consistent with the terms of the contracts.

The White complaint alleged that Mr. Mancuso caused Burton Farm to breach its contracts with White by bringing in other contractors to perform work that was the subject of White's contracts with Burton Farm and by withholding payments from White for work and

materials. Mr. Mancuso and Burton Farm also interfered with White's ability to complete the work necessary in order to receive the remaining sums due under the contracts and to recover retainage amounts withheld by Burton Farm pending completion of White's work.

In addition to causes of action for breach of contract and enforcement of a claim of lien asserted against Burton Farm, the White complaint alleged that Mr. Mancuso "made false, derogatory and defamatory remarks about White" and that "[t]hese slanderous and defamatory remarks, both in writing and orally, were designed to damage the reputation of White, to injure White's ability to perform under the contracts with Burton Farm, and . . . to interfere with White's ability to obtain additional work both from Burton Farm and from other developers." The amended complaint asserted that "[t]he slanderous, libelous, and defamatory remarks and statements made by Mancuso were made maliciously and with a willful and wanton intent to cause injury and harm to White." In the unfair and deceptive trade practice claim against Mancuso, White alleged, in part, that "Mancuso has fabricated information and made false statements to make it appear that the work performed by White was not in conformity with the contracts between White and Burton Farm . . . ."

At some point, Burton Farm notified Universal Insurance of the White complaint and demanded a defense pursuant to a commercial lines policy issued by Universal Insurance that listed Mancuso Development as the named insured and Burton Farm as an additional insured. Universal Insurance filed a declaratory judgment action against Burton Farm, seeking a declaration that Universal Insurance had no duty to defend the White complaint.

Thereafter, First Specialty Insurance, which insured Burton Farm as a named insured under a commercial general liability policy, was allowed to intervene in Universal Insurance's declaratory judgment action. On 8 June 2009, First Specialty Insurance filed a complaint in intervention seeking a declaratory judgment that the White complaint triggered Universal Insurance's duty to defend Burton Farm as an additional insured under the Universal Insurance policy and that the Universal Insurance policy was primary and the First Specialty Insurance policy was excess. First Specialty Insurance also sought equitable contribution and equitable subrogation from Universal Insurance for all amounts paid by First Specialty Insurance in connection with its defense of Burton Farm in the White action.

First Specialty Insurance and Universal Insurance filed cross motions for summary judgment. On 17 September 2010, the trial court entered an order denying Universal Insurance's motion for summary judgment and granting First Specialty Insurance's motion for summary judgment. Universal Insurance timely appealed from that order to this Court.

I

[1] Universal Insurance first contends that it had no duty, under its policy, to defend Burton Farms. Our Supreme Court has observed that "the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy." *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986). This duty to defend "is ordinarily measured by the facts as alleged in the pleadings." *Id.* "When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable." *Id.* An insurer is excused from its duty to defend only "if the facts are not even arguably covered by the policy." *Id.* at 692, 340 S.E.2d at 378.

In order to answer the question whether an insurer has a duty to defend, we apply the " 'comparison test,' reading the policies and the complaint 'side-by-side . . . to determine whether the events as alleged are covered or excluded.' " *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 6, 692 S.E.2d 605, 610 (2010) (quoting *Waste Mgmt.*, 315 N.C. at 693, 340 S.E.2d at 378). In performing this test, "the facts as alleged in the complaint are to be taken as true and compared to the language of the insurance policy. If the insurance policy provides coverage for the facts as alleged, then the insurer has a duty to defend." *Id.* at 7, 692 S.E.2d at 611.

Under North Carolina law, "the insured . . . has the burden of bringing itself within the insuring language of the policy. Once it has been determined that the insuring language embraces the particular claim or injury, the burden then shifts to the insurer to prove that a policy exclusion excepts the particular injury from coverage." *Hobson Constr. Co. v. Great Am. Ins. Co.*, 71 N.C. App. 586, 590, 322 S.E.2d 632, 635 (1984). "Exclusionary clauses are interpreted narrowly while coverage clauses are interpreted broadly to provide the greatest possible protection to the insured." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 542-43, 350 S.E.2d 66, 71 (1986).

In this case, Universal Insurance does not dispute that the White complaint triggered coverage under the personal and advertising injury provisions in the Universal Insurance policy. The Universal Insurance policy provides coverage for personal and advertising injury arising out of one or more of the following offenses: "[o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services[.]"

Notwithstanding that provision, Universal Insurance argues that no duty to defend exists because the Universal Insurance policy excludes coverage for personal and advertising injury "done by or at the direction of the insured with knowledge of its falsity." Universal Insurance contends that the allegations contained in the White complaint—that Mr. Mancuso, the named insured, "mounted a 'smear campaign' "—fit this exclusion, thus precluding any duty to defend Burton Farm.

First Specialty Insurance and Burton Farm argue, however, that the allegations regarding whether Mancuso Development knew of the falsity are immaterial because of the separation of insureds clause in the Universal Insurance policy. That clause states:

> **7. Separation of Insureds**
>
> Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:
>
> **a.** As if each Named Insured were the only Named Insured; and
>
> **b.** Separately to each insured against whom claim is made or "suit" is brought.

"[T]he vast majority of jurisdictions which have addressed the issue" have held that "a separation of insureds clause modifies the meaning of an exclusion phrased in terms of 'the insured[,]' " such that "the exclusion will only be effective if it applies with respect to the specific insured seeking coverage." *Michael Carbone, Inc. v. Gen. Accident Ins. Co.*, 937 F. Supp. 413, 418 (E.D. Pa. 1996). *See, e.g.*, *Float-Away Door Co. v. Cont'l Cas. Co.*, 372 F.2d 701, 708 (5th Cir. 1966) ("The better reasoned cases adopt a restrictive interpretation of 'the insured' as referring only to the party seeking coverage under the policy."); *Shelby Mut. Ins. Co. v. Schuitema*, 183 So. 2d 571, 573 (Fla.

Dist. Ct. App. 1966) ("Since the adoption of the severability of interests clause in a policy which would or might apply to several insureds, the term 'the insured', as used in the exclusions and conditions of the policy, means only the person claiming coverage."); *Commercial Standard Ins. Co. v. Am. Gen. Ins. Co.*, 455 S.W.2d 714, 721 (Tex. 1970) (" 'The insured' does not refer to all insureds; rather, the term is used to refer to each insured as a separate and distinct individual apart from any and every other person who may be entitled to coverage thereunder.").

In *Carbone*, the insurance policy contained a separation of insureds clause essentially identical to the one in this case, as well as an exclusion for bodily injury or property damage arising out of the use of any automobile owned or operated by "*any* insured." 937 F. Supp. at 416 (emphasis added). Applying the majority rule, the court concluded that the reference to "any" insured as opposed to "the" insured was critical in considering the impact of the separation of insured clause:

> Note the exact language. The provision excludes losses caused by an automobile operated by "*any insured*"; the clause does not say "*the insured*." The distinction is paramount. Had the automobile exclusion used the phrase "the insured," the separation of insureds clause would have altered the meaning of the exclusion . . . .

Id. at 420. The court, therefore, held that the plaintiff was not covered by virtue of the exclusion since the loss arose out of the use of an automobile by one of the plaintiff's employees, also an insured. *Id. See also Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006) ("Because it is Bloomington Steel that seeks coverage here, the exclusion for bodily injury expected or intended by 'the insured' is limited to bodily injury expected or intended by Bloomington Steel itself."); *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 188 (Tex. 2002) (policy contained exclusion for bodily injury or property damage expected or intended from standpoint of "the insured"; finding that separation of insureds clause required claim to be viewed from standpoint of particular insured against whom injured party's claim is made and analyzing issue as though party sued were sole insured).

In *Penske Truck Leasing Co. v. Republic W. Ins. Co.*, 407 F. Supp. 2d 741 (E.D.N.C. 2006), the federal district court predicted that North Carolina would follow the majority rule. In that case, the policy

excluded coverage for any obligation for which the " ' "insured" or the "insured's" insurer may be held liable under any workers' compensation, disability benefits or unemployment compensation law or similar law.' " *Id.* at 747. The plaintiff in the underlying action, who was injured when falling off a truck leased by his employer, sued Penske, the lessor of the truck. *Id.* The policy included a "severability of interests" clause that required "the court to apply this exclusion separately to the insured who is seeking coverage and against whom a claim has been brought." *Id.*

The district court noted that the policy's exclusion would preclude coverage in a suit by the plaintiff against his employer, but concluded "[n]either Penske nor Penske's insurer has been or could be held liable under any worker's compensation law for the injuries inflicted upon [the plaintiff in the underlying action.] It would be illogical to conclude, in the face of an explicit direction to apply a policy 'separately to each insured who is seeking coverage,' that an additional insured receives the identical coverage as the named insured. If such were the case, the severability of interests clause would appear to be meaningless and unnecessary." *Id.* Accordingly, the court held "that the worker's compensation exclusion in [the defendant's] policy does not bar coverage for Penske where the insured against whom suit has been filed, here Penske, is not the employer of the employee in question." *Id.* at 749.

We agree with the reasoning of *Penske* and *Carbone* and adopt the majority rule. In this case, the exclusion at issue—the "knowledge of falsity" exclusion—excludes coverage for personal injury "done by or at the direction of *the insured* with knowledge of its falsity." (Emphasis added.) Since the exclusion refers to *the* insured rather than *any* insured, the separation of insureds clause requires that the exclusion be applied separately with respect to each insured. The White complaint does not allege that Burton Farm made or directed the making of any injurious statements about White with knowledge of their falsity. Consequently, the "knowledge of falsity" exclusion does not apply with respect to Burton Farm.

Universal Insurance does not address the separation of insureds clause. It asserts instead that "a party, whether an injured party or an 'additional insured', has no greater rights versus the insurer than the insured." Universal Insurance argues that the "knowledge of falsity" exclusion applies to Mancuso Development, and, therefore, Universal Insurance has no duty to defend Burton Farm because Burton Farm has no greater rights versus Universal Insurance than does Mancuso

Development. This argument cannot, however, be reconciled with the separation of insureds clause. It would, in fact, render the separation of insureds clause meaningless.

Universal Insurance, however, claims that "it is well-settled law in North Carolina that a party, whether an injured party or an '*additional insured*', has no greater rights versus the insurer than the insured." (Emphasis added.) Although Universal Insurance cites *Selective Ins. Co. v. Mid-Carolina Insulation Co.*, 126 N.C. App. 217, 484 S.E.2d 443 (1997), as its sole support for this claim of "well-settled law" regarding additional insureds, nothing in *Selective Insurance* in any way addresses the duty to defend an additional insured. That opinion has no bearing on the issues in this case.

In *Selective Insurance*, Selective had filed an action seeking a declaration that it had no duty to defend or indemnify the defendants in a negligence action that was still pending. The appellant in *Selective*—the injured party suing in the underlying action—appealed a summary judgment order entered in Selective's declaratory judgment action, concluding that Selective had no duty to indemnify or defend one of the additional insureds covered by the Selective policy. This Court expressly "decline[d] to address this case on the merits, however, because the appeal must be dismissed for lack of jurisdiction." *Id.* at 219, 484 S.E.2d at 445.

The Court concluded that it lacked jurisdiction because the appellant injured party was not an aggrieved party as her "legal rights ha[d] not been denied, nor directly and injuriously affected by entry of summary judgment in favor of Selective." The Court explained that "[a]n injured party who obtains a judgment against the insured has no greater rights against the insurer than the insured" and, therefore, "an injured party who has not yet obtained a judgment against the insured [also] has no greater rights against the insurer than the insured." *Id.* Because the individual defendant, the additional insured, had not challenged the summary judgment order, the appellant, the injured party, could not challenge it. *Id.*

Further, the Court pointed out, the appellant injured party was "in effect attempting to make a claim directly against the insurer, prior to any judgment against [the insured]." *Id.* at 220, 484 S.E.2d at 445. Under the law, however, the injured party "ha[d] no legal interest in the liability insurance policy in question unless and until she obtain[ed] a judgment against [the individual defendant] in the underlying negligence suit, and execution of that judgment [was] returned

unsatisfied." *Id.* As a result, because the injured party could not be considered an aggrieved party, the Court had no jurisdiction and dismissed the appeal. *Id.*

In short, *Selective Insurance* includes no holding or analysis relating to the rights of an additional insured under an insurance policy. We, therefore, hold that the exclusion for personal and advertising injury "done by or at the direction of the insured with knowledge of its falsity" does not preclude a duty to defend Burton Farm.

[2] Next, Universal Insurance contends that no coverage exists because the Universal Insurance policy excludes coverage for personal and advertising injury arising out of "supervision . . . done by or for you on a project on which you serve as a construction manager." Although the policy defined "you" as Mr. Mancuso, it did not define "construction manager." In support of its argument that this exclusion applies, Universal Insurance asserts only that "it is undisputed that Mancuso was acting as the construction manager on this construction site."

However, First Specialty Insurance and Burton Farm do dispute whether Mr. Mancuso was a construction manager. As they point out, the White complaint does *not* refer to Mr. Mancuso as a "construction manager." Instead, the White complaint identifies Mancuso Development as a " 'building contractor' " and Mr. Mancuso, the president, owner, and operator of Mancuso Development, as a "project manager." The White complaint contains no reference to a "construction manager."

Universal Insurance has not shown that a "construction manager"and a "project manager" are synonymous. As we are required to construe exclusions narrowly, *State Capital*, 318 N.C. at 542, 350 S.E.2d at 71, we conclude that Universal Insurance has not met its burden of showing that the "construction manager" exclusion applies to preclude a duty to defend Burton Farm in connection with acts by its project manager.

[3] Lastly, Universal Insurance argues that it did not have a duty to defend because employers are "generally not liable" for the acts of independent contractors such as Mr. Mancuso. Universal Insurance's argument goes to the issue whether Burton Farm would ultimately be found liable for any of the allegations in the White complaint and whether Universal Insurance would ultimately have to pay—not whether Universal Insurance has a duty to defend Burton Farm. As this Court explained in *Crandell v. Am. Home Assurance Co.*, 183

N.C. App. 437, 442, 644 S.E.2d 604, 607 (2007) (quoting *Waste Mgmt.*, 315 N.C. at 691, 340 S.E.2d at 377)), even though the claims against the insured in the underlying action might be groundless, that possibility does not excuse an insurer from providing a defense: "The duty to defend is not . . . dependent on the viability of the claims—'the insurer has a duty to defend, whether or not the insured is ultimately liable.' " *See also Duke Univ. v. St. Paul Fire & Marine Ins. Co.*, 96 N.C. App. 635, 638, 386 S.E.2d 762, 764 (1990) (holding insured is not required to establish ultimate liability, but only to show that facts of claim were within coverage of policy).

Universal Insurance has not, therefore, established that any of the exclusions contained in its policy apply or that any other basis exists for determining that the claims asserted against Burton Farm are not covered by the Universal policy. The trial court properly concluded that Universal Insurance had a duty to defend Burton Farm.

II

[4] Universal Insurance argues alternatively that even if it has a duty to defend, Universal Insurance's coverage provides excess coverage while First Specialty Insurance provides primary coverage. Excess insurance clauses generally provide that if other valid and collectible insurance covers the injury in question, the "excess" policy will provide coverage only for liability above the maximum coverage of the primary policy. *Horace Mann Ins. Co. v. Cont'l Cas. Co.*, 54 N.C. App. 551, 555, 284 S.E.2d 211, 213 (1981).

The Universal Insurance policy and the First Specialty Insurance policy contain identically-worded "Other Insurance" provisions:

> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:
>
> **a. Primary Insurance**
>
> This insurance is primary except when **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in **c.** below.
>
> **b. Excess Insurance**
>
> This insurance is excess over:
>
> . . . .

> **(2)** Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

Thus, each policy is excess only over "other primary insurance available to *you*." (Emphasis added.) "You," as defined in the policies, "refer[s] to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy."

Universal Insurance argues that these identical provisions are mutually repugnant and, therefore, should not be considered. However, while the wording of the clauses in the two policies may be identical, the effect of the application of that wording differs between the policies because of the different identity of the "Named Insured" under each policy. It is undisputed that Mancuso Development Inc. is the "Named Insured" under the Universal Policy and that Burton Farm is simply an "additional insured." Reference to "you" in the excess insurance provision of the Universal Insurance policy, therefore, refers only to Mancuso Development Inc. and not to Burton Farm. As a result, the Universal Insurance policy provides primary coverage with respect to Burton Farm.

On the other hand, Burton Farm is the "Named Insured" under the First Specialty Insurance policy. Because Burton Farm, through Universal Insurance, has other primary insurance available to it, the First Specialty Insurance coverage is excess over Universal Insurance's coverage.

Thus, the clauses are not mutually repugnant and can be applied to determine which carrier provides primary coverage. This Court reached the same conclusion in *Iodice v. Jones*, 133 N.C. App. 76, 78, 514 S.E.2d 291, 293 (1999), holding that "the 'other insurance' clauses in [that] case, although identically worded, do not have identical meanings and are therefore not mutually repugnant." The Court then noted that the effect of the clauses—referring, as in this case, to "you," which was defined by the policy as the named insured and spouse—varied when each policy's named insured was substituted for "you." As a result, the clauses were not mutually repugnant, and the Court was able to determine by applying the clauses that "GEICO's UIM coverage is 'excess' " and "Nationwide provides primary UIM coverage in this case." *Id.* at 79, 514 S.E.2d at 293.

Universal Insurance, however, asserts that in *Iodice* "this Court decided to 'read the policies as if [the mutually repugnant excess] clauses were not present' " and "therefore went on to find that, because the plaintiff was not the same 'class' of insured under both policies, *despite the fact that both policies had identical 'Other Insurance' clauses*, the Nationwide policy was primary, and the GEICO policy was excess." (Emphasis original; quoting *Iodice*, 133 N.C. App. at 78, 514 S.E.2d at 293.)

We find this description of *Iodice* inexplicable since the Court in fact expressly held that the policies were not mutually repugnant and unambiguously reached its conclusion regarding excess coverage based on the application of the "other insurance" clauses. The quotation from *Iodice* contained in Universal Insurance's brief suggesting that the *Iodice* decision supports its position came not from the analysis or holding of *Iodice*, but rather from an explanatory parenthetical included in a citation regarding the general law, *id.* at 78, 514 S.E.2d at 293: "*Onley v. Nationwide Mutual Ins. Co.*, 118 N.C. App. 686, 690, 456 S.E.2d 882, 884 ('[W]e read the policies as if [mutually repugnant excess] clauses were not present.'), *disc. review denied*, 341 N.C. 651, 462 S.E.2d 514 (1995)." Further, contrary to Universal Insurance's claim, the Court in *Iodice* did not base its holding on the "class" of the insureds. The Court only generally noted in a footnote during a discussion of a different issue that different classes of insureds may be treated differently from one another. *Iodice*, 133 N.C. App. at 79 n.3, 514 S.E.2d at 293 n.3.

Iodice requires us to conclude that Universal Insurance's policy provides primary coverage while First Specialty Insurance's policy provides only excess coverage. The trial court, therefore, properly denied Universal Insurance's motion for summary judgment and granted First Specialty Insurance's motion for summary judgment.

Affirmed.

Judges BRYANT and BEASLEY concur.

IN RE FIFTH THIRD BANK, NATIONAL ASSOCIATION—VILLAGE OF PENLAND LITIGATION

No. COA11-128

(Filed 1 November 2011)

1. Appeal and Error—preservation of issues—argument not briefed—abandoned

An appeal from an order compelling arbitration was abandoned where the arguments in the brief focused exclusively on later orders.

2. Arbitration and Mediation—damages—unfair trade practices claim—not vacated

Plaintiffs failed to show that an arbitrator's award should have been vacated on the grounds that his decision rested on a manifest disregard of the law. Plaintiffs cited nothing in the record or the award to show that the amount of damages awarded rested upon anything other than an attempt to properly calculate the damages proximately caused by United Community Bank's actions. Moreover, plaintiffs did not cite any decisions holding that the trier of fact in an unfair and deceptive trade practices claim may not consider all of the evidence when determining damages or, if so, that the arbitrator here was aware that he was not to consider such evidence.

3. Arbitration and Mediation—vacation of award—public policy grounds

The trial court did not err by refusing to vacate an arbitration award on the public policy grounds that the arbitration deliberately circumvented the purpose of the Unfair and Deceptive Trade Policy Act where plaintiffs did not identify any portion of the record or any language in the award that supported their assertion.

4. Arbitration and Mediation—damages—calculation—no modification

Plaintiffs did not show that an arbitrator miscalculated their damages in such a way as to entitle them to modification of his award. Plaintiffs did not point to any language in the arbitrator's award that explicitly stated any intention to divide the outstanding balance of the loan as they contended, and the Court of Appeals would not speculate on the mental processes employed by the arbitrator.

5. Civil Procedure—summary judgment—distinct parties

The trial court did not err by granting summary judgment in favor of United Community Bank, Inc. (UCBI) even though plaintiffs argued that UCBI was not entitled to summary judgment based on an arbitration award because it was not a party to the arbitration. All of plaintiff's claims related to a loan from United Community Bank, and the undisputed evidence showed no involvement by UCBI.

Appeal by plaintiffs from orders entered 3 November 2008 and 11 May 2010 by Judges Timothy Lee Patti and W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 September 2011.

Fuller & Barnes, LLP, by Trevor M. Fuller and Michael D. Barnes, for plaintiffs-appellants.

Kilpatrick Townsend & Stockton LLP, by Alan D. McInnes and Stephen E. Hudson, for defendants-appellees.

ERVIN, Judge.

Plaintiffs Jerome E. Williams, Jr., M.D., and Jerome E. Williams, Jr., M.D., Consulting LLC, appeal from an order entered 3 November 2008 compelling them to arbitrate their claims against Defendants United Community Bank (Georgia) and United Community Bank (North Carolina)[1] and dismissing all claims asserted against UCB by Plaintiff Adelle A. Williams, M.D.[2] and from orders entered 11 May 2010 (1) granting UCB's motion to confirm the Arbitrator's award and denying Plaintiffs' motions to vacate or modify the Arbitrator's award and to continue or stay consideration of UCB's motion to confirm the Arbitrator's award and (2) granting summary judgment in favor of Defendant United Community Bank, Inc.,[3] denying Plaintiffs' motion

1. As the trial court noted, "the undisputed evidence shows that United Community Bank chartered in North Carolina has been merged into United Community Bank chartered in Georgia." For that reason, consistently with the approach adopted in both parties' briefs, we will refer to both entities collectively as "UCB."

2. The present appeal was noted solely by Plaintiffs Jerome E. Williams, Jr., M.D., and Jerome E. Williams Jr., M.D., Consulting LLC. Adelle A. Williams, M.D., who was a plaintiff at the trial court level, is not a party to this appeal. As a result, we will refer to Jerome E. Williams Jr., M.D., and Jerome E. Williams Jr., M.D., Consulting LLC, as "Plaintiffs" throughout the remainder of this opinion.

3. UCBI is a holding company that owns the stock of UCB.

to continue the hearing concerning UCBI's motion for summary judgment, and dismissing all of Plaintiffs' claims against UCBI with prejudice. On appeal, Plaintiffs argue that Judge Bell erred by denying their motion to vacate or modify the Arbitrator's award and by granting summary judgment in favor of UCBI. After careful consideration of Plaintiffs' challenges to the trial court's orders in light of the record and the applicable law, we conclude that the challenged orders should be affirmed.

I. Background

A. Substantive Facts

In 2005, Dr. Williams "was made aware of the Village of Penland development through a broker, who presented the development as an investment opportunity." At that time, Dr. Williams was told that the developers had purchased more than 1,000 acres of land in Mitchell County on which they planned to construct a mountain home community. In the event that he "decided to invest, [Dr. Williams] would receive returns on [the] investment by and through the proceeds from the sales of the finished homes in the development." More particularly, investors like Plaintiffs would purchase lots in the Village of Penland, with the purchase of these lots to be financed through credit extended by a lending institutions. The developers, in turn, agreed to be responsible for making the required loan payments for the first two years and to re-purchase the lots in question within two years "for a purchase price equal to the sum of the amount remaining on our bank loans plus an additional 125% of the value of such bank loans."

Dr. Williams decided to invest in the Village of Penland project ("the project"), and, acting in either his individual capacity or through Williams Consulting, bought twenty lots in the Village of Penland at a price of $125,000 per lot. Williams Consulting LLC, which is wholly owned by Dr. Williams, obtained a loan from UCB for the purpose of financing the purchase of eleven of these twenty lots by means of a loan procured through UCB in the principal amount of $1,031,250 and signed a promissory note in favor of UCB for that amount.[4] The UCB loan was secured by a deed of trust applicable to the relevant lots and by a personal guaranty executed by Dr. Williams.

Unfortunately for Plaintiffs, the developers did not use the monies procured through the use of this investment arrangement to

4. The other lots that Plaintiffs purchased in the Village of Penland were financed by loans secured from other lenders.

properly develop the Village of Penland. Ultimately, a number of individuals associated with the developers pled guilty to various federal crimes arising from activities relating to the project. After the failure of the project, Williams Consulting defaulted on the promissory note in favor of UCB, and Dr. Williams failed to honor his personal guaranty. The present litigation stems from a disagreement over the extent to which Plaintiffs are obligated to repay the loans that they secured for the purpose of investing in the project.

B. Procedural History

On 4 April 2008, Plaintiffs filed a complaint against UCB, UCBI, and a number of other defendants in which they sought damages stemming from the failure of their investment in the project. On 25 June 2008, UCB filed a motion to compel Plaintiffs to submit their claims to binding arbitration and to stay litigation of Plaintiffs' claims pending completion of the arbitration process. In seeking to compel Plaintiffs to arbitrate their claims against UCB, UCB relied upon a provision contained in the promissory note executed by Williams Consulting that provided, in pertinent part, that "Lender and Borrower agree that all disputes, claims and controversies between them . . . shall be arbitrated" and that the "Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of this arbitration provision." In addition, UCB sought the dismissal of all claims asserted by Plaintiff Adelle Williams on the grounds that she had not borrowed money from UCB. On 3 November 2008, Judge Patti entered an order compelling Plaintiffs to submit their claims against UCB to binding arbitration, staying the litigation of Plaintiffs' claims against UCB pending completion of the arbitration process, and dismissing Plaintiff Adelle Williams' claims.

On 11 August 2008, UCB commenced an arbitration proceeding against Plaintiffs. In response, Plaintiffs submitted the claims that they had asserted against UCB in their complaint in this case for the Arbitrator's consideration. After conducting a hearing, Arbitrator R. Wayne Thorpe issued an interim award on 25 October 2009 resolving all of the claims that had been asserted in the arbitration proceeding by both UCB and Plaintiffs. More specifically, the Arbitrator found in favor of UCB and against Plaintiffs with respect to all claims except for the unfair and deceptive trade practices claim that Plaintiffs had asserted against UCB. In a final award issued on 3 November 2009, the Arbitrator awarded UCB $602,837.34, a sum which consisted of the total amount that UCB was entitled to receive under the promissory note less the $602,837.34 in damages that the Arbitrator awarded

to Plaintiffs based upon their unfair and deceptive trade practices claim. As a result, the ultimate effect of the Arbitrator's decision was to require Plaintiffs to pay one half of their outstanding indebtedness under the promissory note to UCB.

On 17 December 2009, UCB filed a motion seeking confirmation of the Arbitrator's award and UCBI moved for summary judgment with respect to Plaintiff's remaining claims. On 1 February 2010, Plaintiffs moved to vacate or modify both the interim and final awards and to continue or stay consideration of UCB's motions. After providing the parties with an opportunity to be heard on 22 February 2010, Judge Bell entered two orders on 11 May 2010. In the first of these two orders, Judge Bell granted UCB's request for confirmation of the Arbitrator's award, denied Plaintiffs' motion to vacate or modify the Arbitrator's award, and denied Plaintiffs' motion to continue or stay UCB's confirmation motion. In his second order, Judge Bell granted UCBI's summary judgment motion and denied Plaintiffs' motion to continue or otherwise decline to consider UCBI's motion. Plaintiffs noted an appeal to this Court from Judge Patti's order of 3 November 2008 and Judge Bell's orders of 11 May 2010.

II. Legal Analysis

A. Scope of the Present Appeal

[1] Although Plaintiffs noted an appeal from Judge Patti's 3 November 2008 order compelling them to arbitrate their claims against UCB, staying their claims against UCB pending the outcome of the arbitration proceeding, and dismissing all of the claims asserted by Plaintiff Adelle Williams, Plaintiffs have not advanced any challenge to the validity of these decisions in their brief before this Court. Instead, the arguments advanced in Plaintiffs' brief are focused exclusively upon the validity of the decisions reflected in Judge Bell's 11 May 2010 orders. As a result, we conclude that any challenge that Plaintiffs might have advanced in opposition to Judge Patti's 3 November 2008 order has been abandoned. N.C.R. App. P. 28(b)(6) (stating that "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

B. Motion to Vacate Arbitrator's Decision

1. Manifest Disregard of Applicable Law

[2] First, Plaintiffs argue that Judge Bell erred by denying their motion to vacate the Arbitrator's decision. According to Plaintiffs, the

Arbitrator "exceeded the scope of his authority" in that he "manifestly disregarded the law and dispensed his own brand of justice." We do not believe that Plaintiffs' challenge to Judge Bell's decision to uphold the Arbitrator's award has merit.

