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TABLE OF CONTENTS

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OF
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CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
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RALPH A. WALKER
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CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

DUNCAN C. DAY AND ASHLEY-BROOK DAY, AS CO-ADMINISTRATORS OF THE ESTATE OF DUNCAN C. DAY, JR., DECEASED, PLAINTIFFS V. THOMAS ALAN BRANT, M.D., EDWARD WILLIAM HALES, P.A., MID-ATLANTIC EMERGENCY MEDICAL ASSOCIATES, P.A. AND MOORESVILLE HOSPITAL MANAGEMENT ASSOCIATES, INC. D/B/A LAKE NORMAN REGIONAL MEDICAL CENTER, DEFENDANTS

No. COA09-573-2

(Filed 17 January 2012)

1. Medical Malpractice—expert testimony—medical license—applicable standard of care in community

The trial court erred in a medical malpractice case by directing verdict in favor of defendants based on its conclusion that plaintiffs did not properly establish that a doctor was qualified to provide expert testimony on the applicable standard of care. A jury could reasonably infer from the testimony that the doctor did in fact have a medical license and that he was familiar with defendants and the standard of care in their community or similar communities.

2. Medical Malpractice—proximate cause—breach of standard of care

The trial court erred in a medical malpractice case by directing verdict in favor of defendants based on its conclusion that plaintiffs presented insufficient evidence that any breach of the standard of care proximately caused the patient's death. Although the doctor used the word "speculation" in portions of his testimony, he was merely acknowledging that the practice of putting a specific percentage on the patient's chance of survival was inherently

speculative. The testimony was sufficient to send the issue of proximate cause to the jury.

Appeal by plaintiffs from order entered 25 July 2008 by Judge Christopher M. Collier in Iredell County Superior Court. Heard in the Court of Appeals 4 November 2009. Opinion filed 20 July 2010. Petition for rehearing granted 29 September 2010. The following opinion supersedes and replaces the opinion filed 20 July 2010.

John J. Korzen and David A. Manzi for plaintiffs-appellants.

Carruthers & Roth, P.A., by Richard L. Vanore, Norman F. Klick, Jr., and Robert N. Young, for Thomas Alan Brant, M.D., Edward William Hales, P.A., and Mid-Atlantic Emergency Medical Associates, P.A., defendants-appellees.

Jackson & McGee, LLP, by Sam McGee; and Ferguson, Stein, Chambers, Gresham, & Sumter, P.A., by Adam Stein, for North Carolina Advocates for Justice, Amicus Curiae.

GEER, Judge.

Plaintiffs Duncan C. Day and Ashley-Brook Day have appealed from the trial court's grant of a directed verdict to defendants Thomas Alan Brant, M.D.; Edward William Hales, P.A.; and Mid-Atlantic Emergency Medical Associates, P.A. Plaintiffs' 16-year-old son, Duncan C. Day, Jr. ("Duncan"), was injured in a car accident and brought to Lake Norman Regional Medical Center ("LNRMC"). After being examined and released, he died from internal bleeding when his liver, which had sustained lacerations in the car accident, ruptured. Plaintiffs contend defendants were negligent in failing to discover the liver lacerations and failing to admit Duncan to the hospital for observation and treatment.

At trial, defendants made two arguments in support of their motion for a directed verdict: (1) that plaintiffs' standard of care expert, Dr. Paul Mele, was not qualified to testify to the applicable standard of care and (2) that plaintiffs' causation expert, Dr. James O. Wyatt, III, presented insufficient evidence of proximate causation. Based on our review of that testimony, we disagree and hold that the testimony of Dr. Mele and Dr. Wyatt was sufficient to defeat defendants' motion for a directed verdict. Accordingly, we reverse.

Facts

On 27 October 2003, Duncan was involved in a head-on collision after falling asleep while driving on U.S. 21 in Iredell County, North Carolina. When Duncan arrived at LNRMC, Dr. Brant and Mr. Hales were on duty in the emergency room. Duncan had a seatbelt abrasion from his left shoulder to his right upper abdomen and bruises on his arms and legs. He reported neck and chest pain. A physical examination, blood work, a chest x-ray, cervical spine x-rays, and a limited cervical spine CT scan were performed, and no significant problems were discovered. Neither Dr. Brant nor Mr. Hales ordered an ultrasound or CT scan of Duncan's abdomen. Duncan was given pain medication and discharged.

The next morning, 28 October 2003, Duncan was found unresponsive at home and was pronounced dead on arrival at LNRMC. Internal bleeding from a liver rupture caused his death. Plaintiffs filed suit against Dr. Brant, Mr. Hales, Mid-Atlantic Emergency Medical Associates, and LNRMC in Iredell County Superior Court on 15 November 2004, but subsequently voluntarily dismissed the claim against LNRMC.

At trial, plaintiffs called Dr. Paul Mele, a board certified emergency medicine physician with 20 years of experience, to give an expert opinion on the standard of care. After the trial court admitted Dr. Mele as an expert over defendants' objection, Dr. Mele explained that the liver and the spleen are the organs most commonly injured after blunt force trauma to the abdomen. According to Dr. Mele, simply being restrained by a seat belt can injure these organs.

Dr. Mele concluded that Dr. Brant and Mr. Hales failed to follow the standard of care in treating Duncan. He testified that given the facts known by the two men—Duncan was in a car accident, had chest pain, was bruised across his chest from his shoulder harness, was overweight, and was a teenager—Dr. Brant and Mr. Hales should have been alerted to the possibility that Duncan might have suffered an abdominal injury despite not reporting abdominal pain or suffering a broken rib. According to Dr. Mele, Dr. Brant and Mr. Hales "just really didn't give the abdomen a fair chance to be evaluated," and "[i]t was just too easily dismissed as not an abdominal injury scenario at all . . . ."

Plaintiffs tendered, without objection, their causation expert, Dr. James O. Wyatt, III, as an expert in trauma surgery. Dr. Wyatt explained that Duncan's death was due to exsanguination caused by

a Grade IV or V laceration to his liver and a Grade II injury to his spleen. According to Dr. Wyatt, a "fair amount" of blood had built up underneath the laceration to Duncan's liver, and when it subsequently broke loose, it resulted in rapid bleeding that caused Duncan to pass out and go into cardiac arrest.

Dr. Wyatt testified that none of the studies performed on Duncan when first seen at the hospital would have diagnosed this problem and that such a diagnosis is usually made using a CT scan of the abdomen and pelvis. He testified that if the diagnosis had been made, Duncan should have been admitted to the hospital, where the injury should have initially been handled non-operatively. Dr. Wyatt detailed the options if non operative management failed, including "[a]ngiography with possible embolization," "[s]urgical management with possible hepatic repair," and/or "[s]urgical management with damage control packing." In his written report, he concluded that "[s]urvival is excellent (>51%) in patients who arrive in the hospital and get proper initial and subsequent management." Dr. Wyatt believed that if Duncan had been in the hospital when his liver ruptured, "he would have survived it."

At the conclusion of plaintiffs' evidence, defendants moved for a directed verdict on the grounds that Dr. Mele was not qualified to give an expert opinion on the standard of care and that plaintiffs had not shown proximate cause. The trial court granted the motion without specifying its grounds. Plaintiffs timely appealed to this Court.

Discussion

" 'This Court reviews a trial court's grant of a motion for directed verdict *de novo*.' " *Kerr v. Long*, 189 N.C. App. 331, 334, 657 S.E.2d 920, 922 (2008) (quoting *Herring v. Food Lion, LLC*, 175 N.C. App. 22, 26, 623 S.E.2d 281, 284 (2005), *aff'd per curiam*, 360 N.C. 472, 628 S.E.2d 761 (2006)). 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.' " *Id.* (quoting *Brookshire v. N.C. Dep't of Transp.*, 180 N.C. App. 670, 672, 637 S.E.2d 902, 904 (2006)).

"When a defendant moves for a directed verdict in a medical malpractice case, the question raised is whether the plaintiff has offered evidence of each of the following elements of his claim for relief: (1) the standard of care, (2) breach of the standard of care, (3) proximate causation, and (4) damages." *Turner v. Duke Univ.*, 325 N.C. 152, 162,

381 S.E.2d 706, 712 (1989). In this case, the sole issues are the sufficiency of the evidence as to the standard of care and proximate causation.

I

[1] There is no dispute that Dr. Mele testified that defendants breached the standard of care. Defendants, however, contend that plaintiffs did not properly establish that Dr. Mele was qualified to provide expert testimony on the applicable standard of care. In medical malpractice cases, " '[b]ecause questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant standard of care through expert testimony.' " *Billings v. Rosenstein*, 174 N.C. App. 191, 194, 619 S.E.2d 922, 924 (2005) (quoting *Smith v. Whitmer*, 159 N.C. App. 192, 195, 582 S.E.2d 669, 671-72 (2003)).

N.C. Gen. Stat. § 90-21.12 (2009) sets out the standard of care applicable in a medical malpractice action:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

An expert witness may testify regarding this standard of care " 'when that physician is familiar with the experience and training of the defendant and either (1) the physician is familiar with the standard of care in the defendant's community, or (2) the physician is familiar with the medical resources available in the defendant's community and is familiar with the standard of care in other communities having access to similar resources.' " *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 478, 624 S.E.2d 380, 384 (2006) (quoting *Barham v. Hawk*, 165 N.C. App. 708, 712, 600 S.E.2d 1, 4 (2004), *aff'd per curiam by an equally divided court*, 360 N.C. 358, 625 S.E.2d 778 (2006)).

Defendants first argue that Dr. Mele was not qualified to testify under Rule 702(b) of the Rules of Evidence because he never testified he was a licensed physician. *See* N.C.R. Evid. 702(b) (providing that

"[i]n a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 *unless the person is a licensed health care provider* in this State or another state and meets" specified criteria (emphasis added)).

While Dr. Mele was never specifically asked whether he had a medical license, he testified that he was an emergency medicine physician; that he was board certified in emergency medicine; that he used to have emergency room privileges at Rex Hospital in Raleigh, North Carolina; that he had stopped practicing in an emergency department less than a year earlier because of the difficulties in working on a night shift; that, at the time of the trial, he was instead practicing in occupational medicine and urgent care; and that he now had urgent care privileges at hospitals. Even though Dr. Mele, at the time of his testimony, was no longer an emergency medicine doctor, he was still practicing medicine. A jury could reasonably infer from this testimony that Dr. Mele did in fact have a medical license.

Defendants next contend that plaintiffs failed to show Dr. Mele's familiarity with defendants' community at the time of the alleged breach. If a plaintiff's standard of care expert witness "fail[s] to demonstrate that he [is] sufficiently familiar with the standard of care 'among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action,' " then the "plaintiff [is] unable to establish an essential element of his claim, namely, the applicable standard of care," and the trial court properly enters judgment on behalf of the defendant. *Smith*, 159 N.C. App. at 197, 582 S.E.2d at 673 (quoting N.C. Gen. Stat. § 90-21.12).

Dr. Mele testified at trial that he reviewed defendants' depositions to determine the standard of practice for emergency medicine at LNRMC in 2003. He confirmed that the way they practiced emergency medicine was no different than his practice and that their training and experience in emergency medicine was no different. Dr. Mele reviewed the website of the medical group employing Dr. Brant and Mr. Hales and "read through the qualifications and trainings of their doctors and PA's." He concluded that the physicians had similar academic backgrounds, training, and experience to his.

Dr. Mele also reviewed documents describing the population of the community, the number of beds in the hospital, the kinds of facilities available in the hospital, the kinds of patients seen, and the diag-

nostic services available.[1] He testified that the descriptions of the facilities, the equipment available, the number of beds, and the services performed were all similar to that of hospitals in which he has worked, including Rex Hospital.[2] Dr. Mele did internet research to obtain demographics regarding Mooresville and determined that it was similar to Wake County where Rex Hospital is located. Additionally, Dr. Mele testified that during his career, he has had an opportunity to consult with practitioners working in communities very similar to Iredell County and has determined that the standard of care in those communities is the same as in Iredell County and in the facilities in which he has worked.

This testimony was sufficient to establish Dr. Mele's familiarity with defendants and the standard of care in their community or similar communities. *See Billings*, 174 N.C. App. at 195, 619 S.E.2d at 925 (holding that doctor established sufficient familiarity with standard of care for neurologists in Wilkes County, North Carolina, when he examined demographic data on Wilkes County, he testified he was familiar with similar communities, he was licensed in North Carolina, and he had practiced in multiple communities in North Carolina); *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 199, 605 S.E.2d 154, 157 (2004) (holding doctor qualified to testify when he reviewed demographic information regarding Rocky Mount, North Carolina, drove through Rocky Mount, drove by hospital, determined surgical resources available from report of operation, and had practiced in other small towns in North Carolina), *aff'd per curiam*, 359 N.C. 626, 614 S.E.2d 267 (2005); *Coffman v. Roberson*, 153 N.C. App. 618, 624, 571 S.E.2d 255, 259 (2002) (holding that doctor could testify regarding standard of care where doctor testified that: (1) he practiced in Charlotte, North Carolina and was licensed to practice throughout State; (2) he was familiar with standard of care of communities similar to Wilmington, North Carolina; and (3) he based his opinion on internet research he conducted about hospital's size, training program, and other information); *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 22 23, 564 S.E.2d 883, 888 (2002) (reversing directed verdict when plaintiffs' expert specifically testified that he had knowledge of standard of care in Asheville, North Carolina and similar communities because of his practice in communities of size similar to Asheville

1. Although defendants contend that Dr. Mele did not specify in his trial testimony that he was reviewing 2003 information about the community and the hospital, his testimony as a whole indicates that he was looking at information from 2003.

2. Dr. Mele had in fact worked in the emergency department at LNRMC in 1992 or 1993.

and because he had attended rounds as medical student in Asheville hospital at issue).

To the extent defendants are challenging the fact that Dr. Mele acquired most of his information regarding the community after reaching his opinions and having his deposition taken, this Court has already rejected the argument that such an approach disqualifies the doctor's testimony. In *Roush v. Kennon*, 188 N.C. App. 570, 576, 656 S.E.2d 603, 607 (2008), the expert witness dentist, who was from Atlanta, Georgia, had similarly testified in a deposition that he had never been to the community at issue (Charlotte) and knew nothing about the dental community in Charlotte, but, prior to trial, had "supplement[ed] his understanding of the applicable standard of care in the Charlotte metropolitan area by reviewing, *inter alia*, the demographic data for the Charlotte metropolitan area, the Dental Rules of the North Carolina State Board of Dental Examiners, and the deposition of [the defendant] regarding the procedures, techniques, and implements which he used . . . ." Based on this supplemented knowledge, the Court concluded that the expert witness had sufficient familiarity with Charlotte to testify consistent with N.C. Gen. Stat. § 90-21.12. 188 N.C. App. at 576-77, 656 S.E.2d at 608. We can see no meaningful distinction between this case and *Roush*.

Defendants also argue that Dr. Mele "never testified as to what he specifically learned about the relevant community from reading Defendants' depositions and did not give any specific testimony regarding the physician skill and training in the community, facilities, equipment, funding or physical and financial environment of the evant medical community." Defendants have cited no authority requiring that an expert witness testify "as to what he specifically learned," and we have found none.

Smith establishes that an expert witness cannot simply assert that he is familiar with the applicable standard of care without also providing an explanation of the basis for his familiarity. *Smith*, 159 N.C. App. at 196, 582 S.E.2d at 672 ("Although Dr. Heiman asserted that he was familiar with the applicable standard of care, his testimony is devoid of support for this assertion."). *Smith* does not, however, require the degree of specificity urged by defendants. In *Smith*, the proposed expert admitted that the only basis for his claim of familiarity with the standard of care was verbal information received from the plaintiff's attorney regarding the size of the community and " 'what goes on there.' " *Id.* at 196-97, 582 S.E.2d at 672. The expert knew nothing about the medical community, had never visited the

community, had not spoken to health care practitioners in the community, and was " 'not acquainted with the medical community' " in the area involved. *Id.* at 197, 582 S.E.2d at 672. Further, the expert "offered no testimony regarding defendants' training, experience, or the resources available in the defendants' medical community." *Id.*, 582 S.E.2d at 673.

In this case, Dr. Mele established in his testimony that he had done research and had personal knowledge that supplied the information that the expert in *Smith* lacked. While Dr. Mele did not testify to specific numbers or actual details regarding the hospital and community, his testimony provided a basis—his research and personal knowledge—for his claim of familiarity. This case does not involve a bare statement of familiarity such as that present in *Smith*.

Finally, defendants argue that Dr. Mele incorrectly applied a national standard of care rather than the " 'same or similar community' " standard applicable in North Carolina. In *Smith*, although the plaintiff's expert testified he was familiar with the standard of care for orthopedic surgeons practicing in the relevant community, he ultimately admitted that he was basing his opinions on the fact that the standard of care for orthopedic surgeons all over the country was " 'very similar.' " *Id.* at 194, 582 S.E.2d at 671. In affirming the trial court's exclusion of the expert's testimony, this Court observed that the expert could comment only on the standard of care anywhere in the country regardless of what the medical community involved in the case might do. *Id.* at 197, 582 S.E.2d at 672. Because "there was no evidence that a national standard of care is the same standard of care practiced in defendants' community[,]" this testimony was insufficient. *Id.*, 582 S.E.2d at 673.

It is, however, established that mere mention of a national standard is not sufficient to warrant disregard of an expert's testimony if the expert has testified regarding his or her familiarity with the standard of care in the same or similar communities. In *Roush*, 188 N.C. App. at 576, 656 S.E.2d at 607-08, once this Court concluded that the plaintiff's expert was qualified to testify given the evidence of his familiarity with Charlotte and his conclusion that the standard of care there was similar to that of Atlanta, "[t]he fact that [the plaintiff's expert] previously testified that he believed in a national standard of care [did] not invalidate this conclusion." *See also Pitts*, 167 N.C. App. at 197, 605 S.E.2d at 156 ("Although Dr. Strickland testified that the standard of care for laparoscopic surgery is a national standard,

we are not of the opinion that such testimony inexorably requires that his testimony be excluded. Rather, the critical inquiry is whether the doctor's testimony, taken as a whole, meets the requirements of N.C. Gen. Stat. § 90-21.12."); *Cox v. Steffes*, 161 N.C. App. 237, 244, 246, 587 S.E.2d 908, 913, 914 (2003) (holding that although witness testified that standard of care at issue "was in fact the same across the nation," testimony was sufficient to support jury's verdict of negligence, despite reference to national standard of care, because expert had testified specifically that he knew standard of care practiced in defendant's community).

Defense counsel, in this case, asked Dr. Mele whether he was testifying that he was applying a national standard of care, to which Dr. Mele responded:

> A. I testified that I understood the national standard of care to mean that any hospital that's a Level Two trauma center, perhaps the way we are, would have the same kind of care and the same kind of expertise no matter what city or state it was located in, if it was a Level Two trauma center with particular surgeons and diagnostic capabilities available.

Defense counsel then asked: "And the standard of care that you're applying is the standard of care that you believe would be the same in any city in America; correct?" Dr. Mele replied:

> A. Standard of care applying is a board certified ER doctor who has CAT scan available and has a surgeon available, who has nurses and paramedics available. . . . Those are a more generic definition of what's available to practice medicine in that ER.
>
> . . . .
>
> A. The word national doesn't have the same meaning to me as perhaps you. And if I missed the legal point with that, I apologize. But the standard I'm applying is the training that was available to the physician, the training that was available to the P.A. and the resources that are available for him to do that. It doesn't, in my mind, change his skill or his abilities, what building he's practicing or what the name of the city is if he has those facilities available. So maybe I misspoke on that, but that's my concept.

> Q. And your concept is that the standard of care is the same in any city in the [sic] America, isn't that right?
>
> A. The concept is the standard of care is the same if those other conditions are met.

It is questionable whether this testimony could even be viewed as embracing a national standard of care since Dr. Mele repeatedly rejected defense counsel's attempt to extend Dr. Mele's opinion to all cities and limited his opinion, as our courts require, to those cities having the same facilities, resources, and training available. In any event, Dr. Mele's testimony as a whole met the requirements of N.C. Gen. Stat. § 90-21.12, and he specifically testified that the standard of care he was applying was the standard of care for defendants' community, just like the experts in *Roush*, *Pitts*, and *Cox*.

We, therefore, hold that Dr. Mele was qualified to testify as to the applicable standard of care. Since defendants have not disputed that Dr. Mele further testified that defendants breached that standard of care, plaintiffs presented sufficient evidence to go to the jury on the question of the breach of the standard of care.

II

[2] Defendants argued alternatively that plaintiffs presented insufficient evidence that any breach of the standard of care proximately caused Duncan's death. As this Court has explained, "[o]ur courts rely on medical experts to show medical causation because 'the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen[.]' " *Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 371, 663 S.E.2d 450, 453 (2008) (quoting *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)), *cert. denied*, 363 N.C. 372, 678 S.E.2d 232 (2009).

The expert testimony must establish that the connection between the medical negligence and the injury is " 'probable, not merely a remote possibility.' " *Id.* (quoting *White v. Hunsinger*, 88 N.C. App. 382, 387, 363 S.E.2d 203, 206 (1988)). If, however, "this testimony is based merely upon speculation and conjecture, . . . it is no different than a layman's opinion, and as such, is not sufficiently reliable to be considered competent evidence on issues of medical causation." *Id.* (citing *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000)).

Defendants argue that Dr. Wyatt's testimony was insufficient evidence of proximate cause because Dr. Wyatt's testimony as to Duncan's chances of survival, had he been admitted and observed at the hospital, amounted to mere speculation.[3] Defendants contend that, as to this issue, the Court should apply the abuse of discretion standard of review set out in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004). We disagree.

Howerton addresses the test applicable in determining the *admissibility* of expert testimony. *Id.* In *Howerton*, our Supreme Court set out a "three-step inquiry for evaluating 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?" *Id.* (internal citations omitted).

In this case, there was no dispute at trial regarding the admissibility of Dr. Wyatt's expert testimony. He was admitted as an expert witness without any objection. As for the first prong of the test, defendants expressed no concern regarding the reliability of Dr. Wyatt's "method of proof." *See id.* at 459, 460, 597 S.E.2d at 687 (holding that, in determining reliability, trial court should first look at whether precedent justifies recognition or rejection of "scientific theory or technique" advanced by expert; in absence of precedent, trial court must look at indices of reliability, including expert's use of established techniques, expert's professional background in field, use of visual aids before jury, and independent research conducted by expert"). As for the other two prongs, defendants neither challenge Dr. Wyatt's qualifications to testify nor argue that his testimony was irrelevant. *Howerton* is simply inapplicable.

Instead of challenging the admissibility of Dr. Wyatt's testimony, defendants, at trial and on appeal, have challenged the sufficiency of Dr. Wyatt's testimony to establish causation. Our Supreme Court in *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003), warned that "the standards for admissibility of expert opinion testimony have been confused with the standards for sufficiency of such testimony." Expert testimony as to causation "is admissible if helpful to the jury," although it may be "insufficient to prove causation, particularly 'when there is additional evidence or testimony showing the

3. Defendants also argue that Dr. Wyatt's testimony as to when Duncan's liver began to bleed and the process that ultimately caused his death was speculation. This testimony is immaterial to the issues raised on appeal, and we do not address it.

expert's opinion to be a guess or mere speculation.' " *Id.* at 233, 581 S.E.2d at 753 (quoting *Young*, 353 N.C. at 233, 538 S.E.2d at 916). Defendants' argument on appeal perpetuates this confusion by failing to distinguish between the standard of review for admissibility and the standard of review for the sufficiency of the evidence.

Our Supreme Court, in *Howerton*, cautioned against the merging of the two issues. After rejecting the federal *Daubert* standard for evaluating the admissibility of expert testimony, the Court emphasized its "concern[] that trial courts asserting sweeping pre-trial 'gatekeeping' authority under *Daubert* [regarding the admissibility of expert testimony] may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence." *Howerton*, 358 N.C. at 468, 597 S.E.2d at 692.

More recently, the Supreme Court underscored, in the medical malpractice context, *Howerton's* desire to ensure that preliminary questions of admissibility not intrude upon the right to trial by jury:

> We emphasized [in *Howerton*], on the other hand, that the trial court's preliminary assessment should not "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." [*Howerton*, 358 N.C.] at 460, 597 S.E.2d at 687. Evidence may be "shaky but admissible," and it is the role of the jury to make any final determination regarding the weight to be afforded to the evidence. *Id.* at 460-61, 597 S.E.2d at 687-88 (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596, 125 L. Ed. 2d 469, 484, 133 S. Ct. 2786, 2798 (1993)).

Crocker v. Roethling, 363 N.C. 140, 149-50, 675 S.E.2d 625, 632 (2009) (Martin, J., concurring).[4] The Court further pointed to "the emphasis *Howerton* places on the jury's role in evaluating expert testimony" and concluded that procedures must be adopted with an eye towards "protecting the jury from unreliable expert testimony yet preserving the jury's role in weighing the credibility of expert testimony when appropriate." *Id.* at 153, 675 S.E.2d at 634-35. Even the dissent in *Crocker* recognized that *Howerton* called on the trial court, when "determining whether an expert's testimony is sufficiently reliable for admission," to make " 'a preliminary, foundational inquiry into the basic methodological adequacy of [the] expert testimony.' " *Id.* at 157, 675 S.E.2d at 637 (quoting *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687).

4. Justice Martin's opinion concurring in the plurality opinion by Justice Hudson constitutes the controlling opinion. *Id.* at 154 n.1, 675 S.E.2d at 635 n.1 (Newby, J., dissenting).

In this appeal, no issue exists regarding any preliminary foundational inquiry into the basic methodological adequacy of Dr. Wyatt's testimony or his qualifications to testify. *Howerton* is immaterial, as is its standard of review. Instead, the proper standard of review is the one applicable to decisions at trial regarding the sufficiency of the evidence to take plaintiff's case to the jury—the directed verdict standard.

This conclusion is consistent with this Court's decision in *Weaver v. Sheppa*, 186 N.C. App. 412, 651 S.E.2d 395 (2007), *aff'd per curiam by an equally divided court*, 362 N.C. 341, 661 S.E.2d 733 (2008), a medical malpractice appeal in which the Court reversed the trial court's grant of judgment notwithstanding the verdict ("JNOV:"). After noting that "[b]ecause causation is, in essence, a factual inference to be garnered from attendant facts and circumstances, it is a question generally best answered by a jury," the Court acknowledged—as defendants argue here—that "expert testimony based merely on speculation and conjecture 'is not sufficiently reliable to qualify as competent evidence on issues of medical causation.' " *Id.* at 416, 651 S.E.2d at 398 (quoting *Young*, 353 N.C. at 230, 538 S.E.2d at 915).

However, the Court further stressed that "when the challenged expert testimony relates to *causation* such admitted testimony is competent 'as long as the testimony is helpful to the jury and based sufficiently on information reasonably relied upon under Rule 703[.]' " *Id.* at 416-17, 651 S.E.2d at 399 (quoting *Johnson v. Piggly Wiggly of Pinetops, Inc.*, 156 N.C. App. 42, 49, 575 S.E.2d 797, 802 (2003)). The Court then proceeded to review the sufficiency of the expert testimony of causation under the traditional standard of review applicable to decisions granting JNOV. *Id.* at 417, 651 S.E.2d at 399 ("After a careful review of the record on appeal, we conclude that plaintiffs presented more than a scintilla of evidence supporting the proximate causation element of their medical negligence action."). Consequently, in this case, we apply the standard of review applicable to directed verdicts and not the *Howerton* abuse of discretion standard urged by defendants.

Turning to the merits, Dr. Wyatt testified that had a CT scan been performed on Duncan's abdomen, the liver lacerations would have been discovered. He also testified that he believed Duncan died from the bleeding caused by the liver lacerations and subsequent rupture.

Dr. Wyatt was then asked, "And you have an opinion satisfactory to yourself and to a reasonable degree of medical certainty that had [Duncan's] liver laceration been diagnosed and treated that he would

have had a better than 51 percent chance of survival?" Dr. Wyatt responded, "Yes." He testified: "I believe he would have survived it." This was in conformity with Dr. Wyatt's conclusion in his written report, admitted into evidence, that "[s]urvival is excellent (>51%) in patients who arrive in the hospital and get proper initial and subsequent management."

On cross-examination, Dr. Wyatt was asked, "And you cannot say to a reasonable degree of medical certainty that had he been admitted for observation that the outcome would have been any different, because it's speculation, correct?" He replied: "It is speculation, but I do think he would have had a better chance of surviving." He admitted that he could not "say for certainty" that Duncan would have survived. Dr. Wyatt was then asked:

> Q. And where you talked about in response to the questions of [plaintiffs' counsel], in your report where it says "survival is excellent," that's . . . where you say "greater than 51 percent," . . . you're talking generally, patients generally have survival chances above 51 percent, correct?

He responded:

> A. Well, I was talking specifically about this injury. If—if he had been observed in the proper unit when he started to bleed or showed signs of instability, then I think he had a greater than 50 percent chance of surviving.

When defense counsel pressed him to agree that "he would have had a better chance, but no one can say—it would be speculation to say he would have had a 51 percent or a 49 percent chance, correct?", Dr. Wyatt replied: "That's all speculation."

Finally, Dr. Wyatt was asked:

> Q. And that with regard to this particular case and Duncan Day's particular circumstances, you cannot say to any certainty that he would have, in fact, survived, correct?
>
> [Plaintiffs' Counsel]: Objection.
>
> A. I'm not quite sure if I understand the question.
>
> Q. Okay. Meaning that with regard to Duncan Day's situation, as you just testified to, all you can say is that he would have had a better chance of survival. You can't say what percentage it would have been. Correct?

A. I can say; but, I mean, that's—it's all just specu—I mean, it's—it's guessing. I don't—

Q. Okay.

A. He certainly would have had a better chance of survival.

Q. Okay. But in terms of what percentage, then it would all be speculation, correct?

A. Right.

Q. And all you can say is he just would have had a better chance, correct?

A. Yes.

On re-direct, Dr. Wyatt was asked:

Q. Based on the patients that you have treated with Type IV or Type V liver lacerations, is it still your opinion of the over—based on your overall experience that those people given proper management have a better than 51 percent [sic] of survival?

A. What I can—

[Defendants' Counsel]: Objection.

A. What I can say from my experience is that those who have been managed in the hospital with Grade IV liver lacerations and some Grade V's, most of them have survived.

Q. Would it be more than 51 percent?

A. Yes.

We believe this case is controlled by *Felts v. Liberty Emergency Serv., P.A.*, 97 N.C. App. 381, 388 S.E.2d 619 (1990). In *Felts*, the plaintiffs' expert witness testified that it was " 'possible' " that the plaintiff's heart attack could have been prevented if the plaintiff had been admitted to the hospital's Coronary Care Unit. *Id.* at 388, 388 S.E.2d at 623. Although acknowledging that this testimony that the heart attack could have possibly been prevented, standing alone, would not be sufficient, the Court pointed out that the expert had also given "a detailed explanation of how admission to a hospital . . . could have prevented plaintiff's heart attack." *Id.* at 389, 388 S.E.2d at 623.

The Court held that the testimony as a whole "raise[d] more than a 'mere possibility or conjecture' and [wa]s sufficient to withstand a directed verdict." *Id.* (quoting *Bruegge v. Mastertemp, Inc.*, 83 N.C. App. 508, 510, 350 S.E.2d 918, 919 (1986)). The Court explained:

> We find that plaintiffs' evidence at trial establishes more than a minimal "showing that different treatment would have improved [his] chances of recovery." Plaintiffs' evidence before the trial court tended to show that defendants' failure to hospitalize and failure to more thoroughly diagnose plaintiff's condition contributed to his myocardial infarction and its severity. We hold that this is sufficient to overcome a directed verdict motion on the issue of proximate cause.

Id. at 390, 388 S.E.2d at 624.

Here, Dr. Wyatt specifically testified that "if [Duncan] had been observed in the proper unit when he started to bleed or showed signs of instability, then I think he had a greater than 50 percent chance of surviving." On top of specifically testifying that had he been admitted and observed, Duncan would have had a greater than 50% chance of survival, Dr. Wyatt's report explicitly set out how, if the laceration had been discovered, a rupture and internal bleeding could have been prevented or stopped. Under *Felts*, this was sufficient evidence of proximate cause.

Defendants, however, argue that Dr. Wyatt's proximate cause testimony amounted to speculation. In *Young*, the Supreme Court recognized that "when . . . expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman's opinion. As such, it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." 353 N.C. at 230, 538 S.E.2d at 915. In that case, the Court held that the plaintiff's expert's opinion as to what caused the plaintiff's fibromyalgia "was based entirely upon conjecture and speculation." *Id.* at 231, 538 S.E.2d at 915. The expert had testified that there were several potential causes of the plaintiff's fibromyalgia other than her work-related back injury, but that he had not performed any testing to determine what was, in fact, the cause of her symptoms. *Id.* That testimony was not sufficient evidence of proximate causation. *Id.* at 233, 538 S.E.2d at 917.

Similarly, in *Azar*, 191 N.C. App. at 371, 663 S.E.2d at 453, this Court held there was not sufficient evidence of causation when the plaintiff's expert testified that the plaintiff's bedsores were " 'at least

one cause of infection' " and that she died " 'as a result of all of [her] complications.' " The Court held that the expert's testimony was mere speculation because he could not identify which complication was the ultimate cause of her death. *Id.* at 372, 663 S.E.2d at 453. *See also Campbell v. Duke Univ. Health Sys., Inc.*, 203 N.C. App. 37, 44-45, 691 S.E.2d 31, 37 (holding expert testimony constituted speculation where expert unable to point to any specific action by defendants during plaintiff's surgery that would have caused injury), *disc. review denied*, 364 N.C. 434, 702 S.E.2d 220 (2010).

Here, there is no dispute that Duncan died because of the bleeding due to lacerations to his liver sustained in the car accident. This case is, therefore, unlike *Young*, in which the question was what caused the injurious condition (fibromyalgia), and unlike *Azar*, in which the issue was which condition was the immediate cause of death. It is also unlike *Campbell* in that Dr. Wyatt, in discussing the cause of Duncan's death, specifically pointed to defendants' failure to uncover the lacerations through a CT scan and to hospitalize Duncan for observation and treatment. Dr. Wyatt also gave a detailed explanation of how the failure to perform a CT abdomen scan and admit Duncan to the hospital caused Duncan's death, explaining the list of steps that could have been taken to treat the injury had the scan been performed and the lacerations been discovered while Duncan was in the hospital.

Although defendants also have cited *Gaines v. Cumberland Cnty. Hosp. Sys., Inc.*, 195 N.C. App. 442, 446, 672 S.E.2d 713, 716 (2009), this Court granted rehearing in that case, 203 N.C. App. 213, 222-23, 692 S.E.2d 119, 124-25, *disc. review denied*, 364 N.C. 324, 700 S.E.2d 750 (2010). Initially, this Court held that expert testimony was speculative and insufficient to show proximate cause when the expert testified that if the health care provider defendants had pursued an investigation of potential child abuse of the plaintiff, they would have reported the situation to the Department of Social Services ("DSS"). DSS would have then investigated and substantiated the report and removed the plaintiff from the home, preventing further injury. The Court reasoned that while the expert "did testify regarding what she believed was more likely than not the proximate cause of [the plaintiff's] injuries, her testimony was based on speculation and was not grounded in fact." *Gaines*, 195 N.C. App. at 446, 672 S.E.2d at 716.

On rehearing, however, this Court held that this testimony was sufficient evidence of proximate cause to survive summary judgment, explaining that the expert, who was familiar with DSS policies and

procedures, had specifically listed how and why the plaintiff would have been removed from the home, and how the defendants' negligence in not investigating more likely than not caused the plaintiff's injuries. *Gaines*, 203 N.C. App. at 222-23, 692 S.E.2d at 124-25. The Court held that any competing testimony was a question for the jury. *Id.* at 223, 692 S.E.2d at 125.

Similarly, in this case, Dr. Wyatt had experience treating patients with comparable liver lacerations, specifically listed what would have been done had the lacerations been diagnosed and Duncan hospitalized, and testified that "most" patients with Duncan's level of lacerations survive if hospitalized and properly managed. Under *Gaines*, this testimony was sufficient to take the case to the jury.

Defendants nonetheless contend that Dr. Wyatt admitted that his testimony was speculation. Although Dr. Wyatt used the word "speculation" in portions of his testimony, our review of the entirety of his testimony indicates that Dr. Wyatt was not labeling as speculation his opinion that if Duncan's liver laceration had been diagnosed and treated, he would have had greater than 51% chance of survival. Rather, we read his testimony as acknowledging that the practice of putting a specific percentage on Duncan's chance of survival is inherently speculative. Dr. Wyatt, however, ultimately testified that "most" patients with Duncan's injury who are treated in accordance with the standard of care will survive and that he believes Duncan "would have survived." This opinion is sufficient to establish a probability of survival regardless of the precise numerical percentage used. *See also Turner*, 325 N.C. at 160, 381 S.E.2d at 711 (reversing directed verdict entered based on lack of evidence of proximate cause when expert witness expressed opinion that defendant "should have carefully examined Mrs. Turner's abdomen [and] [h]ad he done so, a colostomy could subsequently have been performed which could have saved Mrs. Turner's life"; stating that "[s]uch evidence is the essence of proximate cause").