The arbitration clause of the promissory note that Williams Consulting executed in favor of UCB states that "[t]he Federal Arbitration Act shall apply to the construction, interpretation, and enforcement of this arbitration provision." In recognition of this fact, Plaintiffs concede that any issues that they wish to raise relating to the validity of Judge Bell's decision to enforce the Arbitrator's award are governed by the FAA. For that reason, we begin our analysis of Plaintiff's challenge to Judge Bell's order by reviewing the relevant provisions of the FAA.

"The [Federal Arbitration] Act . . . supplies mechanisms for enforcing arbitration awards: a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it. [9 U.S.C.] §§ 9-11 . . . . Under the terms of [9 U.S.C.] § 9, a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in [9 U.S.C.] §§ 10 and 11. [9 U.S.C.] § 10 lists grounds for vacating an award, while [9 U.S.C.] § 11 names those for modifying or correcting one." *Hall Street Associates, L. L. C. v. Mattel, Inc.*, 552 U.S. 576, 582, 128 S. Ct. 1396, 1402, 170 L. Ed. 2d 254, 262 (2008). According to 9 U.S.C. § 10(a)(4), a court may vacate an arbitration award "upon the application of any party to the arbitration . . . where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." "[T]he text [of the FAA] compels a reading of the §§ 10 and 11 categories as exclusive . . . [and] as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall*, 552 U.S. at 588, 128 S. Ct. at 1404-05, 170 L. Ed. 2d at 265.

In their brief, Plaintiffs argue that, in addition to the statutory grounds for refusing to enforce an arbitration award specified in 9 U.S.C. § 10, "the award must be set aside" "when the arbitrator's decision is 'in manifest disregard of the law.' " (quoting *CACI Premier Tech. v. Faraci*, 464 F. Supp. 2d 527, 532 (E.D. Va. 2006) (quoting *Upshur Coals Corp. v. UMW, Dist.* 31, 933 F.2d 225, 229 (4th Cir. 1991)). The decisions upon which Plaintiffs rely in support of this assertion were decided before *Hall*. As the parties appear to agree, the United States Supreme Court has "not decide[d] whether 'mani-

fest disregard' survives [the] decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008)." *Stolt-Nielsen S. A. v. Animal Feeds Int'l Corp.*, ___ U.S. ___, ___, n.3, 130 S. Ct. 1758, 1768 n.3, 176 L. Ed. 2d 605, 616 n.3 (2010). However, given their apparent recognition that "manifest disregard of the law" may no longer be a valid basis for vacating an arbitration award, Plaintiffs also argue that, regardless of "whether 'manifest disregard' remains an independent ground for vacatur under 9 U.S.C. § 10 after [*Hall St. Assocs.*], an arbitrator's decision may still be vacated under [9 U.S.C.] § 10(a)(4)" because the arbitrator "exceeded the scope of his authority" by "manifestly disregard [ing] the law and dispens[ing] his own brand of justice." In advancing this argument, Plaintiffs place principal reliance on the United States Supreme Court's statement in *Stolt-Nielsen*, ___ U.S. at ___, 130 S. Ct. at 1767, 176 L. Ed. 2d at 616, that:

> "It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable." In that situation, an arbitration decision may be vacated under [9 U.S.C. § 10(a)(4)] on the ground that the arbitrator "exceeded [his] powers," for the task of an arbitrator is to interpret and enforce a contract, not to make public policy.

(quoting *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509, 121 S. Ct. 1724, 1728, 149 L. Ed. 2d 740, 747 (2001) (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 1361, 4 L. Ed. 2d 1424, 1428 (1960)). After carefully considering Plaintiffs' arguments, we conclude, given Plaintiffs' failure to demonstrate that the Arbitrator either "manifestly disregarded the law" or "dispensed his own brand of industrial justice," that we need not determine the extent, if any, to which "manifest disregard of the law" remains a valid non-statutory basis for vacating an arbitration award.

According to well-established law, when an "action is brought under [a] Federal statute . . . in so far as it has been construed by the Supreme Court of the United States, we are bound by that construction." *Dooley v. R.R.*, 163 N.C. 454, 457-58, 79 S.E. 970, 971 (1913). However, "North Carolina appellate courts are not bound, as to matters of federal law, by decisions of federal courts other than the United States Supreme Court." *Enoch v. Inman*, 164 N.C. App. 415, 420-21, 596 S.E.2d 361, 365 (2004) (citing *Security Mills v. Trust Co.*, 281 N.C. 525, 529, 189 S.E.2d 266, 269 (1972)). Even so, despite the fact that they are " 'not binding on North Carolina's courts, the hold-

ings and underlying rationale of decisions rendered by lower federal courts may be considered persuasive authority in interpreting a federal statute.' " *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 488, n.4, 687 S.E.2d 690, 695 n.4 (2009) (quoting *Security Mills*, 281 N.C. at 529, 189 S.E.2d at 269), *disc. review denied*, 364 N.C. 241, 698 S.E.2d 400 (2010). In light of those fundamental legal principles, we note that the United States Court of Appeals for the Fourth Circuit has stated that:

> In evaluating whether an arbitrator has manifestly disregarded the law, we have heretofore concluded that "a court's belief that an arbitrator misapplied the law will not justify vacation of an arbitral award. Rather, appellant is required to show that the arbitrators were aware of the law, understood it correctly, found it applicable to the case before them, and yet chose to ignore it in propounding their decision." [*See*] *Dawahare v. Spencer*, 210 F.3d 666, 670-71 (6th Cir. 2000) (concluding that in order to vacate for manifest disregard of law, arbitrator must have clearly stated law and expressly chosen to ignore it).

Three S Delaware v. DataQuick Information Systems, 492 F.3d 520, 529 (4th Cir. 2007) (quoting *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994), *cert. denied*, 513 U.S. 1112, 115 S. Ct. 903, 130 L. Ed. 2d 786 (1995)). We will apply this standard, which is essentially the same as that cited by the parties, in evaluating Plaintiffs' "manifest disregard" claim.[5]

Plaintiffs' contention that the Arbitrator "was well aware of [the] law" but "impos[ed] his own policy choice, rather than applying the law as he understood it" rests upon the fact that the Arbitrator found that Plaintiffs bore some responsibility for their losses and included the following statement in his award:

> The evidence here leads to the conclusion that UCB has engaged in unfair practices within the meaning of the North Carolina UDTPA because of its failure to follow its own policies and procedures, banking industry standards, and federal regulations and guidance in ways that contributed materially to the injury of the Respondents, as set forth in more detail above. The conduct of

5. As a result of the fact that Plaintiffs treat the "manifest disregard" standard for vacating awards as essentially identical to the standard enunciated in 9 U.S.C. § 10(a)(4) and the fact that Plaintiffs have failed to establish a "manifest disregard" of the applicable law, we need not determine the exact contours of the standard for vacating an arbitration award set out in 9 U.S.C. § 10(a)(4) and express no opinion about that subject.

> the Respondents also contributed materially to the loss here—again, as explained more fully above. In weighing the relative conduct of the participants I have concluded that the amount of damage proximately caused by UCB is equal to one-half the amount of the outstanding indebtedness, after trebling.

In addition, Plaintiffs argue that the fact that the Arbitrator found their damages to be one-sixth of the outstanding loan amount, resulting in an ultimate award, after the trebling required by N.C. Gen. Stat. § 75-16, of one half of the outstanding loan amount, should lead us to conclude that the Arbitrator improperly reduced his actual damage award based on his assessment of Plaintiffs' "contributory negligence." We are not persuaded by Plaintiffs' argument.

As Plaintiffs correctly observe, "good faith is not a defense to an alleged violation of [N.C. Gen. Stat. §] 75-1.1," and "the Legislature did not intend for violations of this Chapter to go unpunished upon a showing of contributory negligence." *Winston Realty Co. v. G.H.G., Inc.*, 70 N.C. App. 374, 380-81, 320 S.E.2d 286, 290 (1984) (citing *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981)), *aff'd* 314 N.C. 90, 331 S.E.2d 677 (1985). In light of these basic legal principles, Plaintiffs argue that the Arbitrator's consideration of the extent, if any, to which Plaintiffs' losses were proximately caused by their own actions and the "relative conduct of the participants" constituted an improper application of the doctrine of contributory negligence, demonstrating that the Arbitrator manifestly disregarded applicable law. We disagree with this set of contentions for a number of reasons.

First, Plaintiffs cite nothing in the record or the Arbitrator's award tending to show that the Arbitrator's decision to award Plaintiffs an amount of compensatory damages equaling one-sixth of the outstanding loan and to then treble that amount to produce a total damage award of one-half the amount of the outstanding loan balance rested upon anything other than an attempt to properly calculate the damages proximately caused by UCB's actions. The award does not, for example, contain any statement to the effect that, having determined the amount of actual damages, the Arbitrator then reduced that amount based on Plaintiffs' alleged "contributory negligence." Instead, the award simply states the amount of damages that the Arbitrator had decided to award without any indication that this amount was calculated in blatant disregard of applicable legal principles. As a result, it is clear to us that Plaintiffs' argument rests upon nothing more than mere speculation about the thinking that under-

girded the Arbitrator's award instead of demonstrating that the Arbitrator "manifestly disregarded" applicable North Carolina law.

Secondly, Plaintiffs have not cited any decisions of the Supreme Court or this Court holding that, in a case brought under N.C. Gen. Stat. § 75-1.1, the trier of fact is precluded, in determining the appropriate amount of damages proximately caused by a defendant's unfair and deceptive practices, from considering all the evidence, including the behavior of the parties, that might reasonably bear upon the issue of proximate cause. Without attempting to describe such situations in any detail, we are able to conceive of factual scenarios under which a party's conduct might affect the extent to which a particular item of damage was or was not proximately caused by the relevant act or practice. As a result, despite the fact that "contributory negligence" is not a defense to a claim brought pursuant to N.C. Gen. Stat. § 75-1.1, the parties' behavior may still be relevant, depending on the factual circumstances underlying a particular case, to the determination of an appropriate damage award.

Thirdly, even if the Arbitrator committed an error of law by considering both parties' conduct in the course of calculating his damage award, Plaintiffs have not identified anything in the record tending to show that the Arbitrator was aware that he was not entitled to consider such evidence in determining the amount of damages that Plaintiffs were entitled to receive and deliberately ignored that legal principle. According to the authorities that describe the manner in which the "manifest disregard" standard should be applied, establishing the existence of such a deliberate disregard of the applicable law is a necessary component of the showing that must be made in order to justify vacating an arbitration award on the basis of this legal theory. No such showing has been made in this case. As a result, for all of these reasons, we conclude that Plaintiffs have failed to show that the Arbitrator's award should be vacated on the grounds that his decision rested on a "manifest disregard of the law."

2. Public Policy

[3] In addition, Plaintiffs contend that Judge Bell erred by failing to vacate the Arbitrator's award as "violative of North Carolina public policy." As we understand Plaintiff's argument, this contention is predicated on the assertion that the Arbitrator "deliberately circumvent[ed] the remedial and punitive purpose of the UDTPA" and "rewarded" Defendants for misconduct. This argument, in turn, rests on Plaintiffs' contention that the Arbitrator based his award on his

personal perceptions and opinions rather than upon a damage calculation performed in accordance with the applicable law. Once again, however, Plaintiffs have failed to identify any portion of the record or any language in the Arbitrator's award that supports this assertion. In other words, Plaintiffs' argument rests on nothing more than mere speculation as to this basis for the Arbitrator's decision. As a result, we conclude that, even if Plaintiffs' "public policy" argument provides a valid basis for vacating an arbitration award, a subject about which we express no opinion, Plaintiffs have not demonstrated that they are entitled to any relief on "public policy" grounds.

3. Miscalculation of Damages

[4] Next, Plaintiffs argue that the Arbitrator's decision "must be modified due to a miscalculation in the amount of damages" pursuant to 9 U.S.C. § 11(a) (stating that an arbitration award may be modified "[w]here there was an evident material miscalculation of figures . . . in the award"). More particularly, Plaintiffs contend that, having decided that both parties bore responsibility for the situation in which they found themselves, the Arbitrator, "[i]n an effort to give effect to that finding," simply split the outstanding loan balance in half based on his assessment of the parties' conduct and awarded that amount as damages. Once again, however, Plaintiffs fail to point to any language in the Arbitrator's award that explicitly states any intention to divide the outstanding balance of the UCB loan in half and give half to each party. We will not, as we have previously stated, speculate about the mental processes that the Arbitrator employed in reaching his decision. Moreover, instead of arguing that the Arbitrator made a mathematical error of the type that is typically addressed by utilizing the authority granted by 9 U.S.C. § 11(a), *Apex Plumbing Supply v. U.S. Supply Co.*, 142 F.3d 188, 194, (4th Cir.), *cert. denied*, 525 U.S. 876, 119 S. Ct. 178, 142 L. Ed. 2d 145 (1998) (stating that, "[w]here no mathematical error appears on the face of the award," "an arbitration award will not be altered"), Plaintiffs are essentially asserting that the Arbitrator committed an error of law by allocating the loss resulting from the failure of Plaintiffs' investment in the Village of Penland in a manner that Plaintiffs contend is not permitted by N.C. Gen. Stat. § 75-1.1. However, "even a mistake of fact or misinterpretation of law by an arbitrator provides insufficient grounds for the modification of an award." *Apex Plumbing Supply*, 142 F.3d at 194 (citing *Amicizia Societa Nav. v. Chilean Nitrate & Iodine S. Corp.*, 274 F.2d 805 (2nd Cir.), *cert. denied*, 363 U.S. 843, 80 S. Ct. 1612, 4 L. Ed. 2d 1727 (1960)). As a result, we conclude that

Plaintiffs have not shown that the Arbitrator "miscalculated" their damages in such a way as to entitle them to modification of his award pursuant to 9 U.S.C. § 11(a).

C. Summary Judgment Order

[5] Finally, Plaintiffs argue that Judge Bell erred by granting summary judgment in favor of UCBI. In their brief, Plaintiffs assert that UCBI was not entitled to summary judgment "based solely on the arbitration award" because UCBI "was not a party to the arbitration" and because "the arbitration cannot be the basis for *res judicata* in this case." We conclude that Plaintiffs' argument has no merit.

In its summary judgment motion, UCBI asserted that, "[a]s the holding company for UCB, UCBI does not engage in any lending activity, and all of Plaintiffs' claims in this case concern the loan that Dr. Williams and the Consulting Entity obtained from UCB," that "Plaintiffs have had no contact or relationship with UCBI," and that, for that reason, "all of Plaintiffs' claims in this case against UCBI must be dismissed." The motion was supported by an affidavit executed by Bradley J. Miller, Senior Vice President of UCB, in which Mr. Miller stated that:

> Defendant [UCBI] is the publicly-traded holding company for UCB. As such, it does not engage in any lending activity; it merely owns all of the stock of [UCB]. Plaintiffs Dr. Williams and his Consulting Entity did not apply to UCBI for any loan, and UCBI did not make a loan to these Plaintiffs. The bank officers and employees who considered the loan application of Plaintiffs Dr. Williams and his Consulting Entity were employed by [UCB], which actually made the loan.

As UCBI argues, all of the claims asserted in Plaintiff's complaint rest on allegations relating to the loan which Williams Consulting obtained from UCB. According to the undisputed evidence presented in connection with UCBI's summary judgment, UCBI had no involvement in the extension of credit to Plaintiffs and never interacted with Plaintiffs in any way. Thus, the evidence that UCBI submitted in support of its summary judgment motion tended to show that Plaintiffs had no basis for asserting any valid claim against UCBI, which Plaintiffs agree is a separate entity from UCB.[6]

6. Indeed, the ultimate thrust of Plaintiffs' challenge to Judge Bell's decision to grant summary judgment in favor of UCBI is that UCB and UCBI are distinct legal entities, such that the arbitration award resolving Plaintiffs' claims against UCB does not bar the assertion of any claims that Plaintiffs might have against UCBI.

"The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citing *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002)). "[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the non-moving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664, *disc. review denied and appeal dismissed*, 353 N.C. 262, 546 S.E.2d 401 (2000). Plaintiffs did not, however, respond to UCBI's showing by "produc[ing] a forecast of evidence" tending to show that they were entitled to relief from UCBI. In addition, Plaintiffs have not included any argument in their brief on appeal disputing UCBI's showing that Plaintiffs never had any contact with UCBI and were not entitled to recover damages from UCBI for that reason. Finally, although Plaintiffs did seek to have the hearing on UCBI's summary judgment motion continued, they only requested that relief for the purpose of "develop[ing] a factual record showing that the arbitration proceeding did not involve UCBI." As a result, given Plaintiffs' failure to forecast evidence tending to show that they had a *prima facie* case of liability against UCBI, Judge Bell did not err by granting UCBI's summary judgment motion, obviating the necessity for us to determine the extent, if any, to which Plaintiffs' claims against UCBI were barred by *res judicata* considerations stemming from the Arbitrator's award.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Judge Bell did not err by denying Plaintiffs' motion to vacate or amend the Arbitrator's award or by granting summary judgment in favor of UCBI. As a result, the challenged orders should be, and hereby are, affirmed.

AFFIRMED.

Judges STEPHENS and BEASLEY concur.

STATE OF NORTH CAROLINA v. DARRELL LAMAR SULLIVAN, JR.

No. COA11-297

(Filed 1 November 2011)

1. Sentencing—presumptive range—denial of motion for appropriate relief—mitigating factors

The trial court did not abuse its discretion by denying defendant's motion for appropriate relief without holding an evidentiary hearing. Defendant's arguments only related to the presence of mitigating factors for sentencing purposes, and defendant was sentenced in the presumptive range.

2. Appeal and Error—writ of certiorari—exercise of appellate court's discretion

The Court of Appeals exercised its discretion and granted defendant's petition for writ of *certiorari* to reach the merits of defendant's appeal as to the judgments and commitments entered against him on 14 October 2009.

3. Robbery—dangerous weapon—motion to dismiss—sufficiency of evidence—acting in concert

The trial court did not err by denying defendant's motion to dismiss the three charges of robbery with a dangerous weapon under a theory of acting in concert even though the name of one of the participants was omitted.

4. Robbery—dangerous weapon—failure to instruct on lesser-included offense of common law robbery

The trial court did not err in a robbery with a dangerous weapon case by denying defendant's request for a jury instruction on the lesser-included offense of common law robbery. The State presented unequivocal evidence that the three men used a firearm to carry out the robbery, and the trial court's omission of the name of one of the participants in the jury instruction did not prejudice defendant under the circumstances of this case.

5. Costs—restitution—insufficient evidence of amount

The trial court erred by ordering defendant to pay $640.00 in restitution. Defendant did not stipulate to the amounts requested and there was no evidence presented to support the restitution worksheet submitted to the trial court. The restitution award was vacated and remanded for a new hearing on the appropriate amount of restitution.

Appeal by defendant from order entered 19 May 2010 and on Petition for Writ of Certiorari to review judgments entered 14 October 2009 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 14 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Heather H. Freeman, for the State.

Kimberly P. Hoppin for defendant appellant.

McCULLOUGH, Judge.

On 14 October 2009, a jury convicted Darrell Lamar Sullivan, Jr. ("defendant") of three counts of robbery with a firearm and one count of conspiracy to commit robbery with a firearm. On appeal, defendant contends the trial court erred by (1) denying his motion for appropriate relief without holding an evidentiary hearing; (2) denying his motions to dismiss the armed robbery charges for insufficiency of the evidence; (3) denying his request for a jury instruction on the lesser-included offense of common law robbery; and (4) ordering him to pay $640.00 in restitution. We find no error in the trial court's ruling on defendant's motion for appropriate relief and no prejudicial error in defendant's trial. However, we vacate the trial court's restitution order and remand for rehearing on the issue of restitution.

I. Background

On 10 January 2009, a group of individuals were socializing at a residence located on Kenilworth Road in Buncombe County, North Carolina. Among the group were Laura Meadows ("Meadows"), Jonathan Miller ("Miller"), Travis Yates ("Yates"), and Rex Haynie ("Haynie"). Haynie and Yates lived at the residence.

As they were socializing, the group noticed a vehicle appearing to be "an old Caprice" slowly approaching the residence. Three men exited the vehicle and walked up to the back door of the residence. Miller knew two of the men, defendant and Terrell Lucas ("Lucas"), and recognized them as they approached the residence. Meadows also knew Lucas. No one in the group knew the third man, who was identified at trial by defendant and Lucas as "Black."

Defendant asked the group for a cigarette, and the three men then entered the residence. Once inside, Black pulled out a gun, pointed it at the group, and ordered them to get up against the wall. Black then told defendant to grab a nearby book bag and put an Xbox and games inside. Defendant emptied the contents of the book bag, which belonged

to Miller, and put the Xbox and games inside. Black then told defendant and Lucas to check everyone's bags and ordered the individuals against the wall to empty their pockets. Black stated that if any of the individuals against the wall turned around, he would shoot them.

The men took a digital camera and an iPod from Meadows' purse. Digital scales and a red Atlanta Hawks hat were also taken from the rooms of the residence. The hat belonged to Yates and the digital scales belonged to Haynie. After the three men left the residence, Meadows called the police.

Detective Joseph Silberman ("Detective Silberman") with the Asheville Police Department was assigned to the case and conducted an investigation. Based on witness interviews, Detective Silberman located a vehicle that he believed was used by the three men on the night of the robbery. Upon checking DMV records, Detective Silberman discovered that the vehicle in question, a 1998 Chevrolet Caprice Classic, was registered to defendant. Detective Silberman conducted photo lineups with several of the witnesses, and both Yates and Haynie identified defendant as one of the three men who robbed them.

On 1 June 2009, defendant was indicted by a grand jury on three counts of robbery with a dangerous weapon and one count of conspiracy to commit robbery with a dangerous weapon. Defendant was tried by jury on all offenses.

At trial, Lucas testified on behalf of the State. Lucas had been in prison for approximately seven months for three counts of armed robbery, one count of conspiracy, and one count of burglary for the events that occurred on 10 January 2009. Lucas testified that on 10 January 2009, he, defendant, and Black were in defendant's recording studio at defendant's apartment writing a song about drinking, smoking marijuana, and committing a robbery. While writing this song, the three men got "amped up" and decided they wanted to "do something like that." Lucas had been to the Kenilworth Road residence before, and he suggested Yates' residence to rob. Lucas testified that defend- ant and Black "agreed to it."

Lucas testified that Black then took defendant's gun, a nine millimeter assault rifle, with them to defendant's car, and defendant drove them to the residence on Kenilworth Road in a Caprice Classic. Lucas stated that once the three men entered the residence, Black stayed in the living room holding the gun while he and defendant searched the rooms. Lucas testified that he took an Atlanta Hawks

hat, digital scales, an iPod, some marijuana, and seven to ten Ecstasy pills from the residence. Lucas testified that after the robbery, defendant and Black dropped him off, and he kept some of the items taken from the house.

Defendant also testified in his own defense. Defendant testified that on 10 January 2009, Lucas and a friend named Black came over to his girlfriend's apartment. Defendant stated that the three men smoked some marijuana, then left about five minutes later to get cigarettes in defendant's Chevrolet Caprice Classic. Defendant testified that he had recorded music in his studio with Black on prior occasions, but they were not recording any music on the night of the robbery. Defendant testified that as they were driving, Lucas stated that he knew about a party and directed them to the residence on Kenilworth Road. Defendant denied that the three men had ever discussed or planned a robbery of the residence. Defendant also testified that he did not know that Black had a gun until Black pulled the gun out of his coat inside the residence and told defendant to pick up the book bag. Defendant testified that he did not know who the gun belonged to. Defendant testified that he thought Black was going to shoot him, so he picked up the Xbox and some games and put the items in the book bag. Defendant stated that after the three men left the house, Lucas gave some of the items taken from the house to Black, and then they dropped off Lucas. Defendant stated that Black kept the remainder of the items and was dropped off at another location. Defendant stated he then went back to his girlfriend's apartment and did not keep any of the stolen items. Defendant also testified that he and Lucas were forced to participate in the robbery and that he had not seen Black since the date of the incident.

At the close of trial, on 14 October 2009, the jury returned a verdict of guilty on all charges. The trial court entered judgment on the verdicts and sentenced defendant to three consecutive terms of 64 to 86 months' imprisonment for the three armed robbery convictions and to a concurrent term of 25 to 39 months' imprisonment for the conspiracy conviction. The trial court also ordered defendant to pay a total of $640.00 in restitution.

On 23 October 2009, defendant filed a motion for appropriate relief with the trial court "pursuant to G.S. 15A-1414." On 19 May 2010, the trial court entered an order denying defendant's motion for appropriate relief. On 1 June 2010, defendant filed a written notice of appeal to this Court from the judgment entered by the trial court on 19 May 2010. Defendant also filed a petition for writ of certiorari with

this Court asking this Court to review the judgments and commitments entered against him on 14 October 2009.

II. Motion for appropriate relief

[1] Defendant first contends that the trial court committed error by denying his motion for appropriate relief without holding an evidentiary hearing.

We review a trial court's order denying a motion for appropriate relief under an abuse of discretion standard. *State v. Haywood*, 144 N.C. App. 223, 236, 550 S.E.2d 38, 46 (2001). "The test for abuse of discretion requires the reviewing court to determine whether a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *State v. Garris*, 191 N.C. App. 276, 286, 663 S.E.2d 340, 348 (internal quotation marks and citations omitted), *disc. review denied*, 362 N.C. 684, 670 S.E.2d 907 (2008).

Pursuant to N.C. Gen. Stat. § 15A-1420(c)(1) (2009), "[a]ny party is entitled to a hearing on questions of law or fact arising from [a motion for appropriate relief] and any supporting or opposing information presented *unless the court determines that the motion is without merit.*" *Id.* (emphasis added). In addition, N.C. Gen. Stat. § 15A-1420(c)(2) states that "[a]n evidentiary hearing is not required when the motion is made in the trial court pursuant to G.S. 15A-1414, but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact." *Id.*

Here, defendant's motion for appropriate relief was made pursuant to N.C. Gen. Stat. § 15A-1414. As grounds for the motion, defendant asserted that "[t]he sentence imposed on the defendant is not supported by evidence introduced at the trial and sentencing hearing" because "defendant presented numerous mitigating factors." In addition, defendant asserted that "[s]ince the original sentencing hearing newly discovered facts regarding the aforementioned mitigating factors have come to light," stating that it had been learned that defendant had been diagnosed with Post-Traumatic Stress Disorder, that he was taking medications during trial to help with his mental health issues, and that such medications may have affected defendant's decisions regarding plea offers and/or testifying in his own defense.

The trial court's order denying defendant's motion for appropriate relief concludes "that the Defendant's Motion does not state a claim and that the Defendant is not entitled to an evidentiary hearing in this matter." Most significant, the trial court's order notes that "the Defendant was sentenced in the presumptive range."

"The court shall consider evidence of aggravating or mitigating factors . . . , but the decision to depart from the presumptive range is in the discretion of the court." N.C. Gen. Stat. § 15A-1340.16(a) (2009); *see also State v. Garnett*, ___ N.C. App. ___, ___, 706 S.E.2d 280, 287-88, *disc. review denied*, 365 N.C. 200, 710 S.E.2d 31 (2011). Moreover, "[d]efendant's notion that the court is obligated to . . . act on proposed mitigating factors when a presumptive sentence is entered has been repeatedly rejected." *State v. Hagans*, 177 N.C. App. 17, 31, 628 S.E.2d 776, 786 (2006). Given that defendant's arguments in his motion for appropriate relief only related to the presence of mitigating factors for sentencing purposes, and the fact that defendant was sentenced in the presumptive range, the trial judge could properly conclude that defendant's motion was without merit and that defendant therefore was not entitled to an evidentiary hearing. Accordingly, we find no abuse of discretion in the trial court's denial of defendant's motion for appropriate relief without holding an evidentiary hearing.

III. Petition for Writ of Certiorari

[2] Before we address the merits of defendant's remaining arguments, we must first determine if his appeal from the trial court's judgments and commitments entered against him on 14 October 2009 are properly before this Court. Under N.C. Gen. Stat. § 15A-1414 (2009), a defendant may file a motion for appropriate relief within 10 days after entry of judgment, seeking relief for any error committed by the trial court. "When a motion for appropriate relief is made under G.S. 15A-1414 or G.S. 15A-1416(a), the case remains open for the taking of an appeal until the court has ruled on the motion." N.C. Gen. Stat. § 15A-1448(a)(2) (2009). Once the trial court enters its ruling on a defendant's motion for appropriate relief, notice of appeal must be given within the fourteen-day time limit provided in our Rules of Appellate Procedure for taking appeals in criminal matters. N.C. Gen. Stat. § 15A-1448(b) (2009); N.C.R. App. P. 4(a)(2) (2011). The notice of appeal must "designate the judgment or order from which appeal is taken." N.C.R. App. P. 4(b) (2011).