We also note that we cannot, as defendants urge, pull out portions of Dr. Wyatt's testimony that might support a directed verdict and disregard portions that would support sending the case to the jury. A defendant cannot justify a directed verdict by pointing to inconsistencies and contradictions in a plaintiff's evidence because "on a motion for directed verdict conflicts in the evidence unfavorable to the plaintiff must be disregarded." *Polk v. Biles*, 92 N.C. App. 86, 88, 373 S.E.2d 570, 571 (1988). Conflicts in the evidence and contradictions within a particular witness' testimony are "for the jury to

resolve." *Shields v. Nationwide Mut. Fire Ins. Co.*, 61 N.C. App. 365, 374, 301 S.E.2d 439, 445 (1983). *See also Alexander v. Wal-Mart Stores, Inc.*, 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting) ("[I]t is [not] the role of this Court to comb through the testimony and view it in the light most favorable to the defendant, when the Supreme Court has clearly instructed us to do the opposite. Although by doing so, it is possible to find a few excerpts that might be speculative, this Court's role is not to engage in such a weighing of the evidence."), *rev'd per curiam for reasons in dissenting opinion*, 359 N.C. 403, 610 S.E.2d 374 (2005).

This aspect of the directed verdict standard is consistent with the Supreme Court's holding in *Howerton* that "once the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable (and, of course, relevant), any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility." 358 N.C. at 461, 597 S.E.2d at 688. *See also Turner*, 325 N.C. at 161-62, 381 S.E.2d at 712 (refusing to uphold directed verdict in medical malpractice case based on expert's answers to cross-examination questions because doing so would require construing evidence in light most favorable to movants, which "the law does not permit"); *Workman v. Rutherford Elec. Membership Corp.*, 170 N.C. App. 481, 494, 613 S.E.2d 243, 252 (2005) (in workers' compensation case, holding that even though causation expert did not testify without equivocation and gave testimony conflicting to some extent with his medical notes, "[c]redibility issues caused by any variance in [expert's] treatment notes and his later testimony was for the Commission to decide").

Finally, defendants argue that Dr. Wyatt's testimony is insufficient because he merely testified that if the liver laceration had been discovered and Duncan had been in the hospital when his liver ruptured, he had a "better" chance of survival. In this respect, defendants contend this case is similar to *Lord v. Beerman*, 191 N.C. App. 290, 664 S.E.2d 331 (2008), and *White v. Hunsinger*, 88 N.C. App. 382, 363 S.E.2d 203 (1988).[5]

In *Lord*, 191 N.C. App. at 297, 664 S.E.2d at 336, the plaintiff's first expert testified that although earlier receipt of steroid therapy might

5. Defendants also cite *Norman v. Branner*, 171 N.C. App. 515, 615 S.E.2d 738, 2005 WL 1669128, 2005 N.C. App. LEXIS 1324 (2005) (unpublished), but as that case is unpublished and not controlling authority, we do not discuss it.

hasten a patient's recovery with respect to most eye diseases, he could not say whether earlier treatment would have increased the plaintiff's prognosis due to the rarity of his particular eye disease and the lack of research. The plaintiff's second expert similarly testified that while earlier steroid treatment " 'perhaps' " could have led to a fuller recovery and that the plaintiff's eyesight " 'may have been improved to a better outcome,' " an attempt to quantify what improvement might have been obtained "would amount to sheer speculation[.]" *Id.* at 300, 664 S.E.2d at 338. This Court held, after reviewing this testimony, that "Plaintiff's evidence was insufficient to establish the requisite causal connection between Defendants' alleged negligence and Plaintiff's blindness." *Id.*

In *White*, 88 N.C. App. at 383, 363 S.E.2d at 205, the plaintiff's expert testified that the decedent's chances of survival would have increased if he had been transferred to a neurosurgeon earlier. On appeal, the Court affirmed the order granting summary judgment in favor of the defendant, explaining that "plaintiff could not prevail at trial by merely showing that a different course of action would have improved [the decedent's] chances of survival." *Id.* at 386, 363 S.E.2d at 206. The Court emphasized that "[p]roof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient's chances of recovery." *Id.* The Court concluded: "The connection or causation between the negligence and death must be probable, not merely a remote possibility."*Id.* at 387, 363 S.E.2d at 206.

In this case, Dr. Wyatt supplied the testimony that was missing in *Lord* and *White*. While the experts in *Lord* and *White* merely testified that complying with the standard of care would have given the plaintiffs a "better" chance, Dr. Wyatt specifically testified that when patients with liver lacerations like that suffered by Duncan are hospitalized, monitored, and treated, "most" of them survive. He further testified that if the defendants had followed the standard of care, Duncan would have had a better than 51% chance of survival and that he believes Duncan would have survived. In sum, Dr. Wyatt's testimony established that Duncan's survival was not merely possible but rather was probable if defendants had complied with the standard of care. Although defendants point out that Dr. Wyatt could not say to an absolute certainty that Duncan would have survived, absolute certainty is not required. We hold that Dr. Wyatt's testimony was sufficient to send the issue of proximate cause to the jury.

In sum, we hold that plaintiffs presented sufficient competent evidence through Dr. Mele that defendants breached the applicable standard of care. Further, Dr. Wyatt provided sufficient evidence of proximate causation. Since those are the only two elements at issue, we hold that the trial court erred in entering a directed verdict in favor of defendants.

Reversed.

Judges ROBERT C. HUNTER and CALABRIA concur.

IN THE MATTER OF J.K.C. AND J.D.K

No. COA11-783

(Filed 17 January 2012)

1. Termination of Parental Rights—neglect—incarcerated parent—evidence of neglect—insufficient

The trial court did not err by determining that an incarcerated respondent's parental rights could not be terminated based on neglect. The circumstances supported the trial court's determination that the guardian *ad litem* had not presented clear and convincing evidence of respondent's neglect of the children.

2. Termination of Parental Rights—failure to correct conditions—incarcerated parent

In a termination of parental rights case, the unchallenged findings of fact supported the trial court's conclusion that the evidence did not clearly and convincingly show that the incarcerated respondent willfully left the children in foster care without making reasonable progress to correct the conditions which led to the removal of the children from their mother's home.

3. Termination of Parental Rights—failure to pay cost of care—incarcerated respondent—inability of DSS to receive support

The trial court was correct in not terminating an incarcerated respondent's parental rights for willful failure to pay a reasonable cost of care for the children where the failure to pay was not based upon a stubborn resistance, but upon the Guilford County

Department of Social Services' inability to receive support from him at that time.

4. Termination of Parental Rights—paternity—birth certificate

In the context of a proceeding for termination of parental rights where the petitioner has the burden of proving that a respondent has not established paternity of a child, the practical effect of a birth certificate bearing respondent's name as father of the child is the creation of a rebuttable presumption that the respondent has in fact established paternity of the child either judicially or by affidavit, as required by N.C.G.S. § 7B-111(a)(5)(a).

5. Termination of Parental Rights—paternity—judicially established

The trial court properly concluded that the guardian *ad litem* had not met its burden and respondent's parental rights as to one of the children could not be terminated based on N.C.G.S. § 7B-111(a)(5). A finding clearly supported by competent evidence supported the conclusion that the paternity of the child had been judicially established prior to the filing of the petition.

6. Termination of Parental Rights—paternity—incomplete findings—birth certificate presumption—not rebutted

Although the trial court's conclusion that respondent's parental rights should not be terminated pursuant to N.C.G.S. § 7B-1111(a)(5) was not supported by findings that did not address all of the subsections of the statute, a remand is not required if the facts are not in dispute and only one inference can be drawn from them. The guardian *ad litem* in this case did not meet its burden of showing that respondent had not established paternity judicially.

7. Termination of Parental Rights—dependency—insufficient findings

The trial court did not err by dismissing a termination of parental rights petition based upon dependency pursuant to N.C.G.S. § 7B-1111(a)(6). The trial court did not find that respondent was incapable of providing care and supervision and the guardian *ad litem* did not present any evidence that respondent's inability to provide care and support was due to one of the specified conditions or any other similar cause or condition.

8. Termination of Parental Rights—abandonment—dismissal of petition—unnecessary

The trial court erroneously dismissed a petition to terminate parental rights with respect to N.C.G.S. § 7B-1111(a)(7) where the petition alleged abandonment only as to any unknown putative father and not to respondent. Dismissing the petition on this ground was not necessary and did not prejudice any party.

Appeal by guardian ad litem from order entered 22 March 2011 by Judge Polly D. Sizemore in District Court, Guilford County. Heard in the Court of Appeals 28 December 2011.

Attorney Advocate Donna Michelle Wright for appellant Guardian Ad Litem.

J. Lee Gilliam for respondent-appellee father.

STROUD, Judge.

The guardian *ad litem*, on behalf of the minor children, appeals the dismissal of the petition to terminate respondent's parental rights. For the following reasons, we affirm the trial court's order.

I. Background

Respondent and the mother[1] are the parents of J.K.C. ("Jack"), born November 2002, and J.D.K. ("Jasmine")[2], born October 2004. The Guilford County Department of Social Services ("GCDSS") has been involved with the family since May 2003 when GCDSS filed a juvenile petition alleging that Jack was a neglected and dependent child based upon drug abuse and domestic violence issues. The trial court adjudicated Jack a neglected juvenile and placed Jack in the legal and physical custody of GCDSS. About two years later, Jack was placed back in the custody of his mother who was living in New Hanover County.

On 23 January 2006, the New Hanover County Department of Social Services took Jack, age 3, and Jasmine, age 1, into custody based upon the mother's drug relapse and a domestic violence incident between respondent and the mother, which resulted in respondent's arrest. Jack and Jasmine were adjudicated neglected on 16 March

1. The children's mother is not a party to this appeal.

2. We will refer to the minor children J.K.C. and J.D.K. by the pseudonyms Jack and Jasmine, respectively, to protect the children's identities and for ease of reading.

2006. However, by 11 January 2007, the trial court returned custody to their mother based in part on her compliance with her substance abuse treatment.

On 20 February 2008, GCDSS filed a juvenile petition alleging Jack and Jasmine were neglected and dependent juveniles. The petition alleged that the mother was continuing to have substance abuse issues and that respondent was serving a nine-year prison sentence. The trial court adjudicated Jack and Jasmine neglected and dependent juveniles.

The trial court held a permanency planning review hearing in June 2008 and ordered a concurrent plan of adoption and reunification. At the September 2008 permanency planning hearing, the trial court suspended any visitation between respondent and the children because of his incarceration. After holding a permanency planning hearing on 15 January 2009, the trial court suspended the children's visitation with the mother and ordered GCDSS to proceed with termination of parental rights within sixty days.

On 27 April 2009, GCDSS filed a Motion for Review "request[ing] the Court to reconsider Termination of Parental Rights in this matter." By order filed 2 June 2009, the trial court relieved GCDSS of its duty to file the termination action and ordered the Guardian ad Litem program, who accepted responsibility for prosecuting the termination of parental rights, to proceed with filing the action.

On 13 August 2009, the guardian ad litem filed a petition to terminate the parental rights of the mother, respondent, and any unknown father. As to respondent, the petition alleged that grounds existed to terminate his parental rights under N.C. Gen. Stat. § 7B-1111(a)(1) (neglect); N.C. Gen. Stat. § 7B-1111(a)(2)(failure to make reasonable progress); N.C. Gen. Stat. § 7B-1111(a)(3)(failure to pay reasonable cost of care); N.C. Gen. Stat. § 7B-1111(a)(5)(failure to legitimate the juveniles); and N.C. Gen. Stat. § 7B-1111(a)(6) (incapable of providing care and supervision). The mother subsequently relinquished her parental rights to Jack and Jasmine. A hearing was held on the termination petition in November 2009. By order filed 22 March 2011, the trial court concluded that the guardian ad litem failed to show by clear, cogent, and convincing evidence that grounds existed to terminate the parental rights of respondent, and dismissed the petition. The guardian ad litem appeals.

II. Standard of Review

We have stated that "[t]he standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Shepard*, 162 N.C. App. 215, 221-22, 591 S.E.2d 1, 6 (citations and quotation marks omitted), *disc. review denied sub nom. In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004). The burden is on the petitioner to prove the facts justifying termination by clear and convincing evidence. *In re Nolen*, 117 N.C. App. 693, 698, 453 S.E.2d 220, 223 (1995).

We first note that the guardian ad litem challenges only the trial court's finding of fact 18 as not being supported by competent evidence. Respondent challenges finding of fact 17 based on N.C.R. App. P. 28(c). The trial court's remaining unchallenged findings of fact are presumed to be supported by competent evidence and binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). The trial court made the following unchallenged findings of fact in support of its conclusion that the guardian ad litem did not meet its burden as to respondent:

> 9. The minor children were adjudicated to be neglected on March 16, 2006. The Court order found that both parents have substantial problems of substance abuse and that the relationships of the parents "have been marred by domestic violence."
>
> 10. At the time the children were taken into custody of [New Hanover Department of Social Services ("NHDSS")], [respondent] was in jail in New Hanover County with charges of felony assault on [the mother]. It was ordered that [respondent] have supervised visitation upon his release from custody contingent upon clean drug screens and his being substance free. It was also concluded, but not ordered, that reunification efforts be discontinued with [respondent].
>
> 11. [Respondent] remained in the custody of the New Hanover County Sheriff until his conviction on Second Degree Kidnapping and Habitual Misdemeanor Assault on August 7, 2006. He was and remains incarcerated in North Carolina Department of Corrections [sic] with a projected release date of January 4, 2013.
>
> 12. The minor children were returned to the legal and physical custody of their mother in January of 2007.

13. On February 20, 2008, the children were placed in the legal and physical custody of GCDSS pursuant to non secure custody order. On March 20, 2008, the minor children were adjudicated to be neglected and dependent pursuant to a stipulation by [the mother]. [Respondent] was not brought in from prison for the hearing.

14. [Respondent] was not provided a case plan but as noted in the September 11, 2008 [order] he had nine classes while incarcerated, was working to improve himself. He was also contacting the social worker. A case plan was mailed to [respondent] on August 22, 2008 and it was signed and returned in November of 2008. The components of the case plan and [respondent's] compliance is as follows:

a. maintain contact with GCDSS: [Respondent] is in compliance and has regularly sent letters to social worker inquiring about the children, requesting pictures and provided updates regarding location and programs completed:

b. address substance abuse: attend Narcotics Anonymous and Alcohol Anonymous; attend classes as available: [Respondent] is in compliance provided the following certificates: Inpatient Treatment for Chemical Dependency (DART): twelve session of DACPP Aftercare Program. [Respondent] is a Residential Chemical Dependency Program Treatment Assistant.

c. anger management: enroll in classes; [Respondent] is not able to be in compliance on this component as this type of class has not been offered in the prisons he has been placed;

d. parenting: participate in parenting classes if available: there is only [one] class offered by Department of Correction and [respondent] has completed this class;

e. update case plan upon his release from prison.

15. There are no classes available in the Department of Corrections [sic] to address domestic violence. [Respondent] did complete Basic Employability Skills Training, Thinking for Change, Masonry, Office Practice and Character Education Training.

16. [Respondent] is in substantial compliance with his case plan.

. . . .

19. [Respondent] earns $1.00 a day in the Department of Corrections [sic]. He has family members and other friends who contribute to his account. His account in DOC currently totals $1,052.95. He has received over $5,000.00 since 2007.

20. The cost of foster care for [Jasmine] from February 2008 to October of 2009 is $9,397.10 and for [Jack] is $10,613.10. This does not include day care for [Jasmine].

21. [Respondent] has not paid anything toward the care of the children since his incarceration. However, he has written both Guilford County Child Support Enforcement and the social worker inquiring about providing financial support and was informed that it could not be arranged at this time. Guilford County Child Support Enforcement Agency wrote [respondent] and stated that as he was earning less than minimum wage, the agency could not establish a child support case.

22. [Respondent] has not sent cards or letters to children since his incarceration. However, it also appears that at one time he was told not to contact the children and he did not think he was allowed to send anything directly to them. He has sent letters, cards and gifts to his mother so she could, when allowed, give these to the children.

23. He has sent one letter to [Jack], in care of the therapist, at her request, apologizing to [Jack] for his actions.

. . . .

27. [Respondent] has not seen his children or had any contact with them since his incarceration on December 31, 2005 when [Jack] was three years of age and [Jasmine] was one year of age.

28. [Respondent's] only relative to offer to provide a place for the minor children is his mother, but it has been judicially determined that his mother's house is not appropriate.

Based on the evidence presented and the findings, the trial court determined that none of the grounds alleged by the guardian ad litem were established. We now address each ground in turn.

III. Neglect

[1] N.C. Gen. Stat. § 7B-101(15) (2009) defines a "Neglected juvenile" 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[.]" Although a prior adjudication of neglect may be considered by the trial court in a termination hearing, a parent's rights may not be terminated solely on the basis of past neglect where the conditions which led to the neglect no longer exist. *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231-32 (1984). Where a child has been out of the custody of the parent for some time, "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* at 715, 319 S.E.2d at 232 (citation omitted). Determinative factors include "the fitness of the parent to care for the child *at the time of the termination proceeding." Id.* (emphasis in original). Incarceration, by itself, is insufficient to establish neglect in a termination case, but it is relevant to whether a child is neglected. *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

The guardian ad litem argues that the evidence was sufficient to show that respondent has neglected the minor children and that neglect would likely continue since his behavior has not changed since the children were born. To support her argument, the guardian ad litem attempts to distinguish *In re Shermer*, 156 N.C. App. 281, 576 S.E.2d 403 (2003), which was decided on similar facts. In *Shermer*, the respondent was incarcerated when the minor child was adjudicated neglected, the mother voluntarily relinquished her parental rights, and the respondent contacted social services from prison seeking involvement in the case and asking not to have his parental rights terminated. *Id.* at 282-83, 576 S.E.2d at 405. When the respond- ent contacted DSS after he was released from prison, he signed a case plan with social services, he was attempting to comply with the requirements of the case plan by the time of the termination hearing, he was in regular contact with his child, and he had had two visits with the child that went well. *Id.* at 283-84, 576 S.E.2d at 405-06. The trial court in *Shermer* found the child neglected and terminated the father's rights on the grounds of neglect, willfully leaving the child in foster care without making reasonable progress, and willful abandonment. *Id.* at 285, 576 S.E.2d at 406. On appeal, this Court reversed the trial court's decision after determining that the evidence was not clear and convincing that the respondent had neglected the minor child. *Id.* at 288, 576 S.E.2d at 408.

Here, the trial court determined that insufficient evidence was presented on the ground of neglect. In doing so, the trial court made findings of fact that the children were adjudicated neglected juve-

niles. The trial court then considered evidence of changed conditions, including respondent's "substantial compliance with his case plan[,]" and did not find the probability of repetition of neglect. The guardian ad litem points out that respondent did not enroll in domestic violence counseling, is unable to demonstrate outside of prison his sobriety, and lacks a relationship with his children. However, the trial court found, based upon testimony from GCDSS social worker Suzanne Brogdon and respondent, that no anger management classes were offered in the prisons where respondent has been placed; that respondent was in compliance with his substance abuse component of his case plan; that respondent sent letters to the social worker inquiring about his children; and that respondent sent letters, cards, and gifts to the children via his mother.

Similar to *Shermer*, the circumstances in the instant case are sufficient to support the trial court's determination that the guardian ad litem has not presented clear and convincing evidence of respondent's neglect of the children. Therefore, we conclude that the trial court did not err in concluding based upon the findings of fact that respondent's parental rights could not be terminated based on neglect.

IV. Willful failure to make reasonable progress

[2] Parental rights may be terminated when "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2). Willfulness does not imply fault on the part of the parent, but may be "established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re O.C. & O.B.*, 171 N.C. App. 457, 465, 615 S.E.2d 391, 396 (citation and quotation marks omitted), *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005). "[I]ncarceration, standing alone, neither precludes nor requires finding the respondent willfully left a child in foster care." *In re Harris*, 87 N.C. App. 179, 184, 360 S.E.2d 485, 488 (1987) (citations omitted). The guardian ad litem argues that the evidence was sufficient to show that respondent's parental rights should be terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

Here, as noted above, the trial court made detailed findings regarding respondent's case plan and his compliance with that plan. Finding of fact 14 states that respondent was not provided with a case plan until August of 2008, which he signed and returned in November

of 2008. Finding of fact 14 further notes that pursuant to the case plan, respondent had maintained contact with GCDSS, attended ongoing substance abuse treatment, completed the only parenting class offered by the Department of Correction, but had not attended anger management because this type of class was not offered at the prisons in which he had been placed. Finding of fact 15 further states that although there were "no classes available in the Department of Correction to address domestic violence[,]" respondent had completed "Basic Employability Skills Training, Thinking for a Change, Masonry, Office Practice and Character Education Training." Further, finding of fact 16 finds that respondent "is in substantial compliance with his case plan." We conclude that the unchallenged findings of fact 14, 15, and 16 support the trial court's conclusion that the evidence does not clearly and convincingly show that respondent willfully left the children in foster care without making reasonable progress to correct the conditions which led to the removal of the children from their mother's home.

V. Failure to pay cost of care

[3] In order to support termination of parental rights on the ground of willful failure to pay a reasonable cost of care of the child, the petitioner has the burden of presenting evidence of the parent's ability to pay. N.C. Gen. Stat. § 7B-1111(a)(3); *In re Ballard*, 311 N.C. at 716-17, 319 S.E.2d at 233. In the context of N.C. Gen. Stat. § 7B-1111(a)(3), this Court has stated that the word "willful" "imports knowledge and a stubborn resistance . . . one does not willfully fail to do something which it is not in his power to do." *In re Matherly*, 149 N.C. App. 452, 455, 562 S.E.2d 15, 18 (2002) (citation and quotation marks omitted).

We note that the trial court does not specifically reference section "7B-1111(a)(3)" in its conclusion of law which states that the guardian ad litem did not prove grounds existed to terminate respondent's parental rights. It is clear, however, that the trial court dismissed the entire termination petition, which included the ground of failure to pay cost of care under section 7B-1111(a)(3).

The guardian ad litem asserts that the evidence showed that the father had the ability to pay an amount greater than zero despite his incarceration and, therefore, the trial court should have terminated respondent's rights on the ground of failure to pay.

Even though the trial court's finding of fact 21 states that respondent had "not paid anything toward the care of the children since his

incarceration[,]" it further states that respondent had written to GCDSS about providing support but "was informed that it could not be arranged at this time" as "he was earning less than minimum wage, [and] the agency could not establish a child support case." Therefore, respondent's failure to pay was not based on "stubborn resistance[,]" *see Matherly*, 149 N.C. App. at 455, 562 S.E.2d at 18, but on GCDSS' inability to receive any support from him at that time. Accordingly, the trial court correctly did not terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(3).

VI. Paternity

[4] Next, the guardian ad litem challenges the trial court's conclusion that sufficient evidence was not presented to terminate respondent's parental rights based on his failure to legitimate the children. N.C. Gen. Stat. § 7B-1111(a)(5) provides that a trial court may terminate parental rights when the "father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights:

> a. Established paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Health and Human Services; provided, the court shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or
>
> b. Legitimated the juvenile pursuant to provisions of G.S. 49-10 or filed a petition for this specific purpose; or
>
> c. Legitimated the juvenile by marriage to the mother of the juvenile; or
>
> d. Provided substantial financial support or consistent care with respect to the juvenile and mother.

N.C. Gen. Stat. § 7B-1111(a)(5). When basing the termination of parental rights on this statutory provision, the court must make specific findings of fact as to all four subsections and the petitioner bears the burden of proving the father has failed to take any of the four actions. *In re Harris*, 87 N.C. App. at 188, 360 S.E.2d at 490. The guardian ad litem argues that the trial court erred in failing to terminate the parental rights of respondent pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) as to both Jack and Jasmine.

As to Jack, the guardian ad litem first argues that the trial court's finding of fact 18 is not supported by competent evidence. Finding of fact 18 states:

> 18. [Respondent] had [at] some point, in some legal proceeding, submitted to a blood test and was found to be the biological father of [Jack]. [Jack's] birth certificate was amended to include [respondent's] name. No court order was introduced as evidence which included a judicial finding of paternity but the parties agree that this did occur at some point in some case.

As to Jasmine, finding of fact 17 states:

> 17. [Respondent] has not legitimated [Jasmine] either judicially or by affidavit; has not filed a petition to legitimate [Jasmine] and has not legitimated the child by marriage to the mother.

Although these findings are quite different from one another, the same legal principles apply to both children, so we will address these principles first. Also, respondent was identified as the father of both children on their respective birth certificates, both of which are marked as "amended" certificates.

We first note that N.C. Gen. Stat. § 7B-1111(a)(5) places an unusual burden upon the petitioner, as it requires the petitioner for termination of parental rights to prove a negative: that the respondent has not taken any of the actions listed. A party who must prove a negative "faces a greater burden . . . ." *State v. Ipock*, 129 N.C. App. 530, 533, 500 S.E.2d 449, 451 (1998). In addition, petitioner has the burden to prove this negative by "clear, cogent and convincing" evidence. *See Shepard*, 162 N.C. App. at 221-22, 591 S.E.2d at 6. But the guardian ad litem's argument entirely ignores the fact that respondent was listed as the father of both children on their birth certificates. In fact, copies of the birth certificates were attached to the petition for termination of parental rights, which was filed by the guardian ad litem. As the birth certificate is a document which is issued by the State Registrar pursuant to statutory requirements as to its contents, we do not believe that the birth certificate can be ignored. We will therefore consider the legal sufficiency of the birth certificate as a means of proving that paternity has been established judicially, pursuant to N.C. Gen. Stat. § 7B-1111(a)(5)(a).

In this case, the mother and respondent were never married to one another and there is no evidence that the mother was married to anyone else at any relevant time. Issuance of a birth certificate at

birth would therefore have been governed by N.C. Gen. Stat. § 130A-101(f) (2009), which provides:

> (f) If the mother was unmarried at all times from date of conception through date of birth, the name of the father shall not be entered on the certificate unless the child's mother and father complete an affidavit acknowledging paternity which contains the following:
>
> (1) A sworn statement by the mother consenting to the assertion of paternity by the father and declaring that the father is the child's natural father and that the mother was unmarried at all times from the date of conception through the date of birth;
>
> (2) A sworn statement by the father declaring that he believes he is the natural father of the child;
>
> (3) Information explaining in plain language the effect of signing the affidavit, including a statement of parental rights and responsibilities and an acknowledgment of the receipt of this information; and
>
> (4) The social security numbers of both parents.
>
> The State Registrar, in consultation with the Child Support Enforcement Section of the Division of Social Services, shall develop and disseminate a form affidavit for use in compliance with this section, together with an information sheet that contains all the information required to be disclosed by subdivision (3) of this subsection.
>
> Upon the execution of the affidavit, the declaring father shall be listed as the father on the birth certificate, subject to the declaring father's right to rescind under G.S. 110-132. The executed affidavit shall be filed with the registrar along with the birth certificate. In the event paternity is properly placed at issue, a certified copy of the affidavit shall be admissible in any action to establish paternity. . . .

Thus, respondent's name could not have been placed on the birth certificate when it was originally issued unless both parents completed "an affidavit acknowledging paternity" in a format and containing the information as required by N.C. Gen. Stat. § 130A-101(f).

The birth certificates both indicate that they were "amended," although the certificates do not state what the particular amendments were. Based upon the evidence presented, it would appear that the

amendments were made to add respondent's name as the father of the children. The guardian ad litem volunteer testified that a 2003 guardian ad litem report showed that respondent took a paternity test and respondent could not be excluded as the father of Jack. Additionally, the 2 October 2003 GCDSS court summary noted that paternity had been established for Jack. We further note that finding of fact 18 also states that "[n]o court order was introduced as evidence which included a judicial finding of paternity [as to Jack] but the parties agree that this did occur at some point in some case." Regarding Jasmine, in court summaries from GCDSS, dated 22 March 2008, 9 April 2009, and 1 October 2009, respondent is named as the "Biological[,]" rather than the putative, father of Jasmine, and the summaries state that paternity had been established. Additionally, GCDSS court summaries dated 12 June 2008, 11 September 2008, and 15 January 2009 specifically state that Jasmine's biological father is respondent and that paternity had been established "by Civil Adjudication[.]" Thus, the evidence as to both Jack and Jasmine indicates that there was a judicial determination of paternity, which resulted in the amendments to their birth certificates.

A birth certificate can be amended as provided by N.C. Gen. Stat. § 130A-118 (2009), which provides in pertinent part as follows:

> (a) After acceptance for registration by the State Registrar, no record made in accordance with this Article shall be altered or changed, except by a request for amendment. The State Registrar may adopt rules governing the form of these requests and the type and amount of proof required.
>
> (b) A new certificate of birth shall be made by the State Registrar when:
>
> . . . .
>
> 2) Notification is received by the State Registrar from the clerk of a court of competent jurisdiction of a judgment, order or decree disclosing different or additional information relating to the parentage of a person;
>
> (3) Satisfactory proof is submitted to the State Registrar that there has been entered in a court of competent jurisdiction a judgment, order or decree disclosing different or additional information relating to the parentage of a person[. . . .]

Thus, respondent could not have been listed as the "father" of either child unless his name was placed on the certificates in accordance

with either N.C. Gen. Stat. § 130A-101(f) (by affidavit of paternity) or N.C. Gen. Stat. § 130A-118(b) (by amendment based upon a judicial determination of parentage.)[3]

We also recognize that a birth certificate may be amended to remove a father who was originally identified on the certificate in some circumstances, although none of those situations are present in this case, as neither respondent, nor the mother, nor any other putative father has challenged respondent's status as biological father of either child. *See, e.g.*, N.C. Gen. Stat. § 110-132 (2009).

In the context of a proceeding for termination of parental rights, where the petitioner has the burden of proving by clear, cogent, and convincing evidence that a respondent has *not* established paternity of a child, the practical effect of a birth certificate bearing the respondent's name as father of the child is the creation of a rebuttable presumption that the respondent has in fact established paternity of the child either judicially or by affidavit as required by N.C. Gen. Stat. § 7B-1111(a)(5)(a). Although our Courts have not previously identified this as a rebuttable presumption, N.C. Gen. Stat. §§ 130A-101, 130A-118, and 130A-119[4], taken together, create a rebuttable presumption that the respondent has taken the legal steps necessary to establish paternity; otherwise, his name logically could not appear on the birth certificate. *McCormick on Evidence* states that

> the most important consideration in the creation of presumptions is probability. Most presumptions have come into existence primarily because the judges have believed that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it.

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3. A birth certificate may also be amended based upon legitimation by subsequent marriage of the parents, but that factual situation is not present in this case. *See* N.C. Gen. Stat. § 130A-118(b)(1).

4. N.C. Gen. Stat. § 130A-119 (2009) states that "Upon the entry of a judgment determining the paternity of an illegitimate child, the clerk of court of the county in which the judgment is entered shall notify the State Registrar in writing of the name of the person against whom the judgment has been entered, together with the other facts disclosed by the record as may assist in identifying the record of the birth of the child as it appears in the office of the State Registrar. If the judgment is modified or vacated, that fact shall be reported by the clerk to the State Registrar in the same manner. Upon receipt of the notification, the State Registrar shall record the information upon the birth certificate of the illegitimate child."

Kenneth S. Broun et al., *2 McCormick on Evidence* § 343, at 500-01 (6th ed. 2006) (footnote omitted). In this instance, there is no other logical explanation for fact B—that respondent is listed on the birth certificates as father—than the existence of Fact A—that respondent judicially established paternity. We believe this presumption is also consistent with the long-recognized presumption of legitimacy of "[a] child born in wedlock." *Wright v. Wright*, 281 N.C. 159, 172, 188 S.E.2d 317, 325 (1972) (citation omitted). If a child born to a marriage is presumed to be legitimate, we see no reason why a similar presumption should not arise where a child's birth certificate identifies its father, as our statutory scheme requires a determination of paternity by affidavit or judicially before the father's name can be shown on the birth certificate. Of course, this presumption can be rebutted, but in this case, there is no evidence to rebut the presumption raised by the birth certificates. To the contrary, our record does not reveal any significant question or doubt that respondent had established paternity of both children. As noted above, evidence included in the record showed that respondent took a paternity test which showed that he was the father of Jack. Also, respondent is consistently identified as Jasmine's "father" on numerous documents in the record, from 23 January 2006 until 29 October 2009, including juvenile petitions, orders from the court, permanency planning orders, guardian ad litem reports, and DSS reports to the court. As also noted above, several court summaries from GCDSS identify respondent as the "Biological[,]" rather than the putative, father of Jasmine, and the summaries state that paternity had been established "by Civil Adjudication[.]" The trial court, by written orders dated 24 June 2008, and 8 October 2008, accepted and "incorporated by reference" these GCDSS summaries in its findings of fact. Additionally, Martha Harris, the guardian ad litem, testified that at a 20 March 2008 adjudication and disposition hearing that the mother testified that respondent was the biological father of Jasmine and "there were no other possible fathers of [Jasmine]." Respondent is referred to as the "putative father" only twice in the record, once in a 20 February 2008 juvenile petition and again in the guardian ad litem's petition to terminate parental rights, in which the guardian sought to use the failure to establish paternity as a ground for termination.

[5] With this rebuttable presumption in mind, we will now address the trial court's findings as to each child. The guardian ad litem argues that as to Jack, there is no documentation in the record to support the finding that respondent was the biological father of Jack. Respondent testified that around 2004 he took a DNA test, he was

found to be the father of Jack, and Guilford County entered a child support order for Jack. The guardian ad litem argues that "there is no documentation of [a DNA test] . . . and more importantly [respondent] took none of the steps listed in N.C.G.S. § 7B-1111(a)(5) to legitimate [Jack.]" However, the birth certificate itself belies the guardian ad litem's argument. The trial court's finding 18, regarding Jack, is clearly supported by competent record evidence and that finding supports the conclusion that the paternity of Jack had been judicially established prior to the filing of the petition for termination of parental rights. *See* N.C. Gen. Stat. § 7B-1111(a)(5)(a). The guardian ad litem makes no further challenges based on N.C. Gen. Stat. § 7B-1111(a)(5) as to Jack. Accordingly, the trial court properly concluded that the guardian ad litem had not met its burden and respondent's parental rights as to Jack could not be terminated based on N.C. Gen. Stat. § 7B-1111(a)(5).

[6] The finding as to Jasmine is more problematic, as it finds that "[respondent] has not legitimated [Jasmine] either judicially or by affidavit; has not filed a petition to legitimate [Jasmine] and has not legitimated the child by marriage to the mother." The guardian ad litem argues that the trial court's findings do not support its conclusion that it failed to show by clear and convincing evidence that grounds existed to terminated respondent's parental rights as to Jasmine, pursuant to N.C. Gen. Stat. § 7B-1111(a)(5). As noted above, the trial court is required to make specific findings of fact as to all four subsections of N.C. Gen. Stat. § 7B-1111(a)(5). *See Harris*, 87 N.C. App. at 188, 360 S.E.2d at 490.

The guardian ad litem does not challenge finding No. 17 but argues that this finding tends to support a conclusion that respondent's parental rights should be terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(5). However, we note that although the findings address the first three subsections of N.C. Gen. Stat. § 7B-1111(a)(5), the trial court failed to address subsection (d), whether respondent "[p]rovided substantial financial support or consistent care with respect to the juvenile and mother." *See id.; In re Harris*, 87 N.C. App. at 188, 360 S.E.2d at 490. Therefore, this incomplete finding of fact could not support the trial court's conclusion.

Respondent raises an alternative basis for the trial court's conclusion[5], arguing that finding of fact 17 is not supported by com-

5. Even though respondent did not appeal this issue, N.C.R. App. P. 28(c) permits an appellee "[w]ithout taking an appeal" to "present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis

petent evidence, as the evidence in the record shows that he has established paternity of Jasmine judicially, pursuant to N.C. Gen. Stat. § 7B-1111(a)(5)(a). Based upon our determination as discussed above that Jasmine's birth certificate raised a rebuttable presumption that respondent had established paternity judicially, we agree with respondent. This presumption was not rebutted. In addition to the evidence as discussed above, there is also no suggestion in any of the documentation included in the record on appeal that respondent was required to establish paternity of Jasmine as part of a case plan or requiring respondent to take a paternity test to establish paternity for Jasmine. Therefore, the trial court's finding that respondent had "not legitimated [Jasmine] judicially" is not supported by the clear, cogent, and convincing evidence required for termination of parental rights. *See Shepard*, 162 N.C. App. at 221-22, 591 S.E.2d at 6.[6]

We note that the trial court made no findings regarding the above evidence that respondent had established paternity of Jasmine pursuant to N.C. Gen. Stat. § 7B-1111(a)(5)(a) to support its conclusion of law that parental rights should not be terminated. However, we have stated that "when a court fails to make appropriate findings or conclusions, this Court is not required to remand the matter if the facts are not in dispute and only one inference can be drawn from them." *Green Tree Financial Servicing Corp. v. Young*, 133 N.C. App. 339, 341, 515 S.E.2d 223, 224 (1999). The guardian ad litem does not challenge this evidence and only one inference can be drawn from it. *See id.* In addition, the birth certificate identifying respondent as Jasmine's father established a rebuttable presumption, which has not been rebutted by any of the evidence. Accordingly, we need not remand this case for additional findings, and we hold that the trial court did not err in dismissing the petition to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(5), as the guardian ad litem did not meet its burden to show by "clear, cogent and convincing evidence[,]" *see Shepard*, 162 N.C. App. at 221-22, 591 S.E.2d at 6, that respondent had not established paternity judicially.

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in law for supporting the judgment, order, or other determination from which appeal has been taken." *See also* N.C.R. App. P. 10(c).

6. As noted above, N.C. Gen. Stat. § 7B-1111(a)(5)(b) also permits a child to be legitimated pursuant to N.C. Gen. Stat. § 49-10 (2009), but here there was no evidence presented that respondent had filed a written petition requesting a special proceeding to declare Jasmine to be legitimate.

VII. Dependency

[7] The guardian ad litem also argues that it was error for the trial court to not terminate respondent's parental rights based on dependency pursuant to N.C. Gen. Stat. § 7B-1111(a)(6). As for the ground of dependency, the trial court may terminate parental rights based on a finding "[t]hat the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. . . ." N.C. Gen. Stat. § 7B-1111(a)(6). N.C. Gen. Stat. § 7B-101(9) (2009) defines a dependent juvenile as "[a] juvenile in need of assistance or placement because . . . [the juvenile's] parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement." Under this definition, the trial court's findings "must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005).

The guardian ad litem argues the trial court's findings support a conclusion that Jack and Jasmine are dependent juveniles. The guardian ad litem seeks to distinguish *In re Clark*, 151 N.C. App. 286, 565 S.E.2d 245, *disc. review denied*, 356 N.C. 302, 570 S.E.2d 501 (2002) to support her argument. *In Clark*, the father had been incarcerated for most of the child's life and the mother, who had a substance abuse problem, could not care for the child. *Id.* at 286-87, 565 S.E.2d at 246. The trial court concluded that the father had failed to pay a reasonable portion of the cost of care for the child although physically and financially able to do so, and was incapable of providing for the proper care and supervision of the child and that such inability would continue for the foreseeable future. *Id.* at 287, 565 S.E.2d at 246. On appeal, this Court reversed the trial court's decision, holding that there was insufficient evidence to support the trial court's conclusion. *Id.* at 289-90, 565 S.E.2d at 248. This Court specifically determined that there also was no evidence at trial to suggest that the father suffered from any physical or mental illness, disability, or "similar cause or condition" that would prevent him from providing proper care and supervision for the child. *Id.* at 289, 565 S.E.2d at 247-48.

The guardian ad litem argues that *Clark* is inapplicable because: (1) respondent's projected release date is not for another four years, whereas the father in *Clark* was due for release in seventeen months;

and (2) respondent's alternative care arrangement was determined to be inappropriate, whereas the father in *Clark* provided names of relatives to DSS, but DSS did not contact the relatives. *See id.* at 287, 565 S.E.2d at 246.

Here, the trial court found that respondent would be incarcerated until 2013 and that respondent's only relative who had offered to provide for Jack and Jasmine was respondent's mother who was determined to be inappropriate. Although the trial court found that respondent lacked an alternative child care arrangement, the trial court did not find respondent was incapable of providing care and supervision. Similar to the facts in *Clark*, the guardian ad litem here did not present any evidence that respondent's incapability of providing care and supervision was due to one of the specified conditions or any other similar cause or condition. *See id.* Without such a determination, we conclude the trial court did not err in dismissing the termination petition based on N.C. Gen. Stat. § 7B-1111(a)(6).

VIII. Abandonment

[8] We note that the trial court erroneously dismissed the petition with respect to N.C. Gen. Stat. § 7B-1111(a)(7). The termination petition alleged the ground of abandonment only as to "any unknown putative father" and not to respondent. Thus, dismissing the petition on this ground was unnecessary and also did not prejudice any party.

IX. Conclusion

For the foregoing reasons, we affirm the trial court's dismissal of the petition to terminate respondent's parental rights.

AFFIRMED.

Judges STEPHENS and BEASLEY concur.

STATE OF NORTH CAROLINA v. TRAVEN MARQUETTE LEE

NO. COA11-637

(Filed 17 January 2012)

1. Assault—deadly weapon with intent to kill inflicting serious injury—variance with indictment—type of weapon

The trial court did not err by denying defendant's motion to dismiss a charge of assault with a deadly weapon with intent to kill inflicting serious injury for a variance between the evidence and the indictment. The evidence showed that defendant used an AK-47 while the indictment alleged a handgun.

2. Criminal Law—defendant in shackles at trial—jury instruction—no prejudice

Under the circumstances of the case, the trial court's error in requiring defendant to remain in shackles during the trial was not fundamentally unfair and was therefore harmless. The trial court did not follow the well-established statutory or case law, but clearly and emphatically instructed the jury not to consider defendant's restraints in any manner, and defendant was able to obtain an acquittal on an attempted murder charge despite representing himself while in shackles. Furthermore, the evidence against defendant was overwhelming.

3. Constitutional Law—speedy trial—State not willful or negligent—no prejudice

The trial court did not violate defendant's constitutional right to a speedy trial where twenty-two months passed between arrest and trial but defendant made no showing that the delay was due to willful or negligent actions by the State and suffered no prejudice by the delay.

4. Jury—jury instructions unanimous verdict—not coercive

The trial court's reinstructions to the jury did not coerce the jury to return unanimous verdicts under the circumstances. The jury had not indicated that they were having any trouble reaching a unanimous verdict on any of the charges when the trial court inquired of their progress, and the trial court did not instruct them that they would stay until a unanimous verdict was reached but simply that they would stay longer that evening with a view toward reaching a unanimous verdict.

5. Homicide—intent to kill—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss charges of assault with a deadly weapon with intent to kill inflicting serious injury and attempted first-degree murder where defendant challenged only the sufficiency of the evidence that he intended to kill the victim. Although defendant argued that the evidence showed that he shot at the victim only once, aiming below the waist, the circumstances presented by defendant's evidence demonstrated that defendant planned to shoot and kill the victim because of disrespect and a drug deal, and that defendant entered the victim's store and opened fire with a high-powered rifle.

6. Robbery—attempted—sufficiency of evidence

There was sufficient evidence of attempted robbery where defendant entered a store and said "give it up" before firing shots at the owner, and defendant stated after Miranda warnings that he could not take a loss on drugs, that he intended to get his money back from the victim, and that he had discussed robbing the victim with the individual who supplied him with the gun.

Appeal by defendant from judgments entered 3 November 2010 by Judge Cy A. Grant in Halifax County Superior Court. Heard in the Court of Appeals 10 November 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Dorothy Powers, for the State.

Kimberly P. Hoppin for defendant appellant.

McCULLOUGH, Judge.

On 3 November 2010, a jury found Traven Marquette Lee ("defendant") guilty of three charges: attempted first-degree murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWITKISI"). On appeal, defendant contends the trial court erred by (1) denying his motion to dismiss the charge of AWDWITKISI for a fatal variance between the indictment and the evidence introduced at trial; (2) denying his motion to remove his shackles while in front of the jury; (3) denying his motion to dismiss for violating his right to a speedy trial; (4) giving the jury a recess and telling the jury they must stay until they reached a unanimous verdict; and (5) denying his

motions to dismiss the charges for insufficiency of the evidence. We hold defendant received a fair trial free of prejudicial error.

I. Background

On the night of 7 January 2009, Crystal Boswell ("Boswell") was working as a cashier at a convenience store called Nana's Quick Mart located in Roanoke Rapids, North Carolina. Boswell was sitting on a stool behind the counter near the cash register when defendant entered the store. Boswell had seen defendant around the area and knew him by name. Cecil Ransom ("Ransom") was also present at Nana's Quick Mart on the night of 7 January 2009 and was standing behind the counter waiting to speak with the store owner, Raed Sirhan ("Sirhan"), when defendant walked in the door. Ransom had known defendant for several years.

When defendant entered the store, he was carrying an AK-47 rifle. Defendant said "give it up" and began shooting. Boswell got on the ground, crawled under the counter, and heard defendant fire more than five shots. Ransom heard defendant say "give it up" and turned to see defendant begin firing the gun. Ransom dove into the store office behind Sirhan, who was sitting in his office chair. Ransom kicked the office door shut and noticed that Sirhan had been shot. Sirhan gave Ransom a gun that Sirhan kept in his desk and told Ransom not to "let them kill me." Ransom then returned fire through the closed office door. When the shooting stopped, Boswell saw Sirhan sitting in his office chair with his leg bleeding.

Edward Hawkins ("Hawkins") was also working at Nana's Quick Mart on the night of 7 January 2009. He had seen defendant on a few prior occasions in the area. Hawkins saw defendant enter the store carrying the AK-47 rifle, heard the words "give it up," and saw defendant begin to fire the gun. Hawkins then ran to the back of the store and into the store's beer cooler. Hawkins also saw a second armed man standing behind defendant. Once things were quiet, Hawkins came out of the cooler. Hawkins saw blood and holes in Sirhan's shirt and pants legs and called emergency services.

Deputy Christopher Scott ("Deputy Scott") with the Halifax County Sheriff's Office responded to the call and was the first officer to arrive at the scene. Deputy Scott found Sirhan sitting in his office chair with two gunshot wounds in his thighs. Deputy Scott called for an ambulance, and Sirhan was taken to the hospital, where he underwent multiple surgeries in an attempt to repair the damage from gunshot wounds to both his right and left thighs as well as his left pelvis.

At the scene, Deputy Scott spoke with Boswell about the incident, and Ransom informed Deputy Scott that defendant was responsible for the shooting.

Deputy Jay Burch ("Deputy Burch") also responded to the call at Nana's Quick Mart and observed the crime scene. Deputy Burch observed multiple shell casings from both a high-powered rifle and a handgun around the front counter of the store. Lieutenant Bobby Martin ("Lieutenant Martin") photographed the scene inside the store and logged each piece of evidence. Inside Sirhan's office, Lieutenant Martin photographed blood spots and items that appeared to be pieces of flesh, as well as over $3,000 in cash lying on top of Sirhan's desk. Lieutenant Martin also collected the items of evidence from inside the store, including the money from Sirhan's desk, empty shell casings, blood and flesh material, and a .45 caliber handgun. After collecting the evidence and clearing the crime scene, the officers secured arrest warrants for defendant based on the statements given by the witnesses at the scene.

On 8 January 2009, defendant was arrested by Roanoke Rapids police officers and placed in the custody of Patrol Lieutenant Stevie Salmon ("Lieutenant Salmon") with the Halifax County Sheriff's Office. Defendant asked Lieutenant Salmon why he was being arrested, to which Lieutenant Salmon responded that defendant had outstanding warrants for attempted murder and armed robbery. While sitting handcuffed in the front seat of Lieutenant Salmon's patrol vehicle, defendant stated to Lieutenant Salmon that he had "tried to kill the mother f----- because he sold me some bad s---."

Within five minutes, Lieutenant Martin and Detective Sergeant Doug Pilgreen ("Detective Pilgreen") arrived and took defendant into their custody. Once the officers placed defendant in their patrol vehicle, Lieutenant Martin read defendant his *Miranda* rights and had defendant sign a statement that defendant had been so advised. During the car ride to the Sheriff's Office, defendant admitted to Lieutenant Martin that he had gone into the convenience store and shot at Sirhan. Defendant stated he only intended to kill Sirhan because Sirhan had shorted him on a drug deal. Lieutenant Martin reduced defendant's statement to writing and defendant signed the statement. Upon arriving at the sheriff's office, defendant gave a more detailed statement as to what had happened on the previous night. Defendant again stated that he had purchased "$5,000 worth of cocaine" from Sirhan, "but it was bad." Defendant stated he called Sirhan and asked for his money back, to which Sirhan responded that

defendant would "have to take an L on it." Defendant stated he "couldn't take an L" and that he "was going to get [his money] back any way [he] could," so he went to Sirhan's store with an AK-47 gun, saw Sirhan sitting in his office, and "started shooting."

On 10 January 2009, after being Mirandized and waiving his rights, defendant gave another statement to Detective Pilgreen. Defendant gave Detective Pilgreen the name of the individual who had supplied defendant with a car and the gun, as well as a detailed account of the events leading up to the shooting. Defendant again stated that Sirhan had sold him "some bad dope," that defendant told Sirhan he wanted his "money back or some more dope," and that "[he] went to the store to shoot [Sirhan]." Defendant also stated the individual supplying the gun sent his "men" to the store with defendant to rob Sirhan for drugs, "since defendant was going in there anyway."

On 15 January 2009, defendant gave a similar statement to Lieutenant Martin, providing names of the other individuals that accompanied defendant to Nana's Quick Mart on "the night of the robbery," including an individual who went into the store with defendant carrying another assault rifle, and stating that he "only wanted to settle with [Sirhan] over some bad dope." Defendant again gave a similar statement to Special Agent Harold McCluney, Jr. ("Special Agent McCluney") of the Bureau of Alcohol, Tobacco, and Firearms, stating that he had discussed robbing Sirhan's store with the individual supplying the gun and that he "wanted to shoot [Sirhan] because [Sirhan] had disrespected him regarding the drugs and [Sirhan] wouldn't give him his money back."

Beginning on 1 November 2010, defendant was tried by a jury on charges of attempted first-degree murder of Sirhan, Boswell, and Ransom; attempted robbery with a dangerous weapon of Sirhan, Boswell, and Ransom; and AWDWITKISI of Sirhan. Defendant represented himself at trial, with standby counsel. At the close of the evidence, the trial court dismissed the charges of attempted murder and attempted robbery of Boswell, dismissed the charge of attempted robbery of Ransom, and submitted the remaining charges to the jury. The jury returned verdicts of guilty on the charges of attempted first-degree murder, attempted robbery with a dangerous weapon, and AWDWITKISI on Sirhan. The jury returned a verdict of not guilty on the charge of attempted first-degree murder of Ransom.

On 3 November 2010, the trial court entered judgments on the verdicts, sentencing defendant to a term of 220 to 273 months' impris-

onment for the attempted first-degree murder conviction, a consecutive term of 116 to 149 months' imprisonment for the AWDWITKISI conviction, and a consecutive term of 103 to 133 months' imprisonment for the charge of attempted robbery with a dangerous weapon. Defendant gave oral notice of appeal in open court at the close of trial.

II. Motion to dismiss for fatal variance

[1] Defendant first contends the trial court erred in denying his motion to dismiss the AWDWITKISI charge. Defendant argues he was entitled to dismissal of this charge because of a fatal variance between the indictment and the evidence produced at trial.

"It is the settled rule that the evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense." *State v. McDowell*, 1 N.C. App. 361, 365, 161 S.E.2d 769, 771 (1968). " 'A variance occurs where the allegations in an indictment, although they may be sufficiently specific on their face, do not conform to the evidence actually established at trial.' " *State v. Skinner*, 162 N.C. App. 434, 445, 590 S.E.2d 876, 885 (2004) (quoting *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002)). "In order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged." *Id.* at 445-46, 590 S.E.2d at 885 (citations omitted).

The essential elements of the crime of AWDWITKISI are "(1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, and (5) not resulting in death." *Id.* at 445, 590 S.E.2d at 885. In *State v. Ryder*, 196 N.C. App. 56, 674 S.E.2d 805 (2009), this Court noted the well-settled rule that "[w]hen an indictment charges a crime that requires the use of a deadly weapon, the State is required to ' "(1) name the weapon and (2) either to state expressly that the weapon used was a 'deadly weapon' or to allege such facts as would *necessarily* demonstrate the deadly character of the weapon." ' " *Id.* at 65-66, 674 S.E.2d at 812 (quoting *State v. Brinson*, 337 N.C. 764, 768, 448 S.E.2d 822, 824 (1994) (quoting *State v. Palmer*, 293 N.C. 633, 639–40, 239 S.E.2d 406, 411 (1977))). Further, this Court stated that "[t]he State cannot, on appeal, change the identity of the dangerous weapon from that specified in the indictment in order to support the conviction." *Id.* at 66, 674 S.E.2d at 812.

In the present case, defendant argues the evidence produced at trial unequivocally established that defendant used an AK-47 rifle to

commit the offense, which is inconsistent with the allegation in the indictment that defendant used a handgun to commit the offense. Relying on the language in *Ryder*, defendant argues that because the State changed the identity of the dangerous weapon, his conviction for AWDWITKISI should be vacated. However, we fail to see how the difference here is material, as both a handgun and an AK-47 rifle are a type of gun, are obviously dangerous weapons, and carry the same legal significance. *Cf. Skinner*, 162 N.C. App. at 446, 590 S.E.2d at 885 (holding a fatal variance existed where indictment alleged deadly weapon used by the defendant was his hands, but evidence at trial established that deadly weapon used by the defendant was "a hammer or some sort of iron pipe"); *Ryder*, 196 N.C. App. at 65-66, 674 S.E.2d at 812 (holding the State could not support robbery with a dangerous weapon conviction with argument that a car was the dangerous weapon used by the defendant, where the indictment alleged the defendant used a "firearm" to perpetrate the robbery). Had the indictment simply specified that defendant used a "gun" to commit the offense, the indictment would have been sufficient to give notice to defendant of the allegation that he used some type of gun to commit the assault. *See Skinner*, 162 N.C. App. at 445, 590 S.E.2d at 884-85 ("An indictment need only allege the ultimate facts constituting each element of the criminal offense. Evidentiary matters need not be alleged.").

Moreover, defendant has not demonstrated, nor does he argue, that any prejudice resulted from the difference in the gun alleged in the indictment and the gun established at trial. *See State v. Weaver*, 123 N.C. App. 276, 291, 473 S.E.2d 362, 371 (1996) ("In general, a variance between the indictment and the proof at trial does not require reversal unless the defendant is prejudiced as a result. This Court has required that a defendant demonstrate that he or she was misled by a variance, or hampered in his/her defense before this Court will consider the variance error." (citation omitted)). Defendant's argument on this issue is therefore without merit.

III. Motion to remove shackles in presence of jury

[2] Defendant's second contention is that the trial court erred in denying his motion to remove the shackles from his ankles while he was in the presence of the jury. Defendant argues the trial court violated the statutory provisions of N.C. Gen. Stat. § 15A-1031 (2009), as well as his right to due process. In reviewing the propriety of physical restraints in a particular case, "the test on appeal is whether, under

all of the circumstances, the trial court abused its discretion." *State v. Tolley*, 290 N.C. 349, 369, 226 S.E.2d 353, 369 (1976).

In *Tolley*, our Supreme Court established that "there has evolved the general rule that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary instances." *Id.* at 365, 226 S.E.2d at 366.

> The reasons being: (1) it may interfere with the defendant's thought processes and ease of communication with counsel; (2) it intrinsically gives affront to the dignity of the trial process, and most importantly; (3) it tends to create prejudice in the minds of the jurors by suggesting that the defendant is an obviously bad and dangerous person whose guilt is a foregone conclusion.

State v. Jackson, 162 N.C. App. 695, 700, 592 S.E.2d 575, 578 (2004).

Nonetheless, "the rule against shackling is subject to the exception that the trial judge, in the exercise of his sound discretion, may require the accused to be shackled when such action is necessary to prevent escape, to protect others in the courtroom or to maintain order during trial." *Tolley*, 290 N.C. at 367, 226 S.E.2d at 367; *see also* N.C. Gen. Stat. § 15A-1031. *Tolley* enumerates a non-exhaustive list of twelve material circumstances a trial judge should consider in determining whether to shackle a defendant:

> [T]he seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.

Tolley, 290 N.C. at 368, 226 S.E.2d at 368.

Both *Tolley* and N.C. Gen. Stat. § 15A-1031 set forth the proper procedure a trial judge should follow when ordering a defendant to remain shackled during trial. The trial judge must state for the record, out of the presence of the jury and in the presence of the defendant, the particular reasons for the judge's decision and give the defendant an opportunity to voice objections and persuade the court that such measures are unnecessary. *Tolley*, 290 N.C. at 368, 226 S.E.2d at 368;

N.C. Gen. Stat. § 15A-1031. Indeed, this Court has emphasized that "[s]hould the trial judge, in his sound discretion, decide shackling is a necessary means for a safe and orderly trial in his or her courtroom, the determination *must* be supported by adequate findings." *Jackson*, 162 N.C. App. at 700, 592 S.E.2d at 578 (emphasis added). When the need for physical restraints is controverted by the defendant, the trial judge should conduct a full evidentiary hearing and make formal findings of fact. *Tolley*, 290 N.C. at 368, 226 S.E.2d at 368; N.C. Gen. Stat. § 15A-1031. "In any event, a record must be made which reflects the reasons for the action taken by the court and which indicates that counsel have been afforded an opportunity to controvert these reasons and thrash out any resulting factual questions." *Tolley*, 290 N.C. at 368-69, 226 S.E.2d at 368. This Court has previously "caution[ed] trial courts to adhere to the proper use of their discretion and provide the rationale for that discretion, via some finding substantiated in the record." *Jackson*, 162 N.C. App. at 701, 592 S.E.2d at 579. Moreover:

> Once the decision to shackle the defendant during trial has been made by the trial court in this fashion, . . . the judge should . . . instruct the jury in the clearest and most emphatic terms that it give such restraint no consideration whatever in assessing the proofs and determining guilt. *This is the least that can be done toward insuring a fair trial.*

Tolley, 290 N.C. at 369, 226 S.E.2d at 368 (emphasis added) (internal quotation marks and citation omitted); *see also* N.C. Gen. Stat. § 15A-1031.

In the present case, after the jury had been impaneled but before the State had called its first witness, defendant made a motion to the trial court to remove his shackles while he was in the presence of the jury. The trial court simply responded that defendant's motion "is denied," without providing any further elaboration. Thereafter, the State proceeded to call its first witness until the trial was recessed for the evening. On the following morning, before the jury was brought back into the courtroom, the trial court inquired of the bailiff whether defendant was "still wearing the leg chains." The bailiff informed the trial court that defendant was still wearing leg chains because it was "policy." The trial court then brought the jury back in and proceeded to instruct the jury that defendant was wearing "leg irons . . . because it is standard policy with the jail." The trial court then proceeded to give the following instruction to the jury:

> Mr. Lee has not been convicted of a crime. He is not serving a sentence of any type. It is simply that he has not been able to make bond on these charges, and he is being held in custody because he was financially not able to make bond. It is standard policy of the sheriff's department here or the jail that when a person is brought into the courtroom, he has to have the leg chains on.

The trial court then instructed the jury:

> [The shackles are] "no evidence whatsoever that [defendant] is guilty of anything or that he is being treated any differently or that he is more dangerous than anybody else, it is simply standard policy that a person who has not been able to make bond who is being held in custody and is brought into the courtroom has to have on leg chains.

Thus, it appears from the record that the trial court's sole reason for denying defendant's request to remove his shackles during trial was that defendant was financially unable to make bond and therefore required to remain in shackles pursuant to jail policy.

The trial court clearly did not follow the well-established law on this issue: the statutory procedures were not complied with, nor can we determine from the record that the trial judge considered any of the material factors enumerated in our case law in making his determination. In addition, the trial court did not provide defendant any explanation outside the presence of the jury for why it was requiring defendant to remain in shackles during the trial, nor did the trial court state any findings in the record to support the determination. Ordinarily, requiring defendant to remain in shackles during trial in the presence of the jury under these conditions is inherently prejudicial under our case law. *See Tolley*, 290 N.C. at 366, 226 S.E.2d at 367 ("[I]n the absence of a showing of necessity therefor, compelling the defendant to stand trial while shackled is inherently prejudicial in that it so infringes upon the presumption of innocence that it interfere[s] with a fair and just decision of the question of . . . guilt or innocence." (alterations in original) (internal quotation marks and citations omitted)).

However, under the particular circumstances of this case, we conclude the trial court's error in requiring defendant to remain in shackles during the trial of his case was not fundamentally unfair and was therefore harmless. Notably, the trial court clearly and emphatically instructed the jury not to consider defendant's restraints in any manner, and despite having to present his own defense while wearing

the shackles, defendant was still able to obtain an acquittal on one of the attempted murder charges against him. Furthermore, given the overwhelming evidence against defendant, including his own Mirandized statements, we fail to see how defendant's shackling contributed to his convictions in the present case. Nevertheless, we again strongly caution trial courts to adhere to the proper procedures regarding shackling of a defendant, as established by our Supreme Court in *Tolley* and our Legislature in section 15A-1031 of our General Statutes.

IV. Motion to dismiss for speedy trial violation

[3] Defendant's next contention is that the trial court erred in denying his motion to dismiss the charges for violation of his constitutional right to a speedy trial. Both "the fundamental law of this state" and the Sixth and Fourteenth Amendments to the United States Constitution "guarantee those persons formally accused of crime the right to a speedy trial." *State v. Avery*, 302 N.C. 517, 521, 276 S.E.2d 699, 702 (1981). "[A] claim that a speedy trial has been denied must be subjected to a balancing test in which the court weighs the conduct of both the prosecution and the defendant." *State v. McKoy*, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978). In determining whether a defendant's constitutional right to a speedy trial has been violated, our Courts consider the following four "interrelated" factors: "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to defendant resulting from the delay." *Avery*, 302 N.C. at 522, 276 S.E.2d at 702. "Thus the circumstances of each particular case must determine whether a speedy trial has been afforded or denied, and the burden is on an accused who asserts denial of a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution." *McKoy*, 294 N.C. at 141, 240 S.E.2d at 388; *see also State v. Flowers*, 347 N.C. 1, 27, 489 S.E.2d 391, 406 (1997).

Here, defendant was arrested on 8 January 2009, and was tried by a jury on 1 November 2010. Thus, the length of time between defendant's arrest and trial was approximately twenty-two months. Our Supreme Court has observed that such a delay is "unusual." *McKoy*, 294 N.C. at 141, 240 S.E.2d at 388. Nonetheless, "we do not determine the right to a speedy trial by the calendar alone[.]" *Id.* (internal quotation marks and citation omitted). Rather, "we must consider the length of the delay in relation to the three remaining factors." *Id.*

The second factor, the reason for the delay, appears to be a "mixed bag." Following defendant's indictments on 16 February 2009 and 13 April 2009, the trial court held a hearing on 14 April 2009 on defendant's bond motion. The trial court held another pretrial hearing on 27 May 2009 to [address defendant's dissatisfaction with his appointed counsel. At the 27 May hearing, the trial court appointed new counsel for defendant. On 28 July 2009, defendant appeared before the trial court for arraignment. Defendant entered pleas of not guilty as to all the charges against him and rejected all plea offers, and the trial court joined the charges for trial. At the close of the arraignment hearing, the record shows the trial court set the date for trial as 12 October 2009.

However, defendant's trial was continued so that defendant could undergo a court-ordered psychiatric evaluation. Defendant was evaluated by a forensic psychiatrist to determine his competency to stand trial on 13 November 2009. On 9 September 2010, nearly ten months after defendant's competency evaluation was completed, the trial court held a competency hearing. At the conclusion of the competency hearing, defendant's trial was scheduled for 1 November 2010, and defendant was ultimately tried on that date.

In his brief, defendant simply asserts that the State was responsible in part for the twenty-two-month delay by not calendaring his competency hearing until nearly ten months after he completed a competency evaluation. However, from the record before us, we are unable to determine precisely the reasons why nearly ten months elapsed before defendant's competency hearing was calendared. The record indicates that during this time, defendant filed numerous complaints with the State Bar concerning his appointed counsel and wrote the trial court on multiple occasions asking that his appointed counsel be removed from his case. The record further indicates that also during this time, Sirhan was out of the country receiving medical treatment for his injuries and was unavailable. While we are troubled by such a delay, given the actions by defendant concerning his appointed counsel and the availability of the victim, we cannot say the delay was due to any willfulness or negligence on the part of the State, especially in light of the fact that defendant has made no showing of such on appeal.

There is no dispute that defendant repeatedly attempted to assert his right to a speedy trial in this case. However, defendant has failed to show any actual and substantial prejudice resulting from the delay.

In addressing the prejudice factor in speedy trial violations, our Supreme Court has noted:

> The right to a speedy trial is designed:
>
> (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *Of these, the most serious is the last*, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

State v. Webster, 337 N.C. 674, 680-81, 447 S.E.2d 349, 352 (1994) (internal quotation marks and citation omitted).

Here, defendant's sole contention is that the delay impaired his defense. Specifically, defendant contends that because of the delay, Sirhan was no longer available for trial, thereby denying defendant the opportunity to cross-examine Sirhan and elicit evidence that could be helpful for his defense. However, defendant does not state what possible evidence he could have obtained from Sirhan that would have been beneficial or significant to his defense. According to our Supreme Court, "[t]he defendant must show that the resulting lost evidence or testimony was significant and would have been beneficial to his defense." *State v. Marlow*, 310 N.C. 507, 521-22, 313 S.E.2d 532, 541 (1984). Furthermore, the fact that defendant had no opportunity to cross-examine Sirhan is inapposite, as the State neither presented Sirhan as a witness nor used Sirhan's testimony during trial. Thus, defendant has not met his burden of showing any actual or substantial prejudice resulting from the delay.

In light of these factors, although the length of time between defendant's arrest on these charges and his trial appears to be unusual, in light of the fact that defendant has made no showing that such a delay was due to the willful or negligent actions of the State and in light of the fact that defendant has shown no prejudice by the delay, we hold the trial court did not err in denying defendant's motions to dismiss for speedy trial violations.

V. Coerced jury verdicts

[4] Defendant's next contention is that the trial court's re-instructions to the jury coerced the jury to return unanimous verdicts in violation of Article I, Section 24 of the North Carolina Constitution.

In their recent opinion in *State v. Wilson*, 363 N.C. 478, 681 S.E.2d 325 (2009), our Supreme Court announced that "where the error vio-

lates the right to a unanimous jury verdict under Article I, Section 24, it is preserved for appeal without any action by counsel." *Id.* at 484, 681 S.E.2d at 330. This is so because "the right to a unanimous jury verdict is fundamental to our system of justice." *Id.* at 486, 681 S.E.2d at 331. The proper standard of review for an alleged error that violates a defendant's right to a unanimous jury verdict under Article I, Section 24, is harmless error, under which "[t]he State bears the burden of showing that the error was harmless beyond a reasonable doubt." *Id.* at 487, 681 S.E.2d at 331. " 'An error is harmless beyond a reasonable doubt if it did not contribute to the defendant's conviction.' " *Id.* (quoting *State v. Nelson*, 341 N.C. 695, 701, 462 S.E.2d 225, 228 (1995)).

"It is well settled that a trial judge has no right to coerce a verdict, and a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous." *State v. Blair*, 181 N.C. App. 236, 246, 638 S.E.2d 914, 921 (2007) (internal quotation marks and citations omitted). " '[I]t has long been the rule in this State that in deciding whether a court's instructions force a verdict or merely serve as a catalyst for further deliberations, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury.' " *State v. Fernandez*, 346 N.C. 1, 21, 484 S.E.2d 350, 362-63 (1997) (quoting *State v. Peek*, 313 N.C. 266, 271, 328 S.E.2d 249, 253 (1985)). Thus, in determining whether the trial court's actions are coercive, we must look to the totality of the circumstances. *State v. Beaver*, 322 N.C. 462, 464, 368 S.E.2d 607, 608 (1988).

In the present case, the jury retired to begin its deliberations at 3:38 p.m. on the third day of trial. At 5:51 p.m., the trial judge brought the jury back into the courtroom to inquire about the progress the jury had made. The jury indicated that, at that time, it had reached unanimous verdicts on two of the four charges. The trial judge then allowed a twenty-minute recess, giving the following challenged instruction:

> What I am going to do at this point is allow you to take a recess for about 20 minutes[.]
>
> If anyone needs during this 15 or 20 minute recess to call someone, a family member, to let them know that you are going to be delayed—but we are going to stay here this evening with a view towards reaching a unanimous verdict on the other two.

> That's where we are. I want everyone to know that. If you need to call someone to let them know you will be delayed, that's fine.

After taking the recess, and answering a question asked by the jury, the trial judge sent the jury to resume its deliberations at 6:19 p.m. Eleven minutes later, at 6:30 p.m., the jury returned unanimous verdicts in all four cases.

Considering the totality of the circumstances of the present case, the trial court's instructions here were not coercive. Although it only took the jury eleven minutes to reach unanimous verdicts in all four cases following the challenged instruction by the trial court, the jury did not indicate they were having any trouble reaching a unanimous verdict on any of the charges when the trial court inquired of the jury's progress. At the time of the recess, the jury simply stated they had reached unanimous verdicts on two of the four charges. The possibility remains that the jury may have been close to reaching a verdict in the remaining two cases when the judge brought the jury back in. Further, although the trial court told the jury they would stay longer for further deliberations, the trial court did not instruct the jury that they would be required to stay until a unanimous verdict was reached on all charges. The trial court simply instructed the jury they would stay longer that evening "with a view towards reaching a unanimous verdict." After the instruction was given, the jury proceeded to ask the trial court a question, and no juror indicated that staying longer to deliberate would be a problem. Moreover, we fail to see how the trial court's instructions could have contributed to the convictions of defendant in light of the overwhelming evidence against defendant in this case. Thus, the trial court's instructions were not prejudicial error entitling defendant to a new trial.

VI. Motions to dismiss for insufficiency of the evidence

[5] Defendant's final contention is that the trial court erred in denying his motions to dismiss the charges because the State presented insufficient evidence to support the convictions. "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. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (internal quotation marks and citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-

79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994). "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

The essential elements of an AWDWITKISI offense are: (1) an assault on another person, (2) with a deadly weapon, (3) with the intent to kill, (4) inflicting serious injury, and (5) not resulting in death. *State v. Wampler*, 145 N.C. App. 127, 130, 549 S.E.2d 563, 566 (2001); *see also State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994). Here, the State presented competent evidence at trial that defendant entered Sirhan's convenience store carrying an AK-47 rifle, a deadly weapon. Defendant intentionally fired shots into the office where Sirhan was sitting, and Sirhan was hit in the thighs by defendant's shots. Sirhan was seriously injured and was forced to undergo multiple surgeries to repair the damage caused by the shots defendant fired. Moreover, defendant admitted to Lieutenant Salmon and Lieutenant Martin that he intended to kill Sirhan because Sirhan had sold him bad drugs.

"A person commits the crime of attempted first degree murder if he: '(1) specifically intends to kill another person unlawfully; (2) he does an overt act calculated to carry out that intent, going beyond mere preparation; (3) he acts with malice, premeditation, and deliberation; and (4) he falls short of committing the murder.' " *State v. Jackson*, 189 N.C. App. 747, 753, 659 S.E.2d 73, 77-78 (2008) (quoting *State v. Cozart*, 131 N.C. App. 199, 202-03, 505 S.E.2d 906, 909 (1998)), *disc. review denied*, *appeal dismissed*, 362 N.C. 512, 668 S.E.2d 564 (2008), *cert. denied*, 555 U.S. 1215, 173 L. Ed. 2d 662 (2009). Here, again, the State presented competent evidence at trial that defendant admitted to Lieutenant Salmon and Lieutenant Martin that he intended to kill Sirhan because Sirhan had sold him bad drugs. Defendant's own statements indicated that he met with another individual to obtain a gun in order to carry out his plan. Defendant then went to Sirhan's convenience store carrying an AK-47 rifle and shot at Sirhan with the firearm multiple times, seriously injuring him.

With respect to these first two offenses, it appears that defendant only challenges the sufficiency of the evidence that he intended to kill Sirhan, despite the admission of his Mirandized statements to

Lieutenants Salmon and Martin. Although defendant argues that his statements to these two officers were the subject of his motion to suppress, defendant did not appeal the trial court's denial of that motion, and the statements were nevertheless entered into evidence. Although defendant acknowledges that he brought the firearm to the convenience store and intentionally shot at Sirhan, defendant argues the evidence shows only that he shot at Sirhan at least once, aiming below the waist, which is insufficient to establish an intent to kill. However, as defendant also acknowledges, " '[a]n intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances.' " *Wampler*, 145 N.C. App. at 130, 549 S.E.2d at 566 (alteration in original) (quoting *State v. Thacker*, 281 N.C. 447, 455, 189 S.E.2d 145, 150 (1972)). The circumstances presented by the State's evidence demonstrate that defendant planned to shoot and kill Sirhan because Sirhan had "disrespected" him and "shorted" him on a drug deal, and that defendant entered Sirhan's store and opened fire on Sirhan with a high-powered assault rifle. The evidence presented by the State was more than sufficient to support a reasonable conclusion that defendant intended to kill Sirhan.

[6] Finally, the elements of attempted robbery are: (1) the unlawful attempt to take any personal property from another; (2) possession, use or a threatened use of a firearm or other dangerous weapon, and (3) danger or threat to the life of the victim. *State v. Torbit*, 77 N.C. App. 816, 817, 336 S.E.2d 122, 123 (1985). Here, the State's evidence showed that defendant entered the store with an AK-47 rifle and said "give it up" before firing shots at Sirhan. The State also presented defendant's Mirandized statements that he couldn't take a loss on the drugs, that he intended to get his $5,000 back from Sirhan, and that he discussed robbing Sirhan with the individual who supplied defendant with the gun. This is sufficient evidence from which a jury could infer that defendant went to the store to rob Sirhan of the money he felt he was owed.

Accordingly, the State presented sufficient evidence of all three charges, such that the trial court properly submitted the charges to the jury and denied defendant's motions to dismiss.

VII. Conclusion

We hold the trial court did not err in denying defendant's motion to dismiss the AWDWITKISI charge for a fatal variance, as the differ-

ence between a handgun and an AK-47 rifle is not material, and defendant has shown no prejudice resulting from the difference.

Second, we hold that although the trial court abused its discretion in ordering defendant to remain shackled during the pendency of his trial, the error was harmless in the present case in light of the trial court's curative instruction and the overwhelming evidence of defendant's guilt.

We further hold the trial court did not err in denying defendant's motions to dismiss for a speedy trial violation. Although the length of the delay between defendant's arrest and trial was unusual, defendant has shown neither that the delay was due to the neglect or willfulness of the State, nor that he suffered any actual and substantial prejudice from the delay.

We also hold that, under the totality of the circumstances of this case, the trial court's instruction to the jury that they should stay longer with a goal towards reaching a unanimous verdict on the remaining two charges was not coercive, especially in light of the overwhelming evidence of defendant's guilt.

Finally, we hold the trial court did not err in denying defendant's motions to dismiss for insufficiency of the evidence, as the State presented competent evidence as to each element of all three offenses and defendant's being the perpetrator of those offenses. Accordingly, we hold defendant received a fair trial free of prejudicial error.

No prejudicial error.

Judges HUNTER, JR., and THIGPEN concur.

STATE OF NORTH CAROLINA v. MICHAEL SCOTT SISTLER

No. COA11-1035

(Filed 17 January 2012)

1. Homicide—first-degree murder—motion to dismiss—sufficiency of evidence—premeditation—deliberation—malice

The trial court did not err by denying defendant's motions to dismiss the first-degree murder charge at the close of the State's evidence and at the close of all evidence. There was substantial evidence that defendant acted with premeditation, deliberation, and malice. Further, defendant did not act in self-defense.