In the present case, defendant timely appealed the trial court's order denying his motion for appropriate relief. However, because defendant did not also designate his intention to appeal the 14 October 2009 judgments and commitments, he failed to properly appeal those judgments and commitments to this Court, necessitating dismissal of his appeal. *See State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005) ("[W]hen a defendant has not properly

given notice of appeal, this Court is without jurisdiction to hear the appeal.").

In recognition of his failure to properly appeal the trial court's 14 October 2009 judgments and commitments, defendant petitioned this Court for the issuance of a writ of certiorari authorizing appellate review of his claims regarding the judgments and commitments entered by the trial court on 14 October 2009. "The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C.R. App. P. 21(a)(1) (2011). We conclude that we should, in the exercise of our discretion, grant defendant's petition for writ of certiorari and reach the merits of defendant's appeal as to the judgments and commitments entered against him on 14 October 2009.

IV. Motion to dismiss for insufficiency of evidence

[3] Defendant contends the trial court erred by denying his motions to dismiss the three charges of robbery with a dangerous weapon. Specifically, defendant argues the jury was not instructed to consider whether he had acted in concert with the individual named Black to commit the robbery offenses. Therefore, defendant argues the evidence was insufficient to prove that he, acting together with Lucas, either possessed a firearm or used or threatened the use of a firearm.

In order to survive a motion to dismiss for insufficient evidence in a criminal trial, the State must present substantial evidence of (1) each essential element of the charged offense and (2) defendant's being the perpetrator of that offense. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (internal quotation marks and citation omitted). "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" that can be drawn from the evidence. *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455; *see also State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009).

The essential elements of the crime of robbery with a dangerous weapon, or armed robbery, are: " '(1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of "firearms or other dangerous weapon, implement or means"; and (3) danger or threat to the life of the vic-

tim.' " *State v. Trusell*, 170 N.C. App. 33, 37, 612 S.E.2d 195, 198 (2005) (emphasis omitted) (quoting *State v. Joyner*, 295 N.C. 55, 63, 243 S.E.2d 367, 373 (1978)).

Furthermore,

> [t]o be convicted of a crime under the theory of acting in concert, the defendant need not do any particular act constituting some part of the crime. All that is necessary is that the defendant be "present at the scene of the crime" and that "he . . . act[ ] together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime."

State v. Rush, 196 N.C. App. 307, 312, 674 S.E.2d 764, 769 (alteration in original) (citations omitted), *disc. review denied*, 363 N.C. 587, 683 S.E.2d 706 (2009).

In the present case, as defendant appears to recognize, the evidence presented at trial, viewed in the light most favorable to the State, is sufficient to support a reasonable inference that defendant is guilty of the crime of robbery with a firearm under the theory of acting in concert. The State's evidence at trial tended to show that defendant, Lucas and Black were together at defendant's apartment where they formed a plan to rob the Kenilworth Road residence; defendant possessed a gun, which was used by Black to threaten the individuals at the Kenilworth Road residence in order to carry out the robbery; defendant drove the three men in his vehicle to and from the Kenilworth Road residence to carry out the robbery; and defendant and Lucas took items from the residence during the commission of the robbery which belonged to the individuals at the residence. Thus, the State presented sufficient evidence to support defendant's three charges of robbery with a firearm under a concerted action theory.

However, defendant argues that because the trial court did not fully instruct the jury on the concerted action theory, there was insufficient evidence to support his convictions for the armed robbery charges. After instructing the jury on the elements of a robbery with a firearm offense, the trial court gave the jury the following instruction on the principle of acting in concert:

> Now, for a person to be guilty of a crime it is not necessary that he personally do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit robbery with a firearm each of them, if actually or constructively present, is guilty of that crime if the other person commits

> the crime, and also guilty of any other crime committed by the other in pursuance of the common purpose to commit robbery with a firearm, or as a natural or probable consequence thereof.

Thereafter, the trial court proceeded to instruct the jury according to the evidence adduced at trial. Specifically, the trial court stated:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, *acting together with Terrell Devon Lucas*, had in his possession a firearm and took and carried away property from Rex Michael Haynie or in the presence of Rex Michael Haynie without his voluntary consent by endangering or threatening his life with the use or threatened use of a firearm, the defendant knowing that he was not entitled to take the property and intending to deprive that 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."

(Emphasis added.) The trial court repeated this instruction with respect to each victim for each robbery charge.

Defendant argues that because the trial court failed to include in its instruction that the jury consider whether defendant acted in concert with Black, he could not be convicted on that theory. Defendant cites *State v. Wilson*, 345 N.C. 119, 478 S.E.2d 507 (1996), and *State v. Smith*, 65 N.C. App. 770, 310 S.E.2d 115, *modified and aff'd*, 311 N.C. 145, 316 S.E.2d 75 (1984), in support of his contention that "a defend- ant may not be convicted of an offense on a theory of his guilt different from that presented to the jury." *Smith*, 65 N.C. App. at 773, 310 S.E.2d at 117. In both *Wilson* and *Smith*, the trial court failed to provide any instruction to the jury on the law of acting in concert. Rather, in each case, "[t]he only theory of the defendant's guilt submitted to the jury was that defendant actually committed every element of each of the offenses." *Smith*, 65 N.C. App. at 772, 310 S.E.2d at 117; *Wilson*, 345 N.C. at 124, 478 S.E.2d at 511. Accordingly, as this Court held in *Smith*, "[t]he State's case must succeed or fail on that theory." *Smith*, 65 N.C. App. at 772, 310 S.E.2d at 117.

However, unlike *Wilson* and *Smith*, the trial court in the present case did in fact submit the theory of acting in concert to the jury. Furthermore, both this Court and our Supreme Court have held that " 'the trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct.' " *State v. Lark*, 198 N.C. App. 82, 87, 678

S.E.2d 693, 698 (2009) (quoting *State v. Boykin*, 310 N.C. 118, 125, 310 S.E.2d 315, 319 (1984)), *disc. review denied*, 363 N.C. 808, 692 S.E.2d 111 (2010). Here, although the trial court omitted the name of one of the robbery participants in applying the concerted action theory to the armed robbery charge, "reading the jury instructions as a whole," the trial court sufficiently instructed the jury on the theory of acting in concert. *Id.* As the instruction on armed robbery under a concerted action theory was supported by the evidence, we hold the trial court did not err by denying defendant's motions to dismiss those charges.

Moreover, we note that neither counsel for defendant nor for the State objected to the omission of Black's name in the jury instructions. Despite the trial court's asking if there were "any corrections or additions from either party as to the jury charge as given," neither counsel for defendant nor for the State requested any changes. In fact, we recognize that the trial court's instruction in applying the concerted action theory to the evidence presented "was in fact favorable to defendant." *State v. Harris*, 315 N.C. 556, 564, 340 S.E.2d 383, 388 (1986). Accordingly, even if the trial court's jury instruction had been erroneous, we cannot find that defendant was prejudiced thereby. *See id.* (holding the trial court's subsequently corrected instruction that the jury must find the defendant personally committed the offenses in order to convict the defendant on those charges did not prejudice the defendant); *see also State v. Cox*, 303 N.C. 75, 86-87, 277 S.E.2d 376, 383-84 (1981) (finding no prejudicial error in the trial court's omission of an instruction relating the law of acting in concert to the particular offense of kidnapping charged against the defendants).

V. Request for jury instruction on lesser-included offense

[4] Next, defendant contends that the trial court erred when it failed to charge the jury on the lesser-included offense of common law robbery. Defendant again points out that the jury was instructed to consider only whether defendant acted in concert with Lucas to commit robbery with a dangerous weapon by possessing, using, or threatening the use of a firearm. Defendant argues that because there was no evidence presented that either he or Lucas possessed, used, or threatened the use of a firearm, he was entitled to an instruction on the lesser-included offense of common law robbery.

Generally, " '[a] trial court is required to give instructions on a lesser-included offense . . . when there is evidence to support a verdict finding the defendant guilty of the lesser offense.' " *State v. Brunson*,

187 N.C. App. 472, 478, 653 S.E.2d 552, 555 (2007) (omission in original) (quoting *State v. Singletary*, 344 N.C. 95, 103, 472 S.E.2d 895, 900 (1996)). "Nevertheless, a trial court 'is not required to submit lesser included offenses for a jury's consideration when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence related to any element of the crime charged.' " *State v. Wood*, 149 N.C. App. 413, 416, 561 S.E.2d 304, 307 (2002) (quoting *State v. Washington*, 142 N.C. App. 657, 660, 544 S.E.2d 249, 251 (2001)). Accordingly, "[a]n instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002).

"The critical difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened." *State v. Peacock*, 313 N.C. 554, 562, 330 S.E.2d 190, 195 (1985). Here, the State presented unequivocal evidence that the three men used a firearm in order to carry out the robbery, and as we have previously discussed, the trial court's omission of Black's name in the jury instruction did not prejudice defendant under the circumstances of the present case. Accordingly, the trial court did not err in failing to instruct the jury on the lesser included offense of common law robbery.

VI. Restitution

[5] Finally, defendant contends that the trial court erred by ordering him to pay $640.00 in restitution where that amount was not supported by the evidence at trial or at sentencing. We agree.

" 'The amount of restitution ordered by the trial court must be supported by competent evidence presented at trial or sentencing.' " *State v. Davis*, ___ N.C. App. ___, ___, 696 S.E.2d 917, 921 (2010) (quoting *State v. Mauer*, 202 N.C. App. 546, 551, 688 S.E.2d 774, 777 (2010)); *see also State v. Replogle*, 181 N.C. App. 579, 584, 640 S.E.2d 757, 761 (2007) ("It is uncontested that '[t]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing.' " (alteration in original) (quoting *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004))). "In the absence of an agreement or stipulation between defendant and the State, evidence must be presented in support of an award of restitution." *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d

819, 821 (1992). It is well established that unsworn statements made by the prosecutor at sentencing " '[do] not constitute evidence and cannot support the amount of restitution recommended.' " *Replogle*, 181 N.C. App. at 584, 640 S.E.2d at 761 (alteration in original) (quoting *Buchanan*, 108 N.C. App. at 341, 423 S.E.2d at 821).

In the present case, the State submitted a restitution worksheet to the trial court reflecting the total amount of requested restitution as $640.00. The State concedes that defendant did not stipulate to the amounts requested and that there was no evidence presented to support the restitution worksheet submitted to the trial court. Therefore, the trial court erred in awarding $640.00 in restitution. Accordingly, we must vacate the trial court's restitution award and remand for a new hearing on the appropriate amount of restitution.

VII. Conclusion

We hold the trial court did not abuse its discretion in denying defendant's motion for appropriate relief without holding an evidentiary hearing. We also hold the trial court properly denied defendant's motions to dismiss the three charges of robbery with a firearm. The trial court instructed the jury on the principle of acting in concert, and to the extent the trial court omitted the name of one of the robbery participants in its charge, defendant was not prejudiced thereby. In addition, because the unequivocal evidence adduced at trial showed that the three men used a gun to commit the robbery, the trial court did not err in failing to instruct the jury on the lesser-included offense of common law robbery. However, because the restitution amount was not properly supported by evidence adduced at trial or at sentencing, we vacate the trial court's restitution award and remand to the trial court for a new hearing on the issue of restitution.

No error in trial court's ruling on defendant's motion for appropriate relief; no prejudicial error in defendant's trial; vacate and remand for rehearing on issue of restitution.

Judges HUNTER, Robert C., and STEELMAN concur.

STATE OF NORTH CAROLINA v. PAUL JASON CANNON

No. COA11-327

(Filed 1 November 2011)

1. Possession of Stolen Property—felony possession of stolen goods—motion to dismiss—sufficiency of evidence—knew or should have reasonably known stolen

The trial court erred by denying defendant's motion to dismiss the charge of felony possession of stolen goods. There was no evidence in the record regarding the circumstances by which defendant gained possession of the four-wheeler. The State's evidence that the decals had been removed and another sticker attached, even viewed in the light most favorable to the State, fell short of providing substantial evidence that defendant knew or should have reasonably known that the four-wheeler was stolen.

2. Sentencing—prior record level—crime committed while on probation—Blakely error—harmless error

The trial court did not err by sentencing defendant for the charge of possession of a firearm by a felon as a prior record level V. Even though the issue of whether defendant was on probation at the time he committed this offense was not submitted to the jury, any alleged *Blakely* error was harmless beyond a reasonable doubt based on the overwhelming and uncontroverted evidence that defendant committed the offense while on probation. Further, assigning another point under N.C.G.S. § 15A-1340.14(b)(6) was harmless error since its exclusion would not reduce defendant's prior record level or reduce his sentence.

Appeal by defendant from judgments entered 23 September 2010 by Judge Thomas D. Haigwood in Superior Court, Martin County. Heard in the Court of Appeals 29 September 2011.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Daniel D. Addison, for the State.

Geoffrey W. Hosford, for defendant-appellant.

STROUD, Judge.

Paul Jason Cannon ("defendant") appeals from his convictions for felony possession of stolen goods and possession of a firearm by

a convicted felon. For the following reasons, we vacate defendant's conviction for felony possession of stolen goods and find no prejudicial error as to defendant's sentencing on the charge of possession of a firearm by a felon.

I. Background

On 2 February 2010, defendant was indicted for felony possession of stolen goods, five counts of communicating threats, carrying a concealed weapon, resisting a public officer, injury to personal property, and possession of a firearm by a felon. Defendant was tried on these charges during the 20 September 2010 Criminal Session of Superior Court, Martin County. The State's evidence presented at trial tended to show the following: Zeb Winslow, Jr. testified that on the morning of 14 July 2009 he discovered that his 1995 Chevrolet pick-up truck and his 2002 Suzuki four-wheeler had been stolen from his premises. Mr. Winslow reported the theft to the Halifax County Sheriff's Department.

On the evening of 26 September 2009, Hillary Eugene Reed, defendant's first cousin, and a group of six or seven of his family members and friends were sitting on Mr. Reed's back deck around 11 p.m., "drinking a couple of beers[,]" after returning from riding four-wheelers. Shortly thereafter, defendant was observed doing "doughnuts" or circles on a four-wheeler in the road in front of Mr. Reed's residence. Defendant then drove the four-wheeler on to Mr. Reed's property and walked up on the back deck with the others. Defendant began drinking beer and whiskey and then got in an argument with and wanted to fight Mr. Reed's son, Jason Reed. Before anything happened, Mr. Reed told defendant to leave the premises. Defendant left on the four-wheeler but subsequently returned for his jacket that he had left on the deck. However, defendant again started an argument with and wanted to fight Jason Reed. Mr. Reed again told defendant he had to leave and walked him back to the four-wheeler. Defendant got onto the four-wheeler and showed Mr. Reed a nine-millimeter pistol in his waistband, implying that he was going to shoot Jason Reed. Mr. Reed asked defendant what kind of gun it was and whether he could see it. While defendant was holding the gun in the palm of his hand, Mr. Reed was able to "snatch" the gun from defendant and handed it to another family member who ejected the bullet that was in the chamber and removed the magazine; other family members took the gun inside Mr. Reed's house to keep it away from defendant. Defendant began accusing them of stealing his gun and telling them

to call 911. After someone called 911, defendant got back on the four-wheeler and said that he was going to go back to his house to get his rifle and come back and kill all of them. At that point, Mr. Reed and another family member took defendant off of the four-wheeler and held him on the ground for about an hour until a deputy sheriff arrived. Defendant was subsequently taken into custody and arrested by Deputy Wesley Cratt of the Martin County Sheriff's Department. Deputy Cratt had the four-wheeler towed and later investigation revealed that it was stolen in Halifax County and matched the serial number for Mr. Winslow's stolen four-wheeler.

Mr. Winslow further testified that even though the truck was discovered the same day, he did not hear anything about his four-wheeler until September 2009 when he received a call that a four-wheeler matching the serial number of the four-wheeler that had been stolen had been recovered. Upon viewing the recovered four-wheeler, Mr. Winslow noted that the decals and stickers had been removed and someone had affixed an "old Honda decal with Honda Motor Sports" on the front. However, he confirmed that the serial number on this four-wheeler matched the number on the bill of sale for his stolen four-wheeler. He also noted that the serial number had not been altered in any way. Mr. Winslow further testified that he estimated the "cost" of the four-wheeler to be around $4,800 to $5,000. He also testified that he did not know defendant but knew "of him" and he did not give defendant permission to take his four-wheeler. He further stated that the key was in the four-wheeler's ignition when it was stolen and was still in the ignition when it was recovered.

At the close of the State's evidence, defendant made a motion to dismiss all of the charges. The trial court consolidated the five communicating threat charges into two separate charges; granted defendant's motion as to the charge of resisting a public officer; and denied defendant's motion as to charges of injury to personal property, second-degree trespass, possession of stolen goods, possession of a firearm by a convicted felon, and carrying a concealed weapon. Defendant did not present any evidence at trial but renewed his motion to dismiss, which was denied by the trial court.

On 23 September 2010, the jury found defendant guilty of felony possession of stolen goods, carrying a concealed weapon, willful and wanton injury to personal property, second-degree trespass, and possession of a firearm by a convicted felon; the jury acquitted defendant of the two charges of communicating threats. Defense counsel stipulated to defendant's prior convictions and the trial court found that

defendant was at prior record level "V" based on 16 prior record points from the prior convictions listed on the prior record level worksheet. The trial court consolidated the injury to personal property, carrying a concealed weapon, and second-degree trespass convictions and sentenced defendant to a term of 97 days imprisonment; a consecutive term of 21 to 26 months imprisonment for the possession of a firearm by a convicted felon conviction; and a consecutive term of 12 to 15 months imprisonment for the possession of stolen goods conviction. Defendant gave notice of appeal in open court. On appeal defendant challenges his conviction for felony possession of stolen goods, arguing that the trial court erred in denying his motion to dismiss for insufficiency of the evidence, and his conviction for possession of a firearm by a convicted felon, arguing that the trial court erred in calculating his prior record level.

II. Motion to Dismiss

[1] Defendant argues that the trial court erred in denying his motion to dismiss as to the charge of felony possession of stolen goods, as the State failed "to produce substantial evidence that [(1) defendant] knew or had reasonable grounds to believe" that the four-wheeler was stolen or (2) that the four-wheeler's value at the time of the theft was greater than $1,000.00.

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

State v. Phillpott, ___ N.C. App. ___, ___, 713 S.E.2d 202, 209 (2011) (citation omitted). The essential elements of felonious possession of stolen goods are: "(1) possession of personal property; (2) having a value in excess of [$1,000.00]; (3) which has been stolen; (4) the possessor knowing or having reasonable grounds to believe the property was stolen; and (5) the possessor acting with a dishonest purpose." *State v. Martin*, 97 N.C. App. 19, 25, 387 S.E.2d 211, 214 (1990); *see also* N.C. Gen. Stat. §§ 14-71.1, -72 (2009). Defendant challenges ele-

ments two and four, whether defendant knew or had reasonable grounds to believe the goods were stolen and whether the State put forward sufficient evidence to show that the goods had a value in excess of $1,000.00.

First, defendant contends that the State failed to present substantial evidence that he knew or had reason to know that the four-wheeler was stolen. The State, citing *State v. Lofton*, 66 N.C. App. 79, 310 S.E.2d 633 (1984), counters that testimony by the owner of the four-wheeler "that decals which were originally on the vehicle had been removed after the vehicle was stolen" and "that a Honda sticker had been put on the Suzuki four wheeler after the theft" showed that "the vehicle had been altered to conceal its identification" and "was sufficient to show that Defendant, if he was not the thief, himself, had reason to know the vehicle was stolen." This Court has stated that "[w]hether the defendant knew or had reasonable grounds to believe that the [goods] were stolen must necessarily be proved through inferences drawn from the evidence." *State v. Brown*, 85 N.C. App. 583, 589, 355 S.E.2d 225, 229 (citation omitted), *disc. review denied*, 320 N.C. 172, 358 S.E.2d 57 (1987).

In *Lofton*, a car dealer testified that "a brown, two-door, 1975 Toyota Celica" had been stolen off of the lot at his car dealership. 66 N.C. App. at 80, 310 S.E.2d at 634. Months after the theft, the car dealer spotted the stolen car parked at a convenience store, but there were "numerous cosmetic changes that altered the car's appearance and lessened its fair market value from about $3,000 to $ 500[;] . . . [t]he radio, carpet, exterior stripes, and body side molding had been removed[; and] [t]he console, right front fender, and tires had been exchanged." *Id.* Police discovered that the car had the same serial number as the car that was stolen, so police staked out near the car to see if anyone would return for it. Later the same day the defendant was dropped off at the convenience store and used a key to unlock the trunk. *Id.* at 81, 310 S.E.2d at 634. Upon being confronted by police, the defendant fled but was subsequently arrested and charged with possession of stolen property. *Id.* at 80-81, 310 S.E.2d at 634-35. Defendant contended that it was his brother's car and he did not know the car was stolen. *Id.* at 81-82, 310 S.E.2d at 635. On appeal from a conviction, the defendant contended that the trial court had erred in denying his motion to dismiss for insufficiency of the evidence as to the charge of possession of stolen property, as there was no evidence "he knew or had reason to believe [the car] had been stolen or taken." *Id.* at 83, 310 S.E.2d at 636. This Court in holding

that "Defendant's motion for dismissal was properly denied" explained that

> [t]here was . . . plenary evidence that defendant knew or had reason to believe that the vehicle was stolen. Although defendant testified that his brother was driving a brown, two-door, Toyota Celica when he came to visit in March, the vehicle was not stolen until June. The State's evidence suggested that defendant, who had control and possession of the vehicle, had reason to believe, from the numerous cosmetic changes altering the car's appearance and lowering its fair market value, that the vehicle was stolen. Since June, the radio, carpet, exterior stripes, and body side molding had been removed; the console, right front fender, and tires had been exchanged. Further question of defendant's guilty knowledge was raised by the fact that the car had been parked, unauthorized, in a Seven-Eleven parking lot.
>
> Finally, and most damaging was the fact that when Deputy Sheriff Davis pulled into the Seven-Eleven parking lot on 24 November, defendant fled. While flight is not, in itself, an admission of guilt, it is a fact which, once established, may be considered along with other circumstances in determining a defendant's guilt. *State v. Stewart*, 189 N.C. 340, 127 S.E. 260 (1925); *State v. Swain*, 1 N.C. App. 112, 160 S.E. 2d 94 (1968); 2 Brandis on North Carolina Evidence § 178 (1982).

Id. at 83-84, 310 S.E.2d at 636.

Here, like *Lofton*, there was testimony from the owner, Mr. Winslow, that there were "cosmetic changes altering the [four-wheeler's] appearance" when it was recovered, specifically the decals and stickers had been pulled off of it and someone had affixed an "old Honda decal with Honda Motor Sports" to the front. However, the only other evidence in the record as to the four-wheeler is that four witnesses testified that defendant twice drove to Mr. Reed's premises on the four-wheeler, which Deputy Cratt had towed away after defendant's arrest. Only after further investigation did the sheriff's department discover that the four-wheeler had been stolen from Halifax County. Contrary to the State's contention, the ruling in *Lofton* was not based solely on the cosmetic changes to the car, but this Court also considered the fact that the car had been abandoned and the "most damaging" evidence that the defendant had fled from the scene when he realized the police saw him opening the car. *See id*. at 83-84, 310 S.E.2d at 636. Unlike *Lofton*, here the "cosmetic changes" were

minimal compared to the "numerous" changes to the car, as they were limited to the removal and replacement of the decals. Unlike in *Lofton*, the four-wheeler was not hidden or abandoned, but defendant was observed openly driving the four-wheeler and doing "doughnuts" in the road with it, which would have drawn attention to him. Defendant did not flee the scene when police arrived, like the defendant in *Lofton*, but was physically restrained when the deputy sheriff arrived and made no mention of the four-wheeler to the deputy. Also, the key was still in the four wheeler's ignition when defendant was using it. We further note that there is no evidence in the record regarding the circumstances by which defendant gained possession of the four-wheeler. *See Brown*, 85 N.C. App. at 589, 355 S.E.2d at 229 (noting "[t]he fact that a defendant is willing to sell property for a fraction of its value is sufficient to give rise to an inference that he knew, or had reasonable grounds to believe, that the property was stolen"); *State v. Parker*, 316 N.C. 295, 304, 341 S.E.2d 555, 560 (1986) (noting that "knowledge or reasonable belief can also be implied where a defendant-buyer buys property at a fraction of its actual cost").[1] Therefore, the State's evidence that the decals had been removed and another sticker attached, even viewed in the light most favorable to the State, *see Phillpott*, ___ N.C. App. at ___, 713 S.E.2d at 209, falls well short of providing "substantial evidence" that defendant knew or should have reasonably known that the four-wheeler was stolen, as necessary to permit this charge to go to a jury. Therefore, the trial court erred in denying defendant's motion to dismiss the charge of felony possession of stolen goods and we vacate defendant's conviction and sentence as to this charge. As we have vacated defendant's conviction and sentence, we need not address his additional argument as to the value of the four-wheeler.

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1. At trial, the prosecutor argued that the fact that the four-wheeler was found in defendant's possession only two months after it was stolen should also be considered, alluding to the doctrine of recent possession. *See State v. Joyner*, 301 N.C. 18, 28, 269 S.E.2d 125, 132 (1980). Although the doctrine has primarily been applied to prove charges of breaking and entering or larceny, *see State v. Milligan*, 192 N.C. App. 677, 682, 666 S.E.2d 183, 187 (2008), it has also been permitted in the context of a charge for possession of stolen goods. *See State v. McQueen*, 165 N.C. App. 454, 459-60, 598 S.E.2d 672, 676-77 (2004), *disc. review denied*, 359 N.C. 285, 610 S.E.2d 385 (2005). Here, the State raises no argument on appeal as to the doctrine of recent possession; the trial court made no indication in his ruling denying defendant's motion to dismiss that he considered the doctrine; and the State, during the charge conference, made no request for an instruction as to the doctrine and no instruction as to the doctrine of recent possession was given to the jury. Therefore, we need not address this issue.

III. Prior record level

[2] Defendant next contends that he should receive a new sentencing hearing for his conviction for possession of a firearm by a felon because "the trial court erred in sentencing [him] at prior record level V." Defendant argues that it was error for the trial court to add another prior record level point based on the fact that the offense was committed while he was on probation, pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7), as it failed to submit this factor to a jury and have a jury find it beyond a reasonable doubt before relying on it in calculating his prior record level. We review the calculation

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

State v. Bohler, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citations omitted), *disc. review denied*, ___ N.C. ___, 691 S.E.2d 414 (2010). According to N.C. Gen. Stat. § 15A-1340.14(a) (2009), "[t]he prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court, or with respect to subdivision (b)(7) of this section, the jury, finds to have been proved in accordance with this section[.]" Thus, N.C. Gen. Stat. § 15A-1340.14(b)(1)-(5) assigns points based on the class of the prior conviction and whether it is classified as a felony or misdemeanor. However, N.C. Gen. Stat. § 15A-1340.14(b)(7), which, as noted above, must be found by a jury, states that "[i]f the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment, 1 point [should be assigned]." Here, defendant was assessed to have 14 points based on his prior convictions and, pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7), was assessed an additional point, which gave him 15 prior record level points, moving him from a prior record level of "IV" to a "V[.]"[2] But the trial

2. In 2009, the required prior record level points for each prior record level in N.C. Gen. Stat. § 15A-1340.14(c) were changed with Level "V" being decreased from 15 to 18 prior record level points to "[a]t least 14, but not more than 17 points." However, these changes apply only to offenses committed on or after 1 December 2009 and defendant's offense date for possession of a firearm by a felon is 27 September 2009. 2009 N.C. Sess. Laws 555 §§ 1, 3.

court did not submit the N.C. Gen. Stat. § 15A-1340.14(b)(7) issue of whether he was on probation to a jury. Yet defense counsel did stipulate to information in the prior record level worksheet. The last page of the worksheet reads:

> The prosecutor and defense counsel, or the defendant, if not represented by counsel, stipulate to the information set out in Sections I and IV of this form, and agree with the defendant's prior record level or prior conviction level as set out in Section II based on the information herein.