2. Criminal Law—motion for mistrial—reference to suppressed evidence—trial court steps to mitigate

The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion for a mistrial after the prosecutor allegedly referred to suppressed evidence. The suppression order did not constitute a complete ban on all evidence pertaining to defendant's location when he fired the shotgun. Further, the trial court took steps to mitigate the impact of the prosecutor's statement by sustaining defendant's objection and instructing the jury to disregard it.

3. Appeal and Error—preservation of issues—untimely objection—failure to state specific grounds for objection

Although defendant contended that the trial court erred in a first-degree murder case by overruling his objection and motion to strike a witness's testimony concerning defendant's location when the witness heard the shotgun blast, defendant waived review of this issue by failing to object to the challenged testimony in a timely manner. Even if the objection was timely, defense counsel failed to state the specific grounds for the objection.

4. Criminal Law—prosecutor's argument—right to enter home revoked—law enforcement could have helped

The trial court did not commit plain error in a first-degree murder case by failing to intervene *ex mero motu* during the prosecutor's closing argument allegedly insinuating that defendant's right to enter a home had been revoked or by overruling defendant's objection after the prosecutor stated defendant could have

called law enforcement to help him retrieve his clothes from the residence. The consent issue was immaterial, and the law enforcement statement was grounded in reason and common sense.

Appeal by Defendant from judgment entered 17 March 2011 by Judge Robert F. Floyd, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 30 November 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General L. Michael Dodd, for the State.

Marilyn G. Ozer for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Michael Scott Sistler ("Defendant") appeals his conviction for first-degree murder. On appeal, Defendant contends the trial court erred by denying his motions to dismiss the first-degree murder charge at the close of the State's evidence and the close of all the evidence, and by denying Defendant's motion for a mistrial after the prosecutor allegedly referred to evidence suppressed by a pre-trial suppression order. Defendant also argues the trial court erred by overruling his objections and motions to strike portions of the State's rebuttal evidence. Finally, Defendant contends the trial court committed plain error by failing to intervene *ex mero motu* during the prosecutor's allegedly improper closing arguments and further erred by overruling Defendant's objection to a separate portion of the prosecutor's closing arguments. After careful review, we find no error.

I. Factual & Procedural Background

The State's evidence at trial tended to show the following. On the night of 28 December 2008, Joseph Heyden, Richard Charlton, and Kristy Brown sat in the living room of Ms. Brown's mobile home, drinking and watching television. Mr. Charlton and Ms. Brown sat together on the couch, and Mr. Heyden sat on a loveseat nearby. Mr. Charlton and Ms. Brown were dating, and Mr. Charlton kept some of his personal possessions in Ms. Brown's home, including a Grendel .380 semiautomatic pistol. Mr. Heyden was a friend of Mr. Charlton visiting for the evening.

At approximately 9:15 PM, Ms. Brown noticed headlights outside of her home and observed a vehicle enter her driveway. She watched as her ex-boyfriend, Defendant, emerged from his vehicle with a 12-gauge pump shotgun. Ms. Brown had not invited Defendant to her

home that evening. In a panic, she struggled to lock the front door and yelled to Mr. Charlton and Mr. Heyden: "He's got a gun."

Ms. Brown and Mr. Charlton fled from the living room area, down a hallway, to the master bedroom in the rear of the home. Mr. Charlton grabbed his semiautomatic pistol on his way to the bedroom. Mr. Heyden crouched behind a counter in the kitchen area adjoining the living room. Defendant entered through the front door, shouting vulgarities. He carried a sawed-off shotgun at his hip. Mr. Heyden observed Defendant move through the living room, past the kitchen area, and point the shotgun down the hallway leading to the master bedroom. Mr. Heyden heard a shotgun blast immediately after losing sight of Defendant. Mr. Heyden headed for the front door and exited the home. Ms. Brown pushed her way past Defendant in the hallway and went out the front door not far behind Mr. Heyden. Mr. Heyden and Ms. Brown heard several more gunshots, one from the shotgun and three or four from the semiautomatic pistol owned by Mr. Charlton.

Once outside, Mr. Heyden called 911. Ms. Brown joined Mr. Heyden in the front yard as he placed the call. Mr. Heyden went back inside the house to check on Mr. Charlton. He saw Defendant "shot up" and stationary on the floor of the hallway. There was a trail of blood leading from Defendant to the master bedroom. Mr. Heyden found Mr. Charlton on the floor of the bedroom. Mr. Charlton's chest was bloody and he had no pulse.

Deputy Sheriff Patrick Medlin of the Johnston County Sheriff's office was the first law enforcement officer to arrive at the scene at approximately 9:42 PM. He observed Mr. Heyden and Ms. Brown standing in the front yard of Ms. Brown's residence and noted three vehicles in the driveway. Ms. Brown informed Officer Medlin of two gunshot victims inside the residence. Officer Medlin entered the residence and immediately noticed Defendant lying face down in the hallway. Defendant was bleeding badly and barely breathing. Officer Medlin also noticed a blood trail leading from the hallway to a bedroom in the rear of the mobile home. He found Mr. Charlton not breathing and bleeding badly from a chest wound. Officer Medlin observed Defendant's shotgun on the floor of the bedroom to the left of Mr. Charlton and Mr. Charlton's pistol on the opposite side of the room. EMS arrived and rendered medical assistance to Defendant. Mr. Charlton was pronounced dead at the scene.

On 12 January 2009, a Johnston County Grand Jury indicted Defendant on one count of first-degree murder and one count of first-degree burglary. A superseding indictment was later issued on the first-degree burglary charge, removing reference to first-degree murder as the underlying felony. On 15 September 2010, Defendant notified the State of his intent to raise self-defense as a defense to both charges.

On 15 October 2010, the State sent the shotgun recovered from the crime scene to the State Bureau of Investigation ("SBI") for ballistics testing to determine the distance from which the shotgun was fired when the first shotgun blast struck the wall approximately five feet from the entrance of the master bedroom. The SBI report indicated the shotgun was fired "from a distance greater than 14 feet but less than 18 feet." The State averred this report demonstrated that, due to the dimensions of the bedroom, Defendant must have fired the shotgun outside of the bedroom. On 3 December 2010, Defendant moved to suppress this evidence. As trial was set for 10 January 2011, defense counsel contended he had insufficient time to prepare in light of this new evidence. Johnston County Superior Court Judge Thomas H. Lock agreed, and, on 7 January 2011, Judge Lock entered an order granting Defendant's motion to suppress the SBI's testing and results obtained therefrom (hereinafter referred to as the "Suppression Order"). The Suppression Order prohibited the State from referring to the shotgun firing distance testing either directly or through the testimony of its witnesses. The trial date was delayed from 10 January 2011 to 7 March 2011 due to inclement weather, prompting the State to file a motion with the trial court to reconsider the Suppression Order. Judge Lock denied the State's motion.

This matter came on for trial at the 7 March 2011 Criminal Session of the Johnston County Superior Court, the Honorable Robert F. Floyd presiding. At trial, Mr. Heyden testified as a witness for the State. Mr. Heyden testified he saw Defendant point the shotgun down the hallway and heard a shotgun blast the moment he lost sight of Defendant. According to Mr. Heyden, it was not until he exited Ms. Brown's home that he heard the semiautomatic pistol fire several times. When pressed on cross-examination, Mr. Heyden stated he was "sure" he heard the shotgun blast prior to the firing of the semiautomatic pistol. He testified he was able to distinguish between the shotgun and the pistol because he had "shot pistols and shotguns and rifles pretty much [his] whole life," he had personally fired Mr. Charlton's pistol, and he was well aware of the sound of a shotgun when fired, as he had fired a shotgun hundreds of times.

Ronald Mazur, a crime scene investigator with the Johnston County Sheriff's office, described the layout of Ms. Brown's mobile home and the location of the evidence collected by investigators at the crime scene. During the course of direct examination, the prosecutor stated: "There was testimony in this case that a shot was fired from a shotgun in the hallway of the residence." Defense counsel objected to the prosecutor's statement and, out of the presence of the jury, moved for a mistrial. Defense counsel contended the prosecutor's statement assumed matters not in evidence because no witness had testified to actually seeing Defendant fire a gunshot down the hallway and, moreover, the prosecutor's statement elicited testimony in violation of the Suppression Order. The trial court sustained the objection and directed the jury to disregard the statement. The trial court denied Defendant's motion for a mistrial, but "admonished [the State] not to argue or presume matters that are not yet in evidence."

John D. Butts, the medical examiner who performed the autopsy on Mr. Charlton, testified that Mr. Charlton died as a result of a shotgun wound to his left chest region. When asked on cross-examination whether Mr. Charlton would have been able to fire a gun *after* sustaining the shotgun wound, Dr. Butts testified "Mr. Charlton would have lost consciousness rather rapidly, but he could well have been conscious and capable of a few voluntary efforts for a brief period of time before he lost consciousness."

Defense counsel moved to dismiss the charges against Defendant at the close of the State's evidence, asserting the State had failed to offer evidence sufficient to prove each element of the charged offenses. With respect to the murder charge, Defendant contended that the State had introduced no evidence indicating Defendant's permission to enter Ms. Brown's residence had been revoked and that the only evidence indicating Defendant had pulled the trigger was circumstantial. The court denied Defendant's motions.

Ms. Brown testified as a witness on Defendant's behalf. She stated she had been in a romantic relationship with Defendant for approximately eighteen months. They were not "boyfriend and girlfriend," but they did spend Christmas Eve together just a few nights prior to the night in question. According to Ms. Brown, Defendant had "standing consent" to come and go from Ms. Brown's residence. Ms. Brown testified that she was also romantically involved with Mr. Charlton. Mr. Charlton stayed with Ms. Brown at her residence from 26 December 2008 through the time of his death. When Ms. Brown saw Defendant outside of her home on the night of 28 December

2008, she tried to stop Defendant from seeing inside because she did not want Defendant to see her with Mr. Charlton. At the sight of Defendant's shotgun, she feared for the safety of both men because she knew Mr. Charlton was also armed.

Ms. Brown testified that Defendant entered through the front door into the living room area. Ms. Brown and Mr. Charlton headed for the master bedroom in the rear of the trailer, and Defendant followed. Mr. Charlton pointed his pistol at Defendant as Defendant entered the bedroom. Defendant held his shotgun pointed straight ahead with his hand on the pump. Ms. Brown left the bedroom and heard gunfire. She did not know how many shots had been fired, or who fired first. Ms. Brown "about ran over" Mr. Heyden on her way to the front door. After the shooting ceased, Ms. Brown reentered the residence and found Defendant crawling through the kitchen area. Defendant stated to Ms. Brown: "Baby, he shot me first." Ms. Brown found Mr. Charlton lying beside the bed in the master bedroom.

On cross-examination, Ms. Brown testified she received threatening text messages from Defendant earlier that night. Ms. Brown read to the jury the following text message exchange, which transpired at approximately 7:45 PM:

> DEFENDANT: "Fuck you, you slut. You want to fuck Nigger [Mr. Charlton] on Christmas. Fuck you. I hope you die."
>
> MS. BROWN: "What the fuck ever, you drama queen. I didn't fuck [Mr. Charlton] on Christmas Day. Don't be ugly to me. Mean people suck udders."
>
> DEFENDANT: "Fuck you. You're a fucking liar. I wish you both die. I hate you."

Defendant took the stand and testified in his own defense. He described the text messages between himself and Ms. Brown as the way they communicated when they were not getting along, and he was just "messing around" with her. Defendant testified he went to Ms. Brown's residence that night because he was leaving town for work and needed to pick up some clothes. When Defendant arrived at Ms. Brown's residence, he noticed a vehicle in the driveway that he believed to be Mr. Charlton's truck. According to Defendant, he grabbed his shotgun for his own protection. Defendant explained that Mr. Charlton had assaulted him in the past, and Defendant knew that Mr. Charlton "carried a pistol with him at all times." Defendant entered Ms. Brown's residence through the front door with the shot-

gun "as a deterrent." Mr. Charlton was in the living room and Mr. Heyden was in the kitchen. Defendant told Mr. Charlton he didn't want any trouble and was just there to pick up some clothes. Defendant followed Mr. Charlton down the hallway to the master bedroom at the rear of the residence. When they reached the bedroom, Mr. Charlton "spun around and was training his pistol on [Defendant]."[1] Defendant raised his arm and was about to yell, "Don't shoot" when Mr. Charlton opened fire. The bullet penetrated Defendant's arm, and, stumbling backwards, he pumped the shotgun. Defendant "knew he was trying to kill me then." After sustaining a second gunshot wound, Defendant looked away—to avoid being shot in the face—and pulled the trigger on his shotgun. The shooting stopped. Defendant fell to the ground and saw Mr. Charlton, eyes open, propped up against the bed. Defendant did not know if Mr. Charlton was dead. Defendant crawled out of the bedroom and collapsed in the hallway when he was unable to drag himself further.

The defense also introduced the testimony of Defendant's former girlfriend, Teresa Thomas. Ms. Thomas testified that a fight had occurred between Defendant and Mr. Charlton in 2003 after Mr. Charlton slapped Ms. Thomas on the butt at a party. According to Ms. Brown, Defendant "got beat up really bad," was knocked unconscious, and required stitches to his forehead.

The State called Mr. Heyden as a rebuttal witness. Mr. Heyden described to the jury, using a diagram depicting the layout of Ms. Brown's apartment, where he was when he heard the shotgun blast and where he thought Defendant might have been. Defense counsel objected and moved to strike Mr. Heyden's testimony. The trial court overruled the objection and the motion to strike.

Defendant renewed his motions to dismiss the charges against Defendant at the close of all the evidence. The trial court granted Defendant's motion as to the first-degree burglary charge based on its finding that Defendant had standing consent to enter Ms. Brown's residence, and the State had failed to offer sufficient evidence establishing that this consent had been withdrawn. The trial court denied Defendant's motion to dismiss the first-degree murder charge.

During closing arguments, the prosecutor portrayed Defendant as a man tired of losing to Mr. Charlton, referencing both the fight in

1. Although it is unclear from the transcript, Defendant's testimony indicates Ms. Brown was in or around the bedroom at this time, but fled up the hallway when Mr. Charlton pointed his gun at Defendant.

2003 and Mr. Charlton's relationship with Defendant's ex-girlfriend, Ms. Brown. In light of the text message exchange between Defendant and Ms. Brown and Ms. Brown's relationship with Mr. Charlton, the prosecutor argued, Defendant knew "that his right to go into [Ms. Brown's] house ha[d] been revoked." The prosecutor emphasized that the facts indicated Ms. Brown revoked Defendant's "standing consent" to enter her home on the night in question. Defendant raised no objection. The prosecutor accused Defendant of possessing an "outlaw mentality:" instead of attempting to obtain his clothes from Ms. Brown's home peacefully, Defendant carried a loaded shotgun into Ms. Brown's home with the intent to kill Mr. Charlton. At this point, defense counsel objected to the prosecutor's closing argument. The trial court overruled Defendant's objection.

On 17 March 2011, the jury convicted Defendant of first-degree murder. Judge Floyd sentenced Defendant to the mandatory sentence of life in prison without parole. At the conclusion of sentencing, Defendant entered notice of appeal in open court.

II. Jurisdiction

This Court exercises jurisdiction over Defendant's appeal pursuant to N.C. Gen. Stat. § 7A-27(b), as Defendant appeals from the superior court's final judgment as a matter of right.

III. Analysis

A. Defendant's Motion to Dismiss

[1] The first issue presented for this Court's review is whether the trial court erred by denying Defendant's motions to dismiss the first-degree murder charge at the close of the State's evidence and at the close of all the evidence. Defendant contends he is entitled to a new trial under *State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981) because the trial court erred in submitting first-degree murder as a possible verdict to the jury. We disagree and hold that the trial court did not err in denying Defendant's motion to dismiss the first-degree murder charge.

"When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The trial court should grant the defendant's motion to dismiss

"[i]f 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." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982).

"The elements required for conviction of first degree murder are (1) the unlawful killing of another human being; (2) with malice; and (3) with premeditation and deliberation." *State v. Haynesworth*, 146 N.C. App. 523, 531, 553 S.E.2d 103, 109 (2001). In determining whether substantial evidence of each element exists, this Court must view the evidence presented before the trial court in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Conflicting testimony, contradictions, and discrepancies are factual determinations to be resolved by the jury and do not require dismissal. *State v. Prush*, 185 N.C. App. 472, 478, 648 S.E.2d 556, 560 (2007). However, whether substantial evidence exists with respect to each element of the charged offense is a question of law. *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 433 (1956). Accordingly, we review the trial court's denial of Defendant's motion to dismiss *de novo*. *See State v. McNeil*, ___ N.C. App. ___, ___, 707 S.E.2d 674, 679 (2011).

Defendant concedes he fired the gunshot that killed Mr. Charlton. Defendant's sole contention is that his actions were justified under a theory of self-defense and the State failed to carry its burden in proving otherwise. The law of perfect self-defense excuses a killing if, at the time of the killing: (1) the defendant subjectively believed it necessary to kill the deceased to preserve his own life or to avoid substantial bodily injury; (2) the defendant's belief was objectively reasonable; (3) the defendant was not the initial aggressor; and (4) the amount of force employed by the defendant was reasonably necessary under the circumstances to protect himself. *State v. McAvoy*, 331 N.C. 583, 595, 417 S.E.2d 489, 497 (1992). In *State v. Hamilton*, this Court stated:

> The State bears the burden of proving that defendant did not act in self-defense. To survive a motion to dismiss, the State must therefore present sufficient substantial evidence which, when taken in the light most favorable to the State, is sufficient to convince a rational trier of fact that defendant did not act in self-defense.

77 N.C. App. 506, 513, 335 S.E.2d 506, 511 (1985) (internal citation omitted).

Viewing the evidence in the light most favorable to the State, Defendant drove to Ms. Brown's residence, uninvited, after sending threatening text messages to Ms. Brown expressing anger towards Ms. Brown and her relationship with Mr. Charlton. Defendant saw Mr. Charlton's vehicle in the driveway and grabbed his loaded, sawed off shotgun. Wielding the shotgun, Defendant entered Ms. Brown's home. Defendant moved through the living room, past the kitchen area, and down the hallway where he opened fire in the direction of Mr. Charlton and the master bedroom. Mr. Charlton died as a result of a shotgun wound to his chest. Mr. Charlton was able to fire off several rounds with his pistol before succumbing to his injuries. We hold this to be substantial evidence from which a jury could find Defendant acted with premeditation, deliberation, and malice, and, further, is sufficient evidence to convince a rational jury that Defendant did not act in self-defense.

Defendant avers "[a]ll of the evidence at trial showed [Defendant] was shot twice before he fired the fatal shot," and, therefore, the State failed to carry its burden in proving Defendant's conduct was not justified. Defendant's contention ignores Mr. Heyden's testimony indicating Defendant fired the first shot. Mr. Heyden testified he heard a shotgun blast when he was in the kitchen, immediately after losing sight of Defendant. It was not until he ran from the kitchen and out the front door that he heard shots fired from Mr. Charlton's pistol. Mr. Heyden confirmed he was "sure" he heard the shotgun first when pressed on cross-examination. Defendant's contention also ignores Dr. Butts' testimony acknowledging that it would have been possible for Mr. Charlton to fire his pistol after sustaining the shotgun blast.

Defendant points to the testimony of Ms. Brown and Defendant indicating Mr. Charlton fired the first shot, and Defendant returned fire to preserve his own life. According to Defendant, this testimony indicates that the State failed to prove beyond a reasonable doubt that Defendant did not act in self-defense. Defendant misconstrues our standard of review on this issue. While it may be true that a jury could infer Defendant acted in self-defense based upon the evidence presented at trial, we are required to view the evidence in the light most favorable to the State in reviewing the trial court's ruling on Defendant's motion to dismiss. *See supra*. Defendant's evidence is considered only to the extent it is favorable to the State. *State v. Streath*, 73 N.C. App. 546, 552, 327 S.E.2d 240, 243 (1985). We conclude that the evidence, when viewed in the light most favorable to the State, is sufficient to convince a rational jury that Defendant did

not act in self-defense. The conflicting evidence presented at trial concerning, *e.g.*, who fired the first shot and whether Defendant fired the shotgun in the hallway or in the bedroom, left material questions of fact to be resolved by the jury. It was not the function of the trial court to make these determinations in ruling on Defendant's motion to dismiss. *See Powell*, 299 N.C. at 99, 261 S.E.2d at 117 (holding that upon considering a motion to dismiss, the trial court "is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight"). We hold there was sufficient evidence to submit to the jury the charge of first-degree murder and the trial court did not err in denying Defendant's motion to dismiss. Defendant's assignment of error is overruled.

B. Defendant's Motion for a Mistrial

[2] Defendant next contends the trial court erred by denying his motion for a mistrial after the prosecutor allegedly referred to suppressed evidence. We disagree and hold that the trial court acted within its discretion in denying Defendant's motion.

We review the trial court's denial of Defendant's motion for a mistrial for abuse of discretion. *See State v. Simmons*, 191 N.C. App. 224, 227, 662 S.E.2d 559, 561 (2008). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." *State v. Lasiter*, 361 N.C. 299, 302, 643 S.E.2d 909, 911 (2007).

"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 (2009). "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. Stocks*, 319 N.C. 437, 441, 355 S.E.2d 492, 494 (1987). " 'Ordinarily, when incompetent or objectionable evidence is withdrawn from the jury's consideration by appropriate instructions from the trial judge, any error in the admission of the evidence is cured.' " *See State v. Upchurch*, 332 N.C. 439, 450, 421 S.E.2d 577, 584 (1992) (citation omitted).

Here, the prosecutor made the following statement during the State's direct examination of Mr. Mazur: "There was testimony in this case that a shot was fired from a shotgun in the hallway of the residence." We agree with Defendant that the prosecutor's statement was misleading. Mr. Heyden testified he heard the shotgun blast as Defendant moved out of his line of vision into the hallway; he did not testify to actually seeing Defendant fire the shotgun in the hallway. Nor did any other witness at trial testify that the shotgun was fired in the hallway. While the jury may have inferred from Mr. Heyden's testimony that Defendant fired the shotgun in the hallway, the prosecutor's statement assumed matters not in evidence. However, the trial court took steps to mitigate the impact of the statement on the jury by sustaining Defendant's objection to the statement and instructing the jury to disregard it.

Defendant further contends the trial court erred in denying his motion for a mistrial because the prosecutor's statement violated the Suppression Order. We disagree. The Suppression Order prohibited the State from introducing testimony relating to the SBI's testing and the results obtained from the testing. The Suppression Order did not constitute a complete ban on all evidence pertaining to Defendant's location when he fired the shotgun. The prosecutor's statement improperly implied that Mr. Heyden observed Defendant fire the shotgun in the hallway, but it did not refer to the SBI testing. Thus, the prosecutor's statement did not violate the Suppression Order. In light of the trial court's instruction to the jury and our conclusion that the prosecutor did not violate the Suppression Order, we hold that the trial court acted within its discretion in denying Defendant's motion for a mistrial.

C. Defendant's Objections and Motions to Strike

[3] After the defense rested its case, the State called Mr. Heyden as a rebuttal witness. During Mr. Heyden's testimony, the prosecutor asked Mr. Heyden to step down from the witness stand and identify—using a diagram of Ms. Brown's residence—where he believed Defendant was located at the time he heard the first shotgun blast. The following exchange took place:

> [PROSECUTOR]: And where was the defendant when you heard that sound?
>
> [MR. HEYDEN]: He would have been just past this point here (indicating [on the diagram]).

[PROSECUTOR]: Thank you.

(Witness resumes the stand.)

[PROSECUTOR]: Mr. Heyden, how long had you known Richard Charlton?

[DEFENSE COUNSEL]: Your Honor, I would object to the last question, object to his answer, and move the jury to strike it.

THE COURT: Overruled at this point.

[PROSECUTOR]: How long have you know Richard Charlton?

[MR. HEYDEN]: Almost 20 years.

THE COURT: And the motion to strike is denied at this point.

Defendant contends the trial court erred by overruling his objection and motion to strike Mr. Heyden's testimony concerning Defendant's location when Mr. Heyden heard the shotgun blast. Defendant asserts this testimony was speculative and deprived him of his right to a fair trial. We do not address the merits of Defendant's argument because Defendant failed to object to the challenged testimony in a timely manner.

"Assignments of error are generally not considered on appellate review unless an appropriate and timely objection was entered." *State v. Curry*, 171 N.C. App. 568, 573, 615 S.E.2d 327, 331 (2005). "[U]nder Rule 103 of the North Carolina Rules of Evidence, error may not be predicated on a ruling admitting evidence unless a *timely objection or motion to strike* appears in the record." *State v. Reid*, 322 N.C. 309, 312, 367 S.E.2d 672, 674 (1988) (emphasis added). Where the defendant has " 'the opportunity to learn that the evidence was objectionable,' " but fails to object, "he waives the inadmissibility of the evidence." *State v. Potts*, ___ N.C. App. ___, ___, 702 S.E.2d 360, 363 (2010) (citation omitted).

In *State v. Heyder*, the State's witness read into evidence an out of court statement made by the defendant. 100 N.C. App. 270, 274-75, 396 S.E.2d 86, 88-89 (1990). As the witness was reading the statement, defense counsel objected and moved to strike the testimony. *Id.* at 275, 396 S.E.2d at 89. The trial court overruled the objection. *Id.* On appeal, the defendant argued the trial court erred by overruling the objection and motion to strike because the entire statement was hearsay. *Id.* This Court held that "the defendant did not object in apt time" because "the defendant was fully aware throughout the reading

of the statement that it was an out-of-court statement offered for the truth of the matters contained within it." *Id.* at 275-76, 396 S.E.2d at 89. Accordingly, we held the defendant had failed to preserve the alleged error for appeal. *Id.* at 276, 396 S.E.2d at 89.

In the instant case, the record indicates Defendant failed to raise a timely objection to the challenged testimony. Mr. Heyden stepped down from the witness stand and used a diagram of Ms. Brown's residence to indicate to the jury where he believed Defendant to be when he heard the shotgun blast. Defendant did not object. Mr. Heyden returned to the witness stand. The prosecutor then proceeded with Mr. Heyden's testimony, stating: "Mr. Heyden, how long had you known Mr. Charlton?" It was only at this point that Defendant lodged an objection. While it is impossible to surmise from the transcript the precise period of time that had elapsed, this progression of events indicates Defendant failed to object to the challenged testimony in a timely manner.

Furthermore, even if the objection was timely, we further note defense counsel failed to state the specific grounds for the objection. "In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, *stating the specific grounds for the ruling sought if the specific grounds are not apparent.*" *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) (emphasis added); *see* N.C. R. App. P. 10(b)(1). Here, defense counsel did not state the grounds for the objection and, further, the transcript indicates potential confusion as to what Defendant was objecting. Defense counsel objected to the prosecutor's "last question." However, the "last question" posed by the prosecutor was "Mr. Heyden, how long had you known Mr. Charlton?" It was not until *after* Mr. Heyden answered this question, stating he had known Mr. Charlton for "20 years," that the trial court overruled defense counsel's motion to strike. Accordingly, we hold that defense counsel's objection was untimely and lacked the requisite precision, and, therefore, Defendant failed to preserve this issue for appellate review.

We have reviewed Defendant's remaining contentions with respect to the objections and motions lodged by defense counsel during the course of Mr. Heyden's rebuttal testimony and find no error in the trial court's rulings.

D. The State's Closing Arguments

[4] Defendant's final contentions take issue with the prosecutor's closing arguments. During her closing arguments, the prosecutor

reminded the jury of the threatening text messages sent by Defendant to Ms. Brown, the violent history between Defendant and Mr. Charlton, and Mr. Charlton's relationship with Ms. Brown. The prosecutor then stated:

> And so when he goes into that house—the defendant would never admit to this, but he knows that his right to go into that house has been revoked. And he knows that because, again, of the text messages, he knows she's sleeping with another man. He's called her a slut. He's mad at her. A reasonable person, after saying those types of things, would never think you could walk into a woman's house when she was with another man.

Defendant did not object. Later, the prosecutor explained to the jury that it was their job to weigh the testimony of the witnesses and determine the credibility of those witnesses, including Mr. Heyden and Ms. Brown. The prosecutor then stated:

> I would submit to you that the truth is the same yesterday as it is today and as it will be tomorrow. And you cannot do that when you look at Kristy Brown's statement in this case because she said one thing the night of the murder, that she shut the door in the defendant's face as he's coming up to her house with a gun, and she gets on the stand and she testifies that he had consent, "He had standing consent to enter my residence." Is that reasonable to believe, members of the jury? That when she shut the door in his face she wants him to come in the house when she knew he had a shotgun. It's not reasonable to assume.

Again, Defendant did not object.

On appeal, Defendant contends the prosecutor's insinuation that Defendant's right to enter Ms. Brown's home had been revoked improperly contravened the trial court's earlier ruling on the issue of consent. At the close of all the evidence, the trial court dismissed the charge of first-degree burglary against Defendant, stating:

> I just don't see where there's been sufficient evidence shown that she has indicated through her testimony that the standing consent or the consent to—specific intent to come and go into the home, there's no evidence through her indicating that that was negated in her opinion.

In light of the trial court's ruling, Defendant contends the prosecutor's remarks during closing arguments prejudiced Defendant's right to a fair trial and the trial court committed plain error by failing

to intervene *ex mero motu*. Because Defendant failed to object at trial, this Court must determine whether the prosecutor's remarks were "so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Barden*, 356 N.C. 316, 358, 572 S.E.2d 108, 135 (2002).

N.C. Gen. Stat § 15A-1230 provides:

> During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2009). As our Supreme Court has explained, the trial court must intervene during closing arguments only where "the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial." *State v. Atkins*, 349 N.C. 62, 84, 505 S.E.2d 97, 111 (1998); *see also State v. Paul*, 58 N.C. App. 723, 725, 294 S.E.2d 762, 763 (1982) ("Defendant is entitled to a new trial only if the impropriety is shown to be prejudicial.").

After careful review of the record, we conclude the prosecutor's remarks did not impede Defendant's right to a fair trial. The prosecutor's closing arguments asked the jury to infer from the circumstances that Ms. Brown revoked Defendant's permission to enter her home. The prosecutor also encouraged the jury to evaluate the credibility of Ms. Brown's testimony: on one hand, Ms. Brown testified Defendant had "standing consent" to enter her home; on the other hand, Ms. Brown testified she did not want Defendant to see her with Mr. Charlton and slammed the door in Defendant's face. Even assuming the prosecutor's remarks possessed some degree of impropriety in light of the trial court's earlier ruling, we cannot conclude these remarks impeded Defendant's right to a fair trial. As the burglary charge had been dismissed, the issue of whether Defendant had consent to enter Ms. Brown's home had little practical bearing on the jury's verdict as to the first-degree murder charge. Defendant's means of entry is immaterial if he shot and killed Mr. Charlton with premeditation, deliberation, and malice.

Defendant also contends the trial court erred when it overruled Defendant's objection after the prosecutor stated Defendant could

have called law enforcement to help him retrieve his clothes from Ms. Brown's residence. Defendant did object to this portion of the prosecutor's closing arguments, and we review the trial court's ruling for abuse of discretion. *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002).

"During closing arguments, trial counsel is allowed 'wide latitude' in his remarks to the jury and may argue the law, all the facts in evidence, and any reasonable inference drawn from the law and facts." *State v. Anderson*, 175 N.C. App. 444, 452, 624 S.E.2d 393, 400 (2006). The thrust of Defendant's argument is that the prosecutor's statement "was a calculated attempt to mislead the jurors." We disagree with Defendant's characterization of this portion of the prosecutor's closing arguments. The prosecutor posed a statement to the jury grounded in reason and common sense: if Defendant needed to obtain his personal possessions from Ms. Brown's residence, there were ways of doing so without resorting to violence. We hold the trial court was within its discretion in allowing the prosecutor's statement.

For the foregoing reasons, we conclude Defendant received a fair trial free from prejudicial error.

No error.

Judges HUNTER, Robert C., and GEER concur.

NANCY JO CHAPMAN WESTMORELAND, EXECUTOR OF THE ESTATE OF JAMES ROBERT CHAPMAN, DECEASED, PLAINTIFF v. HIGH POINT HEALTHCARE INC. AND HERITAGE HEALTHCARE OF HIGH POINT, LLC, DEFENDANTS

NO. COA10-1103

(Filed 17 January 2012)

1. Appeal and Error—interlocutory orders and appeals—substantial right—denial of motion to stay proceedings for arbitration

An order denying a motion to stay proceedings so that the dispute could be arbitrated affected a substantial right and was immediately appealable under N.C.G.S. § 7A-927(d)(1).

2. Arbitration and Mediation—arbitration agreement—procedural and substantive unconscionability

A *de novo* review revealed that the trial court erred in a wrongful death case by concluding that several factors of an arbitration agreement supported findings of both procedural and substantive unconscionability under *Tillman*, 362 N.C. 93. Plaintiff did not establish a *prima facie* case of bargaining inequality merely because an "ordinary consumer" was negotiating with a "sophisticated health care services provider." Further, the circumstances surrounding execution of the agreement did not excuse an apparent failure to read it.

3. Arbitration and Mediation—arbitration agreement—totality of circumstances—balancing test

A totality of circumstances test revealed that plaintiff failed to demonstrate that an inequality of a bargain was so manifest as to shock the judgment of a person of common sense and that the terms of an arbitration agreement were so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.

Appeal by defendant from denial of motion to compel arbitration entered 12 April 2010 by Judge John O. Craig III in Guilford County Superior Court. Heard in the Court of Appeals 23 March 2011.

Alexander Ralston, Speckhard & Speckhard, L.L.P., by Stanley E. Speckhard, for plaintiff-appellee.

Arnall, Golden, Gregory, L.L.P., by W. Jerad Rissler, and Harris, Creech, Ward & Blackerby, P.A., by Bonnie J. Refinski-Knight, Esq., for defendant-appellants.

STEELMAN, Judge.

Decedent's power of attorney executed an arbitration agreement after decedent was admitted to defendant's nursing facility. The agreement provided that its execution was not a prerequisite to decedent being admitted or remaining in the facility. Plaintiff failed to meet her burden of proof to show that the agreement was procedurally and substantively unconscionable. The order of the trial court denying defendant's motion to compel arbitration is reversed.

I. Factual and Procedural Background

On 17 July 2006, Nancy Jo Chapman Westmoreland, as attorney in fact for her father, James Robert Chapman ("Chapman"), placed him in a nursing facility owned by High Point Healthcare, Inc. ("defendant").

On 18 July 2006, Westmoreland as her father's power of attorney was presented with several documents for her signature, one of which was an arbitration agreement (the "Arbitration Agreement"). The Arbitration Agreement was a separate agreement, labeled as such in bold lettering.[1] It provided that any claims between the parties would be resolved by binding arbitration and that the parties waived their right to trial before a jury or judge. The agreement explicitly stated that execution of the Arbitration Agreement was not a condition to Chapman being admitted to or remaining in the facility. Westmoreland as power of attorney executed this document, and Chapman remained at the facility until his death on 12 September 2007.

On 15 September 2009, Westmoreland, acting as executor of her father's estate (hereinafter referred to as "plaintiff" when acting in this capacity) filed a complaint in the Superior Court of Guilford County seeking monetary damages based upon allegations that Chapman's death was proximately caused by the negligence of defendant. On 16 October 2009, defendant moved to dismiss the complaint or stay the proceedings and compel arbitration.

The motion to compel arbitration was heard on 9 December 2009. On 14 April 2010, the trial court entered a written order denying defendant's motion to dismiss or to compel arbitration, ruling that the Arbitration Agreement was both procedurally and substantively unconscionable.

Defendant appeals.

II. Interlocutory Appeal

[1] The trial court's order is not a final disposition of this case and is an interlocutory order. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). However, our courts have held that an order denying a motion to stay proceedings so that the dispute can be arbitrated affects a substantial right and is immediately appealable pursuant to N.C. Gen. Stat. § 7A-27(d)(1) (2009). *See Barnhouse v. Am. Express Fin. Advisors, Inc.*, 151 N.C. App. 507, 508, 566 S.E.2d 130, 131 (2002).

1. A copy of the entire Arbitration Agreement is attached to this opinion.

III. Arbitration Agreement

[2] In its first argument, defendant contends that the trial court erred in concluding that the Arbitration Agreement was unconscionable. We agree. This issue is dispositive; therefore, we do not address defendant's remaining arguments on appeal.

A. Standard of Review

Unconscionability is a question of law that is reviewed *de novo* on appeal. *Tillman v. Commercial Credit Loans*, 362 N.C. 93, 101, 655 S.E.2d 362, 369 (2008) (plurality opinion). Under *de novo* review, we consider the matter anew and are free to substitute our judgment for that of the trial court. *Blow v. DSM Pharm., Inc.*, 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009). The trial court's findings of fact that are supported by competent evidence are binding on appeal even if there is evidence to support findings to the contrary. *Tillman*, 362 N.C. at 100–01, 655 S.E.2d at 369. The labels "findings of fact" and "conclusions of law" employed by the trial court in a written order do not determine the nature of our review. *See Peters v. Pennington*, ___ N.C. App. ___, ___, 707 S.E.2d 724, 735 (2011) (reviewing what was labeled as a "conclusion of law" as a finding of fact). If the trial court labels as a finding of fact what is in substance a conclusion of law, we review that "finding" *de novo*. *See id.*

B. Analysis

There is no issue as to whether the parties entered into the Arbitration Agreement. The trial court found as a fact that Westmoreland executed the Arbitration Agreement in her capacity as attorney in fact for her father. The trial court specifically rejected plaintiff's argument that as power of attorney, she had no authority to bind the estate to arbitrate a wrongful death claim. On appeal, plaintiff does not argue this as an alternative basis for upholding the ruling of the trial court pursuant to Rule 28(c) of the Rules of Appellate Procedure. Thus, this issue is not before us.

"North Carolina has a strong public policy favoring arbitration." *Raper v. Oliver House, LLC*, 180 N.C. App. 414, 419, 637 S.E.2d 551, 554 (2006) (quoting *Red Springs Presbyterian Church v. Terminix Co.*, 119 N.C. App. 299, 303, 458 S.E.2d 270, 273 (1995)); *cf. Tillman*, 362 N.C. at 101, 655 S.E.2d at 369 ("Arbitration is favored in North Carolina."). As the Supreme Court of Alabama explained, "[t]here is nothing inherently unfair or oppressive about arbitration clauses, and arbitration agreements are not in themselves unconscionable." *Blue*

Cross Blue Shield of Ala. v. Rigas, 923 So. 2d 1077, 1086 (Ala. 2005) (citation omitted).

A contract is unconscionable, and therefore unenforceable under equitable principles,

> only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.

Brenner v. Little Red Sch. House Ltd., 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981), *quoted with approval in Tillman*, 362 N.C. at 101–02, 655 S.E.2d at 369. "An inquiry into unconscionability requires that a court 'consider all the facts and circumstances of a particular case,' and '[i]f the provisions are then viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable.' " *Tillman*, 362 N.C. at 102, 655 S.E.2d at 369 (alteration in original) (quoting *Brenner*, 302 N.C. at 213, 274 S.E.2d at 210).

The leading case in North Carolina on the unconscionability of arbitration agreements is *Tillman v. Commercial Credit Loans, Inc.* In that case, a plurality of three justices concurred in the decision of the Court, two justices concurred in the result only, and two justices dissented. *See Kucan v. Advance Am.*, 190 N.C. App. 396, 404 n.1, 660 S.E.2d 98, 103 n.1 (2008) (explaining that the analysis of the three-justice *Tillman* opinion was "of a plurality, not a majority"). The plurality opinion stated that unconscionability was an affirmative defense and that the party asserting that defense has the burden of establishing that the agreement was unconscionable. *Tillman*, 362 N.C. at 102, 655 S.E.2d at 369. The plurality further stated that to establish unconscionability, a party must demonstrate both procedural unconscionability and substantive unconscionability. *Id.* at 102, 655 S.E.2d at 370 (citing *Martin v. Sheffer*, 102 N.C. App 802, 805, 403 S.E.2d 555, 557 (1991); 1 James J. White & Robert S. Summers, *Uniform Commercial Code* § 4-7, at 315 (5th ed. 2006)). Under the plurality's rationale, both elements must be present, but a court may rule a contract is unconscionable "when [the] contract presents pronounced substantive unfairness and a minimal degree of procedural unfairness, or vice versa." *Id.* at 103, 655 S.E.2d at 370.

A majority of the Court held that the arbitration agreement was unconscionable and therefore unenforceable. *Id.* at 108, 655 S.E.2d at

373. The concurring opinion agreed that the contract was unconscionable, but opined that the determination of unconscionability should be based upon a totality of the circumstances test, as set forth in *Brenner v. Little Red School House, Ltd. Tillman*, 362 N.C. at 109, 655 S.E.2d at 374 (Edmunds, J., concurring). Notably, *Tillman* was the first case where a North Carolina appellate court found a contract to be unconscionable. *Id.* at 111–12, 655 S.E.2d at 375 (Newby, J., dissenting) (making this observation).

Both the plurality and the concurring opinions focused upon the same factors in reaching their decision that the arbitration agreement in *Tillman* was unconscionable. In order to cover all possible modes of analysis in this case, we will first analyze this case under the two-part test posited by the plurality. We will then consider the trial court's order under the totality of the circumstances test posited by the concurring opinion.

1. Procedural Unconscionability

"[P]rocedural unconscionability involves 'bargaining naughtiness' in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power." *Id.* at 102–03, 655 S.E.2d at 370 (plurality opinion) (citing *Rite Color Chem. Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 20, 411 S.E.2d 645, 648 (1992)). In *Tillman*, the Supreme Court plurality found procedural unconscionability based on five factors; (1) the plaintiffs were rushed through the loan closing: (2) the closing officer indicated where to sign; (3) there was no mention of the offending terms at the closing; (4) the defendants admitted they would have refused to make the loan rather than negotiate terms of the arbitration agreement; and (5) "the bargaining power between [the] defendants and [the] plaintiffs was unquestionably unequal in that [the] plaintiffs [were] relatively unsophisticated consumers contracting with corporate defendants who drafted the arbitration clause and included it as boilerplate language in all of their loan agreements." *Id.* at 103, 411 S.E.2d at 370. The instant case lacks several of the indicia of procedural unconscionability that were present in *Tillman*.

An imbalance in bargaining strength is one of many factors that must be considered to determine whether there is procedural unconscionability. *See id.* But bargaining inequality alone generally cannot establish procedural unconscionability. Otherwise, procedural unconscionability would exist in most contracts between corporations and consumers. There would nearly always be some degree of

"inequality of bargaining power." The trial court held that because plaintiff was an "ordinary consumer" and defendant was a "sophisticated health care services provider" that there existed a "*prima facie* inequality of bargaining power." We note that, while this statement was contained in the trial court's findings of fact, this is a legal conclusion to which we accord no deference on appeal. *See Pennington*, ___ N.C. App. at ___, 707 S.E.2d at 735.

This is not, and has never been the law in North Carolina. Whether there is bargaining inequality must be evaluated on a case-by-case basis; this inquiry turns on the specific facts of each case. The trial court erred in holding that plaintiff had established a *prima facie* case of bargaining inequality merely because an "ordinary consumer" was negotiating with a "sophisticated health care services provider."

The balance of the trial court's findings pertaining to procedural unconscionability deal with the execution of the documents. The trial court found that Westmoreland acting as attorney-in-fact for her father was told that the documents had to be signed to accomplish the admission of Chapman to the facility; that there was no discussion of the Arbitration Agreement; that she had no independent understanding of arbitration; and that she would not have signed the document had she understood that she was giving up Chapman's right to a jury trial. The trial court acknowledged that based upon the provisions of the Arbitration Agreement, it was not true that the admission of Chapman to the facility was contingent upon execution of the Arbitration Agreement. Paragraph 8 of the Arbitration Agreement was in boldface and capital type, and reads as follows:

> **8. Right To Consultation. The Resident understands that the Resident has the right to consult an attorney or his or [sic] her choice about this Arbitration Agreement and to receive and [sic] explanation or clarification from the Facility's admissions coordinator. The Resident is not required to sign this Arbitration Agreement in order to be admitted to or to remain in the Facility.**
>
> BY SIGNING THIS AGREEMENT, THE RESIDENT ACKNOWLEDGES THAT THE RESIDENT HAS HAD THE OPPORTUNITY TO READ THIS AGREEMENT OR IT HAS BEEN READ TO THE RESIDENT AND THE RESIDENT UNDERSTANDS ITS CONTENTS.

This paragraph contains three essential provisions: (1) it advised plaintiff of her right to consult with an attorney about the Arbitration

Agreement; (2) it advised her of the right to receive an explanation or clarification from the admissions coordinator; and (3) it provided that she was not required to sign the Arbitration Agreement for her father to be admitted to the facility. In North Carolina, parties to a contract have an affirmative duty to read and understand a written contract before they sign it. *Breece v. Standard Oil Co. of N.J.*, 209 N.C. 527, 530, 184 S.E. 86, 88 (1936).

It has long been the law in North Carolina that "the law will not relieve one who can read and write from liability upon a written contract, upon the ground that he did not understand the purport of the writing, or that he has made an improvident contract, when he could inform himself and has not done so." *Weaver v. St. Joseph of the Pines, Inc.*, 187 N.C. App. 198, 213, 652 S.E.2d 701, 712 (2007) (quoting *Oliver House*, 180 N.C. App. at 421, 637 S.E.2d at 555) (internal quotation marks omitted). In *Weaver*, the plaintiff asserted that a release was an unconscionable contract. In rejecting this argument, this Court relied upon the above-cited law. *Id.* Where the terms and conditions of an agreement are clear and unequivocal, and are further highlighted in bold and capital typeface, a party cannot come into court and complain that an agreement is unconscionable because she failed to read it. Further, where the agreement affirmatively advises a party to seek legal advice or to consult with the admissions coordinator if she has any questions, that party cannot now assert that the agreement was unconscionable because she did not understand its terms.

Plaintiff failed to meet her burden of proving that the Arbitration Agreement was procedurally unconscionable. The trial court erred in concluding as a matter of law that the Arbitration Agreement was procedurally unconscionable. The factors cited in *Tillman* as supporting procedural unconscionability are not present in the instant case. The Arbitration Agreement specifically provided that the admission of the patient was not dependent upon execution of the agreement by Westmoreland as attorney-in-fact for Chapman. The circumstances surrounding the execution of the Arbitration Agreement do not excuse Westmoreland's apparent failure to read it.

This case is further distinguishable from *Tillman* on a number of grounds. In the instant case, the trial court did not find that plaintiff was rushed through the signing process. Defendants did not admit that they would have refused to admit plaintiff's father had she refused to sign the Arbitration Agreement. In fact, the plain language of the Arbitration Agreement supports a contrary finding. Moreover,

Chapman had *already been admitted* to the facility at the time of execution of the Arbitration Agreement. In light of the differences between this case and *Tillman*, particularly the provisions clearly advising plaintiff of three distinct rights, including that admission to or remaining in the facility was not contingent upon execution of the Arbitration Agreement, we discern no procedural unconscionability in the execution of the Arbitration Agreement. The trial court erred in holding that the agreement was procedurally unconscionable due to bargaining naughtiness.

2. Substantive Unconscionability

"Substantive unconscionability . . . refers to harsh, one-sided, and oppressive contract terms." *Tillman*, 362 N.C. at 103, 655 S.E.2d at 370 (citing *Rite Chem. Co.*, 105 N.C. App. at 20, 411 S.E.2d at 648–49).

The trial court based its conclusion of substantive unconscionability upon three factors: (1) the policy of the American Arbitration Association against arbitrating negligent health care claims under pre-dispute arbitration agreements; (2) the allocation of benefits and detriments; and (3) the cost-shifting provisions under the Arbitration Agreement. This analysis was in error.

a. The Policy of the American Arbitration Association Not to Arbitrate Certain Claims

The arbitration agreement provides:

> 2. Proceeding. Any arbitration proceeding that takes place under this **Arbitration Agreement** shall follow the rules of the American Arbitration Association ("AAA") and any resulting decision shall be enforceable by a court of competent jurisdiction. The **arbitration** proceeding shall be conducted where the Facility is located or as close to the Facility as practical. The arbitration proceeding shall be conducted before one neutral arbitrator selected in accordance with the rules of the AAA. The parties agree to bear their own attorneys' fees and costs associated with the **arbitration** proceeding.

The parties stipulated before the trial court that "it was, and remains, the policy of the American Arbitration Association . . . not to arbitrate disputes between health care providers and health care recipients where, as here, the arbitration agreement was signed prior to the occurrence of the facts leading to the dispute . . . ."

The trial court concluded that AAA "does not consider predispute arbitration agreements to be an appropriate methodology or forum for dispute resolution between health care providers and recipients, thereby rendering performance of the agreement impossible." The trial court also found that this was a factor to be considered in determining whether the Arbitration Agreement was unconscionable.

We first must determine whether the AAA policy rendered performance of the Arbitration Agreement impossible. This issue was considered by the Supreme Court of Alabama in the case of *Blue Cross Blue Shield v. Rigas*. In that case, the trial court denied the defendant's motion to compel arbitration. The plaintiff argued that AAA's Health Care Policy Statement of 2003 precluded AAA from arbitrating the case. On appeal, the Supreme Court of Alabama reversed the trial court, holding that the health care policy only indicated that AAA would not accept administration of certain types of cases, but that it did not preclude arbitration of the claims by a non-AAA arbitrator. The plaintiff's arguments that AAA's policy statement meant that the claims were not subject to arbitration were specifically rejected by the court. *Rigas*, 923 So. 2d at 1092.

We hold the logic of the *Rigas* decision to be compelling. In the instant case, as was the case in *Rigas*, the Arbitration Agreement required that the rules of AAA be followed. In addition, the agreement provided that the arbitrator be selected "in accordance with the rules of the AAA." The agreement did not provide that a AAA arbitrator must be used to conduct the arbitration. AAA's policy did not render the performance of the Arbitration Agreement impossible. It simply meant that the arbitration could not be conducted under the auspices of AAA.

We further note that the AAA policy statement is in direct conflict with North Carolina's strong public policy in favor of arbitration. *See, e.g.*, *Oliver House*, 180 N.C. App. at 419, 637 S.E.2d at 554. It is the role of the courts of North Carolina to determine, on a case-by-case basis, whether an arbitration agreement is unconscionable. The courts of North Carolina will not abdicate this decision to AAA.

We hold that the trial court erred in concluding that performance of the Arbitration Agreement was impossible due to the polices of AAA. We also hold that the trial court erred in concluding that the AAA policy statement—which conflicts with this State's public policy in favor of arbitration—weighed in favor of ruling that the Arbitration Agreement was substantively unconscionable.

b. Mutuality of the Agreement

The trial court found that:

> While the arbitration agreement on its face is mutually agreed upon (*i.e.*, as written, no claims are exempted from its scope and its terms are applicable to both parties), in practice, the arbitration agreement is unconscionably one-sided. The agreement requires Defendants to arbitrate "claim[s] for payment, nonpayment, or refund for services rendered to the Resident by the Facility." Given that Defendants received payment in full each month through Social Security receipts and insurance (including Medicaid), Defendants have, in reality, nothing of significance to arbitrate. On the other hand, Mr. Chapman is required to arbitrate "violations of any right granted to the Resident by law or by the Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health or safety whether sounding in tort or contract." As there are no significant claims that Defendant could pursue that would be subject to arbitration, while at the same time, virtually every conceivable claim of substance that Plaintiff could make is subject to arbitration, the arbitration agreement is excessively one-sided and the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, such that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other. (Alteration in original.)

This finding attempted to bring this case under the substantive unconscionability analysis of *Tillman* based upon the agreement being one-sided. However, the agreement in the instant case bears little resemblance to that found in *Tillman*.

In *Tillman*, the arbitration agreement exempted from its operation "foreclosure actions and actions in which the total damages, costs, and fees do not exceed $15,000." *Tillman*, 362 N.C. at 107, 655 S.E.2d at 372. The plurality opinion reasoned that "the exceptions appear to be designed far more for the benefit of [the] defendants than for [the] plaintiffs." *Id.* at 107, 655 S.E.2d at 373. The one-sidedness of the agreement was a factor in the plurality's holding that the arbitration agreement was unconscionable. *Id.*

There is no such exclusion in the Arbitration Agreement at issue in the instant case. The trial court recognized this fact. However, the trial court sought to find a one-sided provision by concluding that the only possible claim that defendant could have against Chapman would be for payment for residing at the facility, and then determining that social security, Medicaid, and insurance paid these charges each month on behalf of Chapman.

This analysis is flawed for two reasons. First, after being admitted to the facility, Westmoreland, as attorney in fact, executed the Admission Agreement on behalf of Chapman. This agreement contained a number of provisions outlining the duties and responsibilities of Chapman, of which the payment of monthly fees was only one item. Second, any analysis of mutuality must be based upon the conditions existing at the time that the Arbitration Agreement was entered into, and not retroactively. *See Weaver*, 187 N.C. App. at 212, 652 S.E.2d at 712 ("The question of unconscionability is determined as of the date the contract was executed.").

It is clear, from the above-recited findings contained in the trial court's order, that the trial court viewed the one-sidedness of the Arbitration Agreement retroactively rather than at the time of its execution.

We hold that the Arbitration Agreement was not one-sided. The trial court erred in concluding to the contrary.

c. Cost-shifting Provision of the Agreement

The trial court found that:

> The agreement provides that each side bear their own costs associated with the arbitration and that the prevailing party is entitled to recover reasonable attorney's fees and costs actually incurred. These provisions, in particular the "loser pays" provision, present unacceptable risks for a person of Plaintiff's limited financial means. The cost-shifting "losers" pays" provision alone would deter a claimant in her financial position from seeking to vindicate rights and renders the agreement substantively unconscionable.

A review of the relevant provisions of the arbitration agreement reveals that this finding by the trial court is without factual or legal basis.[2] The agreement contains two provisions pertaining to costs

2. The trial court has embedded a conclusion of law in its "findings fact." We accord no deference to these legal conclusions. *See supra* Part III.A.

and attorney's fees. In paragraph 2, the agreement provides that: "[t]he parties agree to bear their own attorneys' fees and costs associated with the **arbitration** proceedings." In paragraph 3 of the agreement, it was agreed that: "[t]he prevailing party in the **arbitration** proceeding or in any legal proceedings connected to the **arbitration** proceeding or this **Arbitration Agreement** shall be entitled to recover any reasonable attorneys' fees and costs that are actually incurred as a result."[3]

The portion of the *Tillman* plurality opinion dealing with prohibitively high arbitration costs is the centerpiece of its substantive unconscionability analysis. It focused upon the trial court's findings that the costs of arbitration, as compared to the actual amount in controversy, effectively precluded the plaintiffs from obtaining legal representation and pursuing their claims. The plurality stated, "[T]he combination of the loser pays provision, the *de novo* appeal process, and the prohibition on joinder of claims and class actions creates a barrier to pursuing arbitration that is substantially greater than that present in the context of litigation." *Tillman*, 362 N.C. at 106, 655 S.E.2d at 372.

In the instant case, the trial court focused upon the cost-shifting provisions in isolation, rather than as part of a broader analysis focusing on whether the cumulative effects of various provisions in the agreement create a substantial barrier to a plaintiff pursuing his or her claims. Rather than focusing on the cost-shifting provision in isolation, the *Tillman* plurality, citing an opinion from the Fourth Circuit Court of Appeals, focused upon the cost differential between litigation and arbitration: "[I]n order to find unenforceability due to excessive costs, the cost differential between litigation and arbitration must be so great that it deters individuals from bringing claims under the arbitration clause." *Id.* at 105, 655 S.E.2d at 372 (citing *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001)).

In *Tillman*, there were detailed findings of fact by the trial court that documented the average daily rate of AAA arbitrator compensation in North Carolina to be $1225. *Id.* at 98, 655 S.E.2d at 367. The trial court in *Tillman* also documented that the amount of the single-premium credit life and disability insurance premiums charged to the

3. The provisions regarding fees and costs could be construed to be in conflict. The trial court and the parties have treated them as establishing a "loser-pays" provision. We treat them in the same manner.

plaintiffs were $2064.75 and $4208.75, respectively, thus limiting the plaintiffs' prospective recoveries. *Id.* at 99, 655 S.E.2d at 368. Based upon these findings, the plurality opinion agreed with the conclusion of the trial court that it was "unlikely that any attorneys would be willing to accept the risks attendant to pursuing [these] claims." *Id.*

In contrast, the order of the trial court in the instant case is devoid of any findings of fact as to the potential cost of arbitration as compared to litigation. Rather, we are left with the trial court's conclusory language that the cost-shifting "provision alone would deter a claimant in her financial position from seeking to vindicate rights and renders the agreement substantively unconscionable." Plaintiff failed to establish the difference in the cost of arbitration and the cost of litigating her claims in court. Thus, she has also failed to establish that there is a differential that is so great that it deterred her from bringing the claim in an arbitration proceeding.

We further note that there is a significant difference between the claim for wrongful death brought in the instant case and the claims of the plaintiff brought in *Tillman* based on single premium credit life and disability insurance with premiums less than $5000. In *Tillman*, the small amount of the claim compared to the costs of arbitration made it difficult to procure legal representation to prosecute the claims. In the instant case, the claim is for wrongful death, a substantial claim. The nature and size of the claim in the instant case is not a barrier to obtaining legal representation.

There is another significant distinction between this case and *Tillman*. In *Tillman*, the trial court found that due to their limited financial resources, the only way the plaintiffs would be able to prosecute their claims would be by entering into a contingency fee agreement. *Id.* at 105, 655 S.E.2d at 371. Because the damages sought by the plaintiffs were so low, under $4500 in each case, the trial court and the Supreme Court concluded it was unlikely that a lawyer would take the plaintiffs' claims on a contingency basis. *See id.* at 105, 655 S.E.2d at 371–72. Further, the plurality explained, "The likelihood that an attorney would take a case controlled by the arbitration clause at issue . . . [was] even less because the arbitration clause prohibit[ed] the joinder of claims and class actions. *Id.*

In the instant case, there are no such findings by the trial court. Because this is a wrongful death case, the barriers to representation found in *Tillman* are not present.

d. Conclusion—Substantive Unconscionability

We hold that each of the grounds for substantive unconscionability found by the trial court are flawed. Plaintiff failed to meet her burden of proof to establish substantive unconscionability. The order of the trial court was in error and must be reversed.

IV. Balancing Test of *Tillman* Concurring Opinion

[3] We have held that the trial court erred in concluding several factors supported findings of both procedural and substantive unconscionability under the analysis set forth in the *Tillman* plurality opinion. Because these findings were incorrect, the result will be the same if we apply the totality of the circumstances approach set forth in the concurring opinion. Plaintiff has failed to meet her burden of demonstrating that the "inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and [that] the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." *Id.* at 101–02, 655 S.E.2d at 369 (quoting *Brenner*, 302 N.C. at 213, 274 S.E.2d at 210).

V. Conclusion

It is the public policy of North Carolina to favor arbitration. There is nothing inherently unconscionable about an arbitration agreement.

> People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability.

Blaylock Grading Co., LLP v. Smith, 189 N.C. App. 508, 511, 658 S.E.2d 680, 682 (2008) (quoting *Gas House, Inc. v. Southern Bell Tel. & Tel. Co.*, 289 N.C. 175, 182, 221 S.E.2d 499, 504 (1976)), *overruled on other grounds by State ex rel. Utilities Com'n v. Southern Bell Tel. & Tel. Co.*, 307 N.C. 541, 299 S.E.2d 763 (1983).

There is no question that Westmoreland, as power of attorney for Chapman entered into the Arbitration Agreement. She now asks the courts to set aside that agreement because she would prefer to litigate her claim in the courts rather than through arbitration. The courts of this State will only set aside contractual agreements based upon unconscionability in a very rare case. Plaintiff has failed to meet her burden of establishing procedural and substantive unconscionability.

The ruling of the trial court denying defendant's motion to compel arbitration is reversed, and this matter is remanded to the trial court for entry of an order directing the parties to submit this matter to arbitration in accordance with the terms of the Arbitration Agreement.

REVERSED AND REMANDED.

Judges CALABRIA and BEASLEY concur.

RESIDENT AND FACILITY

ARBITRATION AGREEMENT

PLEASE READ CAREFULLY

It is hereby understood and agreed by High Point Healthcare Center (the "Facility") and James Chapman (the "Resident" or the "Resident's Authorized Representative", together referred to as the "Resident") that, regardless of any other agreement or understanding between the Facility and the Resident, any and all controversies, claims, disputes, disagreements or demands of any kind (referred to as a "Claim" or "Claims") arising out of or relating to the Resident's Admission Agreement with the Facility (the "Admission Agreement") or any service or care provided to the Resident by the Facility shall be settled exclusively by **binding arbitration**. This means that the parties are waiving their right to a trial before a jury or a judge.

1. Claims. For purposes of this **Arbitration Agreement**, a Claim shall include, without being limited to, a claim for payment, nonpayment, or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract.

*This **Arbitration Agreement** shall in no way, however, limit the Resident's right to file a grievance or complaint, formal or informal, with the Facility, the long-term care ombudsman, or any appropriate government agency. This **Arbitration Agreement** does not affect the Facility's duties with respect to the provision of care and treatment.*

2. Proceeding. Any arbitration proceeding that takes place under this **Arbitration Agreement** shall follow the rules of the American Arbitration Association ("AAA") and any resulting decision shall be enforceable by a court of competent jurisdiction. The **arbitration** proceeding shall be conducted where the Facility is located or as close to the Facility as practical. The arbitration proceeding shall be conducted before one neutral arbitrator selected in accordance with the rules of the AAA. The parties agree to bear their own attorneys' fees and costs associated with the **arbitration** proceeding.

All claims related to the same incident, transaction, or related course of care or services, must be **arbitrated** in one **arbitration** proceeding. Any Claim that arose before the date that a notice of **arbitration** is given to the Facility or received by the resident must be presented in the **arbitration** proceeding for which notice is given or it shall be considered waived and forever barred.

3. Awards. The Resident and the Facility agree that any damages awarded as a result of arbitration under this **Arbitration Agreement** shall be determined in accordance with state or federal law that is applicable to a comparable civil action, including any prerequisites to, credit against, or limitations on, such damages. The prevailing party in the **arbitration** proceeding or in any legal proceedings connected to the **arbitration** proceeding or this **Arbitration Agreement** shall be entitled to recover any reasonable attorneys' fees and costs that are actually incurred as a result.

Initials JC

4. Binding Effect. The parties intend that this **Arbitration Agreement** shall benefit and be binding upon the parties, their successors and assigns, including the agents, employees of the Facility, and anyone whose Claim is derived through or on behalf of the Resident, including, without being limited to, any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident.

5. Applicable Law. The Resident and the Facility acknowledge and agree that the Resident's Arbitration Agreement effects a transaction involving interstate commerce, therefore the enforcement of this **Arbitration Agreement** shall be governed by federal law, specifically, the Federal Arbitration Act, notwithstanding any contrary provision of the Admission Agreement or state law. Furthermore, the provisions of this **Arbitration Agreement** remain in effect after the Resident's Admission Agreement has been terminated.

6. Severability. If any term or phrase of this **Arbitration Agreement** is held to be invalid or unenforceable by reason of law, this Agreement will be deemed amended to conform with such law and will otherwise remain in full force and effect, as it is the parties' intent to ensure that the dispute is resolved solely via arbitration.

7. Right of Revocation. The Resident has the right to revoke the **Arbitration Agreement** within thirty (30) days of the signature of the Agreement. Such revocation must be made in writing and submitted to the appropriate, designated Company representative.

8. **Right To Consultation. The Resident understands that the Resident has the right to consult an attorney or his or her choice about this Arbitration Agreement and to receive and explanation or clarification from the Facility's admissions coordinator. The Resident is not required to sign this Arbitration Agreement in order to be admitted to or to remain in the Facility.**

BY SIGNING THIS AGREEMENT, THE RESIDENT ACKNOWLEDGES THAT THE RESIDENT HAS HAD THE OPPORTUNITY TO READ THIS AGREEMENT OR IT HAS BEEN READ TO THE RESIDENT AND THE RESIDENT UNDERSTANDS ITS CONTENTS.

	Carrie Moore 7-18-6
Resident's Signature Date	Facility's Authorized Agent Date
	Carrie Moore
Printed Name of Resident	Printed Name of Facility's Authorized Agent

Nancy Westmoreland 7-18-06
Resident's Authorized Representative Date

NANCY Westmoreland
Printed Name of Resident's Authorized Representative

Vers.01192004
Effective Feb. 1, 2004

Initials _____

STATE OF NORTH CAROLINA v. KEENAN MONTRELL WATKINS

No. COA11-770

(Filed 17 January 2012)

1. Burglary and Unlawful Breaking or Entering—first-degree burglary—instrument crossed threshold—felonious breaking or entering

The trial court erred by denying defendant's motion to dismiss the charge of first-degree burglary. The fact that defendant broke a window of the residence in the nighttime with an instrument to facilitate a subsequent entry, even if the instrument itself crossed the threshold, was not sufficient to find him guilty of burglary. The case was remanded to the trial court for judgment upon a verdict of guilty of felonious breaking or entering.

2. Robbery—common law robbery—motion to dismiss—sufficiency of evidence—taking

The trial court did not err by denying defendant's motion to dismiss the charge of common law robbery. The jury could reasonably conclude that the victim's car was no longer under his protection, but had been relinquished by him to defendant, and that defendant was exercising complete control over the car from the time defendant pointed the gun at the victim and ordered the victim to drive him away in the car.

3. Identification of Defendants—out-of-court identification—in-court identification—show-up procedure not impermissibly suggestive

The trial court did not commit plain error by admitting both the prior out-of-court identification and the in-court identification of defendant by the victim. The totality of circumstances revealed that the show-up identification procedure was not impermissibly suggestive. Further, the jury would not have returned a different verdict absent the challenged evidence because two officers testified at trial as to defendant's admission to committing the crime.

4. Damages and Remedies—restitution—sufficiency of evidence

A *de novo* review revealed that the trial court did not err by ordering defendant to pay restitution for a wrecked automobile.

The prosecutor's introduction of the actual title registration of the car showed the owner of the car and its value.

Appeal by defendant from judgments entered 3 February 2011 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General John P. Barkley, for the State.

James N. Freeman, Jr., for defendant appellant.

McCULLOUGH, Judge.

On 3 February 2011, a jury convicted Keenan Montrell Watkins ("defendant") of first-degree burglary, conspiracy to commit first-degree burglary, possession of a weapon of mass destruction, common law robbery, and first-degree kidnapping. On appeal, defendant contends the trial court (1) erred in denying his motions to dismiss the charges of first-degree burglary and common law robbery for insufficiency of the evidence, (2) committed plain error in admitting both out-of-court and in-court identifications of defendant, and (3) erred in awarding restitution not supported by sufficient evidence. We find no error in the trial court's denial of defendant's motion to dismiss the common law robbery charge, the trial court's admission of the identification evidence, and the trial court's award of restitution. However, we vacate the judgment on defendant's first-degree burglary conviction and remand to the trial court for entry of judgment as upon a guilty verdict for felonious breaking or entering.

I. Background

The State's evidence produced at trial tended to show the following events on the evening of 9 May 2009. Jamie Hairston ("Hairston") was living in a townhome with her boyfriend and his roommate located at 634 Lex Drive in Charlotte, North Carolina, near the University of North Carolina at Charlotte ("UNC Charlotte") campus. Around 11:00 p.m., Hairston was alone in the townhome and asleep in the downstairs bedroom when she heard what sounded like scratching and prying at the back door. Hairston immediately got out of bed and ran up the stairs of the townhome and out the front door to a neighbor's home. Hairston then called 911. While she was on the phone with emergency services, Hairston heard someone running through the woods located behind the apartment complex. Police officers arrived at the scene within five minutes.

Officer Matthew Horner ("Officer Horner") of the Charlotte-Mecklenburg Police Department ("CMPD") responded to the call at 634 Lex Drive that evening. Officer Horner met Hairston in the parking lot of the apartment complex, where she explained what had happened. Officer Horner then went inside the residence to ensure that no one was present. Officer Horner noticed broken glass at the back door area of the ground level bedroom and that the window next to the back door was busted. While searching the residence, Officer Horner discovered a large glass marijuana "bong" and noted a strong odor of marijuana inside the residence. As Officer Horner exited the residence, Hairston informed Officer Horner that she had heard someone running in the woods behind the complex while he was inside searching the residence.

Officer Horner then circled the area and observed Markese Durant ("Durant") coming out of the woods and crossing an adjacent street approximately 50-100 feet from Hairston's townhome. Officer Horner got out of his vehicle to speak with Durant and noticed Durant was walking stiff-legged and trying to shield his right side from Officer Horner's sight. During questioning, Durant informed Officer Horner that Durant had a shotgun in his pants, upon which Officer Horner placed Durant under arrest and seized the shotgun. Officer Horner confirmed the shotgun barrel was 15.5 inches long and the total length of the gun was less than 25 inches long. Officer Horner detained Durant on the sidewalk and called for backup.

Meanwhile, Victor Smith ("Smith") was in the parking lot of the Phase 3 complex on the UNC Charlotte campus packing items into a 1998 Honda Accord that he had recently purchased from his roommate, although the car was still titled in Smith's roommate's name. Smith was working as a resident adviser in Building Y of the Phase 3 complex. As Smith was loading the car, he saw an individual approaching him. Smith felt uneasy, so he pulled out his cell phone, dialed 911, and described his surroundings. The individual asked Smith to take him to the "top" of campus. Smith did not know what the individual meant, so he told the individual he could not drive him, but he could get someone else to take him there. Smith then attempted to call campus security, but he did not have the correct number, so he called his building's resident coordinator and began to vaguely describe what was happening. At that point, the individual took Smith's phone, pointed a gun at Smith, and told Smith to get in the car. At first, Smith tried to give the car keys to the individual, but

the individual told Smith to get in the car and drive while the individual got into the passenger seat of the car.

Smith began to drive the car down the street and made a right turn onto Mary Alexander Road. Smith then noticed a police vehicle approaching in their direction. Smith accelerated through the next stop sign in an effort to get the police officer's attention. Smith then opened the car door, jumped out of the car, and rolled onto the pavement, suffering some road rash and bruises. Smith's car then disappeared from his sight. After getting up, Smith was able to run to the police vehicle. Smith explained the situation to the police officer and got inside the police vehicle. In his written statement to the police officer, Smith described the individual who had approached him as a black male, 5'10" tall, with medium build.

Approximately 10-15 minutes after Officer Horner had detained Durant on the sidewalk, a car approached Officer Horner and Durant at a high rate of speed from Mary Alexander Road. The car swerved towards Officer Horner, then drove down a ravine and crashed into some trees. Officer Horner observed an individual jump out of the car and run away from the vehicle and into the woods.

Officer Phillip Greco ("Officer Greco") with the UNC Charlotte campus police was called to assist with the reported armed robbery in the parking lot of the Phase 3 complex on campus. Officer Greco was informed by radio that the stolen vehicle had crashed and that the suspect had run on foot into the woods away from Mary Alexander Road. Officer Greco drove to the other side of the woods, into the Campus Walk apartment complex and began to search the wood line. Officer Greco located defendant, who matched the description of the suspect he was looking for, lying under some chairs on a rear patio of the apartment complex at the edge of the woods. Officer Greco held defendant at gunpoint until other police officers arrived. Two CMPD officers and another UNC Charlotte campus police officer arrived to assist Officer Greco. Defendant was patted down for weapons, handcuffed, and detained for a show-up. While defendant was being detained for the show-up, a CMPD canine officer tracking the individual who left the car at the scene of the crash emerged from the woods with his handler and alerted to defendant.

The police officer whom Smith was with brought Smith to the back of Campus Walk apartments where the other officers had detained defendant. Spotlights illuminated the back of the apartment complex, and Smith saw defendant sitting in a patio chair. Officer

Greco used his flashlight to further illuminate defendant. Standing approximately 10-12 feet away from defendant, Smith identified defendant as the individual who had hijacked him. Smith had never seen defendant before that evening, and defendant was the only individual shown to Smith by the officers on that evening. Smith testified that he was "sure" defendant was the perpetrator when he made the identification on the night of 9 May 2009. Smith likewise identified defendant in court as the individual who approached him that night and testified he was still "sure" defendant was the perpetrator.

Kris Scheuerman ("Scheuerman"), a crime scene investigator for the CMPD, was called to the scene of the car crash. Scheuerman searched and photographed the car, a 1998 Honda Accord, and discovered a black air pistol BB gun located between the driver's seat and front center console.

Detectives John Fish ("Detective Fish") and Jeffrey Stewart ("Detective Stewart") of the CMPD were called to the University Medical Center to interview defendant. Defendant was in the emergency room, although neither detective observed any injuries on defendant's person. Detective Stewart advised defendant of his *Miranda* rights, and defendant stated that he understood his rights and that he agreed to waive those rights and talk to the officers.

Detective Fish and Detective Stewart both testified that defendant stated that he was informed by a friend that someone living at 634 Lex Drive had obtained a quantity of marijuana. Defendant and Durant then took a sawed-off shotgun with them to the residence with the idea to break in and steal the marijuana and/or money. They believed no one would be home in the residence. When they arrived at the residence, defendant used the end of the shotgun to break the glass in the back window. The two then heard someone inside the residence, split up, and ran. Defendant stated he eventually jumped into the passenger side of a car with someone he didn't know, told the driver to drive him away from the area, and the driver jumped out of the car. Detective Stewart testified that defendant stated he then took over the car and drove it and wrecked shortly thereafter. Defendant indicated he had used a BB gun pistol to take the car, but he didn't know what had happened to the gun. Detectives Fish and Stewart also interviewed Durant at the law enforcement center.

Defendant presented no evidence at trial. On 3 February 2011, the jury returned verdicts finding defendant guilty of first-degree burglary, conspiracy to commit first-degree burglary, possession of a

weapon of mass destruction, common law robbery, and first-degree kidnapping. The trial court entered judgments on the verdicts, sentencing defendant to a total minimum of 185 months' and a maximum of 240 months' imprisonment. Defendant gave notice of appeal in open court on 3 February 2011.

II. Motion to dismiss: insufficiency of the evidence

Defendant's first argument on appeal is that the trial court erred in denying his motions to dismiss the charges of first-degree burglary and common law robbery. Specifically, defendant contends the State presented insufficient evidence that he entered the residence to support the first-degree burglary charge and that he took the vehicle from Smith to support the common law robbery charge.

A. Standard of review

" '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. 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) (citations omitted)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994). "This Court reviews the trial court's denial of a motion to dismiss *de novo.*" *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

B. First-degree burglary

[1] The elements of a first-degree burglary offense are: " '(1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or a room used as a sleeping apartment (5) which is actually occupied at the time of the offense (6) with the intent to commit a felony therein.' " *State v. Farrar*, 190 N.C. App. 202, 203, 660 S.E.2d 116, 117 (2008) (quoting *State v. Wells*, 290 N.C. 485, 496, 226 S.E.2d 325, 332 (1976)). Defendant challenges only the sufficiency of the evidence to support element two: entry.

In *State v. Sneed*, 38 N.C. App. 230, 247 S.E.2d 658 (1978), this Court addressed the issue of "defining 'entry' as used in the offenses of breaking or entering, or burglary." *Id.* at 231, 247 S.E.2d at 659. In *Sneed*, we quoted Blackstone for the definition of entry at common law:

> "As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand, is sufficient: as, to step over the threshold, to put a hand or a hook in at a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries."