The date, the prosecutor's signature, and defense counsel's signature appear below this paragraph. In section one, the worksheet states that "the offense was committed: (a) while on supervised or unsupervised probation, parole, or post-release supervision[,]" and assigns defendant one additional point for this finding. Therefore, the issue before us is whether a defendant could stipulate to this finding through his counsel's signature on the prior record level worksheet or whether this finding regarding whether defendant was on probation when he committed the crime had to go to a jury. This Court has previously addressed this issue in *State v. Wissink*, 172 N.C. App. 829, 617 S.E.2d 319 (2005) ("*Wissink I*") and the related subsequent case *State v. Wissink*, 187 N.C. App. 185, 652 S.E.2d 17 (2007) (*Wissink II*").

In *Wissink I*, the trial court "enhance[ed] defendant's prior record level from III to IV" pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7), after the defendant stipulated that he had "committed the offense of discharging a firearm into occupied property while [he] was on probation[.]" 172 N.C. App. at 836-37, 617 S.E.2d at 324-25. This Court concluded that the stipulation was not properly made and, "the trial court erred by adding a point to defendant's prior record level without first submitting the issue to a jury to find beyond a reasonable doubt" and remanded for resentencing. *Id.* at 837-38, 617 S.E.2d at 325. The State petitioned for discretionary review and our Supreme Court remanded specifically as to this issue to the Court of Appeals for reconsideration in light of its decisions in *State v. Hurt*, 361 N.C. 325, 330, 643 S.E.2d 915, 918 (2007) and *State v. Blackwell*, 361 N.C. 41, 44, 49-51, 638 S.E.2d 452, 455, 458-59 (2006), *cert. denied*, 550 U.S. 948, 167 L. Ed. 2d 1114 (2007). *State v. Wissink*, 361 N.C. 418-19, 645 S.E.2d 761 (2007). On remand in *Wissink II*, this Court reconsidered the issue as directed. *State v. Wissink*, 187 N.C. App. 185, 652 S.E.2d 17 (2007). In *Wissink II*, this Court first examined the applicable United States Supreme Court decisions:

In *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed. 2d 435 (2000), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 147 L. Ed. 2d at 455. In *Blakely v. Washington*, 542 U.S. 296, 159 L.Ed. 2d 403, *reh'g denied*, 542 U.S. 961, 159 L.Ed. 2d 851 (2004), the Supreme Court further held:

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum [the judge] may impose without any additional findings.

Id. at 303-04, 159 L.Ed. 2d at 413-14 (internal citations omitted).

Id. at 187, 652 S.E.2d at 19 (emphasis in original). This Court then summarized the relevant holdings in the cases it was instructed to reconsider:

> In *Hurt*, our Supreme Court held that "a judge may not find an aggravating factor on the basis of a defendant's admission unless that defendant personally or through counsel admits the necessary facts or admits that the aggravating factor is applicable." *Hurt*, 361 N.C. at 330, 643 S.E.2d at 918. This holding seems to suggest that when defense counsel admits the facts necessary for an aggravating factor, such a finding by a trial court does not constitute *Blakely* error.
>
> In *Blackwell*, our Supreme Court held that in accordance with *Washington v. Recuenco*, 548 U.S. 212, 165 L.Ed. 2d 466 (2006), *Blakely* error is subject to harmless error review. *Blackwell*, 361 N.C. at 44, 638 S.E.2d at 455. "In conducting harmless error review, we must determine from the record whether the evidence against the defendant was so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Id.* at 49, 638 S.E.2d at 458 (citing *Neder v. United States*, 527 U.S. 1, 9, 144 L.Ed. 2d 35, 47 (1999)). Our Supreme Court further held that "[a] defendant may not avoid a conclusion that evidence of an aggravating factor is 'uncontroverted' by merely raising an objection at trial. Instead, the defendant must 'bring forth facts contesting the omit-

> ted element,' and must have 'raised evidence sufficient to support a contrary finding.' " *Id.* at 50, 638 S.E.2d at 458 (quoting *Neder*, 527 U.S. at 19, 144 L.Ed. 2d at 53).

Id. at 188, 652 S.E.2d at 19-20. After noting the State's argument that the defense counsel's statements at trial amounted to a stipulation to the fact that defendant was on probation when he committed the offense, this Court held that "[e]ven assuming that defense counsel's statement did not amount to a stipulation, and that *Blakely* error occurred, any error was harmless beyond a reasonable doubt. *Id.* at 188-89, 652 S.E.2d at 20. This Court noted that (1) the defendant had admitted to police during an interview that he was on probation on the date of the offense; (2) defense counsel signed the stipulation on the prior record level worksheet which added one point to the defendant's prior record points based on the finding that he was on probation at the time of the offense; and (3) "the State said at trial that Defendant had one prior record level point because Defendant was on probation at the time of the offense, and defense counsel stated: 'I think that's correct, Your Honor.' " *Id.* at 189, 652 S.E.2d at 20. In finding no prejudicial error, this Court held that based on this uncontested evidence, "there was overwhelming and uncontroverted evidence that Defendant committed the offense of discharging a firearm into occupied property while he was on probation for another offense. Therefore, even if *Blakely* error occurred, any *Blakely* error was harmless beyond a reasonable doubt." *Id.*

Likewise here, at sentencing, defense counsel requested a recess, explaining that

> Judge, I thought that the defendant was a Level IV based on what I was provided in discovery, so I'm not going to be able to stipulate to the record level or stipulate that the defendant was on probation in this case[.]

The trial court granted his request and after the recess, the trial court noted that "So, [defense counsel], [the prosecutor] handed up a work sheet. It appears to bear your signature. It's a stipulation." Defense counsel responded "Yes, sir. Yes, sir." The trial court in order to confirm defense counsel's affirmation asked "that it is 16 Prior Record Points, Level V for felony sentencing . . . ." Defense counsel again confirmed, "Yes, sir." Therefore, unlike the defense counsel in *Wissink II*, who merely signed the worksheet, defense counsel here took a recess to consult with the prosecutor and his client, before giving verbal assent to the contents of the prior record level worksheet. Defense

counsel also signed the worksheet, stipulating that it was correct that defendant committed the crime of possession of a firearm by a felon while he was on probation. Even though the issue of whether defendant was on probation at the time he committed this offense was not submitted to a jury, we hold that "if any *Blakely* error occurred, any *Blakely* error was harmless beyond a reasonable doubt" as there was "overwhelming and uncontroverted evidence that Defendant committed the offense of [possession of a firearm by a convicted felon] while he was on probation for another offense." *See Wissink*, 187 N.C. App. at 189, 652 S.E.2d at 20. Accordingly, we find no prejudicial error in the inclusion of the one point on defendant's prior record level worksheet for defendant being on probation at the time he committed the offense in question.

Defendant also contends that the trial court erred in assessing an additional one prior record level point based on the trial court's conclusion that all of the elements of the firearm possession were including in a prior offense, pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6), as he did not have a prior conviction for possession of a firearm by a convicted felon. Defendant was sentenced in the presumptive range of sentences for Prior Record Level "V[.]" A defendant qualifies for a Prior Record Level "V" if he has 15 to 18 prior record level points. *See* N.C. Gen. Stat. § 15A-1340.14(c)(5). As noted above, defendant had 14 points based solely upon his prior convictions. According to the above analysis, the additional point based on defendant committing the crime while he was on probation was correctly assessed, bringing his total prior record points to 15. Even assuming arguendo that it was error for the trial court to add the 16th point pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6), as defendant contends, this would be harmless error as the exclusion of that record level point would not reduce defendants prior record level to IV and ultimately reduce his sentence. Accordingly, defendant's argument is overruled and we find no prejudicial error as to defendant's sentencing for possession of a firearm by a felon.

VACATED IN PART AND NO PREJUDICAL ERROR IN PART.

Judges GEER and THIGPEN concur.

STATE OF NORTH CAROLINA v. THADDEUS DEE JONES

No. COA11-22

(Filed 1 November 2011)

1. Evidence—expert witness testimony—NarTest NXT 2000 results and reliability—cocaine—marijuana

The trial court committed plain error by allowing two witnesses to testify as experts concerning the results and reliability of the NarTest NXT 2000 for the possession of cocaine charge, and defendant was entitled to a new trial. However, it was harmless error for the possession of marijuana, possession of marijuana with intent to sell and deliver, and sale of marijuana charges since other evidence was properly admitted to establish the identity of the substances.

2. Constitutional Law—right to jury trial—consideration of defendant's failure to plead—length of trial—presumptive range sentence

Defendant was denied his constitutional right to a jury trial in a drug case based on the trial court's consideration of defendant's failure to plead and the length of trial when it fashioned its judgment even though it was within the presumptive range. The case was remanded for resentencing.

3. Costs—restitution—lab fees—unlicensed private lab

The trial court erred by ordering defendant to pay $1,200 in restitution for lab fees paid to NarTest. N.C.G.S. § 7A-304 does not authorize restitution for analysis performed by an unlicensed private lab.

Appeal by defendant from judgments entered 10 June 2010 by Judge Kenneth F. Crow in Onslow County Superior Court. Heard in the Court of Appeals 17 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.

Anne Bleyman for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Thaddeus Dee Jones appeals from the trial court's 10 June 2010 judgments entered after a jury found him guilty of the fol-

lowing crimes: (1) possession with intent to sell and deliver marijuana on 11 February 2009; (2) sale of marijuana on 11 February 2009; (3) possession of drug paraphernalia on 11 February 2009; (4) possession of marijuana on 12 February 2009; (5) possession of drug paraphernalia on 12 February 2009; and (6) possession with intent to sell and deliver cocaine on 12 February 2009.

Defendant argues that the trial court erred by: (1) allowing Captain John Lewis and expert witness H.T. Raney, Jr. to testify concerning the results and reliability of the NarTest NTX 2000 ("the NarTest"); (2) allowing visual identification of the marijuana and cocaine; (3) denying defendant's motion to dismiss; (4) ordering defendant to pay $1,200.00 in restitution for lab fees; and (5) punishing defendant for exercising his right to a trial by jury. After careful review, we order a new trial on the charge of possession with intent to sell and deliver cocaine, but we uphold the three convictions related to possession and sale of marijuana. Defendant makes no arguments concerning the possession of drug paraphernalia charges, therefore, those convictions stand. We vacate the $1,200.00 restitution award and remand for resentencing.

Background

The State's evidence at trial tended to establish that on 11 February 2009, defendant sold approximately seven grams of marijuana to David Shepard, an Onslow County Sheriff's Department informant. Sergeant Ides testified that he gave Mr. Shepard the money to purchase the marijuana and then followed him to the location where the transaction was to take place. Mr. Shepard subsequently turned the marijuana over to Sergeant Ides. Defendant was not arrested at that time.

On 12 February 2009, defendant purchased cocaine from a woman known as "Cherry" at a local "pool hall." Sergeant Ides was conducting surveillance on defendant that evening, and, upon discovering that defendant was driving with a revoked license plate, Sergeant Ides stopped defendant's vehicle. When he approached the vehicle, Sergeant Ides saw defendant "pushing something" into the area between the seat and the center console. Sergeant Ides then performed a search of defendant's person and his vehicle. Defendant was in possession of approximately two and one-half grams of cocaine, which was packaged in four separate bags, approximately one gram of marijuana, drug paraphernalia, and a handgun. Defendant was arrested and later charged with drug related offenses that allegedly took place on 11 and 12 February 2009.

Captain Lewis, who did not participate in defendant's arrest or the confiscation of suspected contraband, testified that he used the NarTest to test the substance defendant sold to Mr. Shepard on 11 February 2009, and the substances seized from defendant's car on 12 February 2009. Captain Lewis was accepted by the trial court as an expert witness "in the use of the NarTest NTX 2000 machine." According to Captain Lewis, the NarTest identified the substance sold to Mr. Shepard as marijuana and the substances seized from defendant's car as marijuana and cocaine. Captain Lewis sent the substances to Mr. Raney at NarTest, LLP ("NarTest") for confirmatory testing. Mr. Raney, who was previously employed by the State Bureau of Investigation ("SBI") and holds a degree in chemistry, was accepted as an expert witness in the field of forensic chemistry. Mr. Raney testified that he conducted chemical analyses on the substances in the same manner used by the SBI and that the results confirmed those of the NarTest. Mr. Raney testified extensively about his experience evaluating the NarTest and provided his expert opinion that the NarTest is, in fact, reliable.

Defendant testified at trial that he never sold marijuana to Mr. Shepard on 11 February 2009; however, defendant admitted that he purchased what he believed to be cocaine on 12 February 2009 for personal use. Defendant stated that he never intended to sell the cocaine.

As stated *supra*, defendant was convicted of various drug related offenses. With regard to the crimes that occurred on 11 February 2009, the trial court consolidated the possession with intent to sell and deliver marijuana and the sale of marijuana charges and sentenced defendant to six to eight months imprisonment. Defendant was sentenced to 45 days imprisonment for the possession of drug paraphernalia charge. With regard to the crimes that occurred on 12 February 2009, the trial court consolidated the possession of marijuana and the possession of drug paraphernalia charges and sentenced defendant to 45 days imprisonment. Defendant was sentenced to six to eight months imprisonment for the possession with intent to sell and deliver cocaine charge. Defendant gave notice of appeal in open court.

Discussion

I. The NarTest Results and Visual Identification

[1] Defendant argues that the trial court committed plain error by allowing Captain Lewis and Mr. Raney to testify as experts concerning the use and reliability of the NarTest, and by admitting the results

generated by this machine. "Plain error is error so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Leyva*, 181 N.C. App. 491, 499, 640 S.E.2d 394, 399 (citation and quotation marks omitted), *disc. review denied and appeal dismissed*, 361 N.C. 573, 651 S.E.2d 370 (2007). Prior to determining whether admission of this evidence constituted plain error, we must first determine whether it was error at all.

As for Captain Lewis' and Mr. Raney's expert testimony concerning the use and reliability of the NarTest, "a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004). Rule 702(a) of the North Carolina Rules of Evidence provides that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2009).[1]

Our Supreme Court has analyzed Rule 702 and set forth the following three-step analysis for determining whether expert opinion testimony is admissible: "(1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686. In the present case, defendant strictly argues that the first prong of this test was not met because the NarTest is not sufficiently reliable as an area for expert testimony.

With regard to the first prong, "when specific precedent justifies recognition of an *established* scientific theory or technique advanced by an expert, the trial court should favor its admissibility, provided the other requirements of admissibility are likewise satisfied." *Id.* at 459, 597 S.E.2d at 687 (emphasis added).

> Where, however, the trial court is *without precedential guidance or faced with novel scientific theories*, *unestablished techniques*, or compelling new perspectives on otherwise settled theories or

1. The General Assembly recently amended Rule 702(a). 2011 N.C. Sess. Law ch. 283, § 1.3 (effective Oct. 1, 2011). The amended statute only applies to actions commenced on or after 1 October 2011, and, consequently, the amended version is not applicable to this case. *Id.*

> techniques, a different approach is required. Here, the trial court should generally focus on the following nonexclusive indices of reliability to determine whether the expert's proffered scientific or technical method of proof is sufficiently reliable: the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked to sacrifice its independence by accepting the scientific hypotheses on faith, and independent research conducted by the expert.
>
> Within this general framework, reliability is thus a preliminary, foundational inquiry into the basic methodological adequacy of an area of expert testimony. This assessment does not, however, go so far as to require the expert's testimony to be proven conclusively reliable or indisputably valid before it can be admitted into evidence.

Id. at 460, 597 S.E.2d at 687 (emphasis added) (citation, quotation marks, and brackets omitted).

This Court previously determined that the NarTest was a "new technology[,]" applied the *Howerton* test, and held that admission of Captain Lewis' testimony concerning the use of the NarTest and its results in that case was prejudicial error. *State v. Meadows*, 201 N.C. App. 707, 713, 687 S.E.2d 305, 309, *disc. review denied and appeal dismissed*, 364 N.C. 245, 699 S.E.2d 640 (2010). There, Captain Lewis testified regarding his personal experience with the NarTest; however, he did not testify as to whether the NarTest had been recognized by experts in the field of chemical analysis as a reliable method of testing, nor did he compare the NarTest to other testing methods currently used to identify controlled substances. *Id.* at 710, 687 S.E.2d at 307. Moreover, while Captain Lewis had been trained to operate the NarTest, he had no "professional background in the field of chemical analysis of controlled substances." *Id.* at 711, 687 S.E.2d at 308 (citation and quotation marks omitted). Additionally, Captain Lewis did not testify as to any independent research he had conducted, nor did he supplement his testimony with a visual aid. *Id.* at 712, 687 S.E.2d at 308.

In reaching its holding in *Meadows*, this Court reasoned: "As the State failed to proffer evidence to support any of the 'indices of reliability' under *Howerton* or any alternative indicia of reliability, we conclude that 'the expert's proffered method of proof [is not] sufficiently reliable as an area for expert testimony[.]' " *Id.* at 712, 687 S.E.2d at 308 (quoting *Howerton*, 358 N.C. at 458–60, 597 S.E.2d at

686–87). In the case *sub judice*, Detective Lewis testified in a manner consistent with his testimony in *Meadows*; consequently, we must hold that his testimony was likewise erroneously admitted in this case. We now address whether Mr. Raney's testimony concerning the reliability of the NarTest was properly admitted.

Mr. Raney has a bachelor's degree in chemistry and worked as a forensic chemist with the SBI for 25 years. Mr. Raney began working for NarTest in 2004 and was asked by the company to "review and see if [the NarTest] had any potential in the law enforcement field." At trial, Mr. Raney explained to the jury that the NarTest operates using "fluorescent based [t]echnologies" and described in detail how this technology is used to identify contraband. The jury was then shown a DVD created by NarTest that reiterated the explanation provided by Mr. Raney. Mr. Raney testified that, while working for NarTest, he has used SBI chemical analysis protocol to test 3,491 contraband samples that were also tested by the NarTest, and that the error rate of the NarTest is 0.17%. Mr. Raney provided his opinion that the NarTest is a reliable method for identifying contraband. He went so far as to say that the NarTest "[p]robably [has a] higher accuracy rate than most scientific equipment." Mr. Raney further testified that he used SBI testing protocol in the present case to perform comparison tests on the contraband seized from defendant and tested by Captain Lewis using the NarTest. The results generated by Mr. Raney's tests were the same as those produced by the NarTest.

While it is undisputed that Mr. Raney's background in forensic chemistry is sufficient to qualify him as an expert in that field, his "remarkable credentials . . . presents a particularly compelling need to halt his testimony when it is based on an insufficient method of proof." *State v. Ward*, 364 N.C. 133, 146, 694 S.E.2d 738, 746 (2010). "The concern . . . is that jurors may ascribe so much authority to such a noteworthy expert in forensic chemistry that they treat his testimony as infallible . . . ." *Id.* Despite Mr. Raney's qualifications, we must carefully examine whether the "proffered method of proof [was] sufficiently reliable as an area for expert testimony[.]" *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686. In examining the indices of reliability set forth in *Howerton*, we hold that Mr. Raney's testimony was inadmissible.

Undoubtedly, Mr. Raney's expertise and comparison testing cures *some* of the defects that were present in Captain Lewis' testimony. The trial court aptly recognized that "the State [wa]s trying to comply with the language in the *Meadows* case" by offering the testimony of Mr. Raney. Still, as in *Meadows*, 201 N.C. App. at 709, 687 S.E.2d at

307, "[w]e are not aware of any cases in which the NarTest has been recognized as an accepted method of analysis or identification of controlled substances in North Carolina or in any other jurisdiction in the United States." Mr. Raney admitted that the NarTest had not been licensed or certified by the Department of Health and Human Services ("DHHS"), or any other agency or department of the State. We find this factor to be the most relevant in our analysis, but we have considered other factors as well, such as the fact that Mr. Raney had not conducted any independent research on the NarTest machine outside of his duties as a NarTest employee. Moreover, the State did not present any evidence that the NarTest machine had been recognized as a reliable method of testing by experts, other than Mr. Raney, in the field of chemical analysis of controlled substances. The State did not point to any publications or research performed by anyone not associated with NarTest. Furthermore, while the State did produce a visual aid to support Mr. Raney's testimony, that aid was no more than a promotional video created by NarTest. In sum, Mr. Raney's professional background and comparison testing provides some indicia of reliability; however, for the foregoing reasons, we are not persuaded that "the expert's proffered method of proof [was] sufficiently reliable as an area for expert testimony[.]" *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686. Consequently, we hold that Mr. Raney's expert testimony was not properly admitted in this case.

Because Captain Lewis' and Mr. Raney's respective testimonies were inadmissible, we hold that the results of the NarTest were likewise inadmissible. *Meadows*, 201 N.C. App. at 712, 687 S.E.2d at 309. We must now determine whether admitting the NarTest results rose to the level of plain error. If other evidence was properly admitted establishing the identity of the controlled substances, we would be inclined to hold that admission of the NarTest results was not plain error. *See State v. Wright*, ___ N.C. App. ___, ___, 708 S.E.2d 112, 122 ("Based on the record, we find Defendant has failed to show plain error. Contrary to Defendant's argument, there was other evidence" that defendant committed the crime charged.), *disc. review denied*, ___ N.C. ___, 710 S.E.2d 9 (2011).

Besides the results of the NarTest machine, the State presented evidence that Mr. Raney tested the substances in the laboratory at NarTest using SBI testing protocol. Mr. Raney testified that the substances seized from defendant were cocaine and marijuana. This Court recently held that such evidence was admissible. *State v. McDonald*, ___ N.C. App. ___, ___, ___, S.E.2d ___, ___ (Oct. 4, 2011)

(No. 11-104). In *McDonald*, the State did not attempt to admit the results of the NarTest machine, only the testimony and lab report of Mr. Raney. *Id.* at ___, ___ S.E.2d at ___. The key distinction between *McDonald* and the present case, however, is that in *McDonald*, Mr. Raney testified that the NarTest *lab* was licensed by DHHS and the Drug Enforcement Agency. *Id.* at ___, ___ S.E.2d at ___. The *McDonald* Court determined that the licensure evidence was dispositive and held that the lab results were admissible to prove that the defendant possessed cocaine. *Id.* at ___, ___ S.E.2d at ___. Here, Mr. Raney testified that the lab was not licensed or accredited by any agency.[2] Consequently, Mr. Raney's lab results were improperly admitted, and, therefore, do not render the erroneous admission of the NarTest results harmless.

The State also offered visual identification of the cocaine and marijuana. Defendant argues that this visual identification was erroneously admitted. Sergeant Ides testified that, pursuant to his training and experience, the substance defendant allegedly sold to Mr. Shepard on 11 February 2009 was marijuana, and the substances seized from defendant on 12 February 2009 were cocaine and marijuana. Our Supreme Court has held that "scientifically valid chemical analysis [, rather than visual inspection,] is required" to identify controlled substances that are defined in terms of their chemical composition. *Ward*, 364 N.C. at 147, 694 S.E.2d at 747. Consequently, Sergeant Ides should not have been permitted to visually identify the cocaine seized from defendant.[3] *Id.*

However, our case law provides that an officer may testify that the contraband seized was marijuana based on visual inspection alone. *State v. Ferguson*, ___ N.C. App. ___, ___, 694 S.E.2d 470, 475 (2010); *State v. Fletcher*, 92 N.C. App. 50, 56, 373 S.E.2d 681, 685 (1988). According to *Ferguson*, ___ N.C. App. at ___, 694 S.E.2d at 475, *Ward* did not "cast[] any doubt on the continued vitality of *Fletcher*." Consequently, we hold that Sergeant Ides was properly permitted to testify that the substance defendant sold to Mr. Shepard on 11 February 2009 was marijuana, and that the substance defendant possessed on 12 February 2009 was also marijuana.

In sum, as for the possession of cocaine charge, there was no evidence properly admitted at trial that would render the results of the

2. The defendant's trial in *McDonald* took place after the trial in the present case.

3. Defendant's statement that he bought what he believed to be cocaine was also insufficient to identify the substance. *State v. Williams*, ___ N.C. App. ___, ___, 702 S.E.2d 233, 238, *temporary stay allowed*, ___ N.C. ___, 705 S.E.2d 382 (2010).

NarTest harmless. We hold that the admission of those results constituted plain error because the jury would certainly have reached a different result absent those results. Defendant is entitled to a new trial on that charge. As for the possession of marijuana, possession of marijuana with intent to sell and deliver, and sale of marijuana charges, Sergeant Ides' testimony was sufficient to render the admission of the NarTest results harmless, and, therefore, we uphold those convictions.[4]

II. Right to a Jury Trial

[2] Next, defendant argues that he was denied his constitutional right to a jury trial. Specifically, defendant contends that the sentence imposed by the trial court was based, in part, on defendant's decision not to plead guilty. We agree.

> A sentence within statutory limits is presumed to be regular. Where the record, however, reveals the trial court considered an improper matter in determining the severity of the sentence, the presumption of regularity is overcome. It is improper for the trial court, in sentencing a defendant, to consider the defendant's decision to insist on a jury trial. Where it can be reasonably inferred the sentence imposed on a defendant was based, even in part, on the defendant's insistence on a jury trial, the defendant is entitled to a new sentencing hearing.

State v. Peterson, 154 N.C. App. 515, 517, 571 S.E.2d 883, 885 (2002) (internal citations and quotation marks omitted).

At the sentencing hearing in this case, the trial court noted more than once that defendant "was given an opportunity to plead guilty[,]" and that such failure to plead was one of the "factors that the Court considers when the Court fashions judgment." At sentencing, the Court also admonished defendant and his counsel for "unnecessarily" protracting the trial for six days when, in the court's opinion, the trial should have only taken two days. Viewed in context, it appears that the trial court wished to punish defendant for going to trial and for the length of the trial.

We recognize that the trial court sentenced defendant within the presumptive range, and consolidated two of the misdemeanor counts

4. We need not address defendant's argument that the trial court erred in denying his motion to dismiss the charges against him. Defendant bases his argument exclusively on the improperly admitted NarTest evidence. "It is not a sufficient basis for granting a motion to dismiss that some of the evidence was erroneously admitted by the trial court." *State v. Morton*, 166 N.C. App. 477, 481-82, 601 S.E.2d 873, 876 (2004).

and two of the felony counts. Nevertheless, the trial court considered defendant's failure to plead, and the length of the trial, when it fashioned its judgment, and, therefore, we must remand this case for resentencing. *Id.*

III. Restitution

[3] Finally, defendant argues that the trial court erred in ordering defendant to pay the Onslow County Sheriff's Department $1,200.00 as restitution for the lab fees paid to NarTest. The State concedes that it did not present sufficient evidence to support the ordered restitution and requests a new hearing on the matter. There is no need for a new hearing because we hold that this type of restitution is not permitted by our General Statutes and should not have been imposed.

"At common law, costs in criminal cases were unknown; liability for costs in criminal cases is therefore dictated purely by statute." *State v. Johnson*, 124 N.C. App. 462, 470, 478 S.E.2d 16, 21 (1996), *cert. denied*, 345 N.C. 758, 485 S.E.2d 304 (1997). N.C. Gen. Stat. § 7A-304(a)(7) (2009) states that the trial court "shall" order restitution in the amount of $600.00 for analysis of a controlled substance by the SBI. N.C. Gen. Stat. § 7A-304(a)(8) allows the same restitution if a "crime laboratory facility operated by a local government" performs an analysis of a controlled substance so long as the "work performed at the local government's laboratory is the equivalent of the same kind of work performed by the [SBI]." N.C. Gen. Stat. § 7A-304 does *not* authorize restitution for analysis performed by an unlicensed private lab such as NarTest. Accordingly, we vacate the $1,200.00 restitution award.[5]

Conclusion

Based on the foregoing, we hold that admission of the NarTest results which stated that the substance possessed by defendant on 12 February 2009 was cocaine constituted plain error; however, we hold that admission of the NarTest results which stated that the substances possessed by defendant on 11 and 12 February 2009 were marijuana did not constitute plain error because other evidence was properly admitted to establish the identity of the substances. We further hold that the trial court improperly considered defendant's failure to plead, and the length of the trial, during sentencing. Addition-

5. The trial court also ordered defendant to reimburse the State for the $30.00 used to purchase the marijuana from defendant on 11 February 2009. Defendant does not contend that this portion of the restitution award was improper.

ally, we hold that the trial court improperly ordered defendant to pay restitution in the amount of $1,200.00.

New trial in part; no prejudicial error in part; remand for resentencing; restitution award vacated in part.

Judges STROUD and HUNTER, Robert N., Jr. concur.

STATE OF NORTH CAROLINA v. ROBBIE ZEB STOKES

No. COA11-373

(Filed 1 November 2011)

1. Sexual Offenses—child abuse with sexual act—digital penetration

The trial court did not err by denying defendant's motion to dismiss a charge of felonious child abuse with a sexual act where defendant contended that digital penetration did not constitute an "object" within the meaning of N.C.G.S. § 14-27.1(4). Defendant's digital penetration of the victim would constitute a sexual act.