Id. at 231-32, 247 S.E.2d at 659 (quoting IV W. Blackstone, Commentaries 227). In *Sneed*, we also quoted Black's Law Dictionary 627 (4th ed. rev. 1968) as stating, " 'In cases of burglary, the least entry with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, is sufficient to complete the offense.' " *Id.* at 231, 247 S.E.2d at 659.

Subsequently, in *State v. Gibbs*, 297 N.C. 410, 255 S.E.2d 168 (1979), our Supreme Court quoted with approval the following definition of entry:

> "Literally, entry is the act of going into the place after a breach has been effected, but the word has a broad significance in the law of burglary, for it is not confined to the intrusion of the whole body, but may consist of the insertion of any part for the purpose of committing a felony. Thus, *an entry is accomplished by inserting into the place broken the hand, the foot, or any instrument with which it is intended to commit a felony. . . .*"

Id. at 418, 255 S.E.2d at 174 (emphasis added) (quoting 13 Am. Jur. 2d *Burglary* § 10, p. 327). Our Supreme Court reiterated this definition in their 2008 opinion in *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755-56 (2008).

Notably, our Supreme Court's definition of entry expressly states "entry is the act of going into the place *after a breach has been effected*[.]" *Gibbs*, 297 N.C. at 418, 255 S.E.2d at 174 (emphasis added). In addition, the foregoing definitions provide that in order to establish an entry, the State must present evidence that the defendant either breached the threshold of the residence with some part of his body or with an "instrument with which it is intended to commit a felony." *Id.* Given these definitions by our Courts, we conclude there is no entry if the breach was accomplished only by an instrument inserted simultaneously during the course of the break. Accordingly,

where the State's evidence seeks to establish an entry by the defendant's use of an instrument, the defendant can only be guilty of burglary if the instrument that crossed the threshold was itself used to commit a felony within the residence. Thus, the defendant must either physically enter the residence, however slight, or commit the burglary "by virtue of the [instrument]." *State v. Surcey*, 139 N.C. App. 432, 435, 533 S.E.2d 479, 482 (2000).

Many leading treatises on criminal law recognize this distinction, and we find those sources persuasive in applying our definition of "entry" to the facts of the present case. *See* 12A C.J.S. *Burglary* § 24 (2004) ("In order to constitute burglary, it is not necessary that entry be made by any part of the accused's body, but entry may be made by an instrument . . . . It is necessary, however, that the instrument shall be put within the structure, and that it shall be inserted for the immediate purpose of committing the felony or aiding in its commission, and not merely for the purpose of making an opening to admit the hand or body, or, in other words, for the sole purpose of breaking."); 3 Wayne R. LaFave, *Substantive Criminal Law* § 21.1(b), at 210 (2d ed. 2003) ("If the actor instead used some instrument which protruded into the structure, no entry occurred unless he was simultaneously using the instrument to achieve his felonious purpose. Thus there was no entry where an instrument was used to open the building, even though it protruded into the structure; but if the actor was also using the instrument to reach some property therein, then it constituted an entry."); 3 Charles E. Torcia, *Wharton's Criminal Law* § 323, at 248-50 (15th ed. 1995) ("If, after a break, an instrument passes the line of the threshold, there is an entry only if such instrument is being used to commit the felony intended. . . . If, on the other hand, an instrument passes the line of the threshold merely in the course of the break, or to facilitate a subsequent entry of the defendant's person by making the opening wider, there is no entry."); Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* at 254 (3d ed. 1982) ("[W]here a tool or other instrument is introduced without any part of the person being within the house, it is an entry if the insertion was for the purpose of completing the felony but not if it was merely to accomplish a breaking.").

Furthermore, North Carolina cases challenging the evidence of an entry are likewise consistent with this distinction. *Compare Gibbs*, 297 N.C. at 418-19, 255 S.E.2d at 174 (extension of the defendant's hand through broken window sufficient to establish entry by defendant's person), *and Sneed*, 38 N.C. App. at 231-32, 247 S.E.2d at 659-60

(defendant's leaning part of his body into a van sufficient to establish entry by defendant's person), *with Surcey*, 139 N.C. App. at 435-36, 533 S.E.2d at 481-82 (defendant's pushing the barrel of a shotgun through a broken windowpane of the victim's house and firing the gun for the purpose of inflicting injury on the victim inside his residence sufficient to establish entry by instrument). *See also State v. Bumgarner*, 147 N.C. App. 409, 415, 556 S.E.2d 324, 329 (2001) (evidence that defendant pulled a chair up to the victim's window, removed the screen from the window, and shot the victim in his bedroom sufficient to establish entry either by defendant's person or by defendant's pushing the gun through the window in order to shoot the victim inside).

In the present case, there is no evidence that any felony was attempted, much less accomplished, inside the residence by means of the instrument which crossed the threshold. Nor is there any evidence that defendant or any part of his person physically crossed the threshold of the residence. Rather, the evidence produced at trial unequivocally shows that after breaking the window with the end of the shotgun, defendant and Durant heard movement inside the residence and immediately fled the scene. The State relies on the simultaneous breaking and entering by the end of the shotgun into the window of the residence to support the burglary charge. However, our reading of the case law leads us to the conclusion that the fact that defendant broke a window of the residence in the nighttime with an instrument—even if the instrument itself crossed the threshold—is not sufficient to find him guilty of burglary. Thus, viewing the evidence in the light most favorable to the State, it appears only that defendant broke a window of the residence with an instrument to facilitate a subsequent entry. Such evidence does not support the trial court's submitting a case of burglary to the jury. It does, however, support a conviction for felonious breaking or entering. *See* N.C. Gen. Stat. § 14-54(a) (2009).

"Felonious breaking or entering is a lesser included offense of burglary. For conviction of felonious breaking or entering, a violation of G.S. 14-54(a), it is not necessary that the State show both a breaking and an entering; proof of either is sufficient if committed with the requisite felonious intent." *State v. Helton*, 79 N.C. App. 566, 569, 339 S.E.2d 814, 816 (1986) (citation omitted); *see also State v. Walton*, 90 N.C. App. 532, 533, 369 S.E.2d 101, 103 (1988) ("To support a conviction for felonious breaking [or] entering under G.S. § 14-54(a), there must exist substantial evidence of each of the following elements: (1)

the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein." (emphasis added)). There is substantial evidence in the record to support a finding of each of these elements, as defendant concedes in his brief. Further, "[a]lthough the evidence is insufficient to sustain a conviction of first-degree burglary, the jury, in convicting defendant of first-degree burglary, necessarily found facts which establish felonious breaking [or] entering, i.e., the breaking [or] entering of a building with intent to commit any felony or larceny therein." *State v. Barnett*, 113 N.C. App. 69, 75-76, 437 S.E.2d 711, 715 (1993). Accordingly, " '[t]he verdict [guilty of first-degree burglary] *must* . . . be considered a verdict of felonious breaking [or] entering, a lesser degree of the crime of burglary, and a violation of G.S. 14-54(a) . . . .' " *Id.* at 76, 437 S.E.2d at 715 (alterations and omissions in original) (quoting *State v. Cox*, 281 N.C. 131, 136, 187 S.E.2d 785, 788 (1972)). We therefore vacate the judgment on defendant's first-degree burglary conviction (No. 09 CRS 227853) and remand the matter to the trial court "for the pronouncement of a judgment as upon a verdict of guilty of felonious breaking [or] entering." *Cox*, 281 N.C. at 136, 187 S.E.2d at 788.

C. Common law robbery

[2] " 'Common law robbery is the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear.' " *State v. Porter*, 198 N.C. App. 183, 186, 679 S.E.2d 167, 169-70 (2009) (quoting *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270 (1982)). "For purposes of robbery, a 'taking' has occurred when 'the thief succeeds in removing the stolen property from the victim's possession.' " *State v. Patterson*, 182 N.C. App. 102, 107, 641 S.E.2d 376, 379 (2007) (quoting *State v. Sumpter*, 318 N.C. 102, 111, 347 S.E.2d 396, 401 (1986)). This Court has recognized "in the robbery context, that '[p]roperty is in the legal possession of a person if it is under the protection of that person.' " *Id.* (quoting *State v. Bellamy*, 159 N.C. App. 143, 149, 582 S.E.2d 663, 668 (2003)).

Defendant challenges the sufficiency of the evidence to support the element of a taking. Defendant argues there is no evidence defendant either asked Smith for the car or forced Smith out of the car. Defendant further argues there is no evidence that defendant ever had control of the car. However, as in *Patterson*, defendant's argument "disregards the existence of the gun" pointed at Smith when defendant forced Smith to drive defendant away in Smith's car. *Id.*

Here, Smith testified that defendant approached him, pointed a gun at him, ordered him to drive defendant across campus, and instructed him where to go. Defendant admitted to Detective Fish that he had used a BB gun pistol to take Smith's car, and a BB gun pistol was found in Smith's car after it crashed. Based on this evidence, the jury could reasonably conclude that Smith's car was no longer under his "protection," but had been relinquished by him to defendant, and that defendant was exercising complete control over the car from the time defendant pointed the gun at Smith and ordered Smith to drive him away in the car. *See Patterson*, 182 N.C. App. at 103, 107, 641 S.E.2d at 377, 379 (holding the State presented sufficient evidence of a taking by the defendant where the defendant approached the victim, pressed a handgun into her stomach, grabbed her purse from the passenger seat of her vehicle, subsequently threw the purse back onto the seat without removing anything, and fled the scene). The fact that Smith was still physically present in the car cannot negate the reasonable inference that defendant's actions were sufficient to bring the car under his sole control. Thus, the State presented sufficient evidence of a taking such that defendant's motion to dismiss the common law robbery charge was properly denied.

III. Plain error: admission of identification evidence

[3] Defendant's next argument on appeal is that the trial court committed plain error in admitting both the prior out-of-court identification and the in-court identification of defendant by Smith. Specifically, defendant contends the show-up procedure whereby defendant was shown individually to Smith while surrounded by police officers was so suggestive as to violate defendant's constitutional rights, and therefore, the testimony concerning both the out-of-court identification and the resulting in-court identification was plainly inadmissible.

Defendant did not object to the admission of the 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*, 201 N.C. App. 681, 686, 687 S.E.2d 525, 529 (2010) (quoting *State v. Steen*, 352 N.C. 227, 269, 536 S.E.2d 1, 25-26 (2000)).

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." *State v. Fisher*, 321 N.C. 19, 23, 361 S.E.2d 551, 553 (1987).

Our Courts have noted that "show-up" procedures, "whereby a suspect is shown singularly to a witness or witnesses for the purposes of identification," are "inherently suggestive." *State v. Harrison*, 169 N.C. App. 257, 262, 610 S.E.2d 407, 412 (2005); *see also State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982). However, our Supreme Court has clarified that suggestive pretrial show-up identifications "are not *per se* violative of a defendant's due process rights." *Turner*, 305 N.C. at 364, 289 S.E.2d at 373. "Even though a pretrial identification procedure may be suggestive, it will be *impermissibly* suggestive only if all the circumstances indicate that the procedure resulted in a very substantial likelihood of irreparable misidentification." *Harris*, 308 N.C. at 164, 301 S.E.2d at 95.

"Whether a substantial likelihood exists depends on the totality of the circumstances." *Fisher*, 321 N.C. at 23, 361 S.E.2d at 553; *see also State v. Rawls*, ___ N.C. App. ___, ___, 700 S.E.2d 112, 118 (2010) ("When evaluating whether such a likelihood [of irreparable misidentification] exists, courts apply a totality of the circumstances test."). 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). "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).

The show-up identification procedure used in the present case was not impermissibly suggestive. First, Smith had ample opportunity to view defendant at the time of the crime. Smith saw defendant approaching him across the parking lot, and noticed that defendant "looked very strange" and was "sweating really bad." Smith thought defendant's presence, as defendant approached Smith, was odd enough to immediately dial 911. Smith stood in the parking lot holding a conversation with defendant about where defendant was asking to go, while attempting to speak with both a 911 operator and his resident coordinator. Smith had further opportunity to view and interact with defendant when defendant pointed the gun at Smith and the two got into the car together. Smith's testimony indicates his attention was focused on defendant during the entire encounter. Further, there is no suggestion in the record, or by defendant in his brief, that the description given by Smith to the police officer of a black male, 5'10" tall, with medium build, was inaccurate in any way. In fact, Officer Greco testified that he detained defendant at gunpoint because defendant "fit the description of the individual [he was] looking for," which was provided to another officer by Smith and relayed by radio to Officer Greco.

During the show-up, Smith stood in close proximity to defendant, and defendant was illuminated by spotlights and Officer Greco's flashlight. Smith stated he was "sure" defendant was the perpetrator, both at the scene and in court. Finally, although no definitive timeline is given in the record, the testimony indicates that the length of time from the moment defendant approached Smith to the time Smith appeared at the show-up was relatively short, as the events appear to have transpired fairly rapidly. Thus, given the totality of the circumstances, the pretrial show-up identification was not impermissibly suggestive, and accordingly, the identification evidence was admissible at trial. In addition, "[s]ince the out-of-court identification was admissible, there is no danger it impermissibly tainted the in-court identification." *State v. Lawson*, 159 N.C. App. 534, 539, 583 S.E.2d 354, 358 (2003).

Even if Smith's testimony regarding the identifications of defendant as the perpetrator were inadmissible, defendant has failed to meet his burden under the plain error standard of review. Defendant mistakenly asserts in his brief that the burden is on the State to prove the admission of such evidence was harmless beyond a reasonable

doubt, as it violated his constitutional right to due process. Defendant would be correct, had he objected to the admission of the evidence on constitutional grounds at trial. *See* N.C. Gen. Stat. § 15A-1443(b) (2009) (placing burden on State to demonstrate alleged constitutional error is harmless beyond a reasonable doubt); *State v. Fowler*, 157 N.C. App. 564, 566, 579 S.E.2d 499, 501 (2003) (defendant's failure to object at trial and properly preserve constitutional issue for appeal limits review of potential constitutional error to plain error standard of review). However, absent objection, our review is limited to plain error under which defendant bears the burden of establishing not only that the trial court committed error, but that absent the error, the jury probably would have reached a different result. *Steen*, 352 N.C. at 269, 536 S.E.2d at 25-26.

Defendant cannot meet such a burden in this case. Even without Smith's identifications of defendant as the individual who approached him and commandeered his car, two different police officers—Detective Fish and Detective Stewart—testified at trial as to defendant's admission that he took Smith's car using a BB gun pistol, asked Smith to drive him away from the area, saw Smith jump out of the car while Smith was driving, and subsequently wrecked the car in the woods. Both officers testified that defendant was fully Mirandized when he made the statements to the officers, and defendant has not challenged the admissibility of his statements on appeal. Further, evidence was presented that a canine officer and his handler tracked a scent from the scene of the crash to defendant's location and alerted to defendant. Given this evidence, we fail to see how the jury would have returned a different verdict, even without the challenged identification evidence. Defendant has failed to show plain error on this issue.

IV. Restitution

[4] Finally, defendant argues the trial court erred in ordering him to pay restitution for the Honda Accord automobile, as there was insufficient evidence to support the amount of restitution and the individual to whom the restitution should be paid. This Court reviews *de novo* the issue of whether the amount of restitution ordered by the trial court is supported by competent evidence adduced at trial or at sentencing. *State v. McNeil*, ___ N.C. App. ___, ___, 707 S.E.2d 674, 684 (2011).

" '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). 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).

The record submitted by the parties did not include a copy of the restitution worksheet submitted by the prosecutor at sentencing. Nonetheless, the transcript of the proceedings reveals the prosecutor introduced documentation to the trial court that the car was titled in the name of Moses Blunt ("Blunt"), and that Smith had paid the amount of $3,790 to Blunt to purchase the car. The transcript indicates the prosecutor submitted both the title registration of the car, as well as a copy of the purchase receipt for the car, in support of these statements. Further, at trial, Smith testified that he had paid $3,790 to his roommate for the purchase of his car, although due to insurance issues, the car was still titled in his roommate's name. Although Smith did not identify the name of his roommate at trial, the prosecutor's introduction of the actual title registration of the car supports the fact that Moses Blunt was the title owner of the car, and that the car was worth $3,790 at the time of the transaction, which according to Smith's testimony, occurred shortly before defendant's actions in the present case. This evidence is sufficient to support the trial court's restitution award.

V. Conclusion

We hold the trial court erred in denying defendant's motion to dismiss the charge of first-degree burglary, as the State failed to present sufficient evidence of entry. However, the evidence does support a conviction for felonious breaking or entering, as defendant concedes. Therefore, we vacate the trial court's judgment on defendant's first-degree burglary conviction and remand to the trial court for pro-

nouncement of judgment on the conviction of felonious breaking or entering, a violation of N.C. Gen. Stat. § 14-54(a).

We further hold the trial court properly denied defendant's motion to dismiss the common law robbery charge, as the State's evidence was sufficient to establish defendant took Smith's car by pointing a gun at Smith and commandeering the vehicle. Also, defendant failed to establish the trial court committed plain error in admitting both the out-of-court and in-court identifications of defendant by Smith, and the record evidence supports the trial court's restitution award.

No error in part; remanded for judgment in part.

Judges McGEE and STEELMAN concur.

STATE OF NORTH CAROLINA v. FELIPE ALFARO RICO

No. COA10-1536

(Filed 17 January 2012)

1. Sentencing—motion for appropriate relief—plea agreement—deviation from presumptive sentencing—no findings of aggravated sentence

The State conceded that the trial court abused its discretion in a murder case by denying defendant's motion for appropriate relief. The trial court failed to make the required findings of any aggravating factors and also failed to exercise its discretion in determining whether an aggravated sentence was appropriate. The presence of a plea agreement did not vitiate the trial court's duty to make written findings when deviating from the presumptive sentencing range under the Structured Sentencing Act.

2. Damages and Remedies—restitution—sufficiency of evidence

Although the trial court judgment was vacated in a murder case, and thus the restitution order was necessarily also vacated, the trial court erred by ordering restitution because it was not supported by competent evidence.

3. Sentencing—plea agreement—mistake—use of firearm as aggravating factor to enhance sentence for voluntary manslaughter

Defendant should be resentenced on his guilty plea to voluntary manslaughter under a plea arrangement because the State could not use defendant's use of a firearm as an aggravating factor to enhance his sentence for voluntary manslaughter. Defendant fully performed under the plea agreement and it would have been inequitable to release the State from its obligations under the agreement. The risk of mistake in plea agreements lies with the State.

Judge STEELMAN concurring in part and dissenting in part.

On writ of *certiorari* from judgment and order entered 18 March 2010 by Judge Russell J. Lanier, Jr., in Sampson County Superior Court. Heard in the Court of Appeals 26 May 2011.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

CALABRIA, Judge.

Felipe Alfaro Rico ("defendant") appeals from (1) a judgment entered upon his guilty plea to voluntary manslaughter and (2) an order denying his motion for appropriate relief ("MAR"). We vacate defendant's judgment and the order denying his MAR and remand for resentencing.

I. Background

On 29 September 2008, defendant was indicted in Sampson County Superior Court on the charge of first degree murder for the shooting death of Mario Alberto Rivera-Juarez. On 9 July 2008, the State served defendant's counsel with notice of its intention to prove the existence of the aggravating factor that defendant used a deadly weapon at the time of his alleged crime.

On 1 October 2008, the State and defendant entered into a plea agreement whereby defendant agreed to plead guilty to the lesser offense of voluntary manslaughter and admit to the aggravating factor in exchange for a dismissal of the first degree murder charge.

Under the terms of the agreement, defendant also agreed to "receive an active sentence of not less than 84 months nor more than 110 months in the NC Dept. of Corrections." Defendant stipulated that he had three prior convictions and that he was a prior record level II offender for felony structured sentencing purposes. Under the sentencing grid that was in effect at the time defendant committed his offense, defendant's agreed upon sentence was in the aggravated range.

Judge W. Russell Duke, Jr., accepted defendant's guilty plea and entered a judgment sentencing defendant to a minimum of 84 months to a maximum of 110 months in the North Carolina Department of Correction. The judgment indicated that the sentence was in the presumptive range and was imposed "pursuant to a plea arrangement as to sentence under Article 58 of G.S. Chapter 15A." Judge Duke stated that he made no findings regarding any aggravating or mitigating factors "because the prison term imposed is pursuant to a plea arrangement." In addition, Judge Duke recommended that defendant pay restitution in the amount of $5,052.75.

On 31 August 2009, defendant filed a *pro se* MAR in Sampson County Superior Court. In the MAR, defendant argued, *inter alia*, that the State improperly sentenced him in the aggravated range. Defendant moved for a new sentencing hearing and the appointment of counsel to assist him in pursuing his MAR.

Judge Russell J. Lanier, Jr. reviewed defendant's motion and his court file. Judge Lanier determined that an evidentiary hearing was unnecessary. On 19 March 2010, Judge Lanier entered an order which denied defendant's MAR. The order concluded that defendant's judgment contained a clerical error because it imposed an aggravated sentence without the finding of an aggravating factor. Judge Lanier then entered an amended judgment which included a finding that defendant used a deadly weapon at the time of the offense based upon the terms of the plea agreement and defendant's colloquy with Judge Duke. The amended judgment was otherwise essentially the same as the original judgment, as it sentenced defendant to a an active term of 84 to 110 months and recommended the same amount of restitution.

On 18 May 2010, defendant filed a *pro se* petition for writ of *certiorari* to this Court, seeking review of Judge Lanier's order denying his MAR and the amended judgment. This Court granted defendant's petition on 1 June 2010.

II. Motion for Appropriate Relief

[1] Defendant argues, and the State concedes, that the trial court erred by denying his MAR. Specifically, defendant contends that Judge Duke's imposition of an aggravated sentence was improper. We agree.

The imposition of an aggravated sentence is governed by the Structured Sentencing Act, and the Act contains multiple requirements which must be met before an aggravated sentence can be imposed. First, "Structured Sentencing provides specifically and without exception that a trial court must make written findings when deviating from the presumptive sentence . . . ." *State v. Bright*, 135 N.C. App. 381, 383, 520 S.E.2d 138, 140 (1999). In addition, "[o]nce the trial court f[inds] aggravating and mitigating factors, it [i]s required to weigh them pursuant to N.C. Gen. Stat. 15A-1340.16(b)." *State v. Gillespie*, ___ N.C. App. ___, ___, 707 S.E.2d 712, 715 (2011). Even in cases where only aggravating factors are present, as in the instant case, N.C. Gen. Stat. § 15A-1340.16(b) does not mandate that the trial court sentence a defendant in the aggravated range. Instead, the statute states that "[i]f aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it *may* impose a sentence that is permitted by the aggravated range." N.C. Gen. Stat. § 15A-1340.16(b) (2011)(emphasis added). Thus, the determination of whether an aggravated sentence is appropriate rests solely within the sound discretion of the sentencing judge. *See Gillespie*, ___ N.C. App. at ___, 707 S.E.2d at 714.

A. The Initial Judgment

In the instant case, defendant, pursuant to a plea agreement with the State, pled guilty to voluntary manslaughter, admitted the existence of the aggravating factor that he used a deadly weapon at the time of the crime, and agreed to the imposition of a sentence which was in the aggravated range. At sentencing, Judge Duke conducted a colloquy with defendant in which defendant admitted the aggravating factor in compliance with N.C. Gen. Stat. § 15A-1022.1 (2011) and then imposed an aggravated sentence.

However, Judge Duke failed to make the required findings of any aggravating factors and also failed to exercise his discretion in determining whether an aggravated sentence was appropriate. At defend ant's sentencing hearing, Judge Duke stated that he made no findings because "the prison term imposed is pursuant to a plea arrangement." The judgment entered by Judge Duke also indicated that defendant's

sentence was imposed "as a plea arrangement as to sentence" under N.C. Gen. Stat. § 15A-1023 (2011).

This Court has previously stated that the presence of a plea agreement as to sentence does not vitiate the trial court's duty to make written findings when deviating from the presumptive sentencing range under the Structured Sentencing Act. *See Bright*, 135 N.C. App. at 382-83, 520 S.E.2d at 139. Likewise, there is nothing in N.C. Gen. Stat. § 15A-1340.16 which would permit a sentencing judge, when presented with a plea agreement, to forego the exercise of his discretion in determining whether an aggravated sentence is appropriate.

Since the judgment entered by Judge Duke did not include the required findings to support an aggravated sentence and the record reflects that Judge Duke failed to exercise his discretion in determining whether an aggravated sentence was appropriate, defendant's sentence was invalid as a matter of law.

B. The Amended Judgment

In his order denying defendant's MAR, Judge Lanier indicated that Judge Duke's errors were merely clerical and attempted to correct defendant's judgment by adding the required finding of an aggravating factor in an amended judgment. However,

> in the exercise of power to amend the record of a court, the court is only authorized to make the record correspond to the actual facts and cannot, under the guise of an amendment of its records, correct a judicial error or incorporate anything in the minutes except a recital of what actually occurred.

State v. Bullock, 183 N.C. App. 594, 600, 645 S.E.2d 402, 406 (2007). In the instant case, we have already determined that Judge Duke's failure to make any findings or exercise any discretion when imposing defendant's aggravated sentence was an error of law. Judge Lanier could not correct this judicial error by treating it as a mere clerical error and therefore, we must also vacate the denial of defendant's MAR and the "amended" judgment.

III. Restitution

[2] Defendant argues that the trial court erred by ordering restitution because the amount of restitution was not supported by competent evidence. Since defendant's judgment has been vacated, the restitution order has necessarily also been vacated. Nevertheless, we address

defendant's restitution argument for directional purposes, as we agree that the trial court erred by ordering restitution.[1]

Initially, we address the State's contention that this issue is not properly before this Court. The State argues that defendant has no right to appeal the restitution recommendation under N.C. Gen. Stat. § 15A-1444, which sets out a criminal defendant's limited right to appeal following a guilty plea. This statute states, in relevant part:

> (a1) A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

N.C. Gen. Stat. § 15A-1444(a1) (2011).

The State, in its brief, cites two unpublished cases, *State v. Chiles*, ___ N.C. App. ___, 694 S.E.2d 522, 2010 N.C. App. LEXIS 832, 2010 WL 1957867 (2010)(unpublished) and *State v. Harris*, 191 N.C. App. 400, 663 S.E.2d 13, 2008 N.C. App. LEXIS 1337, 2008 WL 2736673 (2008)(unpublished), in which this Court dismissed previous attempts to challenge restitution orders by a defendant who pled guilty. As these opinions were unpublished, they have no precedential authority. *See* N.C.R. App. P. 30(e) (2010).

By contrast, in a published case, *State v. Davis*, this Court determined that it had jurisdiction to address the defendant's appeal of a restitution order even though the defendant had pled guilty, when the defendant had appealed his aggravated sentence as a matter of right under N.C. Gen. Stat. § 15A-1444 (a1). ___ N.C. App. ___, ___, 696 S.E.2d 917, 921-22 (2010). Although defendant's appeal in the instant case is pursuant to a writ of *certiorari*, defendant could also have appealed his sentence as a matter of right pursuant to N.C. Gen. Stat. § 15A-1444(a1), and thus, this case is materially indistinguishable

1. Defendant's judgment ordered that "upon completion of the term of imprisonment imposed herein, the defendant shall be delivered over to the custody of the Immigration [and] Custom[s] Enforcement or it's [*sic*] successor, for the immediate deportation to the Republic of Mexico." This suggests that, as a practical matter, the restitution recommendation may be unenforceable because it is a condition of work release or post-release supervision.

from *Davis*. As a result, defendant's guilty plea does not preclude review of the trial court's restitution recommendation. *See id.*

This Court has repeatedly stated that "[t]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Replogle*, 181 N.C. App. 579, 584, 640 S.E.2d 757, 761 (2007) (internal quotations and citation omitted). In the instant case, the State concedes that the restitution recommendation was not supported by competent evidence. Therefore, we vacate the trial court's restitution recommendation in the amount of $5,052.75.

IV. Mistake in the Plea Agreement

[3] Defendant requests that we remand the instant case for a new sentencing hearing. The State, in contrast, does not advocate a precise disposition, but agrees that the case must be remanded "for further proceedings." We agree with defendant that a new sentencing hearing is required. However, in light of the plea agreement, it is necessary to determine the precise parameters of this new sentencing hearing.

The terms of the plea agreement were as follows:

> Upon the defendant's plea of guilty to the offense listed below [voluntary manslaughter], the State will not proceed on the remaining related offense listed on the reverse [murder]. The defendant admits the existence of aggravating factor No. 10(b) (used a deadly weapon at the time of the crime[)]. The defendant shall receive an active sentence of not less than 84 months nor more than 110 months in the NC Dept. of Correction[]. Further, the defendant waives any rights under NCGS 15A-268 regarding the disposal or destruction of evidence.

Both the State and defendant identify a mistake in a material portion of this plea agreement. As previously noted, defendant's agreed upon sentence, as stated in the plea agreement, was in the aggravated range for his prior record level. To facilitate this aggravated sentence, defendant agreed to admit that he used a deadly weapon at the time of the offense, and both the State and the trial court appear to have assumed that the use of this aggravating factor was appropriate.

However, N.C. Gen. Stat. § 15A-1340.16(d) states that "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation[.]" Following a previous version of this statute, the Court in *State v. Rivers* held that when the use of a

deadly weapon was necessary to prove the unlawful killing element of voluntary manslaughter, it could not also be used as an aggravating factor. 64 N.C. App. 554, 557, 307 S.E.2d 588, 590 (1983).

In the instant case, as in *Rivers*, defendant's use of a deadly weapon was necessary to prove the unlawful killing element of voluntary manslaughter. Consequently, even though defendant admitted to the aggravating factor of use of a deadly weapon, this could not support imposition of an aggravated sentence for his guilty plea to voluntary manslaughter, as contemplated by the parties in the plea agreement.

As a result of this mistake, the State cannot, under the original terms of the plea agreement, legally receive the full benefit of its bargain by having the trial court sentence defendant in the aggravated range. In light of this circumstance, we must determine whether the mistake requires the plea agreement to be set aside, in an attempt to return the parties to their original position. This determination is further complicated by the fact that it is no longer possible to fully return the parties to their respective positions before the plea agreement was executed. As part of the plea agreement, defendant agreed to "waive any rights under NCGS 15A-268 regarding the disposal or destruction of evidence."[2] As a result, it is likely that much, if not all, of the biological evidence against defendant has been destroyed in the years following defendant's plea.

This Court has explained that "[a]lthough a plea agreement occurs in the context of a criminal proceeding, it remains contractual in nature. A plea agreement will be valid if both sides voluntarily and knowingly fulfill every aspect of the bargain." *State v. Rodriguez*, 111 N.C. App. 141, 144, 431 S.E.2d 788, 790 (1993)(internal citation omitted). Moreover, our Supreme Court has stated that

> [w]hen viewed in light of the analogous law of contracts, it is clear that plea agreements normally arise in the form of unilateral contracts. The consideration given for the prosecutor's promise is not defendant's corresponding promise to plead guilty, but rather is defendant's actual performance by so pleading. Thus, the prosecutor agrees to perform if and when defendant performs but has no right to compel defendant's performance. Similarly,

2. Even if defendant had not waived his rights, N.C. Gen. Stat. § 15A-268 only required biological evidence to be preserved for three years after defendant's conviction, since defendant entered a guilty plea. *See* N.C. Gen. Stat. § 15A-268 (a6)(3) (2011)("[I]n [homicide] cases where the person convicted entered and was convicted on a plea of guilty, . . . evidence shall be preserved for the earlier of three years from the date of conviction or until released.").

> the prosecutor may rescind his offer of a proposed plea arrangement before defendant consummates the contract by pleading guilty or takes other action constituting detrimental reliance upon the agreement.

State v. Collins, 300 N.C. 142, 149, 265 S.E.2d 172, 176 (1980). Thus, "the State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon the arrangement." *Id.* at 148, 265 S.E.2d at 176.

In the instant case, defendant fully performed his duties under the terms of the plea agreement. Specifically, defendant pled guilty to the offense of voluntary manslaughter and admitted to the existence of the aggravating factor that he used a deadly weapon at the time of the offense. Moreover, nothing in the plea agreement precluded defendant from challenging his sentence collaterally, and we cannot judicially impose such a condition. Defendant's challenge to his sentence is specifically permitted by our statutes and does not impact his performance under the plea agreement. Since defendant has fully performed under the plea agreement and has not breached the agreement in any way, it would be inequitable to release the State from its obligations under the agreement. *See id.* Consequently, defendant should be resentenced on his guilty plea under the plea arrangement.

This result is supported by this Court's recognition that the State bears a higher degree of responsibility for the contents of plea agreements. In *State v. Blackwell*, the Court stated that "due process mandates strict adherence to any plea agreement. Moreover, this strict adherence requires holding the [State] to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements." 135 N.C. App. 729, 731, 522 S.E.2d 313, 315 (1999) (internal quotations and citations omitted). Accordingly, the risk of mistake in plea agreements lies with the State, and the State may not withdraw or have set aside a plea agreement based upon an uninduced mistake contained therein. *See Deans v. Layton*, 89 N.C. App. 358, 363, 366 S.E.2d 560, 564 (1988).

In particular, the State should be well cognizant of the law of North Carolina, as reflected in our statutes and the prior decisions of our Courts, and be fully responsible for any mistakes related to this law when it negotiates plea agreements. As explained by the Utah Court of Appeals, "[t]he State is generally in the better position to

know the correct law, given that the State has control over the charges in the information and final say over whether to accept a defendant's plea, and the State must be deemed to know the law it is enforcing." *State v. Patience*, 944 P.2d 381, 388 (Utah Ct. App. 1997); *see also Coy v. Fields*, 27 P.3d 799, 803 (Ariz. Ct. App. 2001)("We, too, hold the state accountable for knowing Arizona law when it negotiates, drafts, and enters into plea agreements.") and *Osborne v. State*, 499 A.2d 170, 178 (Md. 1985)("The State must be held to be aware of the common law and the statutes of Maryland.").

In the instant case, it was clear from our statutes and from the decisions of this Court that the State could not use defendant's use of a firearm as an aggravating factor to enhance his sentence for voluntary manslaughter. N.C. Gen. Stat. § 15A-1340.16(d) clearly states that "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation," and cases from this Court, such as *Rivers*, which have dealt precisely with the scenario at issue in the instant case, are nearly thirty years old. The State should have been fully aware of this applicable law when it entered into the plea agreement, and "we refuse to relieve the State of what it now considers a bad bargain where the plea agreement was the result of uninduced mistake . . . ." *Patience*, 944 P.2d at 388. Ultimately,

> [w]hen the State is culpable in creating an illegal sentence in an otherwise lawful plea agreement, we reject the proposition that the remedy is that the parties be returned to where they were before the plea agreement. Instead, fundamental fairness and the analogous contract principles require that we allow the defendant to retain the benefit of his plea bargain and be lawfully sentenced.

State v. Alba, 697 N.W.2d 295, 307 (Neb. Ct. App. 2005). Accordingly, we refuse to set aside the plea agreement, and instead remand the instant case to the trial court for a new sentencing hearing on defendant's guilty plea.

V. Conclusion

Defendant's original aggravated sentence was invalid as a matter of law because Judge Duke failed to make any findings as to aggravating factors and failed to exercise his discretion in determining whether an aggravated sentence was appropriate, as required by the Structured Sentencing Act. Since Judge Duke's errors were errors of law, Judge Lanier could not correct them under the guise of amending a clerical error. Consequently, defendant's initial and amended judgments and Judge Lanier's order denying defendant's MAR are vacated.

Since defendant could appeal his sentence as a matter of right, he was also permitted to challenge the trial court's restitution recommendation pursuant to *Davis*. The restitution recommendation was not supported by competent evidence and must also be vacated.

There was a mistake in the plea agreement in that, contrary to the belief of the parties, the aggravating factor of use of a firearm cannot enhance a sentence for voluntary manslaughter by use of that same firearm. However, defendant has fully complied with the terms of his plea agreement, and the risk of any mistake in a plea agreement must be borne by the State. As a result, the State remains bound by the plea agreement and defendant should be resentenced upon his guilty plea to voluntary manslaughter.

Vacated and remanded.

Judge ELMORE concurs.

Judge STEELMAN concurs in part and dissents in part by separate opinion.

STEELMAN, Judge concurring in part and dissenting in part.

I concur with the portions of the majority opinion vacating Judge Lanier's order on defendant's motion for appropriate relief and his amended Judgment and Commitment of 18 March 2010. I further concur in the portion of the opinion discussing the award of restitution.

I dissent in this matter because the plea arrangement of 1 October 2008 must be set aside, and this matter remanded to the trial court for disposition of the murder charge against defendant.

I. Factual and Procedural Background

On 29 September 2008, Felipe Alfaro Rico (defendant) was indicted for the murder of Mario Alberto Rivera-Juarez. This offense was alleged to have taken place on 15 May 2008. On 9 July 2008, the State served upon defendant's counsel a Notice of Aggravating Factors, which alleged the aggravating factor that defendant used a deadly weapon at the time of the crime. N.C. Gen. Stat. § 15A-1340.16(d)(10). On 1 October 2008, defendant consented to being tried upon a bill of information charging him with the lesser crime of voluntary manslaughter.

On 1 October 2008, before Judge W. Russell Duke, Jr., the defendant pled guilty to voluntary manslaughter. The terms of the plea arrangement between the State and the defendant were as follows:

> Upon the defendant's plea of guilty to the offense listed below [voluntary manslaughter], the State will not proceed on the remaining related offense listed on the reverse [murder]. The defendant admits the existence of aggravating factor No. 10(b) (used a deadly weapon at the time of the crime [sic]. The defendant shall receive an active sentence of not less than 84 months nor more than 110 months[1] in the NC Dept. of Corrections. Further, the defendant waives any rights under NCGS 15A-268 regarding the disposal or destruction of evidence.