2. Aiding and Abetting—sex offense—duress—criminality

The trial court did not err by denying defendant's motion to dismiss a charge of aiding and abetting a sex offense where defendant argued that there was no crime to aid and abet because he forced his teenage son to commit the acts against his daughter. Duress would have provided the son with a legally valid reason for committing the acts, but would not have transformed those acts into non-criminal activity.

3. Evidence—contradictory testimony—not prejudicial—other testimony

In light of other testimony, there was no prejudice in a prosecution for multiple offenses involving the sexual abuse of a child from the testimony which defendant argued contradicted the victim.

4. Evidence—no plain error—other evidence

In light of other evidence, there was no plain error in a prosecution arising from child sexual abuse in the admission of the testimony of several witnesses.

5. Criminal Law—acting in concert—instructions—duress—law accurately stated

The trial court did not err in its instructions on acting in concert in a child sexual abuse case where defendant argued that there was no common action because the second person was a 12 year old boy who acted under defendant's direct orders and threats.

6. Satellite-Based Monitoring—findings—highest-level of supervision not needed—long term of imprisonment

Orders requiring lifetime satellite-based monitoring (SBM) were reversed and remanded where the trial court found that defendant did not require the highest possible level of supervision and monitoring but ordered that defendant enroll in SBM for life. The trial court may have determined that defendant would not require the highest level of supervision and monitoring because of the length of his sentence, but wanted SBM if defendant was released from prison. However, the highest level of supervision is SBM and the determination is based on the relevant statutory language rather than defendant's likely term of imprisonment.

Appeal by defendant from judgments entered 16 August 2010 by Judge F. Lane Williamson in Superior Court, Cleveland County. Heard in the Court of Appeals 29 September 2009.

Attorney General Roy A. Cooper, III, by Sonya M. Calloway-Durham, for plaintiff-appellee.

Haral E. Carlin, for defendant-appellant.

STROUD, Judge.

Defendant appeals the trial court judgments convicting him of aiding and abetting first degree sex offense, two counts of felony child abuse—sexual act, and first degree sex offense with a child; defendant also appeals the trial court orders enrolling him in satellite-based monitoring. For the following reasons, we find no error in defendant's trial or judgments but reverse and remand the order for satellite-based monitoring for a new hearing.

I. Background

The State's evidence tended to show that Becca, a minor child, was residing with her brother, Todd[1] and defendant, their father. Defendant "hurt[]" Becca, in the "[f]ront part" of her "private area" by sticking "[h]is thing[,]" "[a] wiener[,]" in her which caused her to bleed; defendant did this "several" times. Todd also "stuck" a toy car in Becca's "front part." Todd witnessed defendant put his fingers in Becca's vagina on more than one occasion. Defendant also forced Becca to "play" with Todd's penis "by putting it in her mouth" on multiple occasions. Dr. Christopher Cerjan, a pediatrician at Shelby Children's Clinic, examined Becca and noted that Becca's vaginal exam was abnormal in a manner which would only be caused by repeated "direct trauma going into the vaginal opening."

On 22 January 2007, defendant was indicted for two counts of felony child abuse—sexual act, first degree statutory sexual offense, and first degree sex offense with a child. Defendant was found guilty by a jury of all of the charges, specifically felonious child abuse by a sexual act ("child abuse"), first degree sexual offense with a child under the age of thirteen ("sex offense with a child"), aiding and abetting first degree sexual offense with a child under the age of thirteen ("aiding and abetting a sex offense"), felonious child abuse by allowing the commission of a sexual act ("child abuse by allowing a sex act"). The trial court entered judgments wherein defendant was sentenced to imprisonment; the trial court also ordered that defendant be placed on satellite-based monitoring "for his . . . natural life[.]" Defendant appeals.

II. Motion to Dismiss

Defendant contends that the trial court erred in denying his motion to dismiss the charges of child abuse, aiding and abetting a sex offense, and child abuse by allowing a sexual act.

> The standard of review concerning a motion to dismiss is *de novo*. In reviewing a motion to dismiss criminal charges, we view all evidence in the light most favorable to the State and give the State every reasonable inference which can be drawn therefrom. To overcome a motion to dismiss, the State must have presented substantial evidence of each element of the offense charged and of the defendant's guilt. Substantial evidence is relevant evidence

1. Pseudonyms will be used to protect the identity of the minor children involved in this case.

> that a reasonable mind might accept as adequate to support a conclusion. Any contradictions or discrepancies in the evidence are for the jury to resolve, and these inconsistencies, by themselves, do not serve as grounds for dismissal.

State v. Cole, 199 N.C. App. 151, 156, 681 S.E.2d 423, 427, *disc. review denied*, 363 N.C. 658, 686 S.E.2d 678, *disc. review denied*, 363 N.C. 658, 686 S.E.2d 679 (2009) (citations and quotation marks omitted.)

A. Child Abuse

[1] N.C. Gen. Stat. § 14-318.4(a2) provides that "[(1) a]ny parent or legal guardian [(2)] of a child less than 16 years of age [(3)] who commits or allows the commission of any sexual act upon" a child is guilty of felonious child abuse. *See* N.C. Gen. Stat. § 14-318.4(a2) (2005). " 'Sexual act' means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body[.]" N.C. Gen. Stat. § 14-27.1(4) (2005).

Defendant does not contest that he is Becca's "parent" or that she was "less than 16 years of age" at the time of the offense; *see* N.C. Gen. Stat. § 14-318.4(a2), instead, "defendant contends the State failed to present sufficient evidence [defendant] was in fact the person that inserted an object into the vagina of" Becca. Defendant argues that Becca testified "that [defendant] only had vaginal intercourse with her . . . [s]he specifically testified that he committed no other sexual acts against her." However, Todd testified that he witnessed his father "[m]oving . . . in and out" of Becca's "vagina" with "[h]is finger." Defendant's digital penetration of Becca's vagina would constitute a sexual act. *See State v. Lucas*, 302 N.C. 342, 345-46, 275 S.E.2d 433, 435-36 (1981) ("The evidence in this case tends to show that defendant penetrated the genital opening of [the victim's] body with his fingers. Defendant contends this is not a "sexual act" under the statute because the Legislature only intended the words "any object" in G.S. 14-27.1(4) to mean any object foreign to the human body. . . . [W]e are of the opinion, and so hold, that the Legislature did not intend to limit the meaning of the words "any object" to objects foreign to the human body.") Any inconsistencies between Becca's testimony and Todd's testimony would be for "the jury to resolve[.]" *Cole*, 199 N.C. App. at 156, 681 S.E.2d at 427. Accordingly, this argument is without merit.

B. Aiding and Abetting a Sex Offense and Child Abuse by Allowing a Sex Act

[2] Defendant's conviction for aiding and abetting a sex offense was based upon the allegation that defendant "unlawfully, willfully and feloniously did allow, aid, abet, encourage, and knowingly fail to protect his 10 year old child, [Becca] . . ., from a sexual act, the penetration of her vagina and anus by an object and by the fingers of his juvenile teenage son" Todd. Defendant's conviction for child abuse by allowing a sex act was based upon the allegation that defendant "unlawfully, willfully and feloniously did allow a sexual act to be committed against his 10-year-old daughter by his juvenile son by inserting and allowing to be inserted an object and fingers into the vagina and anus of" Becca.

N.C. Gen. Stat. § 14-27.4(a)(1) provides that

> [a] person is guilty of a sexual offense in the first degree if the person engages in a sexual act . . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]

N.C. Gen. Stat. § 14-27.4(a)(1) (2005). Again, the elements for child abuse by allowing a sex act are "[a]ny parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any sexual act upon" the child. *See* N.C. Gen. Stat. § 14-318.4(a2). In *State v. Holcombe*, this Court stated:

> Although it is not defined by our statutes, our Supreme Court has upheld three elements of the crime of aiding and abetting: (1) that the principal crime was committed by another; (2) that the defendant knowingly advised, instigated, encouraged, procured, or aided the other person; and (3) that the defendant's actions or statements caused or contributed to the commission of the principal crime by the other person.

___ N.C. App. ___, ___, 691 S.E.2d 740, 746 (2010) (citation, quotation marks, and brackets omitted).

Defendant contends that

> [u]nder the theory of aiding and abetting the State must prove that some person other than the defendant committed the crime[s] of . . . [aiding and abetting a sex offense and child abuse by allowing a sex act]. The question to be asked is can [defendant] aid and abet [and allow Todd], a 12-year old, in

> committing the crime[s charged] . . . when [Todd] is acting under duress through the threats from [defendant].
>
> The defendant argues that because [Todd] was acting under duress and did not engage in the act willfully, he did not commit a crime and therefore, there was no basis for conviction of the defendant[.]

Here, defendant does not contest that Todd committed the elements of the crimes charged or that he committed the elements of aiding and abetting and allowed such crimes; defendant only contends that because he forced Todd to commit the acts against Becca, Todd was acting under duress and thus could not be guilty of a crime.

We find defendant's argument to be both offensive and absurd. However, even assuming *arguendo*, that defendant's argument is reasonable and that Todd was under duress while performing certain acts upon his sister, such acts would still constitute a crime. Duress is an affirmative defense. *See State v. Cheek*, 351 N.C. 48, 61, 520 S.E.2d 545, 553 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000). An affirmative defense is "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." Black's Law Dictionary 482 (9th ed. 2009). Thus, in essence, duress would provide Todd with a legally valid reason for committing the acts he did; duress does not however transform those acts into non-criminal activity as defendant argues. Whether Todd was acting of his own free will or under duress, or any level of volition between, his acts still constitute a crime, and thus this argument is without merit.

III. Testimony

Defendant next argues that the trial court erred in allowing the testimony of various witnesses.

A. Mr. Billy Payne

[3] Defendant objected during his trial, but "[e]ven if the complaining party can show that the trial court erred in its ruling, relief will not ordinarily be granted absent a showing of prejudice." *State v. Edmonds*, ___ N.C. App. ___, ___, 713 S.E.2d 111, 117 (2011) (citation and quotation marks omitted).

Defendant's first argument is regarding the testimony of Becca's adoptive father, Mr. Billy Payne; defendant argues that Mr. Payne's testimony "not only went far beyond that of [Becca's] but in fact con-

tradicted her testimony[.]" Mr. Payne's allegedly erroneous testimony included stating that Todd "put his thing in her and that daddy was there when he did that, and that daddy put his thing in her mouth and made a mess all over her on numerous occasions." Even assuming *arguendo* that the trial court erred in allowing Mr. Payne to testify as he did, it was not prejudicial in light of Becca's testimony establishing numerous sexual offenses committed against her, Todd's testimony regarding what he witnessed, and Dr. Cerjan's testimony which stated that Becca's vaginal exam was abnormal in a manner which would only be caused by repeated "direct trauma going into the vaginal opening." In fact, Becca's and Todd's testimonies alone establish all of the elements of the crimes with which defendant was charged. Accordingly, we find no prejudice, and this argument is overruled.

B. Plain Error

[4] Defendant concedes that he did not object to some of the witnesses' testimonies and thus requests this Court review these issues for plain error.

> [T]he plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation, quotation marks, ellipses, and brackets omitted). "Plain error is error so fundamental that it tilted the scales and caused the jury to reach its verdict convicting the defendant." *State v. McNeil*, 196 N.C. App. 394, 400, 674 S.E.2d 813, 817 (2009) (citation and quotation marks omitted).

1. Todd

As to Todd's testimony, regarding what his father did to Becca and himself, defendant notes that it differs from Becca's in that she testified only that Todd "insert[ed] a toy car into her vaginal opening"

whereas Todd testified "he had oral sex with her, anal sex with her and vaginal sex with her[.]" Defendant's convictions involving acts which he forced Todd to commit were aiding and abetting a sex offense and child abuse by allowing a sex act. Thus, even assuming *arguendo* that Todd's testimony was erroneously admitted, defendant fails to show plain error because Becca's testimony alone establishes the elements of the crimes for defendant's relevant convictions. *See* N.C. Gen. Stat. §§ 14-27.4(a)(1), -318.4(a2). Accordingly, this argument is overruled.

2. Dr. Robert Costrini

Defendant next argues that the trial court erroneously allowed Dr. Robert Costrini, Todd's therapist, to testify as he did because Todd

> said the only thing that occurred in the presence of his father was oral sex. Dr. Costrini testified that typically when the three were together it involved vaginal penetration with his penis and anal penetration. The testimony alleging that [defendant] would undress and remove his penis and masturbate while watching the two children was never testified to by

Todd or Becca. Again, even assuming *arguendo* that the trial court erred in allowing Dr. Costrini to testify in the manner described herein, defendant cannot show plain error in light of Becca's, Todd's, and Dr. Cerjan's testimonies. This argument is overruled.

3. Investigator T.O. Curry

Defendant also contends that

> [a]lthough [Todd]'s testimony was clear, that his father was not present when anal or vaginal intercourse was occurring between he and [Becca], Detective Curry[, law enforcement investigator,] was allowed to dispute and contradict that testimony by saying that [Todd] told him that his father was present in the room when he placed his penis inside the vagina of [Becca].

Defendant also argues that "the trial court committed reversible plain error by allowing Detective Currie [sic] to give improper testimony of [Todd]'s credibility by stating "I felt like he told me the truth in what he told me[.]' " (Original in all caps.) Again, in light of Becca's, Todd's, and Dr. Cerjan's testimonies, any erroneous admission of this portion of Detective Curry's testimony is not plain error. This argument is overruled.

4. Mr. Billy Payne

As to Mr. Payne's testimony defendant also argues that "the trial court committed reversible plain error by allowing Billy Payne to give improper testimony of [Becca]'s credibility by stating [Becca] has never said "it didn't happen or that someone else did those things to her." (Original in all caps.) Again, in light of the other evidence against defendant the admission of such a statement would not constitute plain error.

IV. Acting in Concert

[5] Defendant next contends that the trial court erroneously instructed the jury on acting in concert when "[t]he evidence at trial showed that [Todd] was a 12-year old boy who acted under the direct orders and threats from [defendant] and therefore was not acting together in harmony or in conjunction with another pursuant to a common plan or purpose." Similar to his aiding and abetting argument, defendant essentially argues here that because Todd was a victim of the crime, he could not be acting in concert with defendant to commit the crime. Defendant again concedes that because he failed to object at trial we may only review this issue for plain error. We have read the jury instructions as a whole, and in light of the fact that they correctly state the law as to aiding and abetting, defendant did not object to the aiding and abetting instruction, and the fact that the jury could have found defendant guilty of aiding and abetting as to the acts which he forced Todd to perform, rather than finding him guilty of acting in concert with Todd, we conclude that defendant has not met the high hurdle of plain error. This argument is overruled.

V. Satellite-Based Monitoring

[6] Lastly, defendant requests we review the trial court's orders requiring him to enroll in satellite-based monitoring ("SBM"). Defendant failed to file a written notice of appeal from his orders imposing SBM but did file a petition for certiorari asking us to review this issue. The State also requests that this Court allow defendant's petition for certiorari. In *State v. Mann*, this Court stated:

> Defendant petitions this Court for writ of certiorari because he failed to file written notice of appeal as required by *State v. Brooks*, ___ N.C. App. ___, ___, 693 S.E.2d 204, 206 (2010) (holding oral notice pursuant to N.C.R. App. P. 4(a)(1) insufficient to confer jurisdiction on this Court because SBM hearings involve a civil " 'regulatory scheme' " (quoting *State v. Bare*, 197 N.C. App.

> 461, 472, 677 S.E.2d 518, 527 (2009), *disc. review denied*, 364 N.C. 436, 702 S.E.2d 492 (2010))). The *Brooks* opinion was filed 18 May 2010 and defendant was sentenced two months later on 19 July 2010. Because *Brooks* was filed only two months before defendant's sentencing, we choose, in our discretion, to allow the petition for writ of certiorari.

___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (COA 10-1186) (Aug. 2, 2011). Here, the trial court orders requiring defendant to enroll in SBM were entered on 16 August 2010. As 16 August 2010 is within three months of when *State v. Brooks* was filed, we grant defendant's petition for certiorari in our discretion. *See id.*

As to the orders for SBM, defendant specifically argues that "the trial court committed reversible error by sentencing the defendant to a lifetime satellite-based monitoring program for the rest of his natural life when the court made a finding defendant did not require the highest level of satellite monitoring." (Original in all caps.) Defendant requests a new hearing regarding SBM. We agree.

Indeed, defendant's SBM orders conclude that he "has not been classified as a sexually violent predator[,]" "is not a recidivist[,]" and that though his offenses "did involve the physical, mental, or sexual abuse of a minor" defendant "does not require the highest possible level of supervision and monitoring[.]" Despite these findings, the orders go on to require defendant to enroll in SBM for life. The State's brief also essentially concedes that defendant should receive a new hearing as to SBM as it "request[s] remand for clarification in light of the conflict between the findings and the order." In addition, it appears from the transcript that this was not a clerical error where the trial court mistakenly checked the wrong box on the form. The trial court stated that it

> was my assumption that he would not need monitoring in the Department of Corrections. Well, I think given his lack of previous record, the fact that he's going to be serving a long-term prison sentence, and that there's no indication that he has victimized any other person other than the two children, I am not going to find that he requires the highest level of satellite monitoring.

However, our statutes do not provide for different levels of SBM; the proper finding is that the defendant requires, or does not require, "the highest possible level of supervision and monitoring[,]" and "the highest level of supervision and monitoring" is, by definition, SBM.

See State v. Kilby, 198 N.C. App. 363, 367 n.2, 679 S.E.2d 430, 432 n.2 (2009). As this Court has noted, the statutory phrase

> 'highest possible level of supervision and monitoring' simply refers to SBM, as the statute provides only for SBM and does not provide for any lesser levels or forms of supervision or monitoring of a sex offender. If SBM is imposed, the only remaining variable to be determined by the court is the duration of the SBM.

Id.

It appears from the transcript that the trial court may have determined defendant would not require "the highest possible level of supervision and monitoring" in the form of SBM since defendant would be in prison for such a long time, but nonetheless the trial court ordered SBM because *if* the defendant is released from prison, SBM would be required. However, the determination as to whether SBM is required is to be based upon the relevant statutory language, rather than defendant's likely term of imprisonment. *See State v. Causby*, 200 N.C. App. 113, 115, 683 S.E.2d 262, 263-64 (2009) ("N.C. Gen. Stat. § 14-208.40A(d) provides that if the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, that the offense is not an aggravated offense or a violation of G.S. 14-27.2A or G.S. 14-27.4A and the offender is not a recidivist, the court shall order that the Department of Correction do a risk assessment of the offender. Upon receipt of that risk assessment, the court shall determine whether, based on the Department's risk assessment, the offender requires the highest possible level of supervision and monitoring." N.C. Gen. Stat. § 14-208.40A(e). If . . . the trial court determines that the offender does require the highest possible level of supervision and monitoring, then the trial court "shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court." (citation, quotation marks, and brackets omitted)). We find nothing in Chapter 14, Article 27A of the North Carolina General Statutes which provides that the length of the sentences of a defendant required to be on SBM should be a factor in determining if defendant "requires" SBM, if and when he is released from prison. As the trial court's finding that defendant "does not require the highest possible level of supervision and monitoring" does not support the order's decree that defendant enroll in SBM for life and as it is unclear whether either the finding or the requirement of SBM was entered in error, we must reverse and remand defendant's orders requiring SBM for a new hearing.

VI. Conclusion

For the foregoing reasons, we find no error in defendant's trial but order that he receive a new hearing regarding his enrollment in SBM.

NO ERROR in part; REVERSED and REMANDED in part.

Judges GEER and THIGPEN concur.

ROBERT EDWARD BELL, PLAINTIFF v. JAMES W. MOZLEY, JR., DEFENDANT

No. COA11-393

(Filed 1 November 2011)

Jurisdiction—personal—insufficient minimum contacts—alienation of affections—criminal conversation—due process rights

The trial court erred in an alienation of affections and criminal conversation case by denying defendant's motions to dismiss under N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(2). Defendant did not have the requisite minimum contacts with this state for either specific or general jurisdiction purposes, and the trial court's exercise of personal jurisdiction over defendant would violate defendant's due process rights.

Appeal by defendant from orders entered 20 January 2011 by Judge Jesse B. Caldwell, III, in Caldwell County Superior Court. Heard in the Court of Appeals 28 September 2011.

W. Wallace Respess, Jr., for plaintiff appellee.

Morrow Porter Vermitsky & Fowler, PLLC, by Katie Foster Fowler and John F. Morrow, for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals two orders entered by the trial court denying his motions to dismiss pursuant to Rules 12(b)(1) and 12(b)(2) of the North Carolina Rules of Civil Procedure. We reverse.

I. Background

Robert Edward Bell ("plaintiff") is a citizen and resident of Beaufort County, South Carolina.

Plaintiff also owns a second home in Blowing Rock, Caldwell County, North Carolina. James W. Mozley, Jr. ("defendant") is also a citizen and resident of Beaufort County, South Carolina.

Defendant is employed with Crescent Resources, LLC ("Crescent"), a company that is headquartered in Charlotte, North Carolina. Defendant serves as the company's vice president and as president of the company's residential division. Beginning in 2005 or 2006, Crescent began a development project in Burke County, North Carolina, which adjoins Caldwell County, North Carolina. This development project is presently ongoing. Defendant leads the development, and in connection with his employment, defendant travels to North Carolina up to six times per year. In addition, defendant communicates with Crescent's home office in Charlotte by telephone twice a month, and by email once per week.

On 30 September 2009, plaintiff filed a complaint against defendant in Caldwell County Superior Court, seeking compensatory and punitive damages upon allegations that defendant had alienated the affections of plaintiff's wife and that defendant had engaged in criminal conversation with plaintiff's wife. In his complaint, plaintiff alleged that he was married to Lisa R. Bell ("Lisa") on 4 March 2000. Plaintiff stated that "two children were born of their marriage," A.B., born in 2002, and N.B., born in 2005. Plaintiff further alleged the following:

> 10. In late December of 2006, the Plaintiff and his wife Lisa R. Bell invited the Defendant and his wife Janet Mozley to their residence in Blowing Rock, Caldwell County, North Carolina for New Years.
>
> 11. During the visit, the minor child [A.B.] became ill and was rushed back to South Carolina by the Plaintiff. Lisa R. Bell remained in the Blowing Rock residence with the Defendant and his wife Janet Mozley.
>
> 12. After returning to their residence in Beaufort, South Carolina in January of 2007, the marriage began experiencing difficulties. Later Lisa R. Bell would remark that the difficulties began at the time of the New Year's visit.

Plaintiff also alleged that "[b]eginning in early 2007, the Defendant commenced an adulterous relationship with Lisa R. Bell." Plaintiff and Lisa separated on 16 July 2008 and were divorced on 24 July 2009.

On 22 October 2009, defendant filed motions to dismiss plaintiff's claims for lack of subject matter jurisdiction under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure; lack of personal jurisdiction under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure; and failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Thereafter, on 29 July 2010, defendant filed a motion for summary judgment based upon defendant's motions for dismissal for lack of subject matter jurisdiction and personal jurisdiction. Attached to defendant's motion for summary judgment were sworn affidavits by defendant and Lisa. In his affidavit, defendant attested that he is a citizen and resident of Beaufort County, South Carolina, and has "never been a resident of the state of North Carolina." Defendant also stated that his "primary contact with North Carolina" is through his employment with Crescent. Defendant stated that the "only time period" in which he was present in the State of North Carolina in the presence of plaintiff and/or Lisa was on the occasion of the December 2006 New Year's trip. Lisa likewise attested this was the only occasion during which defendant was in her presence in the State of North Carolina. Lisa also attested that she is a "citizen and resident of Charleston, South Carolina."

In response, plaintiff also filed a sworn affidavit. In addition to the allegations in plaintiff's complaint regarding the December 2006 New Year's trip, plaintiff attested that on 17 July 2007, while he and Lisa were at their Blowing Rock home, Lisa called defendant's home on three occasions, defendant returned Lisa's calls, and defendant and Lisa spoke for approximately five minutes. Plaintiff further attested that in July 2008, he found a partially used bottle of vaginal lubricant in Lisa's bedside table. Plaintiff stated that he had never used vaginal lubricant with Lisa in their Blowing Rock home.

Depositions were also taken of both plaintiff and defendant. In his deposition, defendant admitted having sexual relations with Lisa in the States of South Carolina, New York, California, and Hawaii. Defendant also admitted that he used vaginal lubricant during sexual intercourse with Lisa, although defendant testified this was not during the period in which Lisa was still married to plaintiff.

At his deposition, plaintiff admitted that all of the actions alleged in his complaint, aside from the allegations concerning the December 2006 New Year's trip, occurred in the State of South Carolina. Plaintiff likewise admitted that all of the witness affidavits obtained in this case were given by individuals living in South Carolina within 50 miles of the parties. Plaintiff also admitted that he had no personal knowledge and no direct evidence of any contact between Lisa and defendant in the State of North Carolina other than the December 2006 New Year's trip.

On 20 January 2011, following a hearing at which the depositions of the parties and the affidavits of the parties and Lisa were submitted as evidence, the trial court entered two orders denying defendant's motions to dismiss for lack of personal jurisdiction and lack of subject matter jurisdiction. Defendant timely appealed to this Court.

II. Personal Jurisdiction

We first address defendant's argument that the trial court erred in denying his motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. Although the order denying defendant's motion to dismiss is an interlocutory order, N.C. Gen. Stat. § 1-277(b) (2009) provides that "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . . ." *Id.* Accordingly, "the denial of [defendant]'s motion to dismiss on personal jurisdiction grounds is immediately appealable." *Bauer v. Douglas Aquatics, Inc.*, ___ N.C. App. ___, ___, 698 S.E.2d 757, 760 (2010).

"The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record[.]" *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999). " '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.' " *Nat'l Util. Review, LLC v. Care Ctrs., Inc.*, 200 N.C. App. 301, 303, 683 S.E.2d 460, 463 (2009) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). We review *de novo* the issue of whether the trial court's findings of fact support its conclusion of law that the court has personal jurisdiction over defendant. *Id.*

"Our courts engage in a two-step inquiry to resolve whether personal jurisdiction over a non-resident defendant is properly asserted:

first, North Carolina's long-arm statute must authorize jurisdiction over the defendant. If so, the court must then determine whether the exercise of jurisdiction is consistent with due process." *Bauer*, ___ N.C. App. at ___, 698 S.E.2d at 760. "A plaintiff bears the burden of establishing that some ground exists for the exercise of personal jurisdiction over a defendant." *Jaeger v. Applied Analytical Indus. Deutschland GMBH*, 159 N.C. App. 167, 170, 582 S.E.2d 640, 643-44 (2003). In the present case, defendant does not appear to dispute the applicability of North Carolina's long-arm statutory authority. Rather, defendant contends that the trial court erred in denying his motion to dismiss because plaintiff failed to establish that defendant has the necessary minimum contacts with this state to satisfy the requirements of due process. Accordingly, we limit our discussion to the issue of whether North Carolina's exercise of personal jurisdiction over defendant in the present action comports with due process of law.

"In order to satisfy the requirements of the Due Process Clause, the pivotal inquiry is whether the defendant has established 'certain minimum contacts with [the forum state] such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' " *MidweSterling*, 133 N.C. App. at 143, 515 S.E.2d at 49 (alteration in original) (quoting *Murphy v. Glafenhein*, 110 N.C. App. 830, 835, 431 S.E.2d 241, 244 (1993) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945))). "The relationship between the defendant and the forum state must be such that the defendant should 'reasonably anticipate being haled into' a North Carolina court." *Tejal Vyas, LLC v. Carriage Park Ltd. P'ship*, 166 N.C. App. 34, 39, 600 S.E.2d 881, 885-86 (2004) (quoting *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 632, 394 S.E.2d 651, 656 (1990)). "The facts of each case determine whether the defendant's activities in the forum state satisfy due process." *Id.* at 39, 600 S.E.2d at 886.

> In cases which arise from or are related to defendant's contacts with the forum, a court is said to exercise specific jurisdiction over the defendant. However, in cases . . . where defendant's contacts with the state are not related to the suit, an application of the doctrine of general jurisdiction is appropriate. Under this doctrine, jurisdiction may be asserted even if the cause of action is unrelated to defendant's activities in the forum as long as there are sufficient continuous and systematic contacts between defendant and the forum state.

Bruggeman v. Meditrust Acquisition Co., 138 N.C. App. 612, 617, 532 S.E.2d 215, 219 (2000) (internal quotation marks and citations omitted).

In determining whether sufficient minimum contacts exist, our Courts consider (1) the quantity of the contacts between defendant and North Carolina; (2) the nature and quality of such contacts; (3) the source and connection of plaintiff's cause of action to those contacts; (4) the interest of North Carolina in having plaintiff's case tried here; and (5) the convenience to the parties. *First Union Nat'l Bank of Del. v. Bankers Wholesale Mortgage, LLC*, 153 N.C. App. 248, 253, 570 S.E.2d 217, 221 (2002). "No single factor controls, but they all must be weighed in light of fundamental fairness and the circumstances of the case." *B.F. Goodrich Co. v. Tire King*, 80 N.C. App. 129, 132, 341 S.E.2d 65, 67 (1986). In addition, "[t]his Court must also weigh and consider the interests of and fairness to the parties involved in the litigation." *Tejal Vyas*, 166 N.C. App. at 40, 600 S.E.2d at 886.

In the present case, the only evidence offered by plaintiff to establish specific jurisdiction over defendant is as follows: defendant was an invited guest at plaintiff's Blowing Rock home for approximately three days for a December 2006 New Year's holiday trip; defendant returned a phone call to Lisa while she was at the Blowing Rock home during which they spoke for approximately five minutes; plaintiff discovered lubricant in Lisa's bedside table at plaintiff's Blowing Rock home in July 2008; and defendant admitted using vaginal lubricant during sexual intercourse with Lisa in other states. It appears from the trial court's order that the trial court recognized that this evidence is insufficient to support a conclusion that the trial court retained specific jurisdiction over defendant, given the speculative and tenuous connection between defendant's contacts with Lisa in this state and plaintiff's causes of action. Thus, we review defendant's contacts with the State of North Carolina for purposes of general jurisdiction. We defer to the trial court's unchallenged findings of fact so long as they are supported by competent evidence. *Deer Corp. v. Carter*, 177 N.C. App. 314, 321, 629 S.E.2d 159, 165 (2006).

Regarding the first two factors—the quantity and nature of defendant's North Carolina contacts—the trial court made the following pertinent findings of fact: defendant is employed by Crescent, a company that is registered and certified to do business in the State of North Carolina with its headquarters in Charlotte, North Carolina;

defendant is the senior vice president of Crescent and president of the company's residential division; as president of the residential division and senior vice president of the company, "the Defendant visits Charlotte, North Carolina as many as six (6) times per year conducting business on behalf of his employer. Additionally, the Defendant communicates with the home office in Charlotte, North Carolina by telephone at least twice per month and communicates by e-mail to the Charlotte, North Carolina office from South Carolina once a week"; defendant spearheaded the company's development of property located in Burke County, North Carolina, beginning in 2005 or 2006 and visits North Carolina once every two months to supervise the "presently ongoing" project; defendant has been involved in other projects for Crescent in North Carolina, specifically a project at Lake Norman, North Carolina. Therefore, the trial court's findings of fact support the conclusion that defendant's business contacts with this state are continuous and systematic in nature.

Nonetheless, "a finding of continuous and systematic contacts does not automatically authorize the exercise of personal jurisdiction over a defendant." *Eluhu v. Rosenhaus*, 159 N.C. App. 355, 361, 583 S.E.2d 707, 712 (2003). Rather, a review of the remaining factors in the present case compel us to conclude that defendant's contacts with this state do not support a finding that due process has been satisfied for general jurisdiction over defendant in the present case.

First, regarding "the source and connection" of plaintiff's cause of action with defendant's contacts, defendant's contacts with this state, as reflected by the trial court's findings of fact, are strictly related to defendant's employment. There is no evidence in the record, nor did the trial court find as fact, that defendant has had significant contact with the State of North Carolina in any other manner. Thus, defendant's contacts are clearly not the source of and are in no way related to plaintiff's claims for alienation of affection and criminal conversation.

The next factor—the interest of the forum state—likewise heavily militates against North Carolina's exercise of personal jurisdiction in this case. In its order, the trial court made the following finding: "North Carolina's interest in providing a forum for the Plaintiff's cause of action is especially great in light of the circumstances. South Carolina has abolished the torts of Alienation of Affection and Criminal Conversation." However, this finding is directly contrary to this Court's holding in *Eluhu*, 159 N.C. App. 355, 583 S.E.2d 707.

The facts in *Eluhu* are substantially similar to the facts in the present case. *Eluhu* involved a plaintiff who was a citizen and resident of the State of Tennessee seeking damages upon allegations that the defendant had alienated the affections of the plaintiff's wife, also a citizen and resident of Tennessee. *Id.* at 356-57, 583 S.E.2d at 709. At the time the plaintiff filed his action in *Eluhu*, the defendant was a citizen and resident of the State of California. *Id.* at 356, 583 S.E.2d at 709. However, prior to moving to California, the defendant had resided in Raleigh, North Carolina, for nearly six years before residing in Nashville, Tennessee, for nearly two years. *Id.* After moving to Tennessee, the defendant in *Eluhu* made occasional visits to North Carolina to visit his wife and son, owned a house in Raleigh, North Carolina, that he rented to a third party, and vacationed in Atlantic Beach, North Carolina, for approximately three days. *Id.* at 356-57, 583 S.E.2d at 709.

Evaluating the factors for personal jurisdiction in *Eluhu*, this Court recognized that the State of North Carolina has an interest in both "providing a forum for actions based on torts that occur in North Carolina," and protecting the institution of marriage between North Carolina residents. *Id.* at 360, 362, 583 S.E.2d at 711, 712. However, as we held in *Eluhu*, such is not the case here. Rather, in the present case, as in *Eluhu*, "the evidence presented to the trial court showed that neither plaintiff nor defendant is a resident of North Carolina and that almost all of the contact between defendant and [plaintiff's wife] occurred in [another state]." *Id.* at 360, 583 S.E.2d at 711.

Moreover, this Court stated in *Eluhu*:

> Given that the tort of alienation of affection has been abolished in both [defendant's state of residence and the state in which the tortious acts admittedly occurred], but not North Carolina, and that it is a transitory tort, to which courts must apply the substantive law of the state in which the tort occurred, *plaintiff's decision to sue defendant in North Carolina smacks of forum-shopping.*

Id. (citations omitted) (emphasis added). Here, defendant has admitted engaging in sexual relations with Lisa in South Carolina, New York, California, and Hawaii. However, there is little, if any, evidence that defendant had sexual relations with Lisa in the State of North Carolina. In fact, plaintiff admitted in his deposition that he had no personal knowledge and no direct evidence of defendant and Lisa being together in this state. In addition, both parties to this case live

in the State of South Carolina, a vast majority of the actions alleged in plaintiff's complaint occurred in the State of South Carolina, and plaintiff has admitted that all witness affidavits obtained in this case were from individuals living within 50 miles of the parties in the State of South Carolina. Given these facts, coupled with the fact that South Carolina has abolished these torts, we are compelled to conclude that "plaintiff's decision to sue defendant in North Carolina smacks of forum-shopping." *Id.*

Furthermore, although plaintiff argues the inconvenience to defendant in litigating his claim in North Carolina is minimal given that defendant lives in a neighboring state and travels to North Carolina for business, we conclude that it would be inconvenient for defendant to defend this matter in North Carolina. Not only would defendant be required to travel in excess of five hours from his home in South Carolina more frequently than his six visits per year for business purposes, "[p]laintiff neither alleged nor attested to the existence of witnesses or evidence within North Carolina necessary to his case." *Id.* at 362, 583 S.E.2d at 712. "Without some showing of interest on the part of North Carolina in adjudicating this dispute, the inconvenience to defendant of defending the matter here is not mitigated." *Id.* Because we find the circumstances of this case strikingly similar to those in *Eluhu*, that decision is controlling here.

Thus, in light of fundamental fairness to the parties, and considering the overwhelming majority of the actions concerning the claims of plaintiff occurred in other states which have abolished the claims plaintiff is seeking to litigate against defendant in North Carolina, we conclude due process would be violated by the exercise of personal jurisdiction in this case. Although defendant's business contacts with North Carolina appear to be continuous and systematic, such contacts are insufficient in the present case to support a conclusion that defendant should "reasonably anticipate being haled into a North Carolina court" to defend any type of litigation filed against him. *Tejal Vyas*, 166 N.C. App. at 39, 600 S.E.2d at 885-86 (internal quotation marks and citation omitted).

Because we conclude the trial court cannot properly assert personal jurisdiction over defendant for plaintiff's alienation of affection and criminal conversation claims, we need not address defendant's remaining argument concerning the trial court's subject matter jurisdiction in this case.

III. Conclusion

Based on the foregoing, we conclude that defendant does not have the requisite minimum contacts with this state for either specific or general jurisdiction purposes and that the trial court erroneously found that this state's exercise of personal jurisdiction over defendant would not violate defendant's due process rights. Accordingly, the order of the trial court must be reversed.

Reversed.

Judges HUNTER (Robert C.) and STEELMAN concur.

MOORE PRINTING, INC., PLAINTIFF v. AUTOMATED PRINT SOLUTIONS, LLC, DEFENDANT

No. COA11-308

(Filed 1 November 2011)

1. Uniform Commercial Code—lease of printer—document insufficient—not enforceable

The trial court did not err by granting summary judgment for defendant in a dispute over a leased high-speed commercial printer where there was no issue of fact as to whether a contract existed between plaintiff and defendant. The document cited by plaintiff as a firm offer under the Uniform Commercial Code was not signed by defendant and was insufficient to form an enforceable lease.

2. Leases of Personal Property—privity—lease of printing equipment

There was no implied privity of contract between plaintiff and defendant through plaintiff's lease of commercial printing equipment with Wells Fargo where the equipment was demonstrated to plaintiff by defendant, defendant provided the specifications and a proposed lease agreement to plaintiff, and defend- ant signed a separate maintenance agreement with defendant. Defendant was not mentioned in the lease agreement, the lease named another company as the supplier-seller of the equipment, and the company named as the supplier-seller was not mentioned in plaintiff's suit.

3. Warranties—leased equipment—party proposing sale—not a party to lease

The trial court did not err by granting summary judgment for defendant in an action involving leased printing equipment where plaintiff contended that defendant had made actionable warranties, but the written contract between plaintiff and defendant was only for printer maintenance and supplies. Any redress under warranties from the supplier-seller would be not be owed by defendant.

4. Discovery—summary judgment before end of discovery—no prejudice

Plaintiff did not show prejudice where summary judgment was granted before the discovery period was complete. Plaintiff did not seek additional information through discovery prior to the order granting summary judgment and did not allege evidence that might have been produced before the end of the discovery period.

5. Leases of Personal Property—rescission—parties

It was not possible to rescind a lease for commercial printing equipment for breach of warranties where the company that presented the proposal for the equipment was not a party to the lease and the company listed on the lease agreement was not a party to the suit. There was no contract between plaintiff and defendant from which plaintiff would be entitled to warranties for the printer's performance.

6. Unfair Trade Practices—lease of commercial printer—lease not required—performance observed before lease

There was no unfair or deceptive trade practice in the lease of a commercial printer where plaintiff was encouraged to lease rather than purchase the equipment but was not forced to sign the lease agreement, and plaintiff's president observed a demonstration of the equipment in which it did not work satisfactorily but attributed the problem to user error and did not further confirm the quality or performance of the printer.

7. Uniform Commercial Code—nonconforming good—cure—defendant not the seller

The trial court did not err by granting summary judgment for defendant on its counterclaim for ink and maintenance in a dispute over a leased printer where plaintiff contended that defendant's attempts to resolve the printing problems were attempts to

cure a nonconforming good. Defendant was not a party to the lease agreement, but merely had an agreement for maintenance and supplies. Assuming that the printer was a nonconforming good, defendant was not the seller of the printer.

Appeal by plaintiff from order entered 23 November 2010 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 September 2011.

John F. Hanzel, P.A., by John F. Hanzel, for plaintiff-appellant.

H.M. Whitesides, Jr., for defendant-appellee.

HUNTER, Robert C., Judge.

Plaintiff Moore Printing, Inc. ("Moore Printing") appeals from the trial court's order granting defendant Automated Print Solutions, LLC's ("APS") motions for summary judgment. After careful review, we affirm.

Background

This case stems from a dispute regarding the lease of a high-speed commercial printer by Moore Printing, a printing company located in Lincolnton, North Carolina. APS is a Charlotte-based company "dedicated to the sales and service of the Riso line of digital printing products." APS performed a demonstration of a Riso HC5500 high-speed commercial printer ("the printer") for Moore Printing and submitted a proposal for the lease and maintenance of the printer. The proposal, which states it "is a proposal only and informative in nature[,]" provides the specifications of the printer, leasing options, and terms of a maintenance plan that included parts, labor, and ink.

On 17 April 2009, Cathy Moore ("Ms. Moore"), president of Moore Printing, signed an "Equipment Lease Agreement" with Wells Fargo Financial Leasing, Inc. ("Wells Fargo"). The lease agreement specified Wells Fargo was leasing the printer to Moore Printing and that Network Data Systems was the "equipment supplier." Although APS provided Moore Printing with the proposal and the lease agreement, and conducted the demonstration of the printer, APS is not mentioned in the lease agreement. Rather, Moore Printing entered into a separate maintenance agreement for the printer with APS.

The lease between Moore Printing and Wells Fargo included a disclaimer of all warranties and states the lessee is leasing the equip-

ment "as is." However, the lease also states that the lessee "may be entitled to the promises and warranties (if any) provided to [Wells Fargo] by the Supplier." The lease further provides that Wells Fargo did "transfer to [Moore Printing] all automatically transferable warranties, if any, made to [Wells Fargo] by the Supplier."

Moore Printing states that it began having problems with the printer shortly after taking delivery. Through its maintenance contract with Moore Printing, APS attempted to resolve the problems on several occasions, but Moore Printing had to discard many printing jobs due to the problems. Ultimately, APS was unable to resolve the printer problems to the satisfaction of Moore Printing.

On 15 March 2010, Moore Printing filed suit against APS alleging breach of contract, breach of fitness for a particular purpose, conversion, and unfair and deceptive trade practices. Moore Printing also sought rescission of the lease agreement and *quantum meruit*. On 19 April 2010, APS filed a counterclaim for nonpayment of maintenance services rendered and supplies delivered to Moore Printing.

On 17 September 2010, APS filed a motion for summary judgment asking the trial court to dismiss Moore Printing's complaint in its entirety, arguing that APS was not a party to Moore Printing's lease agreement for the printer and that any representations made by APS were not specific enough to constitute warranties. APS also moved for summary judgment on its counterclaim for lack of payment pursuant to its maintenance contract with Moore Printing. On 21 October 2010, APS moved for, and was granted, an extension to respond to Moore Printing's first set of interrogatories and requests for production of documents, extending the deadline to and including 25 November 2010. However, on 23 November 2010, after reviewing the pleadings, depositions, and documents tendered, the trial court entered an order granting APS's motions for summary judgment and awarded $4,784.50 in favor of APS on its counterclaim. Moore Printing timely appealed from this order.

Discussion

We review the trial court's grant of summary judgment *de novo*. *Stratton v. Royal Bank of Canada*, ___ N.C. App. ___, ___, 712 S.E.2d 221, 226 (2011). To prevail on a motion of summary judgment the moving party must establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Taylor v. Ashburn*, 112 N.C. App. 604, 606, 436 S.E.2d 276, 278

(1993). The moving party can satisfy this burden "by showing either (1) an essential element of the non-movant's claim is nonexistent, (2) the non-movant cannot produce evidence to support an essential element of his claim, or (3) the non-movant cannot surmount an affirmative defense which would bar his claim." *Id.* at 606-07, 436 S.E.2d at 278.

A. Lease Agreement

Moore Printing argues the trial court erred in granting APS' motions for summary judgment as there is a genuine issue of material fact as to whether a contract exists between Moore Printing and APS for the lease of the printer, either as a matter of fact or as a matter of law. We disagree.

1. "Complete Office Solutions Agreement"

[1] First, Moore Printing argues that APS' proposal for the lease and maintenance of a Riso printer was a "firm offer" under the Uniform Commercial Code ("UCC") and was accepted by Moore Printing, via the signature of Ms. Moore. Moore Printing contends that a genuine issue of material fact exists as to the scope of this agreement.

The document, which Moore Printing refers to as a "firm offer," is printed on APS letterhead and is titled "Complete Office Solutions Agreement." The text of the document contains a brief description of an "HC 5500 Main Unit" and additional items which appear to be parts associated with a printer. It also specifies the terms of a lease, "60 mo. Lease $640.00 mo." Ms. Moore's signature appears under the text "THIS CONTRACT IS NON-CANCELABLE." Moore Printing further argues that the fact that it later entered into a written agreement between Wells Fargo for the lease of the printer, does not negate the existence of the "Complete Office Solutions Agreement."

We note, however, that the UCC, as codified in our General Statues, provides, in pertinent part, that

> [a] lease contract is not enforceable by way of action or defense unless: . . . (b) there is a writing, *signed by the party against whom enforcement is sought* or by that party's authorized agent, sufficient to indicate that a lease contract has been made between the parties and to describe the goods leased and the lease term.

N.C. Gen. Stat. § 25-2A-201(1) to -201(1)(b) (2009) (emphasis added). Here, the "Complete Office Solutions Agreement" is not signed by

APS; only Ms. Moore's signature appears on the document. Therefore, the document is insufficient to form an enforceable lease between Moore Printing and APS.

2. Privity

[2] Alternatively, Moore Printing argues that a contract existed between itself and APS due to implied privity of contract. Moore Printing contends that through its lease agreement with Wells Fargo, Moore Printing has implied privity of contract with the company that sold the printer to Wells Fargo and that this establishes privity of contract between Moore Printing and APS.

In support of its argument, Moore Printing relies on *Coastal Leasing Corp. v. O'Neal* in which this Court held that a lease agreement between the lessor and lessee established privity of contract between the lessee and the supplier-seller (the company that sold the leased equipment to the lessor). 103 N.C. App. 230, 236, 405 S.E.2d 208, 212 (1991). In that case, the lessee negotiated a deal by which the supplier-seller sold refrigeration equipment to the lessor so that the lessor could then lease the equipment to the lessee. *Id.* at 232-33, 405 S.E.2d at 209-10. The lease expressly provided no warranties existed between the lessor and lessee, but provided that the lessee would seek redress for warranty issues against the equipment supplier-seller. *Id.* at 232-33, 405 S.E.2d at 210.

When the equipment failed to meet the lessee's needs, the lessee stopped making lease payments, prompting the lessor to file suit. *Id.* at 231, 234, 405 S.E.2d at 209-10. The lessee then filed a crossclaim against the supplier-seller of the leased equipment alleging a breach of warranty due to the equipment's poor performance. *Id.* at 231, 233, 405 S.E.2d at 210. Claiming, *inter alia*, a lack of privity, the supplier-seller was granted a dismissal of the crossclaim. *Id.* at 231, 234, 405 S.E.2d at 209, 211.

On appeal, this Court concluded the lessee and supplier-seller were in privity of contract for warranty purposes and the lessee had a cognizable claim against the supplier-seller rather than the warranty-disclaiming lessor. *Coastal Leasing Corp.*, 103 N.C. App. at 235-36, 405 S.E.2d at 212. This Court emphasized that the "clear and unambiguous language" of the lease directed the lessee to "seek relief exclusively from the [supplier-]seller of the equipment" and identified the supplier-seller by name. *Id.* at 235, 237, 405 S.E.2d at 211, 213. The Court further noted that the supplier-seller was a party to the suit. *Id.* at 234, 405 S.E.2d at 211.

While the language in the lease between Wells Fargo and Moore Printing is similar to the language in the lease at issue in *Coastal Leasing Corp.*, the present case is distinguishable. Significantly, in *Coastal Leasing Corp.*, the supplier-seller of the leased equipment was specifically identified in the lease as the entity from which the lessee should seek redress and was a party to the subsequent suit for breach of warranty. *Id.* Here, the lease agreement specifies that Network Data Systems is the supplier-seller of the leased equipment, not APS. In fact, APS is not mentioned anywhere in the lease agreement.

Furthermore, in *Costal Leasing Corp.*, this Court concluded that where the lessee was a third-party beneficiary of the sales contract between the supplier-seller and the lessor, the lessee had the right to try to prove that the equipment seller's direct representations to him, or any implied or express warranties made to the lessor, were part of the inducement to enter into the contract. *Id.* at 236, 405 S.E.2d at 212. In the present case, Moore Printing may have been a third-party beneficiary of the sales contract between the supplier-seller and Wells Fargo, but the supplier-seller, Network Data Systems, was not a party to Moore Printing's suit. Thus, we conclude the reasoning of *Coastal Leasing Corp.* does not establish privity of contract between Moore Printing and APS.

B. Warranties

[3] Next, Moore Printing argues that APS is liable to Moore Printing as APS made actionable warranties regarding the printer. We disagree.

Moore Printing relies on the theory that the two parties are in privity of contract for the lease of the printer and any applicable warranties. The written contract between the parties, however, is only for printer maintenance and supplies. Moore Printing cites *Coastal Leasing Corp.* for the proposition that any warranties owed to Wells Fargo from the supplier-seller inure to Moore Printing. However, redress under those warranties, if any exists, would be owed by Network Data Systems, the equipment supplier-seller, not by APS.

C. Discovery

[4] Moore Printing also argues that the trial court erred by granting summary judgment before discovery was concluded. We disagree.

Generally, it is improper for a court to enter summary judgment prior to the close of discovery as long as there are discovery procedures still pending, "which might lead to the production of evidence

relevant to the motion." *Cellu Products Co. v. G.T.E. Products Corp.*, 81 N.C. App. 474, 477, 344 S.E.2d 566, 567 (1986). In that case, this Court concluded that the information sought, by the nonmoving party was not material to the disposition of the case. *Id.* at 477, 344 S.E.2d at 567-68. Therefore, "plaintiff suffered no prejudice because the court granted the summary judgment motion prior to the completion of discovery." *Id.* at 477, 344 S.E.2d at 568.

Moore Printing fails to allege what evidence might have been produced during the three remaining days between the filing of the order granting summary judgment and the end of the discovery period. In addition, there is nothing in the record to show that Moore Printing sought any additional information through discovery prior to the order granting summary judgment. Therefore, Moore Printing fails to demonstrate it was prejudiced.

D. Rescission

[5] Moore Printing argues that it should be able to rescind both its contract with APS and its lease with Wells Fargo for breach of warranties. We disagree.

First, Moore Printing requests this Court to rescind a contract with a party that is not before the Court. "A necessary party is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence." *Crosrol Carding Developments, Inc. v. Gunter & Cooke, Inc.*, 12 N.C. App. 448, 451-52, 183 S.E.2d 834, 837 (1971). Here, the parties to the lease agreement for the printer are Moore Printing and Wells Fargo. As Wells Fargo was not made a party to the suit, it is not possible to rescind the lease agreement.

Additionally, Moore Printing is not entitled to rescission of the maintenance contract with APS because Moore Printing's alleged basis for rescission is breach of warranties made by APS for the printer. "Rescission, an equitable remedy, is allowed to promote justice. The right to rescind does not exist where the breach is not substantial and material and does not go to the heart of an agreement." *Wilson v. Wilson*, 261 N.C. 40, 43, 134 S.E.2d 240, 243 (1964).

Moore Printing again relies on having a contract, either in fact or in law, for the lease of the printer from which Moore Printing would be entitled to warranties from APS for the printer's performance. As discussed above, Moore Printing has no such privity of contract with APS. Therefore, failure of the printer to meet performance expecta-

tions does not qualify as a substantial and material breach of the agreement between Moore Printing and APS. Moore Printing's argument is without merit.

E. Unfair and Deceptive Trade Practices

[6] Next, Moore Printing argues that APS engaged in unfair and deceptive trade practices. Moore Printing alleges that APS "pushed" the company into leasing the printer from Wells Fargo and that APS supplied the company with a printer that did not conform to Moore Printing's requirements. We disagree.

> The elements of a claim for unfair or deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1 (2003) are: (1) an unfair or deceptive act or practice or an unfair method of competition; (2) in or affecting commerce; (3) that proximately causes actual injury to the plaintiff or to his business.

RD&J Props. v. Lauralea-Dilton Enters., 165 N.C. App. 737, 748, 600 S.E.2d 492, 500 (2004).

Moore Printing fails to establish the elements required to sustain a claim of unfair and deceptive trade practices by APS. First, the lease agreement provided no warranty protection to Moore Printing from the lessor. Moore Printing argues that APS "pushed" it into leasing the equipment in an attempt to leave Moore Printing with no remedies if the printer did not perform. Based on the deposition of Ms. Moore, Moore Printing was not forced to sign the lease agreement but was merely "encouraged" to lease rather than purchase the printer. Second, Ms. Moore observed a demonstration of the machine in person and even though the machine was not performing satisfactorily, she attributed the problems to user error. Without further confirming the quality or performance of the printer, Moore Printing entered into the lease agreement with Wells Fargo. Thus, we cannot conclude that Moore Printing was victim of any unfair or deceptive act that prompted the company to enter into the lease agreement with Wells Fargo.

F. Counterclaim

[7] Lastly, Moore Printing argues that the order granting summary judgment on APS' counterclaim should be reversed as the counterclaim for ink and maintenance charges were actually an attempt to cure a nonconforming good, the printer.

Under Moore Printing's theory, APS's efforts to resolve the printing problems were not made pursuant to the maintenance agreement but were attempts to cure a nonconforming good. Moore Printing characterizes its contract with APS as a purchase agreement for the printer and cites N.C. Gen. Stat. § 25-2-508(1) (2009). Section 25-2-508(1) provides that after delivery of a nonconforming good has been rejected, and time for the seller's performance has not expired, "the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery." *Id.*

Moore Printing again relies on the existence of a contract for the lease of the printer between itself and APS. As discussed above, APS is not a party to the lease agreement. Moore Printing and APS have a contract merely for maintenance and supplies for the printer and N.C. Gen. Stat. § 25-2-508(1) does not apply. Assuming *arguendo* that the printer was a nonconforming good, N.C. Gen. Stat. § 25-2-508(1) would not apply here because APS is not the seller of the printer; the equipment supplier-seller is Network Data Systems.

Furthermore, Moore Printing does not dispute that it has not paid APS for the maintenance and supplies that are the subject of the counterclaim. Plaintiff's argument is overruled.

Conclusion

For the reasons stated above, we conclude the trial court did not err in granting defendant's motions for summary judgment.

Affirmed.

Judges STEELMAN and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. FRANCIS LOUIS DEMAIO

No. COA11-407

(Filed 1 November 2011)

1. Appeal and Error—guilty plea—certiorari—Rule 21

Certiorari was granted by the Court of Appeals to hear an appeal from a guilty plea where defendant contended that his plea was improperly accepted because the plea was not the prod-

uct of informed choice and did not provide the benefit of the bargain. Defendant properly petitioned for *certiorari* and, while there are cases from the Court of Appeals that recognize the limits Rule 21 of the Rules of Appellate Procedure places on the ability of the Court of Appeals to grant *certiorari*, those cases cannot overrule *State v. Bolinger*, 320 N.C. 596.

2. Criminal Law—guilty plea—vacated—benefit of bargain impossible

A guilty plea was vacated and remanded where there was no way for defendant to achieve his end of the bargain. Defendant pled not guilty on the condition that his right to appeal the denial of two motions be preserved, but had no statutory right to appeal those motions. Neither motion qualified for review under either Rule 21 of the Rules of Appellate Procedure or *State v. Bolinger*, 320 N.C. 596.

Appeal by Defendant from judgments entered 13 October 2010 by Judge Carl Fox in Chatham County Superior Court. Heard in the Court of Appeals 27 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General LaToya B. Powell, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Daniel Shatz, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Francis Louis Demaio ("Defendant") appeals from judgments entered on his pleas of guilty to trafficking in opium and obtaining a controlled substance by fraud or forgery. Defendant argues the trial court erred in determining that a factual basis for Defendant's plea had been established. Defendant further argues the trial court erred in finding that Defendant's plea was an informed choice made freely, voluntarily, and understandingly.

Recognizing Defendant is not entitled to an appeal as a matter of right on this issue, Defendant filed a petition for writ of certiorari with this Court. On 20 June 2011, the State filed a response to Defendant's petition and a motion to dismiss the appeal. We denied the State's motion to dismiss and, pursuant to *State v. Bolinger*, 320 N.C. 596, 601-02, 359 S.E.2d 459, 462 (1987), now exercise our discretion to allow Defendant's petition for writ of certiorari. We hold

Defendant's plea was not an informed choice since he did not receive the benefit of his plea bargain. Accordingly, we need not address whether a factual basis for Defendant's plea had been established. Thus, we vacate and remand this case to the trial court for further proceedings consistent with this opinion.

I. Factual and Procedural Background

On 23 December 2009, Defendant visited the UNC Hospital emergency room complaining of back pain. After a medical assessment, Dr. Katherine Scott treated Defendant with ten milligrams of oxycodone/APAP, the generic version of Percocet, and prescribed him six Percocet to relieve his pain until his next primary care physician visit.

On 28 December 2009, Defendant took the prescription to Pittsboro Discount Drugs in Chatham County. The prescription the pharmacist, Dr. Gregory Vassie, received was for sixty Percocet, not six as originally prescribed. Dr. Vassie filled the prescription with sixty pills of oxycodone/APAP. He weighed similar pills from a different batch and determined that each such pill weighed .525 grams, with sixty pills totaling 31.50 grams.