Defendant further stipulated to three prior convictions and that he was a prior record level II for purposes of felony structured sentencing.

The trial court entered judgment sentencing defendant to an active term of imprisonment of 84 to 110 months. The judgment reflects that this was a sentence from the presumptive range, and that it was imposed pursuant to a plea arrangement as to sentence. On 27 August 2009, defendant filed a *pro se* motion for appropriate relief with the trial court. Defendant contended that it was improper for the State to use the aggravating factor of using a deadly weapon at the time of the crime to aggravate his sentence for the crime of voluntary manslaughter. Defendant further alleged that the aggravated sentence violated the strictures of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), and that he was not given notice of the aggravating factor as required by N.C. Gen. Stat. § 15A-1340.16(a6). Defendant sought a new sentencing hearing, and appointment of counsel to represent him in connection with his motion.

On 19 March 2010, Judge Russell J. Lanier, Jr. entered an order upon defendant's motion for appropriate relief, without a hearing. This order held that defendant's motion for appropriate relief was without merit, and denied that motion. The order further held that there was a clerical error in the judgment, in that it imposed a sentence from the aggravated range of sentences, without finding an aggravating factor.[2] Judge Lanier entered findings in aggravation con-

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1. Based upon the sentencing grid in effect at the time of the offense, this sentence was from the aggravated range. N.C. Gen. Stat. § 15A-1340.17(c).

2. A review of the sentencing hearing on 1 October 2008 reveals that there was no clerical error. Judge Duke stated that: "[t]he Court makes no written findings because the prison term imposed is pursuant to a plea arrangement."

sistent with the terms of the plea arrangement, and then entered an amended judgment imposing an active sentence of 84 to 110 months, from the aggravated range of sentences.

On 21 May 2010, defendant filed a *pro se* petition for writ of *certiorari* with the North Carolina Court of Appeals, seeking review of Judge Lanier's judgment of 18 March 2010. On 1 June 2010, this Court allowed defendant's petition and directed that the Superior Court of Sampson County determine whether defendant was entitled to proceed as an indigent. Appellate entries were made on 16 July 2010.

II. Imposition of Aggravated Sentences Under Structured Sentencing

Defendant pled guilty to voluntary manslaughter, and stipulated to the existence of the aggravating factor that he used a deadly weapon at the time of the crime. Judge Duke conducted a colloquy with the defendant concerning this aggravating factor that complied with the provisions of N.C. Gen. Stat. § 15A-1022.1. Once the aggravating factor was established, the trial court was required to weigh the aggravating factor against any mitigating factors (there were none present in the instant case) and determine whether it was appropriate to impose an aggravated sentence. N.C. Gen. Stat. § 15A-1340.16(b). This statute provides that the trial court "*may* impose a sentence that is permitted by the aggravated range . . . ." (emphasis added) The imposition of an aggravated sentence rests in the sound discretion of the sentencing judge. *State v. Gillespie*, ___ N.C. App. ___, ___, 707 S.E.2d 712, 714 (2011).

Instead of making findings in aggravation and mitigation as required by N.C. Gen. Stat. § 15A-1340.16 and exercising his discretion as to whether an aggravated sentence should be imposed, Judge Duke treated the plea arrangement as being a plea bargain as to sentence pursuant to N.C. Gen. Stat. § 15A-1023. Since an aggravated sentence can only be imposed in the discretion of the trial court pursuant to 15A-1340.16, such a sentence can never be the subject of a plea bargain as to sentence. Only a sentence from the presumptive range can be the subject of a plea bargain as to sentence under N.C. Gen. Stat. § 15A-1023.

Judge Duke erred in treating defendant's plea as a plea bargain as to sentencing. The judgment which Judge Lanier attempted to correct was fatally flawed.

III. Rescission of the Plea Bargain

Defendant was indicted for the murder of Mario Alberto Rivera. The plea agreement with the State allowed him to plead guilty to the lesser offense of voluntary manslaughter. In return for the plea to a lesser offense, defendant admitted to an aggravated factor and agreed to the imposition of a specific sentence from the aggravated range. As is noted in the majority opinion and section II of this dissent, neither the aggravating factor nor the aggravated sentence were proper. Defendant seeks to disavow the portions of the plea arrangement that were unfavorable (aggravated range sentence) but yet retain the portion that is favorable (plea to a reduced offense). The majority opinion allows defendant to fully achieve his objectives.

> Although a plea agreement occurs in the context of a criminal proceeding, it remains contractual in nature. *United States v. Read*, 778 F.2d 1437, 1441 (9th Cir. 1985), *cert. denied*, 479 U.S. 835, 93 L.Ed.2d 75 (1986). A plea agreement will be valid if both sides voluntarily and knowingly fulfill every aspect of the bargain. *See Dixon v. State*, 8 N.C. App. 408, 416, 174 S.E.2d 683, 689 (1970) (a plea of guilty will stand unless induced by misrepresentation, including unfulfilled or unfulfillable promises); *State v. Fox*, 34 N.C. App. 576, 579, 239 S.E.2d 471, 473 (1977) (if defend- ant elects not to stand by his portion of the plea arrangement, the State is not bound by its agreement).

State v. Rodriguez, 111 N.C. App. 141, 144, 431 S.E.2d 788, 790 (1993).

In the instant case, essential and fundamental terms of the plea agreement were unfulfillable. Defendant has elected to repudiate a portion of his agreement. Defendant cannot repudiate in part without repudiating the whole. *State v. Fox*, 34 N.C. App. 576, 579, 239 S.E.2d 471, 473 (1977) ("Where a defendant elects not to stand by his portion of a plea agreement, the State is not bound by its agreement to forego the greater charge.").

The entire plea agreement must be set aside, and this case remanded to the Superior Court of Sampson County for disposition on the original charge of murder.

IN RE T.H.

[218 N.C. App. 123 (2012)]

IN THE MATTER OF: T.H.

No. COA11-718

(Filed 17 January 2012)

1. Juveniles—motion to dismiss petitions—N.C.G.S. § 7B-1702

A *de novo* review revealed that the trial court did not commit prejudicial error by denying a juvenile's motion to dismiss the petitions based on an alleged violation of N.C.G.S. § 7B-1702. The legislature's addition of the words "if practicable" lowered the burden on juvenile court counselors to conduct every interview suggested by the statute to only when additional evidence is needed to evaluate the factors provided by the county department of juvenile justice.

2. Appeal and Error—transcript delivered over one year later—no prejudicial error

The trial court did not err by concluding a juvenile was not prejudiced by the court reporter's deliverance of the transcript over a year after the juvenile gave notice of appeal. The delay was not "presumptively prejudicial," appellate defense counsel was partly to blame, the juvenile did not specifically assert his right to a speedy trial, and the juvenile was not particularly prejudiced by the, at most, one year delay.

3. Juveniles—simple assault—common law robbery—motion to dismiss—sufficiency of evidence

The trial court did not err by denying a juvenile's motion to dismiss the petitions at the close of all evidence based on the State's alleged failure to prove every element of the offenses of simple assault and common law robbery. The evidence, viewed in the light most favorable to the State, showed the State met its burden.

Appeal by respondent from an adjudication and disposition order entered 26 May 2010 by Judge William A. Marsh, III, in Durham County District Court. Heard in the Court of Appeals 15 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General LaToya B. Powell, for the State.

Peter Wood for juvenile appellant.

McCULLOUGH, Judge.

T.H.[1] ("respondent") appeals the adjudication and disposition for simple assault, in violation of N.C. Gen. Stat. § 14-33(a), and common law robbery, in violation of N.C. Gen. Stat. § 14-87.1, entered by the trial court on 26 May 2010. The trial court entered a Level 2 disposition and placed respondent on probation with multiple conditions.

I. Background

L.C. is a student at the Durham School of the Arts ("DSA") and on 15 January 2010, he was assaulted and robbed by a group of boys while waiting for his mother after school. L.C. had been attending an after school program at the Reality Center, which closed at 6:00 p.m. L.C. subsequently returned to DSA to wait for his mother where he began kicking a soccer ball with a friend, who was also waiting for a parent. At some point a "tall dude" approached L.C. and his friend, and began passing the ball with them. L.C.'s friend then left when his father arrived and L.C. began listening to his iPod.

Not long after L.C.'s friend left, the "tall dude" approached L.C. and asked him what grade he was in. The "tall dude" had four or five friends with him, who L.C. did not know, but had seen come from the Reality Center. According to L.C., the "tall dude" asked a few more questions and then winked at a "little dude." The "little dude" gradually moved behind L.C. and suddenly wrapped his arm around L.C.'s neck, pulling him to the ground. All the other boys rushed in and began patting L.C. down, trying to steal his possessions. He was able to get up, but the "tall dude" took his backpack and iPod. They all then ran off.

Following the incident, L.C. continued to wait for his mother when Laura Crissman, L.C.'s former teacher, passed him while walking to her car. She noticed L.C. was the only student left and asked if he needed a ride. She saw that he was visibly upset and asked what happened. He recounted what happened and asked for a ride. As Ms. Crissman drove him home, she asked if she could tell Officer Terry Mikels, an officer with the Durham Police Department ("DPD"), about the incident. Officer Mikels works part-time at DSA as part of the Gang Resistance Education and Training unit.

The next day L.C. told Officer Mikels what happened, which was that one boy had pulled him down while the others robbed him. Officer Mikels discussed the incident with DSA's Assistant Principal,

1. All juveniles will be referred to by initials throughout this opinion to protect their identities.

Michael L. Ferguson, who had already talked to L.C. L.C. told Mr. Ferguson that he thought the "short dude" that pulled him down was a sixth grader at DSA, so Mr. Ferguson took L.C. to a few classes to see if he could identify anyone. L.C. could not find the "short dude" in the classes, so Mr. Ferguson showed him a yearbook. L.C. picked M.B. out of the yearbook. M.B. had been suspended from school on the day of the incident.

Officer Mikels then talked to an administrator at the Reality Center who told him that a group of boys had left soon after L.C. on the evening of the incident. The administrator also told Officer Mikels that students are required to sign in and out of the Reality Center. By reviewing records Officer Mikels was able to determine that M.B. and respondent were at the center, and that evening respondent left one minute before L.C. Officer Mikels talked to M.B. at his house, but M.B. denied any involvement. Officer Mikels tried to talk to respondent at what he believed to be his house, but he was not home. He did briefly speak to respondent's grandmother, with whom respondent formerly lived. On 19 February 2010, Officer Mikels asked L.C. to write a statement about the incident. L.C. asked his teacher to help him because he was not good with spelling. Officer Mikels then turned the investigation over to the Youth Division of the DPD.

On 24 March 2010, Investigator Danny Glover of the DPD, administered a photographic lineup to L.C. in Mr. Ferguson's office. He showed L.C. a series of six yearbook photos and for each separate picture asked him, "Is this the person you saw rob you, yes or no[?]" Investigator Glover conducted the photo lineup twice and both times L.C. positively identified photograph number three. Photograph number three was a picture of respondent. L.C. stated that he was eighty-five percent sure the person in photo number three robbed him. He later testified in court that he was ninety-five percent sure respondent was one of the boys who robbed him. M.B. testified at trial that he, his brother, respondent, and a 16-year-old were around when the incident occurred, but that the 16-year-old was the only one who robbed L.C. However, M.B. did admit to being the shortest and smallest boy in the group.

On 14 December 2009, the trial court charged respondent, by juvenile petition, with larceny and misdemeanor possession of stolen goods for taking two hats from Citi Trend, Inc., in Durham. The trial court dismissed the possession of stolen goods charge and adjudicated respondent delinquent for misdemeanor larceny. The court then entered a Level 1 disposition and placed respondent on six

months' probation. On 15 February 2010, respondent was charged by juvenile petition with shoplifting earrings and a watch from Macy's, Inc. Respondent admitted to the shoplifting pursuant to a Juvenile Transcript of Admission. The trial court again adjudicated respondent delinquent, but the record does not include a disposition order relating to this crime.

Finally, on 26 February 2010, Tonya Griffis, the juvenile court counselor ("JCC") for the Durham County Department of Juvenile Justice, received a complaint alleging common law robbery and simple assault against respondent. After talking to the complaining officer, Ms. Griffis approved the petition for filing due to the seriousness of the offenses and respondent's recent juvenile court history. Ms. Griffis did not investigate the complaint and did not speak with respondent or L.C. On 30 March 2010, respondent's counsel filed a motion to dismiss the charges, arguing a violation of N.C. Gen. Stat. § 7B-1702. The trial court subsequently denied the motion following a *voir dire* hearing. The State began a probable cause hearing for the common law robbery charge, but concluded the hearing was unnecessary due to respondent and his co-respondent being only 12 years old. The adjudication hearing was continued until 26 May 2010. The trial court then adjudicated respondent delinquent for simple assault and common law robbery and entered a Level 2 disposition. The trial court placed respondent on probation with multiple conditions. On 4 June 2010, respondent gave written notice of appeal from the 26 May 2010 disposition and adjudication. The record on appeal was finally filed on 13 June 2011.

II. Analysis

A. Interpretation of N.C. Gen. Stat. § 7B-1702

[1] Respondent first argues the trial court committed prejudicial error by violating N.C. Gen. Stat. § 7B-1702 (2009), in denying respondent's motion to dismiss the juvenile petitions. Specifically, respondent claims Ms. Griffis failed to properly investigate the complaint against respondent before filing the petition and therefore allegedly violated the statute. We do not agree.

"As this is a question of statutory interpretation, we review this argument *de novo*." *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, ___ N.C. App. ___, ___, 693 S.E.2d 361, 368 (2010), *disc. review denied*, 364 N.C. 325, 700 S.E.2d 753 (2010).

> Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish. The statute's words should be given their natural and ordinary meaning unless the context requires them to be construed differently.

Shelton v. Morehead Memorial Hospital, 318 N.C. 76, 81-82, 347 S.E.2d 824, 828 (1986) (citations omitted).

The statute at issue, N.C. Gen. Stat. § 7B-1702, provides:

> Upon a finding of legal sufficiency, except in cases involving nondivertible offenses set out in G.S. 7B-1701, the juvenile court counselor shall determine whether a complaint should be filed as a petition, the juvenile diverted pursuant to G.S. 7B-1706, or the case resolved without further action. In making the decision, the counselor shall consider criteria provided by the Department. The intake process shall include the following steps if practicable:
>
> (1) Interviews with the complainant and the victim if someone other than the complainant;
>
> (2) Interviews with the juvenile and the juvenile's parent, guardian, or custodian;
>
> (3) Interviews with persons known to have relevant information about the juvenile or the juvenile's family.
>
> Interviews required by this section shall be conducted in person unless it is necessary to conduct them by telephone.

Id.

Article 17 of the Juvenile Code sets forth procedures for the screening of complaints regarding allegedly delinquent juveniles. *See* N.C. Gen. Stat. § 7B-1700, *et seq.* (2009). The procedure starts with the JCC's determination of whether or not a "juvenile is within the jurisdiction of the court as a delinquent or undisciplined juvenile." N.C. Gen. Stat. § 7B-1701 (2009). Then the JCC must decide whether or not "legal sufficiency" has been established and if the "matters alleged are frivolous." *Id.* Following a finding of legal sufficiency, the JCC must evaluate the complaint pursuant to N.C. Gen. Stat. § 7B-1702, as provided above, and determine whether to file it as a petition. It is not the JCC's duty to "engage in field investigations to substantiate complaints[.]" N.C. Gen. Stat. § 7B-1700. The evidence clearly supports

Ms. Griffis' finding of legal sufficiency and jurisdiction to support the complaint. Officer Mikels provided evidence in the form of L.C.'s written statement and photographic lineup identifications to satisfy the elements for the charges of simple assault and common law robbery. *See* N.C. Gen. Stat. §§ 14-33(a), -87.1 (2009).

The issue then turns to whether Ms. Griffis properly evaluated the complaint prior to filing a petition against respondent. The JCC must decide whether a legally sufficient complaint should be filed as a petition or resolved in another manner and in doing so must consider the criteria as provided by the Department of Juvenile Justice and Delinquency Prevention ("DJJDP"):

> (b) Intake evaluation—In order to determine whether a complaint shall be filed as a petition, the juvenile court counselor in the best interest of the juvenile shall consider the following factors:
>
> (1) Protection of the community;
>
> (2) The seriousness of the offense;
>
> (3) The juvenile's previous record of involvement in the legal system including previous diversions;
>
> (4) The ability of the juvenile and the juvenile's family to use community resources;
>
> (5) Consideration of the victim;
>
> (6) The juvenile's age; and
>
> (7) The juvenile's culpability in the alleged complaint.

28 N.C.A.C. 04A.0102(b) (2003); *see* N.C. Gen. Stat. § 7B-1702.

Respondent argues Ms. Griffis violated N.C. Gen. Stat. § 7B-1702, by filing the petition after only speaking to the complaining officer and not L.C. or respondent. However, the State claims Ms. Griffis' filing of the petition based on the seriousness of the crimes and respondent's recent juvenile court history did not violate the statute as there was no need to speak to either L.C. or respondent due to the evidence provided by the complaining officer.

Respondent further contends all intake procedures are mandatory and the trial court errs if it does not

> follow[] the statutory process for handling complaints of undisciplined behavior, under the Juvenile Code. This process would include the: screening of complaints by a court counselor, G.S. § 7A-530 (1995), preliminary inquiry regarding jurisdiction, divertability, and legal sufficiency, G.S. § 7A-531 (1995), evaluation by intake counselor considering diversion to a community resource, G.S. § 7A-532, 533, 289.6(1) (1995), referral, follow-up and request for review by prosecutor, G.S. § 7A-534, 535, filing of petition, G.S. § 7A-560, 561, 563 (1995) and ultimate adjudication and disposition by the juvenile court, G.S. § 7A-629, 640 (1995).

Taylor v. Robinson, 131 N.C. App. 337, 342, 508 S.E.2d 289, 293 (1998). He acknowledges that there is little case law interpreting N.C. Gen. Stat. § 7B-1702; however, he notes the case of *In re Tate*, 56 N.C. App. 241, 287 S.E.2d 416 (1982), which involves the statute's previous version, N.C. Gen. Stat. § 7A-532(2) (repealed 1998). There, our Court held the intake screening procedures were mandatory and substantial compliance with the statute was not sufficient. *Tate*, 56 N.C. App. at 241, 287 S.E.2d at 416. As a result, respondent would prefer that we interpret the procedures of N.C. Gen. Stat. § 7B-1702 to be mandatory for JCCs.

The legislature added some key language in 1998 when it repealed N.C. Gen. Stat. § 7A-532(2) and revised N.C. Gen. Stat. § 7B-1702. The added language makes respondent's reliance on Tate misplaced because the new words changed the semantics of the statute. The legislature merely added the words "if practicable" in revising the statute, but these two words add new meaning to the statute. *See* N.C. Gen. Stat. § 7B-1702. The words refer to when the intake counselor shall follow the listed procedures of the intake process. Respondent claims the meaning of "if practicable" is unambiguous and clearly means "unless impossible" in the context of the new statute. We do believe the words "if practicable" are unambiguous in the context of the statute, but that respondent is misinterpreting it in this situation. " 'When the language of a statute is clear and unambiguous, there is not 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.' " *State v. Carr*, 145 N.C. App. 335, 343, 549 S.E.2d 897, 902 (2001) (quoting *State v. Jarman*, 140 N.C. App. 198, 205, 535 S.E.2d 875, 880 (2000).

The main purpose of N.C. Gen. Stat. § 7B-1702 is for the JCC to evaluate the factors as provided by the DJJDP and determine whether the filing of a petition is necessary. *See* N.C. Gen. Stat. § 7B-1702. The

statute merely provides methods by which the JCC can obtain information to evaluate the DJJDP factors, but the methods shall only be used "if practicable." *See id.* The legislature clearly added the words "if practicable" to the statute to alleviate an onerous burden once imposed on JCCs. It can be tedious for a JCC to have to contact numerous people to obtain information regarding a complaint, and we believe the legislature's intent in adding the words "if practicable" was to give the JCC more flexibility in how it conducts its intake process and evaluates the complaints.

Here, Officer Mikels had already obtained a statement from L.C. and Investigator Glover had conducted a photographic lineup with L.C. There would be no need for Ms. Griffis to contact L.C. further. Ms. Griffis thoroughly considered the seriousness of the offense, the fact that there was a victim of an assault, and respondent's history in the juvenile system, which she readily obtained from the documentation accompanying the complaint. From the evidence it appears that interviews with L.C. or respondent would be unnecessary, and we believe this is one of the situations the legislature envisioned when adding the words "if practicable" to the statute. Nonetheless, Ms. Griffis did conduct one brief interview when she talked over the phone with Shirley Ann Herron, respondents' great aunt with whom he was currently living and who was already aware of the charges against respondent. Also, Officer Mikels had briefly talked to respondent's grandmother about the incident.

Consequently, we believe the legislature's addition of the words "if practicable" lowered the burden on JCCs to conduct every interview suggested by the statute to only when additional evidence is needed to evaluate the factors provided by DJJDP. Thus, the trial court did not err in denying respondent's pre-trial motion to dismiss because the JCC complied with the requirements of N.C. Gen. Stat. § 7B-1702.

B. Delay in Delivery of Transcript

[2] Respondent next claims he was prejudiced by the court reporter's deliverance of the transcript from the 30 March 2010 hearing on 11 April 2011, over a year after respondent gave notice of appeal. For reasons discussed herein, we disagree.

Respondent's argument can be interpreted as a claim that the delay in producing the trial transcript was a violation of "his constitutional and statutory rights to meaningful and effective appellate

review." *State v. Berryman*, 170 N.C. App. 336, 341, 612 S.E.2d 672, 676 (2005), *aff'd*, 360 N.C. 209, 624 S.E.2d 350 (2006).

> This Court recognizes that " 'undue delay in processing an appeal *may* rise to the level of a due process violation.' " *State v. Hammonds*, 141 N.C. App. 152, 164, 541 S.E.2d 166, 175 (2000) (*quoting United States v. Johnson*, 732 F.2d 379, 381 (4th Cir. 1984) (citations omitted) (emphasis in original)). Determination of whether delay in processing an appeal rises to a due process violation is determined by the same factors used to determine whether pre-trial delay amounts to a denial of a defendant's right to a speedy trial under the Sixth Amendment of the United States Constitution. *Id.* Those factors are: "(1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant resulting from the delay." *Hammonds*, 141 N.C. App. at 158, 541 S.E.2d at 172 (*citing Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972)). "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.*
>
> . . . .
>
> "[T]he length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Hammonds*, 141 N.C. App. at 159, 541 S.E.2d at 172.

Id. at 342, 612 S.E.2d at 676.

In the case at bar, the delay in producing the transcript could not be considered more than a year and could certainly be considered less. "Because the length of delay is viewed as a triggering mechanism for the speedy trial issue, its significance in the balance is not great." *Id.* at 342, 612 S.E.2d at 676 (internal quotation marks and citations omitted). While the significance of the length of delay is not great, we do not consider a delay of a year to be "presumptively prejudicial" to trigger an inquiry into the other factors. Nevertheless, we would like to briefly note the circumstances in the case at hand and our reasoning for any future, similar situations. *See State v. Berryman*, 360 N.C. 209, 220-23, 624 S.E.2d 350, 358-60 (2006) (six-year delay was inexcusable, but not in violation of defendant's due process rights); *State v. China*,

150 N.C. App. 469, 474-75, 564 S.E.2d 64, 68-69 (2002) (seven-year delay, standing alone, did not violate defendant's due process rights).

The record contains two appellate entries forms, one filed 17 March 2010 and the other filed 14 June 2010. The 17 March 2010 form lists the hearing date as the same day it was filed while the 14 June 2010 form lists the hearing date as 26 May 2010. In addition, the 14 June 2010 form contains a written notation, initialed by the trial court, adding the 30 March 2010 hearing to the dates to be transcribed. It is unclear when this notation was added, but the record contains an email chain between the court reporter and appellate defense counsel with an email dated 22 November 2010 where appellate defense counsel asks the court reporter if "the clerk sent [him] an amended appellate entries form yet for the transcription of the 3/30 hearing?" The rest of the email chain shows some confusion between the two, but we can infer from the emails that the court reporter did not know about the required transcription of the 30 March 2010 hearing date until sometime in November. It can also be inferred that appellate defense counsel is partially at fault for a portion of the delay for not asking the court reporter about the missing transcript until November. Therefore, the delay in the case at hand is not "presumptively prejudicial," appellate defense counsel is partly to blame, respondent did not specifically assert his right to a speedy trial, and respondent has not been particularly prejudiced by the at most one year delay. As such, the delay in the case at hand did not deprive respondent of his due process rights.

C. Respondent's Motion to Dismiss

[3] Respondent's final argument on appeal is that the trial court erred in denying his motion to dismiss the petitions at the close of all evidence because the State failed to prove every element of the offenses of simple assault and common law robbery. We disagree.

In reviewing the denial of a motion to dismiss a juvenile petition, our Court must "determine whether, in the light most favorable to the State, there was substantial evidence supporting each element of the charged offense." *In re I.R.T.*, 184 N.C. App. 579, 588, 647 S.E.2d 129, 136 (2007). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks and citation omitted).

The crime of simple assault consists of "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence,

to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." *State v. Jeffries*, 57 N.C. App. 416, 418, 291 S.E.2d 859, 860-61 (1982). For the crime of common law robbery, the State must prove " 'the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear.' " *State v. Elkins*, ___ N.C. App. ___, ___, 707 S.E.2d 744, 748 (2011) (quoting *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270 (1982)).

The evidence, viewed in the light most favorable to the State, tends to show the State met its burden in proving respondent committed the crimes of simple assault and common law robbery against L.C. The State presented evidence that L.C. was robbed of his iPod and backpack by a group of boys while waiting for his mother after school at the DPA. L.C. twice identified respondent in photographic lineups as one of his assaulters. He further testified at trial to remembering respondent patting him down and M.B. testified to respondent having walked behind L.C. Furthermore, L.C. testified and wrote a statement giving a vivid description of the incident in which the boys confronted L.C., M.B. walked behind L.C. and pulled him down, and then the rest of the boys, including respondent, "rushed in and beat [L.C.] up and robbed [him]." Consequently, the evidence meets the elements of simple assault and common law robbery. Moreover, the evidence shows respondent joined the group of boys in assaulting and robbing L.C. *See State v. Begley*, 72 N.C. App. 37, 323 S.E.2d 56 (1984) (holding three defendants guilty under acting in concert principle). Thus, the trial court did not err in denying respondent's motion to dismiss.

III. Conclusion

Based on the foregoing, the trial court did not err in denying respondent's pretrial motion to dismiss because the JCC complied with the requisite statute in filing the juvenile complaint. Also, respondent was not prejudiced by the delay in delivery of the trial transcript and the trial court did not err in denying respondent's motion to dismiss at the end of all evidence.

Affirmed.

Judges McGEE and STEELMAN concur.

STATE OF NORTH CAROLINA v. KEITH WADE KIDWELL

No. COA10-1407

(Filed 17 January 2012)

1. Discovery—timeliness—motion for continuance denied—waiver of constitutional issues—speculation

The trial court did not abuse its discretion in a larceny and first-degree murder case by failing to grant defendant's motion for a continuance based on the State's alleged repeated failure to provide material discovery in a timely manner. Defendant failed to raise his constitutional issues at trial, and thus, they were waived. Further, defendant raised no more than mere speculation that something helpful to him may have turned up.

2. Homicide—first-degree murder—motion to dismiss—sufficiency of evidence—robbery

The trial court did not err by failing to dismiss the charge of first-degree murder. The State presented substantial evidence that defendant killed the victim during the commission of a robbery at a convenience store.

Appeal by defendant from judgment entered 3 November 2009 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 17 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

David Neal for defendant-appellant.

BRYANT, Judge.

Because defendant offers only the intangible hope that something helpful to his defense may have possibly turned up from the untimely receipt of discovery, the trial court did not err in denying his motions for a continuance. Where there was substantial evidence that defendant killed the victim in order to commit a robbery, the trial court did not err in denying defendant's motion to dismiss the charge of first-degree murder.

On 10 February 2005, at 3:00 a.m., Robert Holmes, an employee of Maola Milk and Ice Cream Company, was making a delivery to the

Kangaroo convenience store located on North Roxboro Street in Durham County. As he entered the lot, Holmes observed a Ford F-150 truck backing out of a space near the front door. Holmes recognized the truck as belonging to Crayton Nelms, a store clerk who worked the third shift. However, as the vehicles passed, Holmes saw a black male whom he did not recognize driving Nelms' truck. In the convenience store, searching for the clerk to sign off on the delivery, Holmes discovered Nelms' deceased body.

Sergeant Brent Hallans, supervisor of the Durham Police Department, Homicide Division, reported to and assumed control of the crime scene that morning. Nelms' head exhibited severe bruising and scrapes, and his left ear was almost completely detached. A medical examiner later testified that Nelms suffered a "compressive injury" to the skull caused by pressure possibly created between hands and/or feet and the floor which resulted in shear hemorrhages within the brain. The cause of death was blunt force trauma to the head.

Nelms' pants pockets had been turned inside out, and scattered on the floor of the convenience store were empty canisters which normally contained money used to make change for cash transactions. The store manager estimated that approximately $900.00 to $1,000.00 was missing.[1]

Sgt. Hallans issued a notice for law enforcement to be on the lookout for Nelms' burgundy 2004 Ford F-150 pick-up truck. Approximately twenty-four hours later, at 3:00 a.m. the next morning, 11 February 2005, defendant Keith Kidwell was stopped by a highway patrol trooper for speeding on west-bound Interstate 40 in Oklahoma. Defendant, a large black male, was driving Nelms' Ford F-150 truck. The trooper took defendant into custody for questioning about the homicide in North Carolina. After being read his Miranda rights, defendant stated "murder, I'm going down for murder."

Patting defendant down, the trooper found "a wad of currency" and change totaling $627.69. After inventorying the vehicle, troopers also seized a pair of Nike tennis shoes. Blood on a ten dollar bill found in defendant's possession contained Nelms' DNA, and the left Nike tennis shoe had DNA from both defendant and Nelms.

From the Kangaroo convenience store in Durham, law enforcement preserved bloodstained cardboard found under Nelms body and

1. Defendant worked at the Kangaroo convenience store located on North Roxboro Road as a store clerk from 21 October 2004 through 27 October 2004.

a stained fleece vest he was wearing. The outsole design of shoe prints left on the blood stained cardboard matched the outsole design of the Nike tennis shoes found in the Ford F-150 truck when defendant was arrested. A shoe print left on the victim's fleece vest matched the size and outsole design of the left Nike tennis shoe. And, latent prints recovered from the convenience store men's restroom matched defendant's finger prints.

On 21 March 2005, defendant was indicted for larceny of a motor vehicle and subsequently indicted for obtaining property by false pretenses, and murder. Soon after, defendant filed a motion for voluntary discovery requesting that the prosecutor's office make available "the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant." A voluminous amount of discovery was provided to defendant pursuant to his request. Otherwise, over four years later, on 17 September 2009, five days before defendant's jury trial commenced in Durham County Superior Court, the prosecution released to defendant twenty-two pages of Sgt. Hallan's notes. During the trial, defendant was provided with a photo log of the crime scene—the convenience store—and was also made aware of the existence of the following: an unanalyzed latent shoe print; a fingerprint near blood spatter that did not match defendant; and, eighteen latent print cards and a latent print comparison log indicating prints made by persons other than defendant. Defendant also learned that law enforcement did not lift a latent print from the shoes of Robert Holmes, the delivery man who discovered the body. Defendant's motions to continue due to untimely receipt of discovery were denied.

On 3 November 2009, defendant was found guilty of larceny and first-degree murder on the basis of felony murder. The trial court entered a consolidated judgment in accordance with the jury verdict and sentenced defendant to life imprisonment without parole. Defendant appeals.

On appeal, defendant raises the following arguments: the trial court erred in failing to (I) grant a continuance and compel additional testing on items recovered; and (II) dismiss the charge of first-degree murder.

I

[1] Defendant argues that the trial court erred in failing to grant his motion for a continuance. Defendant contends that the State repeat-

edly failed to provide material discovery in a timely manner and that the trial court's refusal to grant a continuance violated defendant's right to a fair trial. We disagree.

Under North Carolina General Statutes, section 15A-903,

> [u]pon motion of the defendant, the court must order the State to:
>
> > (1) Make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes . . . investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.

N.C. Gen. Stat. § 15A-903(a)(1) (2009). "Noncompliance with discovery requests in criminal cases [is] governed by North Carolina General Statutes section 15A-910." *State v. Sisk*, 123 N.C. App. 361, 367, 473 S.E.2d 348, 352 (1996). A trial court may grant a continuance or impose other sanctions for failure to comply with discovery orders. N.C.G.S. § 15A-910(a)(2) (2009), "[H]owever, the decision of whether to impose sanctions is within the sound discretion of the trial court and is not reviewable on appeal absent an abuse of discretion . . . ." *Sisk*, 123 N.C. App. at 367, 473 S.E.2d at 352 (citations omitted). "Generally, the denial of a motion to continue . . . is sufficient grounds for the granting of a new trial only when the defendant is able to show that the denial was erroneous and that he suffered prejudice as a result of the error." *State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 675 (2000) (citation omitted).

> [A] postponement is proper if there is a belief that *material* evidence will come to light and such belief is reasonably grounded on known facts. But a mere intangible hope that something helpful to a litigant may possibly turn up affords no sufficient basis for delaying a trial to a later term.

State v. Tolley, 290 N.C. 349, 357, 226 S.E.2d 353, 362 (1976) (citations omitted).

Following defendant's 7 April 2005 voluntary discovery request, the prosecution provided substantial discovery to defendant over the next four years, including: DNA evidence, Nelms' autopsy report, video from the SBI investigation, evidence inventory sheets, scientific data, and SBI reports. Thereafter, in a hearing held 3 August 2009, the

trial court ordered that discovery be completed at least one month prior to trial.

Trial was scheduled to begin on 22 September 2009. On 17 September 2009, defendant was given additional discovery in the form of 22 pages of notes handwritten by Sgt. Hallan. On 22 September, defendant made a motion for a continuance asserting that the prosecution failed to provide access to the complete files of the District Attorney and law enforcement and citing a lack of notes from the head of the forensic investigation team. Defendant noted that the prosecution had recently provided the notes of Sgt. Hallan, who, at the time the homicide was reported, was Homicide Division supervisor and assumed control of the crime scene. Sgt. Hallan's notes record actions taken by law enforcement at various points during the investigation starting from the time he arrived at the crime scene on the morning of 10 February 2005 until 24 March 2005 when an arrest warrant was issued charging defendant with murder. In particular, defendant cites the following notations from Sgt. Hallan's notes:

(1) a homicide detective contacted a store clerk who discussed "B/M . . . runs scams[,] visits weekly[,] [store clerk] said saw him Sun[.,] gets mad[,] buy beers sometime[, and] Black & Mild[,] store 1A contacted for list";

(2) notes from contact with defendant's mother -- "on site [at her residence] . . . consent given, briefed her on sit rep[,] room searched—rec'd Nike shoe box (property)[,] trash & woods[.] Stated: her son last seen on Wed[.] nite [sic] about 10:00 pm. when she woke up Thur[.] morn, her son & his bags were gone";

(3) notes from a 28 February 2005 discussion with another detective "date for evidence to be taken to SBI for DNA . . . [detective] advises during morn meeting he will not charge till DNA is back"; and

(4) On the date 28 February under the heading "Task," Sgt. Hallan writes "1—interview store clerks on last cleaning of store—particularly @ sink[,] 2—knife found in poss of suspect—can it be ID by victim family[,] 3—interview sus mother about son and the money he had or did not have[, and] 4—print check book found on highway[.]"

Defendant contends that Sgt. Hallan's notes indicate tasks defendant could not otherwise have known had taken place, and, because

the notes were provided days before trial was to commence, he could not adequately investigate.

Apart from defendant's pretrial argument regarding Sgt. Hallan's notes, defendant asserts that the day before trial, he was provided with sketches of the convenience store made by a law enforcement officer, and, during the trial, he was provided with photo logs and photos taken during law enforcement's investigation in the convenience store.[2]

Defendant argues that the prosecution's failure to provide discovery in a timely manner impacted his ability to thoroughly examine law enforcement's investigation. Defendant contends Sgt. Hallan's notes and crime scene diagrams indicate that law enforcement failed to analyze all latent shoe prints and test blood collected away from the main areas where Nelms' blood was found. Defendant contends that this was significant in that it would either further inculpate defendant or lead to the identity of another suspect. Defendant argues on appeal that the cumulative effect of these discovery violations resulted in a violation of his constitutional right to due process. However, defendant did not raise this argument before the trial court. *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." (citation omitted)). Therefore, we do not further address defendant's constitutional argument.[3]

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2. Though included in defendant's question presented, defendant does not further reference the forensic file, non-matching fingerprints, and crime scene photos in his argument.

3. While we do not directly address defendant's constitutional argument, we note the acknowledgments of our Supreme Court in addressing allegations of discovery violations with regard to due process.

> The United States Supreme Court has noted the difficulties involved in requiring a state to take affirmative steps to preserve evidence on behalf of criminal defendants and has stated that "police do not have a constitutional duty to perform any particular tests" on crime scene evidence or to "use a particular investigatory tool," [*Arizona v. Youngblood*, 488 U.S. 51, 58-59 (1988)] (stating also that the Due Process Clause does not "impose[] on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution").

State v. Taylor, 362 N.C. 514, 525-26, 669 S.E.2d 239, 253 (2008) (citation and quotations omitted).

" '[T]he purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate.' " *State v. Cook*, 362 N.C. 285, 291, 661 S.E.2d 874, 878 (2008) (quoting *State v. Murillo*, 349 N.C. 573, 585, 509 S.E.2d 752, 759 (1998)).