The next morning, Dr. Vassie listened to a message on the store's answering machine from an anonymous female caller stating that Defendant had altered the prescription filled by Dr. Vassie the previous day. Dr. Vassie received another call from the same anonymous female caller later that morning with the same message. Dr. Vassie then called Dr. Scott's office to check the validity of the prescription. Dr. Scott's office confirmed the prescription was for six Percocet, not sixty. Dr. Vassie then examined the prescription more closely and determined it had been altered from six to sixty pills. He called Detective Brandon Jones, supervisor of the Chatham County Narcotics Unit, who further investigated the matter.

On 22 February 2010, the Chatham County Grand Jury indicted Defendant for obtaining a controlled substance by fraud in violation of N.C. Gen. Stat. § 90-108(a) and trafficking in opium by possession of more than twenty-eight grams of opium in violation of N.C. Gen. Stat. § 90-95(h)(4). On 11 October 2010, Defendant was charged in a superseding indictment with the same offenses.

Defendant was tried during the 11 October 2010 Criminal Session of Chatham County Superior Court, the Honorable Carl Fox presiding. Before trial, Defendant filed a motion to dismiss the trafficking charge, arguing the rule of lenity required him to be prosecuted for

his possession of sixty oxycodone/APAP pills under N.C. Gen. Stat. § 90-95(d)(2) and not under § 90-95(h)(4). Defendant also filed a motion *in limine* to limit expert testimony identifying the pills as oxycodone/APAP based solely on visual inspection. The court denied both of Defendant's motions.

After the State had presented most of its evidence at trial, Defendant agreed to plead guilty pursuant to a plea agreement. On 13 October 2010, Defendant entered an *Alford* plea of guilty to the Class I felony of obtaining a controlled substance by fraud and the Class E felony of trafficking by possession of more than fourteen and less than twenty-eight grams of opium. Defendant's plea agreement provided that he preserved the right to appeal the denial of his motion to dismiss and motion *in limine*. Pursuant to the agreement, the court imposed active, concurrent sentences of four to five months and 90 to 117 months imprisonment and a $100,000 fine. Defendant gave notice of appeal in open court after sentencing.

II. Analysis

a. Right to Appeal

[1] As a threshold matter, we first address whether Defendant has a right to appeal from his guilty plea. A "defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea." *Bolinger*, 320 N.C. at 601, 359 S.E.2d at 462. A defendant who pleads guilty has a right of appeal limited to the following:

> (1) Whether the sentence "is supported by the evidence." This issue is appealable only if his minimum term of imprison ment does not fall within the presumptive range. N.C. Gen. Stat. § 15A-1444(a1) (2001);
>
> (2) Whether the sentence "results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21." N.C. Gen. Stat. § 15A-1444(a2)(1) (2001);
>
> (3) Whether the sentence contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; N.C. Gen. Stat. § 15A-1444(a2)(2) (2001);
>
> (4) Whether the sentence "contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S.

15A-1340.23 for the defendant's class of offense and prior record or conviction level." N.C. Gen. Stat. § 15A-1444(a2)(3) (2001);

(5) Whether the trial court improperly denied defendant's motion to suppress. N.C. Gen. Stat. §§ 15A-979(b)(2001), 15A-1444(e) (2001);

(6) Whether the trial court improperly denied defendant's motion to withdraw his guilty plea. N.C. Gen. Stat. § 15A-1444(e).

State v. Jamerson, 161 N.C. App. 527, 528-29, 588 S.E.2d 545, 546-47 (2003). Notwithstanding these statutory guidelines, however, our Supreme Court has held that when a trial court improperly accepts a guilty plea, the defendant "may obtain appellate review of this issue only upon grant of a writ of certiorari." *Bolinger*, 320 N.C. at 601, 359 S.E.2d at 462; *see also* N.C. Gen. Stat. § 15A-1444(e) (2009) (A defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court with certain exceptions, "but he may petition the appellate division for review by writ of certiorari.").

Here, Defendant did not have an appeal as of right from his guilty plea. However, his challenge that his plea was improperly accepted because it was not the product of informed choice and did not provide him the benefit of his bargain is a procedural challenge to the guilty plea for which he may petition this Court for writ of certiorari under *Bolinger*. *See* N.C. Gen. Stat. § 15A-1022(b) (2009) (stating that a trial "judge may not accept a plea of guilty . . . from a defendant without first determining that the plea is a product of informed choice"); *see also State v. Jones*, 161 N.C. App. 60, 63, 588 S.E.2d 5, 8 (2003) (reviewing whether defendant received "the benefit of his bargain" after pleading guilty), *rev'd in part on other grounds*, 358 N.C. 473, 598 S.E.2d 125 (2004). Defendant properly petitioned this Court for certiorari, and, therefore, we grant certiorari to review whether the trial court erred in accepting Defendant's guilty plea.

The State argues, however, that *Bolinger* does not control. The State contends the *Bolinger* Court reviewed the merits of the defendant's claim only because neither party recognized the limited bases for appellate review of judgments entered upon guilty pleas. It is true the *Bolinger* Court noted the defendant was not entitled to an appeal from his guilty plea, however, the Court nonetheless determined that review was still available based on a petition for writ of certiorari:

> [A]ccording to N.C.G.S. § 15A-1444 defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea. *Defendant may obtain appellate review of this issue only upon grant of a writ of certiorari.* Because defendant in the instant case failed to petition this Court for a writ of certiorari, he is therefore not entitled to review of the issue.
>
> Neither party to this appeal appears to have recognized the limited bases for appellate review of judgments entered upon pleas of guilty. For this reason, we nevertheless choose to review the merits of defendant's contention.

Bolinger, 320 N.C. at 601-02, 359 S.E.2d at 462 (emphasis added). Here, as the State properly contends, both parties have acknowledged Defendant has no appeal as of right from his guilty plea. However, unlike the defendant in *Bolinger*, Defendant here *did* petition this Court for a writ of certiorari, and we now exercise our discretion to grant Defendant's petition.

The State further argues that *Bolinger* does not control because it does not address Rule 21 of the North Carolina Rules of Appellate Procedure. Rule 21 limits this Court to issuing a writ of certiorari

> in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

N.C. R. App. P. 21(a)(1). The State directs this Court to Judge Thornburg's concurrence in *State v. Carter*, 167 N.C. App. 582, 587, 605 S.E.2d 676, 680 (2004) (Thornburg, J., concurring), in which he states, because the *Bolinger* Court did not address the applicability of Rule 21, "it does not appear the Court in *Bolinger* intended to sanction a general exception to our appellate rules." The State further points out two conflicting lines of opinions by this Court and urges this Court to follow *State v. Dickson*, 151 N.C. App. 136, 564 S.E.2d 640 (2002), and its progeny. These cases recognize the limited ability of this Court under Rule 21 to grant certiorari, thereby requiring dismissal of appeals based on guilty plea procedures. However, as this Court recognized in *State v. Rhodes*, this Court's opinions in *Dickson* and its progeny cannot overrule *Bolinger*, a holding from the Supreme Court, which specifically allows petitioning for certiorari when chal-

lenging guilty plea procedures. 163 N.C. App. 191, 193-94, 592 S.E.2d 731, 732-33 (2004). Only the Supreme Court can revisit that holding. *Id.* at 194, 592 S.E.2d at 733; *see also Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985) (The Court of Appeals has a "responsibility to follow" decisions of the North Carolina Supreme Court, until otherwise ordered by the Supreme Court.). As the issue at hand falls squarely within whether the trial judge followed proper procedure in accepting Defendant's guilty plea, we grant certiorari.

b. Benefit of Plea Bargain

[2] As for Defendant's challenge to the procedure in accepting his guilty plea, he argues his plea was not the product of informed choice because he cannot get the benefit of his plea bargain as he was promised. We agree. This issue presents a question of law, and, as such, is reviewed *de novo. See Al Smith Buick Co., Inc. v. Mazda Motor of Am., Inc.*, 122 N.C. App. 429, 433, 470 S.E.2d 552, 554, *writ denied sub nom*, 343 N.C. 749, 473 S.E.2d 609 (1996).

A defendant who pleads guilty is "entitled to receive the benefit of his bargain." *Jones*, 161 N.C. App. at 63, 588 S.E.2d at 8 (quoting *State v. Wall*, 348 N.C. 671, 676, 502 S.E.2d 585, 588 (1998)). In *Jones*, the defendant pled guilty on the condition that appellate review of his writ of habeas corpus, motion to suppress, and motion to dismiss would be preserved. *Id.* at 61, 588 S.E.2d at 7. This Court, however, lacked jurisdiction to review the denial of the defendant's writ of habeas corpus or motion to dismiss, either by appeal as of right or by granting certiorari. *Id.* at 62, 588 S.E.2d at 7. This Court held that "[a]lthough defendant and the State agreed he could appeal the delineated issues, jurisdiction [could not] be conferred by consent where it does not otherwise exist."[1] *Id.* at 61, 588 S.E.2d at 7 (internal citation and quotation marks omitted).

We recognize that if a defendant does not have an appeal of right, our statute provides for the defendant to seek appellate review by fil-

1. The State contends this case is controlled not by *Jones* relying on *Wall* but by *State v. Rinehart*, where this Court dismissed a defendant's appeal of a plea bargain that improperly preserved defendant's right to appeal the denial of his pretrial motions to dismiss on double jeopardy and speedy trial grounds. *State v. Rinehart*, 195 N.C. App. 774, 673 S.E.2d 769, *appeal dismissed, review denied*, 363 N.C. 380, 680 S.E.2d 204 (2009). In *Rinehart*, this Court stated that *Wall* is "distinguishable from the facts of the present case because the State in *Wall* had, and exercised, its right to appeal from the judgment; in the present case, defendant has no right to appeal." *Id.* at 776 n.1, 673 S.E.2d at 771 n.1. Here, however, as discussed in part a above, Defendant did have a right to appeal his guilty plea procedures pursuant to *Bolinger*, and, thus, this case is analogous to *Wall* and distinguishable from *Rinehart*.

ing a petition for writ of certiorari. N.C. Gen. Stat. § 15A-1444(e) (2009). However, as discussed above, Rule 21 and *Bolinger* provide the only bases upon which this Court may grant certiorari. If a defendant does not have an appeal as of right and we are not permitted under Rule 21 or *Bolinger* to grant certiorari on issues the defendant was promised would be preserved for appeal, then the plea agreement violates the law. *See State v. Smith*, 193 N.C. App. 739, 668 S.E.2d 612 (2008) (finding that a plea agreement improperly preserving appellate review of a denial of a motion to dismiss was unenforceable). In such a situation, the appellate court must place "the defendant back in the position he was in before he struck his bargain[.]" *Jones*, 161 N.C. App. at 63, 588 S.E.2d at 8. "[T]he appellate court should vacate the judgment and remand the case to the trial court where defendant 'may withdraw his guilty plea and proceed to trial on the criminal charges . . . [or] withdraw his plea and attempt to negotiate another plea agreement that does not violate [State law].' " *Id.* (quoting *Wall*, 348 N.C. at 676, 502 S.E.2d at 588 (alterations in original)).

Here, Defendant pled guilty on the condition that "his right to appeal the court's denial of his motion to dismiss and [] motion to limit expert testimony" was preserved. However, Defendant has no statutory right to appeal these motions. Furthermore, this Court cannot grant certiorari to review either of these motions as they do not qualify under either Rule 21 or *Bolinger*. Therefore, because there is no way for Defendant to achieve his end of the plea bargain, his plea bargain violated the law. Accordingly, we must place Defendant back in the position he was before he struck his bargain. Therefore, we vacate the judgment and remand this case to the trial court where Defendant may either withdraw his guilty plea and proceed to trial on the original charges or withdraw his plea and attempt to negotiate another plea agreement that does not violate North Carolina law.

III. Conclusion

Because Defendant did not receive the benefit of his plea bargain, we vacate the judgment and remand to the trial court for further proceedings consistent with this opinion.

Vacated and remanded.

Judges McGEE and ELMORE concur.

STATE OF NORTH CAROLINA v. REYNARLDO RAFAEL RIVERA

No. COA11-268

(Filed 1 November 2011)

Robbery—dangerous weapon—stun gun—motion to dismiss—sufficiency of evidence—manner of use—serious nature of injuries

The trial court did not err by denying defendant's motion to dismiss and instructing the jury on robbery with a dangerous weapon even though a corporal testified that a stun gun was less than lethal when properly used. The stun gun was a dangerous weapon that endangered or threatened the victim's life based on its manner of use and the serious nature of the victim's injury. The State was not required to prove that the victim was actually in fear for her life.

Appeal by defendant from judgment entered 29 October 2010 by Judge R. Allen Baddour, Jr. in Wake County Superior Court. Heard in the Court of Appeals 14 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Douglas W. Corkhill, for the State.

Edward Eldred Attorney at Law, PLLC, by Edward Eldred, for defendant-appellant.

HUNTER, Robert C., Judge.

Reynarldo Rafael Rivera ("defendant") appeals from the trial court's entry of judgment after a jury returned a verdict finding him guilty of robbery with a dangerous weapon. After careful review, we find no error.

Background

The State's evidence tended to establish the following facts: On the morning of 8 September 2008, Josephine Scott ("Scott") was working as a Customer Service Representative at a branch of the Fort Sill National Bank located inside a Wal-Mart in Wake County, North Carolina. At approximately noon, two men robbed Scott and her manager, Lashonda Bond, while they replenished a cash cassette in one of the bank's ATMs. One man approached Scott from her front and grabbed the cassette from her hands. As Scott struggled over the cas-

sette, another man approached from her left side and shocked her with a stun gun. Scott did not see the man but felt a burning pain rated at a seven or eight on a ten-point scale. Scott saw the two men escape with the cassette as she fell to the ground, tearing her rotator cuff in the process. For two to three weeks after the robbery, Scott retained red marks where she was shocked. Scott's fall and torn rotator cuff resulted in two surgeries, required physical therapy, limited her left arm's range of motion, caused her to miss approximately one month of work, and continued to cause pain two years after the robbery occurred.

Police arrested defendant for the robbery but did not recover the stun gun. During trial, the State's expert witness, Corporal Gerald Takano of the Raleigh Police Department, viewed photographs of Scott's injuries and stated that they were "highly consistent with signature marks from a stun gun in stun gun mode." Corporal Takano also testified that "the overall potential for serious physical injury or death [from a stun gun] is minimal," and "the overall potential for serious physical injury or death [from a stun gun] would be consistent with being struck with a hand or foot."

At the close of the State's case, defendant moved to dismiss the charge of robbery with a dangerous weapon. The trial court denied the motion. Defendant moved to dismiss on the same ground at the conclusion of all evidence and the trial court again denied the motion. The trial court submitted the charges of common-law robbery and robbery with a dangerous weapon to the jury. The jury found defendant guilty of robbery with a dangerous weapon and the trial court sentenced him to an active term of imprisonment of 77 to 102 months. Defendant gave notice of appeal in open court.

Discussion

Defendant contends that the State presented insufficient evidence to establish that the stun gun was a dangerous weapon that endangered or threatened Scott's life. Defendant claims that the trial court should have instructed the jury only on the lesser included offense of common law robbery. We disagree.[1]

> When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential

1. Defendant seeks to frame his argument as strictly pertaining to the trial court's jury instructions; however, defendant's argument regarding sufficiency of the evidence, and the authority cited in support of his argument, pertains to denial of defendant's motion to dismiss the charged offense.

> element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied.

State v. Earnhardt, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 66, 296 S.E.2d at 652. "In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals." *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985) (citing *State v. Vestal*, 283 N.C. 249, 195 S.E.2d 297, *cert. denied*, 414 U.S. 874, 38 L. Ed. 2d 114 (1973)).

The elements of robbery with a dangerous weapon are: (1) the 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. N.C. Gen. Stat. § 14-87 (2009); *State v. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991). "The element of danger or threat to the life of the victim is the essence of the offense." *State v. Gibbons*, 303 N.C. 484, 489, 279 S.E.2d 574, 578 (1981). The dispositive issue in this case is whether there was sufficient evidence presented at trial to establish that the stun gun was a dangerous weapon that endangered or threatened Scott's life.

When deciding whether an object is a dangerous weapon, our Supreme Court has stated:

> The rules are: (1) When a robbery is committed with what appeared to the victim to be a firearm or other dangerous weapon capable of endangering or threatening the life of the victim and there is no evidence to the contrary, there is a mandatory presumption that the weapon was as it appeared to the victim to be. (2) If there is some evidence that the implement used was not a firearm or other dangerous weapon which could have threatened or endangered the life of the victim, the mandatory presumption disappears leaving only a permissive inference, which permits but does not require the jury to infer that the instrument used was in fact a firearm or other dangerous weapon whereby the victim's life was endangered or threatened. (3) If all the evidence shows the instrument could not have been a firearm or other dangerous weapon capable of threatening or endangering the life of the victim, the armed robbery charge should not be submitted to the jury.

State v. Allen, 317 N.C. 119, 124-25, 343 S.E.2d 893, 897 (1986). "We must look at the circumstances of use to determine whether an instrument is capable of threatening or endangering life." *State v. Westall*, 116 N.C. App. 534, 539, 449 S.E.2d 24, 27, *disc. review denied*, 338 N.C. 671, 453 S.E.2d 185 (1994).

In the present case, defendant claims that Corporal Takano's classification of stun guns as "less than lethal" devices with an impact similar to that inflicted by a hand or foot constituted affirmative proof that the stun gun used by defendant could not be considered a dangerous weapon as a matter of law. We disagree. Corporal Takano's testimony tended to establish that a stun gun is not a dangerous weapon in and of itself *when properly used* under controlled conditions. Corporal Takano did not testify that stun guns can *never* be considered dangerous weapons. In fact, Corporal Takano stated that stun guns are considered "less than lethal" weapons simply because they fall somewhere between hands and feet and firearms on the "force continuum." Police officers use the force continuum to determine how much force they can apply in a given situation. The force continuum is comprised of five categories ranked in order from least dangerous to most dangerous: hands-on/restraining techniques, striking techniques (inflicting blows with hands or feet), impact weapons (use of batons, etc.), less than lethal weapons, and firearms. Despite classifying stun guns as "less than lethal" weapons, Corporal Takano stated that any weapon or object can be a dangerous weapon depending on "the manner in which it can be used." Further indicating that a stun gun can be a dangerous weapon in certain circumstances, Corporal Takano stated that "any use of force, whether it be from the low end of restraining, just touching someone, all the way through using a firearm[,] [t]hey all have a potential for causing serious physical injury or death."

Defendant also points to the fact that the Raleigh Police Department tested Taser-brand X26 stun guns on many of its officers. However, Raleigh police officers were tased by experienced professionals in an environment designed to minimize the risk of injury. In fact, the police department required a neurosurgeon to attend testing sessions. Additionally, Corporal Takano stated that the Taser X26 model has a low energy output and is the weakest of all current production stun guns used by law enforcement. Because the stun gun in this case was never recovered, Corporal Takano could not testify to its nature and reasonably conclude that its output strength and

capacity to endanger life was equivalent to the low-output X26. When used in such a controlled manner, it is likely that a stun gun shock will not produce serious bodily injury or death. The manner in which the stun gun was used in this case differs greatly from the Raleigh Police Department's safety-oriented training. In sum, Corporal Takano's testimony did not establish that a stun is not a dangerous weapon as a matter of law.

To the contrary, this Court specifically addressed the dangerous nature of a stun gun in *State v. Gay*, 151 N.C. App. 530, 566 S.E.2d 121 (2002) and held that it was a dangerous weapon under the circumstances of that case. There, the defendant admitted "that a stun gun can be a dangerous weapon, depending on how it is used." *Id.* at 533, 566 S.E.2d at 124. The facts at trial tended to establish that the defendant approached a woman, "wrapped his left arm around her neck and placed a 'stun gun' up against her neck. Defendant took [the victim's] backpack with the money inside and fled the scene." *Id.* at 531, 566 S.E.2d at 123. Even though the defendant in *Gay* did not shock the victim, the Court determined that the stun gun was a dangerous weapon based on the manner in which it was used. *Id.* at 533, 566 S.E.2d at 124.

Having determined that a stun gun can be considered a dangerous weapon, we must still look to the manner in which the stun gun was used in the instant case to determine if the charge of robbery with a dangerous weapon was properly presented to the jury. Here, Scott was tased, suffered significant pain from the shock, fell, and injured her rotator cuff. She endured two surgeries and extensive physical therapy. Two years after the robbery, Scott was still experiencing pain and a limited range of motion in her left arm. Scott's injuries far exceeded those of the victim in *Gay*. Still, defendant contends that, despite her serious injury, Scott's *life* was not endangered or threatened. Defendant's argument is without merit.

This Court has established that

> [t]he use of a dangerous weapon need not result in death, but the instrument itself must merely be capable of taking life in the manner that it was used. . . . [A]ny instrument capable of causing serious bodily injury could also cause death depending on its use. *In our view, serious bodily injury is synonymous with endangering or threatening life.*

Westall, 116 N.C. App. at 541, 449 S.E.2d at 28 (emphasis added) (internal citation omitted). Moreover, our courts have consistently held that an object can be considered a dangerous or deadly weapon based on the manner in which it was used even if the instrument is not considered dangerous *per se* and the weapon does not cause death or a life threatening injury. *See State v. Joyner*, 295 N.C. 55, 65, 243 S.E.2d 367, 374 (1978) (considering a glass bottle a deadly weapon when used in a sexual assault); *State v. Cockerham*, 129 N.C. App. 221, 226, 497 S.E.2d 831, 834 (considering gasoline a dangerous weapon when in close proximity to a book of matches), *disc. review denied*, 348 N.C. 503, 510 S.E.2d 659 (1998); *Westall*, 116 N.C. App. at 540-41, 449 S.E.2d at 28 (considering a pellet gun a dangerous weapon when aimed at a vital organ but not fired); *State v. Funderbunk*, 60 N.C. App. 777, 778, 299 S.E.2d 822, 823 (considering an inoperable air gun a dangerous weapon when used as a club, giving the victim a black eye), *disc. review denied*, 307 N.C. 699, 301 S.E.2d 392 (1983). These cases, as well as *Gay*, demonstrate that our courts rely on resulting and, at times, potential injuries when determining if an object qualifies as a dangerous weapon. *See also State v. Roper*, 39 N.C. App. 256, 258, 249 S.E.2d 870, 871 (1978) ("The actual effects produced by the weapon may also be considered in determining whether it is deadly.").

Here, it is true that Scott did not die or come close to death; nevertheless, she was seriously injured. We hold that due to the actual effect of the stun gun in this case—serious injury—a permissive inference existed sufficient to support a jury determination that the stun gun was a dangerous weapon.

Defendant further argues that even if a stun gun can be classified as a dangerous weapon, the use of the stun gun in this case did not threaten Scott's life because she did not know that she was being robbed or that she was about to be tased before it occurred. Defendant bases this argument on Scott's statements that "everything happened so fast and simultaneously" and that she had "no suspicion or anything like that" immediately before the robbery. This argument is without merit. The State was not required to prove that Scott was actually in fear for her life. *Joyner*, 295 N.C. at 63, 243 S.E.2d at 373. "[T]he State could prove, at the least, that during the course of the robbery or attempted robbery, there was a threatened use of a dangerous weapon which endangered or threatened the life of the victim." *Id.* Since we have determined that the stun gun used by defend-

ant could be considered a dangerous weapon given the manner in which it was used, it was not necessary for the State to establish that Scott was actually in fear for her life.[2]

In sum, Corporal Takano's testimony that a stun gun is "less than lethal" when properly used did not establish that a stun gun can never be considered a dangerous weapon. *Gay* clearly set forth that a stun gun can be a dangerous weapon depending upon the manner in which it was used. We hold that, given the serious nature of the injury suffered by Scott, the question of whether the stun gun was a dangerous weapon that threatened or endangered Scott's life was properly placed before the jury. The trial court did not err by denying defendant's motion to dismiss and instructing the jury on robbery with a dangerous weapon.

No error.

Judges STEELMAN and McCULLOUGH concur.

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2. We note that N.C. Gen. Stat. § 14-269(a) (2009) states that "[i]t shall be unlawful for any person willfully and intentionally to carry concealed about his person any bowie knife, dirk, dagger, slung shot, loaded cane, metallic knuckles, razor, shurikin, stun gun, or other deadly weapon of like kind, except when the person is on the person's own premises." Although not dispositive, N.C. Gen. Stat. § 14-269(a) shows legislative intent to classify stun guns as deadly weapons. Numerous states mirror this intent. Possession of a stun gun is a crime in Hawaii (Haw. Rev. Stat. § 134-16(a) (2007)), New Jersey (N.J. Stat. Ann. § 2C:39-3(h) (2009)), New York (N.Y. Penal Law § 265.01(1) (2008)), Wisconsin (Wis. Stat. Ann. § 941.295(1) (2003)), Rhode Island (R.I. Gen. Laws § 11-47-42(a)(1) (1994)), Michigan (Mich. Comp. Laws Ann. § 750.224a(1) (2004)), and Massachusetts (Mass. Gen. Laws Ann. ch. 140, § 131J (2004)). Pennsylvania considers stun guns prohibited offensive weapons. 18 Pa. Cons. Stat. Ann. § 908 (2002). It is illegal to carry a stun gun in public in Illinois and Connecticut. 720 Ill. Comp. Stat. 5/24-1(a)(2) (2010); Conn. Gen. Stat. § 53-206(a) (2010). Indiana regulates stun gun use with its handgun laws and requires citizens to hold a concealed weapons permit before carrying a stun gun in public. Ind. Code Ann. § 35-47-2-1 (2011); Ind. Code Ann. § 35-47-8-4 (1985).

ROBINSON v. HOPE

[216 N.C. App. 573 (2011)]

EDWARD G. ROBINSON AND RITA SWANSON-ROBINSON, PLAINTIFFS v. JOSEPH W. HOPE, JR., INDIVIDUALLY AND AS AGENT FOR FLAT ROCK REALTY, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, AND FLAT ROCK REALTY, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, DEFENDANTS

No. COA11-665

(Filed 1 November 2011)

Attorney Fees—litigation-related expenses—expert witness fees—other litigation costs—no statutory authority

The trial court did not err in a breach of fiduciary duty and unfair trade practices case by granting partial summary judgment in favor of defendants to the extent that plaintiffs were seeking damages in the form of attorney fees, litigation-related expenses, expert witness fees, and other litigation costs when the alleged wrongful conduct of defendant realtor resulted in a third-party lawsuit. There was no statutory authority for an award of attorney fees under the circumstances of this case.

Appeal by plaintiffs from order entered 5 January 2011 by Judge C. Philip Ginn in Henderson County Superior Court. Heard in the Court of Appeals 3 October 2011.

F.B. Jackson & Associates Law Firm, PLLC, by Angela S. Beeker and Frank B. Jackson, for plaintiff appellants.

Roberts & Stevens, P.A., by Wyatt S. Stevens and Ann-Patton Hornthal, for defendant appellees.

McCULLOUGH, Judge.

Plaintiffs appeal from an order granting partial summary judgment in favor of defendants to the extent that plaintiffs are seeking damages in the form of attorneys' fees, litigation-related expenses, expert witness fees and other litigation costs associated with defending a prior third-party lawsuit. We affirm.

I. Background

Plaintiffs Edward G. Robinson ("Robinson") and Rita Swanson-Robinson ("Swanson-Robinson," collectively, "plaintiffs") initiated the present action by filing a Summons and Complaint against defendants Joseph W. Hope, Jr. ("Hope"), and Flat Rock Realty, LLC ("FRR," collectively, "defendants"), alleging, *inter alia*, breach of fiduciary duty and violation of the Unfair and Deceptive Trade Practices Act

("UDTPA"). In the present action, plaintiffs seek damages in the form of attorneys' fees, litigation-related expenses, expert witness fees, and/or other litigation costs associated with defending a prior action brought against them by Elizabeth Runnels ("Runnels"), the buyer of a residence located on Robinson's real property. Runnels sued plaintiffs for breach of contract, alleging, among other things, that plaintiffs had failed to obtain a permit for a residential septic system and that plaintiffs had failed to construct the residence in conformity with the North Carolina Residential Building Code. FRR was the realty company that had listed the property, and Hope served as plaintiffs' real estate agent in the sale of their property to Runnels. The facts underlying the prior action are more fully set forth in our prior opinion in *Runnels v. Robinson*, No. COA10-923 (N.C. Ct. App. May 17, 2011).

In their complaint against Hope and FRR, plaintiffs allege that all communications with Runnels or her real estate agent concerning Robinson's property were made on Robinson's behalf by and through Hope and FRR. Accordingly, plaintiffs allege that Hope and FRR "had a fiduciary duty to fully and accurately communicate all material facts concerning [Robinson's property] to third parties." Specifically, plaintiffs allege that "with the help and guidance of, and in reliance upon Hope and Hope's advice as a realtor," Robinson completed a residential property disclosure form that was sent to Runnels by Hope. However, given the manner in which the form was completed, plaintiffs allege that the resulting disclosure statement "was confusing and unclear, and subject to misinterpretation by a potential purchaser." Plaintiffs further allege that Hope prepared advertising materials that incorrectly described the building on Robinson's property as a "three bedroom, one bath, home," and that Hope specifically informed Runnels that there existed a permitted septic system for a three-bedroom residence on Robinson's property. Plaintiffs' complaint states that Hope's willful and/or negligent misrepresentations to Runnels constituted a breach of fiduciary duty and a violation of the UDTPA.

On 29 November 2010, defendants filed a motion for summary judgment seeking dismissal of plaintiffs' complaint. Following a hearing on the motion, the trial court granted partial summary judgment in favor of defendants "to the extent that Plaintiffs are seeking to recover their attorneys' fees, litigation related expenses, expert witness fees or other litigation costs associated with defending the Runnels lawsuit." The trial court denied summary judgment to the extent that plaintiffs are seeking to recover their own personal damages related to the alleged breach of fiduciary duty and unfair trade

practices by defendants. The trial court's order granting partial summary judgment was filed on 5 January 2011.

Thereafter, on 9 March 2011, plaintiffs filed a voluntary dismissal without prejudice as to their remaining claims in order to bring the matter to final judgment for the purpose of allowing the trial court's partial summary judgment order to be appealed. Accordingly, on 9 March 2011, plaintiffs filed a written notice of appeal to this Court from the trial court's order granting partial summary judgment in favor of defendants.

II. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). Thus, "[s]ummary judgment is properly granted when it appears that even if the facts as claimed by the non-movant are taken as true, there can be no recovery." *Howard v. Jackson*, 120 N.C. App. 243, 246, 461 S.E.2d 793, 796 (1995). We review the trial court's ruling on a motion for summary judgment *de novo*. *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 166, 684 S.E.2d 41, 46 (2009).

III. Attorneys' fees as damages

" ' "It is settled law in North Carolina that ordinarily attorneys fees are not recoverable as an item of damages or of costs, absent express statutory authority for fixing and awarding them." ' " *Eakes v. Eakes*, 194 N.C. App. 303, 312, 669 S.E.2d 891, 897 (2008) (quoting *Baxley v. Jackson*, 179 N.C. App. 635, 640, 634 S.E.2d 905, 908 (2006) (quoting *Records v. Tape Corp. and Broadcasting System v. Tape Corp.*, 18 N.C. App. 183, 187, 196 S.E.2d 598, 602 (1973))). Plaintiffs' sole argument on appeal asks this Court to create a judicial exception to this well-established rule and allow the recovery of attorneys' fees and other litigation-related expenses as compensatory damages when the alleged wrongful conduct of the defendant necessitates a third-party lawsuit. Plaintiffs concede they are thus asking this Court to enunciate a new rule of law in North Carolina.

We previously addressed this argument in the case of *Martin v. Hartford Accident and Indemnity Co.*, 68 N.C. App. 534, 316 S.E.2d 126 (1984). In *Martin*, the plaintiff, a cattle dealer, brought an action against the defendant indemnity company who, as a surety, issued a

bond to cover purchases of livestock made by a third-party purchaser. *Id.* at 535, 316 S.E.2d at 127. The plaintiff's action alleged that the indemnity company had refused to honor the bond guaranteeing the purchase price, which necessitated a lawsuit directly against the purchaser. *Id.* Thus, the plaintiff sought to recover from the defendant indemnity company the attorneys' fees the plaintiff had incurred in bringing the earlier action against the third-party purchaser. *Id.* The trial court granted summary judgment in favor of the defendant indemnity company, and the plaintiff appealed the decision to this Court. *Id.*

On appeal, the plaintiff in *Martin* requested the same relief from this Court that plaintiffs in the present case now seek:

> Cognizant that North Carolina does not currently authorize the recovery of attorney's fees in the type of situation exemplified by the facts at bar, plaintiff urges us to adopt for the first time in this State a judicial exception to the general rule disallowing attorney's fees in civil cases, absent statute or contractual agreement.

Id. at 538, 316 S.E.2d at 129. However, in *Martin*, this Court "decline[d] to modify the rule beyond those exceptions currently embodied by North Carolina statutes." *Id.* at 539, 316 S.E.2d at 130. Rather, we left the matter "to the consideration of the legislature." *Id.* at 540, 316 S.E.2d at 130.

Despite this holding, plaintiffs point to our discussion of the issue in *Martin*, in which we recognized that both the Virginia Supreme Court and the Wisconsin Supreme Court had adopted the exception that plaintiffs again urge upon this Court in the present case. *See id.* at 538-39, 316 S.E.2d at 129-30 (discussing the cases of *Owen v. Shelton*, 221 Va. 1051, 277 S.E.2d 189 (1981) (where real estate broker failed to disclose certain information to his clients, the owners, and litigation resulted between owners and purchasers because of this failure, owners were allowed to recover attorneys' fees in subsequent suit against broker, holding that "where a breach of contract has forced the plaintiff to maintain or defend a suit with a third person, he may recover the counsel fees incurred by him in the former suit provided they are reasonable in amount and reasonably incurred"), and *City of Cedarburg L. & W. Com'n v. Glens Falls Ins. Co.*, 42 Wis. 2d 120, 166 N.W.2d 165 (1969) (where defendant-insurer denied claim under fire insurance policy and plaintiff successfully sued the party actually responsible, plaintiffs allowed to recover attorneys' fees expended in collateral suit despite the fact that no statute allowed

such recovery)). In addition to the cases cited in dicta in *Martin*, plaintiffs also cite persuasive authority from Illinois, New Jersey, and Nebraska, as well as the Restatement (First) of Torts § 914 (1939) and the Restatement (Second) of Torts § 914(2) (1979), in support of their argument that attorneys' fees incurred in a collateral lawsuit as a result of the defendant's wrongdoing should be recoverable as an item of compensatory damages. Plaintiffs argue that such caselaw from other jurisdictions allowing the requested exception to the general rule distinguishes between attorneys' fees expended in the present action against a defendant, to which the general rule would apply, and those spent to remedy the harm incurred as a result of a defendant's wrongdoing. *See*, *e.g.*, *Sorenson v. Fio Rito*, 90 Ill. App. 3d 368, 371-74, 413 N.E.2d 47, 51-53 (1980); *National Wrecking Co. v. Coleman*, 139 Ill. App. 3d 979, 982-83, 487 N.E.2d 1164, 1165-66 (1985). Plaintiffs contend this reasoning was subsequently adopted by this Court in *Gram v. Davis*, 128 N.C. App. 484, 495 S.E.2d 384 (1998).

In *Gram*, the plaintiff had purchased two parcels of land, a tract that he intended to develop into a subdivision and a lot in the adjoining subdivision on which he intended to build an access road. *Id.* at 485, 495 S.E.2d at 385. The plaintiff retained the legal services of the defendant attorney to perform the closing and complete a title search for the two parcels. *Id.* Although the defendant attorney discovered that the subdivision lot was restricted to residential use only, he advised the plaintiff that the restriction would not prohibit him from building the access road across the lot. *Id.* However, after constructing the access road, the plaintiff learned that the subdivision lot could not be used to access the subdivision development on his other parcel. *Id.* Thereafter, the plaintiff incurred substantial attorneys' fees to free the parcel from the encumbrance. *Id.* at 486-87, 495 S.E.2d at 386. The plaintiff then sued the defendant attorney for malpractice, seeking as damages the attorneys' fees paid to the subsequent attorney to remedy the effects of the alleged malpractice. *Id.* at 485, 495 S.E.2d at 385.

In *Gram*, we held:

> Although the general rule in North Carolina is that attorneys' fees and other costs associated with litigation are not recoverable in a legal malpractice action absent statutory liability, this rule does not apply to bar recovery for costs, including attorneys' fees, incurred by a plaintiff to remedy the injury caused by the malpractice.

Id. at 489, 495 S.E.2d at 387 (citation omitted). Plaintiffs are correct that this Court in *Gram* looked to the caselaw of another jurisdiction and adopted the policy rationale "that rather than attempting to recover the attorneys' fees he expended in litigating the malpractice action, the plaintiff is merely attempting to place himself in the same position as he would have been *but for* the negligence of the defendants." *Id.* at 489, 495 S.E.2d at 388.

Here, plaintiffs argue there exists a strong similarity between an attorney-client relationship and that between a realtor and his client, such that the holding in *Gram* should be extended to the circumstances of the present case. Plaintiffs further argue that, allowing the recovery of attorneys' fees expended to mitigate the alleged wrongdoing of the realtor in the present case is likewise supported by the same policy rationale announced in *Gram* and comports with the purpose of compensatory damages: "[T]o restore the plaintiff to his original condition or to make the plaintiff whole." *Watson v. Dixon*, 352 N.C. 343, 347, 532 S.E.2d 175, 178 (2000).

Nonetheless, we believe the holding in *Gram* should be limited to the circumstances of that case, namely attorney malpractice actions. Were we to extend the exception to allow recovery of attorneys' fees incurred as a result of the alleged wrongdoings of realtors, such a holding would effectively erode the long-standing rule in North Carolina that attorneys' fees are not recoverable as an item of damages absent statutory authority for such an award, as we see no meaningful distinction between realtors and other professionals in this State who maintain a fiduciary relationship with their clients or others.

Moreover, although plaintiffs have cited substantial persuasive authority from other jurisdictions as well as the Restatements of Torts, we are nevertheless bound by the long-standing precedent in this state which disallows the remedy plaintiffs are seeking here. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). As plaintiffs concede, there is no statutory authority for an award of attorneys' fees as damages under the circumstances of the present case. This Court is without the power to change the law in North Carolina, and as such, we once again decline to modify the long-standing rule beyond the current exceptions embodied in our statutes and leave the matter to the consideration of the legislature or our Supreme Court.

Thus, because plaintiffs cannot recover the damages they are seeking in the present case as a matter of law, we affirm the trial court's grant of summary judgment in favor of defendants on that issue.

IV. Conclusion

For the foregoing reasons, we must affirm the trial court's order granting summary judgment in favor of defendants to the extent that plaintiffs are seeking as damages attorneys' fees, litigation-related expenses, expert witness fees or other litigation costs associated with defending the Runnels lawsuit.

Affirmed.

Judges STEELMAN and ERVIN concur.

IN THE MATTER OF MITCHELL BORDEN

No. COA11-306

(Filed 1 November 2011)

Sexual Offenders—registration—termination

The trial court erred when it terminated petitioner's sex offender registration requirement pursuant to N.C.G.S. § 14-208.12A where a Kentucky registration requirement for a Kentucky crime had expired but petitioner had not been registered in North Carolina for ten years. The North Carolina legislature intended to define "initial county registration" to mean initial county registration in North Carolina.

Appeal by the State from order entered 13 October 2010 by Judge John O. Craig, III, in Guilford County Superior Court. Heard in the Court of Appeals 15 September 2011.

Roy Cooper, Attorney General, by Catherine F. Jordan, Assistant Attorney General, for the State.

No brief filed for petitioner.

THIGPEN, Judge.

The State of North Carolina ("the State") appeals from an order terminating Mitchell Borden's ("Petitioner") sex offender registration requirement pursuant to N.C. Gen. Stat. § 14-208.12A (2009). We must determine whether the term "initial county registration" as provided in N.C. Gen. Stat. § 14-208.12A(a) means the date of initial county reg-

istration in North Carolina or in any jurisdiction. Because "initial county registration" means the date of initial county registration in North Carolina, and Petitioner has not been registered as a sex offender in North Carolina for at least ten years, we reverse the trial court's order.

Petitioner was convicted of "Rape 1" or "Sexual Abuse 1st Degree"[1] in February 1995 in Fayette County, Kentucky. In 2010, Petitioner received a written notice from the Kentucky Sex Offender Registry stating, "The period of time for which you were required to register as a sex offender in the Commonwealth of Kentucky has expired. As of June 25, 2010 you are no longer required to register as a sex offender with the Kentucky Sex Offender Registry for the above referenced offense." Subsequently, on 14 September 2010, Petitioner filed a petition for termination of sex offender registration in Guilford County Superior Court. The petition lists Petitioner's date of initial county registration in North Carolina as 1 June 2009.[2]

On 13 October 2010, the trial court heard Petitioner's petition for termination of sex offender registration. The trial court reviewed the letter from the Kentucky Sex Offender Registry removing Petitioner from the registry. The trial court also reviewed Petitioner's North Carolina criminal record and determined that "it appears there were a couple of charges but they were dismissed." The trial court then stated, "I think he would probably qualify to have his petition granted." In response, the prosecutor raised the following concern:

> [T]he only hitch I potentially see is the statute allows he can petition after 10 years from the date of initial county registration, which if he states he's only been living here for two years, his county registration here wouldn't be 10 years old. However, it would seem to me that the fact that he's off the registry in Kentucky, that would trump, but I'm just highlighting what I see as the only potential flaw—or problem with the statute.

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1. Petitioner indicated on his petition for termination of sex offender registration that he was convicted of "Rape 1"; however, the notice from the Kentucky Sex Offender Registry lists Petitioner's offense as "Sexual Abuse 1st Degree."

2. We note that the date Petitioner initially registered as a sex offender in North Carolina is not clear from the record. On his petition for termination of sex offender registration, Petitioner listed his "Date of Original NC registration" as 1 June 2009. Similarly, at the 13 October 2010 hearing before the trial court, when asked how long he had resided in North Carolina, Petitioner told the trial court, "It will be two years in June, sir." Conversely, the State's Motion to Stay Order states that "[a]lthough [Petitioner's] petition indicates his date of initial county registration in North Carolina was June 1, 2009, information in the Clerk of Court's file, 10 CRS 24618, shows his date of initial county registration in North Carolina was actually March 1, 2002."

The trial court replied, "I would read that to mean initial county registration in any jurisdiction[.]" The trial court then entered an order terminating Petitioner's sex offender registration requirement and finding, *inter alia*, that Petitioner "has been subject to North Carolina registration requirements of Part 2 of Article 27A for at least ten (10) years beginning with the Date Of Initial NC Registration above. Kentucky registration 1995." The State appeals from this order.

In this case, we must determine whether the North Carolina General Assembly intended for "the date of initial county registration" to mean the date of initial county registration in North Carolina or in any jurisdiction.

"Resolution of issues involving statutory construction is ultimately a question of law for the courts. Where an appeal presents a question of statutory interpretation, full review is appropriate, and we review a trial court's conclusions of law *de novo*." *State v. Davison*, 201 N.C. App. 354, 357, 689 S.E.2d 510, 513 (2009) (citations and quotation marks omitted), *disc. review denied*, ___ N.C. ___, 703 S.E.2d 738 (2010).

We determine matters of statutory construction as follows:

> When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. Moreover, when confronted with a clear and unambiguous statute, courts are without power to interpolate, or superimpose, provisions and limitations not contained therein.

In re R.L.C., 361 N.C. 287, 292, 643 S.E.2d 920, 923 (2007) (internal citations and quotation marks omitted). "The best indicia of the legislature's intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish. Moreover, in discerning the intent of the General Assembly, statutes *in pari materia* should be construed together and harmonized whenever possible." *State v. Abshire*, 363 N.C. 322, 330, 677 S.E.2d 444, 450 (2009) (quotations and quotation marks omitted). "*In pari materia* is defined as upon the same matter or subject." *Durham Herald Co., Inc. v. North Carolina Low-Level Radioactive Waste Management Authority*, 110 N.C. App. 607, 612, 430 S.E.2d 441, 445 (citations and quotation marks omitted), *disc. review denied*, 334 N.C. 619, 435 S.E.2d 334 (1993).

The purpose of the North Carolina Sex Offender and Public Protection Registration Program ("Registration Program") is outlined in N.C. Gen. Stat. § 14-208.5 (2009):

> [I]t is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.

See also Abshire, 363 N.C. at 330, 677 S.E.2d at 450 (stating "[t]he registration program was designed to assist law enforcement agencies and the public in knowing the whereabouts of sex offenders and in locating them when necessary"). With the creation of this program, the legislature explicitly recognized that "sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest." N.C. Gen. Stat. § 14-208.5. Furthermore, the legislature recognized that individuals who commit certain types of offenses against minors, "such as kidnapping, pose significant and unacceptable threats to the public safety and welfare of the children in this State and that the protection of those children is of great governmental interest." *Id.*

The Registration Program requires the following persons to register:

> A person who is a State resident and who has a reportable conviction[3] shall be required to maintain registration with the sheriff of the county where the person resides. If the person moves to North Carolina from outside this State, the person shall register within three business days of establishing residence in this State, or whenever the person has been present in the State for 15 days, whichever comes first.

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3. The definition of "reportable conviction" includes "[a] final conviction in another state of an offense, which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense as defined by this section, or a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state." N.C. Gen. Stat. § 14-208.6(4)(b) (2009). Here, Petitioner was convicted of "Rape 1" or "Sexual Abuse 1st Degree" in Kentucky in 1995 and was required to register as a sex offender in Kentucky; thus, Petitioner's 1995 Kentucky conviction is a reportable conviction under the North Carolina Registration Program.

N.C. Gen. Stat. § 14-208.7(a) (2009). "Registration shall be maintained for a period of at least 30 years following the date of initial county registration unless the person, after 10 years of registration, successfully petitions the superior court to shorten his or her registration time period under G.S. 14-208.12A." *Id.* N.C. Gen. Stat. § 14-208.12A(a) states:

> Ten years from the date of *initial county registration*, a person required to register under this Part may petition the superior court in the district where the person resides to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article.

(Emphasis added).

Considering the provisions of the Registration Program *in pari materia*, we conclude the legislature intended for "initial county registration" to mean initial county registration in North Carolina. "[T]he twin aims of the North Carolina Sex Offender and Public Protection Registration Program, [are] public safety and protection[.]" *State v. Bryant*, 359 N.C. 554, 560, 614 S.E.2d 479, 483 (2005) (citation omitted). Allowing registered offenders to be removed from the sex offender registry without being on the registry for at least ten years in North Carolina contradicts the intent of the statutes to protect the public, maintain public safety, and assist law enforcement agencies and the public in knowing the whereabouts of sex offenders. *See id.*; *Abshire*, 363 N.C. at 330, 677 S.E.2d at 450.

Additionally, construing "initial county registration" to mean initial county registration in North Carolina is consistent with the definitions provided in the Registration Program. For instance, N.C. Gen. Stat. § 14-208.6 defines "county registry" as "the information compiled by the sheriff of a county in compliance with this Article" and "sheriff" as "the sheriff of a county in this State." N.C. Gen. Stat. § 14-208.6(1b) and (7). These definitions demonstrate the legislature's intent to define "initial county registration" as a sex offender's initial registration with a sheriff of a county in this State.

In this case, the trial court incorrectly interpreted "initial county registration" to mean "initial county registration in any jurisdiction." While Petitioner had been registered as a sex offender in Kentucky

for at least ten years,[4] the record shows he was not registered in North Carolina for at least ten years. Thus, the trial court erred when it terminated Petitioner's sex offender registration requirement. Accordingly, we reverse the trial court's order.

REVERSED.

Judges GEER and STROUD concur.

4. Although it is not clear from the record when Petitioner initially registered in North Carolina, using the earliest date in the record, 1 March 2002, Petitioner has not been registered in North Carolina for at least ten years.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 NOVEMBER 2011)

ALAWAR v. COURTYARD MARRIOTT NORTH No. 11-248	Ind. Comm. (494525)	Affirmed in Part and Reversed in Part
CHURCH v. CHURCH No. 11-222	Caldwell (01CVD1391)	Reversed and Remanded
CINOMAN v. UNIV. OF N.C. No. 11-160	Wake (09CVS3164)	Reversed and Remanded
DIVERSIFIED FIN. v. F & F EXCAVATING & PAVING No. 11-292	Macon (09CVS317)	DISMISSED in Part; AFFIRMED in Part.
FOX v. FOX No. 11-468	Person (07CVD185)	Affirmed
HADDOCK v. BARKER REALTY, INC. No. 11-449	Wake (10CVS10797)	Affirmed
IN RE A.W.A. No. 11-690	Catawba (09JT172)	Affirmed
IN RE H.T. No. 11-563	Orange (06JA130)	Reversed and Remanded
IN RE M.S. No. 11-410	Wake (10JT226)	Reversed and Remanded
IN RE N.E.D.	Gaston (09JT226)	Affirmed
IN RE P.W. No. 11-422	Lenoir (09JA78)	Affirmed
IN RE PEACOCK No. 11-317	Macon (10CVS487)	Affirmed
IN RE R.P. No. 11-370	Durham (09JB58)	Remanded
INT'L SON-RYS ENTERS., INC. v. B & T POOLS, INC. No. 11-204	Mecklenburg (09CVS25531)	Affirmed
JMK, INC. v. McALLISTER GRP., INC. No. 11-302	Mecklenburg (09CVS14688)	Affirmed

JOHNSON v. LYNCH No. 11-347	Carteret (09CVS267)	Affirmed
KELLY v. SHOAF No. 11-335	Brunswick (08CVS2995)	Affirmed
OSAE v. OSAE No. 11-560	Wake (08CVD1667)	Remanded
PETTY v. CITY OF KANNAPOLIS No. 11-322	Cabarrus (09CVS4765)	Affirmed
RUFFIN v. DOMTAR PAPER CO. No. 11-277	Ind. Comm. (146188)	Affirmed
SPOONER v. CLEMMONS No. 11-276	Brunswick (09CVS1666)	Affirmed
STATE v. BURGESS No. 11-460	Robeson (04CRS52500)	Affirmed
STATE v. COLE No. 11-323	Randolph (06CRS54587)	No Error
STATE v. DOVER No. 11-502	Lincoln (08CRS53405)	No error in part; no prejudicial error in part; vacated and remanded in part
STATE v. FRIDAY No. 11-264	Guilford (10CRS71786)	No Error
STATE v. GILLESPIE No. 11-146	Wake (09CRS213732)	No Error
STATE v. GREEN No. 11-109	Columbus (08CRS50614-15)	Affirm revocation of probation. Remand for correction of clerical error.
STATE v. HARRIS No. 11-14	Mecklenburg (09CRS209479)	Affirmed
STATE v. JOHNSON No. 11-325	Buncombe (09CRS52759) (09CRS544) (09CRS55628-31)	Affirmed
STATE v. JOHNSON No. 11-443	New Hanover (09CRS58144) (09CRS58145)	No Error

STATE v. LEFTDWRIGE No. 11-152	Wayne (08CRS58229) (09CRS50320)	No Error
STATE v. LOCKLEAR No. 11-194	Robeson (05CRS56801)	No Error
STATE v. McMICKLE No. 11-215	Gaston (09CRS58657)	No Error
STATE v. MENDEZ No. 11-120	Anson (10CRS51070)	Affirmed
STATE v. MOORE No. 11-267	Alamance (09CRS50814)	Vacated in part. No error in part.
STATE v. TWITTY No. 11-182	Moore (09CRS50966) (09CRS51217) (09CRS51248) (09CRS51252) (09CRS56)	No Error
STATE v. WILLIAMS No. 11-328	Harnett (09CRS3715) (09CRS50776)	No Error
STATE v. WOOTEN No. 11-385	Columbus (09CRS54038) (09CRS54040-44) (09CRS54046)	No Prejudicial Error
SUTTON v. SUTTON No. 11-547	Onslow (07CVD1225)	Affirmed

HEADNOTE INDEX

EVIDENCE—Continued

High speed chase—officer's death—second-degree murder—officer's negligence—irrelevant—The trial court did not err in a second-degree murder prosecution by excluding evidence of negligence by an officer killed in an automobile chase of defendant. The officer's alleged negligent conduct was relevant only insofar as it could have constituted an intervening or superseding cause that alone produced the injury. That was clearly not the case here. **State v. Pierce, 377.**

No plain error—other evidence—In light of other evidence, there was no plain error in a prosecution arising from child sexual abuse in the admission of the testimony of several witnesses. **State v. Stokes, 529.**

Other crimes—knowledge and motive—The trial court did not err by admitting evidence of other crimes where defendant did not properly object to some of the evidence, other evidence showed defendant's knowledge of the dangers of flight from the police, and still other evidence showed defendant's motive to flee from the police. **State v. Pierce, 377.**

Police dash cam video—admission not prejudicial—The admission of evidence from video recording devices in cars was not prejudicial where, assuming that admission of the evidence was error, defendant did not show prejudice. **State v. Pierce, 377.**

Social worker testimony—characterization of child sex abuse victim—overly dramatic, manipulative, and attention seeking behavior—not shorthand statement of fact—The trial court did not err in a first-degree sexual offense case by excluding the testimony of a social worker to the effect that during therapy sessions the child victim was overly dramatic, manipulative, and exhibited attention seeking behavior. Defendant failed to cite authority as required by N.C. R. App. P. 28(b)(6) to support his corroboration argument. Further, the social worker's characterizations of the child's behavior did not relate to an expert opinion which the social worker was qualified to deliver. Finally, it was not an admissible shorthand statement of fact. **State v. Carter, 453.**

Time of fatal injuries—harmless error—The trial court's admission of a doctor's testimony that the minor child victim's fatal injuries were inflicted between 8:00 am and 1:00 pm in a felony murder case was harmless error. Defendant failed to demonstrate there was a reasonable possibility that a different result would have been reached at trial absent the alleged error. **State v. Barrow, 436.**

Transcript of recording—poor sound quality—There was no prejudicial error in a first-degree murder prosecution where the jury saw a videotaped interview at which defendant confessed and the jury was allowed to read a transcript made from enhanced audio without hearing the audio. A different result was not likely without the transcript in light of the other evidence. **State v. Jordan, 112.**

Unavailable witness—statements to officers—corroborative evidence—The trial court did not abuse its discretion in a prosecution for attempted murder, assault, and other offenses by admitting as corroborative evidence statements made by an unavailable witness to two law enforcement officers. The statements to the officers added some details to the witness's testimony from the probable cause hearing but were substantially similar and not contradictory to the probable cause testimony, and information regarding the victims' criminal activity did not prejudice defendant. **State v. Ross, 337.**

STATUTES OF LIMITATION AND REPOSE—Continued

of a special use zoning permit based on the petition being time-barred. Petitioners were not in substantial compliance with N.C.G.S. § 160A-388(e2). Further, professional and courteous conduct between counsel does not operate to waive statutory requirements. **McCrann v. Vill. of Pinehurst, 291.**

TERMINATION OF PARENTAL RIGHTS

Findings of fact—likelihood of repetition of neglect—The trial court did not err in a termination of parental rights case by its findings of fact 25 through 29 regarding a substantial risk of physical, mental, or emotional impairment of the minor son as a consequence of respondent mother's failure to provide proper care, supervision, or discipline. **In re C.G.R., 351.**

Grounds—neglect—failure to obtain stable and appropriate housing—The trial court did not err by concluding a ground existed to terminate respondent mother's parental rights to her minor daughter based on neglect under N.C.G.S. § 7B-1111(a)(1). The findings sufficiently showed that it was unknown how long it would take respondent to obtain stable and appropriate housing. **In re C.G.R., 351.**

Likelihood of repetition of neglect—findings of fact—unnecessary for determination—The trial court did not err in a termination of parental rights case by its findings of fact 35 regarding respondent mother's statement against her interest, finding 36 regarding her significant contact with co-defendants in a criminal case following her release from jail, finding 38 regarding her difficulty meeting her monthly living expenses, and finding 40 that she had no support system. These findings were unnecessary to support the trial court's finding of likelihood of repetition of neglect. **In re C.G.R., 351.**

Neglect—ongoing inability to maintain housing and employment—substantial risk of continued neglect—The trial court did not err in a termination of parental rights case by concluding that respondent mother neglected her minor daughter. In light of respondent's prior neglect of her minor son and her ongoing inability to maintain housing and employment, the minor daughter was at a substantial risk of continued neglect. **In re C.G.R., 351.**

Neglect—risk of future neglect—The trial court did not err by concluding a ground existed to terminate respondent mother's parental rights to her minor son based on neglect. The trial court's findings regarding the risk of future neglect to the minor daughter given respondent's current circumstances applied equally to her minor son. **In re C.G.R., 351.**

Physical, mental, or emotional impairment of juvenile—substantial risk of such impairment—failure to provide proper care, supervision, or discipline—The trial court did not err in a termination of parental rights case by finding physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of respondent mother's failure to provide proper care, supervision, or discipline. **In re C.G.R., 351.**

TORT CLAIMS ACT

Negligent inspection by state environmental health specialist—intentional certification of incorrect soil depths—jurisdiction—The Industrial Commission did not err by requiring defendant North Carolina Department of Environment and Natural Resources to pay $28,300.00 to plaintiffs based on the negligent actions of