Because the trial court denied defendant's motion for a continuance and because we dismiss defendant's constitutional argument, we review the trial court's actions for abuse of discretion.

Here, the trial court ordered the State to continue analyzing certain discovery evidence, such as the latent shoe print, and to report to the court and defendant the results of any analysis. The trial court noted that the testimony of any witnesses involved in the analysis of the evidence in question would be postponed pending completion of the analysis.

In his brief, defendant set forth many arguments suggesting that, because of the late discovery provided by the State, defendant might have been able to pursue certain leads that might in turn have revealed additional evidence that might have been helpful to the defense. Such speculation, no matter how forcefully argued is not sufficient to show material prejudice. Because defendant raises no more than the mere hope that something helpful to him may have turned up, defendant is unable to show that the trial court abused its discretion in denying defendant's motion. *See Tolley*, 290 N.C. at 357, 226 S.E.2d at 362. Defendant's argument is overruled.

II

[2] Defendant argues that the trial court erred in denying his motion to dismiss the first-degree murder charge. Defendant contends that his motion to dismiss should have been granted because the State failed to present substantial evidence that defendant was the only person who killed the victim. We disagree.

> The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of

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> Whether a failure to make evidence available to a defendant violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution depends in part on the nature of the evidence at issue. When the evidence is exculpatory, that is, "either material to the guilt of the defendant or relevant to the punishment to be imposed," the state's failure to disclose the evidence violates the defendant's constitutional rights irrespective of the good or bad faith of the state. Nonetheless, when the evidence is only "'potentially useful'" or when "'no more can be said [of the evidence] than that it could have been subjected to tests, the results of which might have exonerated the defendant,'" the state's failure to preserve the evidence does not violate the defendant's constitutional rights unless the defendant shows bad faith on the part of the state.

Taylor, 362 N.C. at 525, 669 S.E.2d at 252-53 (citations omitted).

> the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Webb, 192 N.C. App. 719, 721, 666 S.E.2d 212, 214 (2008) (citation omitted). "When as here the motion to dismiss puts into question the sufficiency of circumstantial evidence, the court must decide whether a reasonable inference of the defendant's guilt may be drawn from the circumstances shown." *State v. Alford*, 329 N.C. 755, 760-61, 407 S.E.2d 519, 523 (1991) (citation omitted).

Defendant was indicted and tried on the charge of murder. The jury found defendant guilty of first-degree murder on the basis of the felony murder rule. Under North Carolina General Statutes, section 14-17, "[a] murder which shall be . . . committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed . . . shall be deemed to be murder in the first degree . . . ." N.C. Gen. Stat. § 14-17 (2009). "Common law robbery is defined as the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Shaw*, 164 N.C. App. 723, 728, 596 S.E.2d 884, 888 (2004) (citation omitted).

Here, the State presented evidence that defendant worked at the Kangaroo convenience store located on North Roxboro Road in Durham as a clerk from 21 October 2004 through 27 November 2004. On 10 February 2005 at 3:00 a.m., the body of store clerk Crayton Nelms was found at the Kangaroo convenience store located on North Roxboro Road in Durham. The medical examiner testified that the cause of death was blunt force trauma to the head: specifically compression of the skull possibly caused by pressure created between hands and/or feet and the floor.

Nelms' pockets were turned inside out. Cylinders which contained individual denominations of money for the clerks to make change for customers lay on the floor, empty. The store manager testified that between $900.00 and $1,000.00 was missing from the store and that it may have taken as long as an hour for that much money to be removed. The delivery man informed law enforcement that when he

pulled into the parking lot, he observed Nelms' burgundy 2004 Ford F-150 pick-up truck being driven away by a black male whom he did not recognize.

At 3:00 a.m. the next morning, 11 February 2005, Oklahoma Highway Patrol trooper stopped defendant, a large, black male, while he was driving Nelms' burgundy 2004 Ford F-150 pick-up truck. Defendant had $627.69 in cash on his person. Shoe prints found both on the convenience store floor under the victim, as well as, on the victim's clothes were consistent with the soles of tennis shoes found in defendant's possession at the time he was arrested approximately twenty-four hours later. Fingerprints matching defendant's were found in the convenience store bathroom. Furthermore, Nelms' DNA was found on the cash and shoes defendant had in his possession at the time he was arrested.

The prosecution presented substantial evidence that defendant killed Nelms during the commission of a robbery at the Kangaroo convenience store. Accordingly, defendant's argument is overruled.

No error.

Judges GEER and BEASLEY concur.

MANUEL MOSQUEDA, TERESITA VAQUEZ, JOVANNY DE JESUS DE MATA AND MANUEL MOSQUEDA AS GUARDIAN AD LITEM OF MINOR CHILD EMILY MOSQUEDA, PLAINTIFFS V. MARIA MOSQUEDA, DEFENDANT

No. COA11-629

(Filed 17 January 2012)

1. Appeal and Error—interlocutory orders and appeals—denial of motion to dismiss—failure to show substantial right

Defendant's appeal from an order denying her motion to dismiss negligence claims arising from an automobile accident was from an interlocutory order and not entitled to immediate review. Defendant failed to meet the burden of showing a substantial right would be affected.

2. Appeal and Error—interlocutory orders and appeals—substantial right—possibility of inconsistent orders

Although plaintiffs' appeal from the portion of the trial court's order granting defendant's motion to dismiss negligence claims arising from an automobile accident was from an interlocutory order, the trial court's decision affected a substantial right that would be lost absent immediate review based on the possibility of inconsistent verdicts.

3. Motor Vehicles—Alabama automobile guest statute—no violation of North Carolina public policy—choice of law—lex loci deliciti doctrine

The trial court did not err in a negligence case arising from an automobile accident by concluding Alabama's automobile guest statute did not violate North Carolina's public policy. North Carolina strongly adheres to the traditional application of the *lex loci deliciti* doctrine when choice of law issues arise.

4. Constitutional Law—Alabama automobile guest statute—equal protection

Alabama Code § 32-1-2 does not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Any change regarding whether automobile guest statutes violate the Equal Protection Clause should be addressed by the United States Supreme Court.

Appeal by Plaintiffs and Defendant from order entered 10 February 2011 by Judge Michael R. Morgan in Guilford County Superior Court. Heard in the Court of Appeals 10 November 2011.

A.G. Linett & Associates, PA, by Adam G. Linett and J. Rodrigo Pocasangre, for Plaintiffs.

Teague Rotenstreich Stanaland Fox & Holt, P.L.L.C., by Steven B. Fox and Kara C. Vey, for Defendant.

THIGPEN, Judge.

Manuel Mosqueda ("Plaintiff Manuel"), Teresita Vasquez ("Plaintiff Teresita"), Jovanny De Jesus De Mata ("Plaintiff Jovanny"), and Emily Mosqueda ("Plaintiff Emily") were passengers in a car driven by Maria Mosqueda ("Defendant") in the State of Alabama when an accident occurred and Plaintiffs were injured. Three of Plaintiffs'

claims were dismissed pursuant to Ala. Code § 32-1-2, the Alabama automobile guest statute. We must determine whether the Alabama automobile guest statute violates North Carolina public policy or the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. We conclude the Alabama automobile guest statute does not violate North Carolina public policy or the Equal Protection Clause, and we therefore affirm the order of the trial court.

I: Factual and Procedural Background

The record tends to show that Plaintiff Manuel and Defendant are husband and wife, and Plaintiff Emily is their daughter. Plaintiff Manuel, Plaintiff Emily and Defendant reside in Greensboro, North Carolina. Plaintiff Jovanny also resides in Greensboro, North Carolina. Plaintiff Teresita is a resident of Mexico, who was visiting the United States to spend the holidays with her family.

On 7 January 2010, Plaintiffs were passengers in a car driven by Defendant in Calhoun County, Alabama, en route to North Carolina from Texas. The road was icy, and Defendant was allegedly driving at a higher speed than the conditions allowed. Defendant lost control of the vehicle, skidded off the road, hit an embankment, and the vehicle rolled over several times.

Plaintiffs alleged that all of the passengers suffered injuries as a result of the accident. Plaintiff Manuel sustained a compound fracture to his spinal column and severe back pain. Plaintiff Teresita sustained a right orbital fracture that required fourteen stitches above her right eye. Plaintiff Jovanny sustained a severe ankle sprain and cervical and lumbar sprains. Plaintiff Emily suffered cervical pain and pain behind her knees.

Plaintiffs filed a complaint on 14 October 2010 in the Superior Court of Guilford County, alleging Defendant's negligence. Defendant moved to dismiss the action pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) in her answer filed 16 December 2010, citing the doctrine of *lex loci delicti commissi* and the Alabama automobile guest statute, Ala. Code § 32-1-2. On 10 February 2011, the trial court entered an order dismissing the claims of three of the four Plaintiffs pursuant to Ala. Code § 32-1-2. The trial court dismissed the claims of Plaintiff Teresita, Plaintiff Jovanny and Plaintiff Emily (hereinafter, "Plaintiffs"). However, the trial court denied Defendant's motion to dismiss the claim of Plaintiff Manuel. Plaintiffs appeal this order, and Defendant cross-appeals.

II: Defendant's Appeal

[1] Defendant appeals the portion of the trial court's order denying her N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) motion to dismiss the claim of Plaintiff Manuel. We must first determine whether Defendant's appeal is properly before this Court.

i: Interlocutory Order

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950).

> Ordinarily, a denial of a motion to dismiss under Rule 12(b)(6) merely serves to continue the action then pending. No final judgment is involved, and the disappointed movant is generally not deprived of any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on its merits. Thus, an adverse ruling on a Rule 12(b)(6) motion is in most cases an interlocutory order from which no direct appeal may be taken.

State ex rel. Edmisten v. Fayetteville Street Christian School, 299 N.C. 351, 355, 261 S.E.2d 908, 911 (1980).

"There are only two means by which an interlocutory order may be appealed: (1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C.R. Civ. P. 54(b) or (2) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *CBP Resources, Inc. v. Mountaire Farms of N.C., Inc.*, 134 N.C. App. 169, 171, 517 S.E.2d 151, 153 (1999) (quotation and citations omitted).

When an appeal is based upon an interlocutory order, "the appellant must include in its statement of grounds for appellate review 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005) (quoting N.C. R. App. P. 28(b)(4)). "[T]he burden is on the appellant to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds." *Romig v. Jefferson–Pilot Life Ins. Co.*, 132 N.C. App. 682, 685, 513 S.E.2d 598,

600 (1999), *appeal dismissed in part, disc. review denied, and cert. denied*, 350 N.C. 836, 539 S.E.2d 293-94 (1999), *aff'd per curiam*, 351 N.C. 349, 524 S.E.2d 804 (2000) (quotation omitted). When the appellant fails to meet this burden, her appeal will be dismissed. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

In this case, Defendant's appeal from the order denying her N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) motion to dismiss the claims of Plaintiff Manuel is interlocutory. The trial court did not certify there was no just reason to delay Defendant's appeal pursuant to N.C.R. Civ. P. 54(b). Defendant acknowledges in her brief that an interlocutory order is not ordinarily appealable unless a substantial right is affected. However, Defendant gives no explanation to the Court in her brief as to what substantial right is affected in this case. Because "the burden is on the appellant to present appropriate grounds for this Court's acceptance of an interlocutory appeal[,]" *Romig*, 132 N.C. App. at 685, 513 S.E.2d at 600, and because Defendant failed to meet this burden, we dismiss Defendant's appeal.

III: Plaintiffs' Appeal

[2] Plaintiffs appeal the portion of the trial court's order granting Defendant's N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) motion to dismiss Plaintiffs' claims.[1] We must first determine whether Plaintiffs' appeal is properly before this Court.

i: Interlocutory Order

An appeal from an order granting a defendant's N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) motion as to some but not all of the plaintiffs' claims, thus adjudicating the rights and liabilities of fewer than all the parties, is interlocutory. *Pentecostal Pilgrims & Strangers Corp. v. Connor*, 202 N.C. App. 128, 132, 688 S.E.2d 81, 84 (2010).

"There are only two means by which an interlocutory order may be appealed: (1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C.R. Civ. P. 54(b) or (2) if the trial court's decision deprives the appellant of a substantial right which

1. The trial court denied Defendant's motion to dismiss the claim of Plaintiff Manuel, because Plaintiff Manuel was the owner of the vehicle driven by Defendant when the accident occurred. *See Coffey v. Moore*, 948 So. 2d 544, 545 (2006) (holding the owner of the vehicle is not the guest of the driver while riding in his own vehicle). Therefore, only Plaintiff Teresita, Plaintiff Jovanny and Plaintiff Emily appeal the trial court's order.

would be lost absent immediate review." *CBP Resources, Inc.*, 134 N.C. App. at 171, 517 S.E.2d at 153 (quotation and citations omitted). "[T]he burden is on the appellant to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds." *Romig*, 132 N.C. App. at 685, 513 S.E.2d at 600.

A final judgment as to fewer than all parties affects a substantial right when there is a possibility of inconsistent verdicts. *Camp v. Leonard*, 133 N.C. App. 554, 557, 515 S.E.2d 909, 912 (1999) (citation omitted). A two-part test determines whether a substantial right is affected under these circumstances, requiring a party to show "(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exist." *Id.* at 558, 515 S.E.2d at 912.

In this case, we agree with Plaintiffs' assertion that there exists a possibility for inconsistent verdicts. Assuming this Court dismissed Plaintiffs' appeal as interlocutory, Plaintiff Manuel's individual claim would proceed to trial alone. On appeal after Plaintiff Manuel's trial, the dismissed claims of the remaining Plaintiffs could hypothetically be reinstated, resulting in a second trial. As all Plaintiffs' were in the vehicle driven by Defendant when the accident occurred, the same factual issues would be present in both trials. Moreover, it is conceivable that two juries could deliver inconsistent verdicts. We believe that although Plaintiffs' appeal is interlocutory, the trial court's decision deprived Plaintiffs of a substantial right which would be lost absent immediate review. Therefore, we will address Plaintiffs' appeal.

ii: Standard of Review

"The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Bobbitt v. Eizenga*, ___ N.C. App. ___, ___, 715 S.E.2d 613, 615 (2011) (quotation omitted). "On a motion to dismiss, the complaint's material factual allegations are taken as true." *Id.* (quotation omitted). Dismissal is proper when one of the following three conditions is satisfied: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Id.* (quotation omitted).

iii: Automobile Guest Statute: Public Policy Exception

[3] In Plaintiffs' first argument on appeal, they contend the trial court erred by applying Alabama's automobile guest statute to dismiss Plaintiffs' claims because the Alabama automobile guest statute violates North Carolina public policy.

"Our traditional conflict of laws rule is that matters affecting the substantial rights of the parties are determined by lex loci, the law of the situs of the claim, and remedial or procedural rights are determined by lex fori, the law of the forum." *Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d 849, 854 (1988). "For actions sounding in tort, the state where the injury occurred is considered the situs of the claim[;] [t]hus, under North Carolina law, when the injury giving rise to a negligence or strict liability claim occurs in another state, the law of that state governs resolution of the substantive issues in the controversy." *Id.* at 335, 368 S.E.2d at 854. This approach provides "certainty, uniformity, and predictability of outcome in choice of law decisions." *Id.* at 336, 368 S.E.2d at 854.

The automobile accident in this case occurred in Alabama. Therefore, Ala. Code § 32-1-2 applies to this case and provides the following:

> The owner, operator or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest while being transported without payment therefor in or upon said motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the willful or wanton misconduct of such operator, owner or person responsible for the operation of said motor vehicle.

Id. In this case, Plaintiffs did not allege the willful or wanton misconduct of Defendant in their complaint. Moreover, Plaintiffs do not dispute that the doctrine of *lex loci delicti commissi* requires that the Alabama automobile guest statute apply to this case. Rather, Plaintiffs argue the Alabama automobile guest statute violates North Carolina public policy.

"It is thoroughly established as a broad general rule that foreign law or rights based thereon will not be given effect or enforced if opposed to the settled public policy of the forum." *Davis v. Davi*s, 269 N.C. 120, 125, 152 S.E.2d 306, 310 (1967) (quotation omitted).

> However, the mere fact that the law of the forum differs from that of the other jurisdiction does not mean that the foreign

> statute is contrary to the public policy of the forum. To render foreign law unenforceable as contrary to public policy, it must violate some prevalent conception of good morals or fundamental principle of natural justice or involve injustice to the people of the forum state. This public policy exception has generally been applied in cases such as those involving prohibited marriages, wagers, lotteries, racing, gaming, and the sale of liquor.

Baughman, 322 N.C. at 342, 368 S.E.2d at 857-58 (citations omitted).

Plaintiffs specifically argue the application of Alabama's automobile guest statute is contrary to North Carolina public policy for the following reasons: (1) automobile guest statutes have "fallen out of favor around the country and have been either repealed, held unconstitutional, or substantially limited in scope"; and (2) automobile guest statutes are contrary to the " 'natural justice' of this State, which allows for persons injured by others to recover in tort[,]" especially considering that "North Carolina has abolished . . . interspousal immunity[,] . . . charitable immunity[,] . . . [and] parental immunity in automobile accidents[.]"

North Carolina has applied the automobile guest statutes of other states to claims initiated in this forum. *See, e.g.*, *Chewning v. Chewning*, 20 N.C. App. 283, 201 S.E.2d 353 (1973) (applying South Carolina's automobile guest statute); *Smith v. Stepp*, 257 N.C. 422, 125 S.E.2d 903 (1962) (applying Virginia's automobile guest statute); *Frisbee v. West*, 260 N.C. 269, 132 S.E.2d 609 (1963) (applying Washington's automobile guest statute); *Kizer v. Bowman*, 256 N.C. 565, 124 S.E.2d 543 (1962) (applying Florida's automobile guest statute).

Furthermore, this Court in *Gbye v. Gbye*, 130 N.C. App. 585, 587, 503 S.E.2d 434, 435 (1998), addressed the question of whether "Alabama's parental immunity doctrine is contrary to the 'extraordinarily strong public policy' in this state against such immunity in cases involving motor vehicle accidents[.]" The *Gbye* Court noted, "North Carolina case law reveals a steadfast adherence by our courts to the traditional application of the *lex loci deliciti* doctrine." *Id.* The *Gbye* Court ultimately concluded:

> [B]ecause application of the parental immunity doctrine to the particular facts of this case does not, in our opinion, go against the good morals or natural justice of this State, or work an injustice against the citizens of North Carolina, we find no merit in the contention that Alabama law should not be applied

> in this case on the ground that it is contrary to North Carolina public policy.

Id. at 588, 503 S.E.2d at 436.

We find the application of the automobile guest statute of other states in numerous decisions by this Court and our Supreme Court, and the holding of this Court in *Gbye*, persuasive authority that the Alabama automobile guest statute in this case is not contrary to North Carolina public policy. Furthermore, we find Plaintiffs' argument that Alabama's automobile guest statute is contrary to public policy because North Carolina has abolished interspousal immunity, charitable immunity, and parental immunity unconvincing. The *Gbye* Court unequivocally stated, "[f]rom the outset, it should be noted that our legislature's abolition of parental immunity under N.C.G.S. § 1-539.21 does not necessarily mean that a contrary law of a foreign jurisdiction is repugnant to North Carolina public policy." *Id.* at 588, 503 S.E.2d at 436. Given our Courts' "strong adherence to the traditional application of the *lex loci deliciti* doctrine when choice of law issues arise[,]" *Id.* at 587, 503 S.E.2d at 436, and in accordance with this Court's holding in *Gbye*, we conclude that because application of Ala. Code § 32-1-2 to this case does not, in our opinion, go against the good morals or natural justice of this State, or work an injustice against the citizens of North Carolina, there is no merit to Plaintiffs' contention that Ala. Code § 32-1-2 should not be applied on the ground that it is contrary to North Carolina public policy.

iv: Automobile Guest Statute: Constitutionality

[4] In Plaintiffs' final argument on appeal, they contend Ala. Code § 32-1-2 violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. We disagree.

The United States Supreme Court has held that an automobile guest statute did not violate the Equal Protection Clause, because it could not be said that "no grounds [existed] for the distinction" between gratuitous passengers in automobiles and those in other classes of vehicles. *Silver v. Silver*, 280 U.S. 117, 123, 74 L. Ed. 221, 225, 50 S. Ct. 57, 59 (1929). We take the view that if the rule of *Silver*, the highest authority on whether automobile guest statutes violate the Equal Protection Clause, is to be changed and the strictures of the Fourteenth Amendment extended in this area of the law, the appropriate body to make such a change would be the United States Supreme Court.

For the foregoing reasons, we dismiss Defendant's interlocutory appeal and affirm the order of the trial court dismissing three of the four Plaintiffs' claims pursuant to Defendant's N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) motion to dismiss.

AFFIRMED, in part, DISMISSED, in part.

Judges STEELMAN and BEASLEY concur.

MERRION CARR, EMPLOYEE, PLAINTIFF v. DEPARTMENT OF HEALTH AND HUMAN SERVICES (CASWELL CENTER), EMPLOYER, SELF-INSURED (CORVEL CORPORATION, THIRD-PARTY ADMINISTRATOR), DEFENDANT

No. COA11-789

(Filed 17 January 2012)

1. Workers' Compensation—injury—neck injury caused by hand injury

The Industrial Commission did not err in a workers' compensation case by concluding plaintiff's cervical spine injury was caused, exacerbated, or aggravated by her 5 May 2008 left hand injury.

2. Workers' Compensation—disability—unable to earn wages—Russell method

The Industrial Commission erred in a workers' compensation case by concluding plaintiff was unable to earn wages and was entitled to disability benefits. The case was remanded for further findings regarding disability with regard to methods two and three in *Russell*, 108 N.C. App. 762.

Appeal by defendant from Opinion and Award entered 29 March 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 November 2011.

The Law Offices of James Scott Farrin, by Douglas E. Berger, for plaintiff-appellee.

Roy Cooper, Attorney General, by Lora C. Cubbage, Assistant Attorney General, for defendant-appellant.

MARTIN, Chief Judge.

Defendant-employer, Caswell Development Center/Department of Health and Human Services ("defendant"), appeals from an Opinion and Award by the North Carolina Industrial Commission ("the Commission") awarding plaintiff-employee, Merrion Carr, temporary total disability compensation and past and future medical expenses related to her workers' compensation claim. After careful consideration, we affirm in part and remand in part.

On 5 May 2008, plaintiff, a licensed practical nurse, was standing at a medicine cart at work when she was hit from behind by a patient operating his wheelchair in reverse. A drawer closed on her left hand, her elbow went up and twisted, and her head moved forward and then backward about six or seven inches. That evening, plaintiff went to Lenoir Memorial Hospital complaining of pain in her left hand, where she was x-rayed, diagnosed with a contusion, and released.

Two days later, plaintiff presented to Dr. Max Kasselt, an orthopedic surgeon, complaining of wrist, left middle finger, and neck pain which radiated down her shoulder into her left hand. Dr. Kasselt ordered radiographs of the cervical and lumbar spine, left wrist, and left middle finger, all of which were unremarkable. Plaintiff, however, continued to have pain, and returned to see Dr. Kasselt again on 16 June 2008, complaining of left wrist and middle finger pain, frontal headaches, and neck pain. Although Dr. Kasselt first suspected plaintiff was a malingerer when he could not find an explanation for her neck symptoms, he reconsidered and opined that plaintiff could have a herniated disk at C6-7. He referred plaintiff to Raleigh Hand Center for a second opinion. An MRI taken of plaintiff's cervical spine revealed a prominent, left greater than right, C6-7 subligamentous disc herniation with some cord impingement, spinal stenosis and minor disc herniations at the C3 to C6 levels.

Plaintiff went to see Dr. Barry Katz, a neurosurgeon, on 16 July 2008 for an evaluation of her neck pain. Dr. Katz diagnosed plaintiff with significant cervical radiculopathy and discussed treatment options with plaintiff. Plaintiff elected to have surgery, and underwent a C6-7 anterior cervical discectomy and fusion procedure on 25 July 2008. Plaintiff continued to have some neck pain, which Dr. Katz opined was normal. Dr. Katz followed up with plaintiff several times after surgery, and ultimately released her to return to work on 3 November 2008 with the restriction of no lifting greater than ten pounds.

Plaintiff informed defendant she could return to work, but with a ten-pound lifting restriction. Defendant did not make a job available to plaintiff within her restriction, and instead directed her to sign up for short-term disability, which she did.

Plaintiff simultaneously continued to undergo treatment for her left hand with Dr. Paul Schricker of the Raleigh Hand Center. He diagnosed plaintiff with a contusion and sprain of the left long finger PIP joint and continued to treat plaintiff until 18 December 2008, when he determined she had reached maximum medical improvement. Dr. Schricker opined that plaintiff had a three percent (3%) permanent partial impairment of the left long finger.

Meanwhile, plaintiff had filed a Form 18 Notice of Accident to Employer on 2 October 2008 citing injuries to her "left hand/upper extremity, neck/back, hips/lower extremities." Defendant filed a Form 60 accepting plaintiff's claim with regard to the left hand injury, but simultaneously filed a Form 61 denying plaintiff's claim as to her other injuries. Plaintiff requested a hearing and the matter was assigned to a deputy commissioner and scheduled for hearing on 15 December 2009. In an Opinion and Award filed on 11 June 2010, the deputy commissioner concluded that, although plaintiff sustained a compensable injury to her left hand and had a resulting 3% impairment of her left middle finger, she failed to meet her burden of proving her neck injury and subsequent disability was causally related to her compensable injury.

Plaintiff then appealed to the Full Commission regarding her neck condition. The Full Commission found, *inter alia:*

> 14. Dr. Katz opined the events of May 5, 2008 could have caused plaintiff's neck symptoms and could have aggravated a pre-existing condition. Dr. Katz further opined that if plaintiff's neck moved as she described in her testimony, it could cause the symptoms she described, if she had stenosis or a herniated disc prior and could get worse.
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> . . . .
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> 16. The Full Commission finds that there is sufficient medical evidence of record upon which to find that plaintiff's cervical spine condition was caused, exacerbated, or aggravated by her May 5, 2008 injury and that the medical treatment plaintiff received, including the C6-7 anterior discectomy and fusion, was necessary . . . .

. . . .

23. The Full Commission finds that the medical evidence of record, including the deposition testimony of Dr. Katz, establishes that, as a result of the May 5, 2008 work related incident, plaintiff has been disabled and unable to earn any wages since the date of injury and continuing.

The Commission concluded that, because defendant accepted the left hand injury as compensable by filing a Form 60, a rebuttable presumption arose that any subsequent treatment is directly related to plaintiff's compensable injury. The Commission concluded defendant had not rebutted the presumption that the subsequent treatment was directly related to the compensable injury, and that, therefore, plaintiff is entitled to receive past and future medical expenses. The Commission also concluded plaintiff is entitled to continue to receive temporary total disability related to her neck injury. Defendant appeals.

At issue on appeal are the Commission's conclusions that (I) plaintiff's cervical spine injury was causally related to her compensable left hand injury and (II) plaintiff is unable to earn wages and is therefore entitled to disability benefits.

I.

[1] Defendant first contends the Commission erred in concluding plaintiff's cervical spine injury was caused, exacerbated, or aggravated by her 5 May 2008 left hand injury.

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This '[c]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274. Where the exact nature and probable genesis of an injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent evidence as to causation. *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 291 (1980). When expert opinion is based "merely

upon speculation and conjecture," it cannot qualify as competent evidence of medical causation. *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). Stating an accident "could or might" have caused an injury, or "possibly" caused it is not generally enough alone to prove medical causation; however, supplementing that opinion with statements that something "more than likely" caused an injury or that the witness is satisfied to a "reasonable degree of medical certainty" has been considered sufficient. *See*, *e.g.*, *Young*, 353 N.C. at 233, 538 S.E.2d at 916; *Kelly v. Duke Univ.*, 190 N.C. App. 733, 740, 661 S.E.2d 745, 749, *supersedeas denied*, *disc. rev. denied*, 363 N.C. 128, 675 S.E.2d 367 (2008).

In the instant case, the Commission determined the record contained competent evidence of a causal connection between the left hand injury and neck injury. Dr. Katz opined that the mechanism of injury described by plaintiff, her neck moving forward and back during her fall, "theoretically could" have caused the cervical spine injury. He also stated, in response to the question of whether the mechanism is consistent with aggravation of the condition he surgically treated, that:

> [T]heoretically, if your neck moves in this sort of direction, and it was, you know, from an accident, theoretically, you can cause, you know, symptoms like she was describing if she had stenosis or a herniated disc prior. And theoretically it could get a little bit worse with this kind of mechanism.

Dr. Katz went on to clarify that his opinion was "satisfactory to [himself]" and, assuming plaintiff had no symptoms and the incident occurred as she said it did, that he believed the fall "more likely than not" caused the neck injury. Furthermore, there is independent corroboration for Dr. Katz's opinion. Plaintiff complained of neck pain to Dr. Kasselt only two days after her injury. Although he initially believed her to be a "malingerer," he noted that the tenderness in her left middle finger could be a symptom of a C6-7 herniation, and recommended she get an MRI of the cervical spine. This MRI was done and confirmed Dr. Kasselt's suspicions of a C6-7 herniation, which Dr. Katz later surgically corrected.

Though Dr. Katz admitted on cross-examination that herniated discs can be spontaneous in nature, he clarified that the condition could be ongoing for a period of years based on deterioration, but then suddenly become worse. That statement, in and of itself, does not render Dr. Katz's testimony "mere speculation."

Defendant further contends Dr. Katz's testimony was based solely on the fallacy of *post hoc ergo propter hoc*, or, confusing sequence with consequence, and therefore, cannot be the basis for causation. "[W]here the threshold question is the cause of a controversial medical condition, the maxim of '*post hoc, ergo propter hoc*,' is not competent evidence of causation." *Young*, 353 N.C. at 232, 538 S.E.2d at 916. Dr. Katz's opinion, however, was based on more than merely the sequence of events. In his deposition, Dr. Katz stated that although "a lot of it is based on timing," his opinion was based on the mechanism of injury as well as the temporal relationship between the incident and symptoms. The Commission recognized this, and stated in Finding of Fact 14 that Dr. Katz opined, "if plaintiff's neck moved as she described in her testimony, it could cause the symptoms she described." Therefore, there is no merit to defendant's contention.

Defendant also argues that in finding the neck injury compensable, the Commission improperly applied this Court's holdings in *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), and *Perez v. American Airlines/AMR Corp.*, 174 N.C. App. 128, 620 S.E.2d 288 (2005). *Parsons* established plaintiffs only need to prove causation at the initial hearing; thereafter, a rebuttable presumption arises that additional medical treatment is related to the prior injury, and defendant must prove the present injury is unrelated to the compensable injury. *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869. In *Perez*, this Court found acceptance of a workers' compensation claim by a Form 60 gives rise to the *Parsons* rebuttable presumption. *Perez*, 174 N.C. App. at 136, 620 S.E.2d at 293. Defendant argues the *Parsons* presumption does not apply when plaintiff's injury is a wholly different injury from the one accepted on the Form 60. We disagree.

In the instant case, defendant filed a Form 60 on 2 October 2008 accepting the left hand injury as compensable. Although the Commission recited the *Parsons* presumption, it did not rely on it in finding the neck injury compensable. The Commission evaluated the medical evidence, including the testimony of Dr. Katz, and stated in Finding of Fact 16 that the neck injury was causally related to the 5 May 2008 injury. Therefore, regardless of the presumption, plaintiff proved the neck injury was causally related to the left hand injury and was therefore compensable.

II.

[2] Defendant next contends the Commission erred in concluding plaintiff has been unable to earn wages and is entitled to disability

benefits. After close consideration, we must agree and remand this case to the Commission for further findings with respect to the issue.

Under N.C.G.S. § 97-2(9), " 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2011). The burden is on the employee to show she is unable to earn the same wages she earned before the injury, either in the same or other employment. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). The employee may meet this burden by producing evidence that she is: (1) physically or mentally, as a consequence of the work-related injury, incapable of work in any employment; (2) capable of some work, but that she has, after a reasonable effort on her part, been unsuccessful in her effort to obtain employment; (3) capable of some work but that it would be futile to seek other employment because of preexisting conditions; or (4) she has obtained other employment at a wage less than that earned prior to the injury. *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). To meet the requirements of the first method of proof in *Russell*, plaintiff must present medical evidence that she is incapable of *work in any employment. Britt v. Gator Wood, Inc.*, 185 N.C. App. 677, 684, 648 S.E.2d 917, 922 (2007). If the findings of fact show plaintiff is capable of performing some work, and there is evidence plaintiff may have satisfied the second or third prong of *Russell*, the Commission must make findings addressing those methods of proof. *Id.*

Here, medical evidence shows plaintiff underwent a functional capacity evaluation at Goldsboro Orthopaedics Associates and was found to score in the twenty-eighth percentile (28%) on the neck disability index, which can be characterized as moderate disability. Based on the evaluation, it was recommended that plaintiff seek employment in the sedentary work category, where she would not need to lift greater than ten pounds. The position description given by the North Carolina Office of State Personnel states plaintiff's job requires her to be on her feet seventy-five percent (75%) of the time. Thus, medical evidence suggests plaintiff is no longer capable of performing her previous position. However, medical evidence does not show plaintiff is incapable of working in any employment, so the Commission's finding regarding disability cannot be based on the first *Russell* prong.

For the Commission's conclusion to be based on the second or third prong of *Russell*, it would have to make findings regarding plain-

tiff's disability; i.e., whether plaintiff has made a reasonable effort to obtain employment, but been unsuccessful, or that it would be futile for plaintiff to seek work because of preexisting conditions. The Commission merely stated "that the medical evidence of record, including the deposition testimony of Dr. Katz, establishes that, as a result of the May 5, 2008 work related incident, plaintiff has been disabled and unable to earn any wages since the date of injury and continuing." Although plaintiff has testified that she availed herself to defendant and they did not accommodate her with a sedentary job, the Commission made no findings which acknowledged this or concluded that her actions constituted a reasonable effort to obtain employment. Thus, there is no basis in its findings for the conclusion that plaintiff is disabled based on either the second or third prong of *Russell*. Furthermore, the Commission's conclusion cannot be based on the fourth prong, since plaintiff had not, at the time of the hearing, obtained other employment. Therefore, we must remand to the Commission to make findings regarding plaintiff's disability with regard to *Russell* methods two and three.

Affirmed in part; remanded in part.

Judges ELMORE and STEPHENS concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER BERNARD HAMMONDS

No. COA11-271

(Filed 17 January 2012)

1. Appeal and Error—notice of appeal—poorly drafted—certiorari

A petition for *certiorari* was granted in the discretion of the Court of Appeals where defendant lost his right of appeal through sloppy drafting by counsel and through no fault of his own (the written notice of appeal did not list all the convictions he was attempting to appeal and did not properly name the court to which he was appealing). Failure to issue a writ of *certiorari* would have been manifestly unjust.

2. Jury—selection—voir dire reopened—peremptory challenge

The trial court erred by refusing to remove a juror in a larceny trial where the judge reopened *voir dire* and allowed further questioning of a juror after learning that the juror had lunch with a member of the district attorney's office. Because the judge reopened *voir dire*, defendant had an absolute right to exercise a remaining challenge.

Appeal by defendant from judgments entered 1 July 2010 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Thomas D. Henry, for the State.

Kevin P. Bradley for defendant-appellant.

GEER, Judge.

Defendant Christopher Bernard Hammonds appeals from his convictions of felonious larceny of a firearm, misdemeanor larceny, assault on a government officer, and resisting an officer. On appeal, defendant primarily challenges the trial court's refusal to allow defendant, after the jury was impanelled, to exercise a remaining peremptory challenge to excuse a juror who acknowledged having lunch with a friend who was a lawyer in the district attorney's office. *State v. Holden*, 346 N.C. 404, 488 S.E.2d 514 (1997), and *State v. Thomas*, 195 N.C. App. 593, 673 S.E.2d 372, *disc. review denied*, 363 N.C. 662, 685 S.E.2d 800 (2009), are controlling. Under those decisions, because the trial court reopened voir dire and because defendant had not exhausted all of his peremptory challenges, the trial court was required to allow defendant to exercise a peremptory challenge to excuse the juror. Defendant is, under *Holden* and *Thomas*, entitled to a new trial.

Facts

The State's evidence tended to show the following facts. On 26 November 2008, Michael Hansen's Cadillac Escalade automobile was parked outside a nightclub in Charlotte, North Carolina. When Mr. Hansen came out of the nightclub around 1:35 a.m., someone had broken into his vehicle and stolen a cell phone and a .45mm handgun left in the car.

Mr. Hansen activated the tracking service associated with his cell phone plan and discovered that his cell phone was at the third house on Lynn Lee Circle. Mr. Hansen then called the police, reported that his cell phone and gun had been stolen, and gave them the location of the cell phone as identified by the locator service.

At approximately 4:30 a.m., four officers of the Charlotte-Mecklenburg police department (Sergeants Jackson and Suarez and Officers Langford and Markley) went to the Lynn Lee Circle address to conduct a knock and talk investigation. When three of the officers knocked on the front door, defendant emerged from the back of the house where Officer Langford was waiting. All four officers then converged on defendant, and Sergeant Suarez asked defendant if he would agree to a pat down search.

After defendant agreed to the pat down, Sergeant Suarez felt what seemed to be another cell phone in defendant's pocket even though defendant was also holding a cell phone in his hand. Defendant did not respond when Sergeant Suarez asked defendant if he would allow her to see the cell phone in his pocket. Sergeant Suarez then walked around the corner of the house, called the Hansens, and asked Mrs. Hansen to call her husband's cell phone.

Sergeant Suarez walked back around the house, and within a minute the cell phone in defendant' pocket began ringing. Sergeant Suarez then moved to handcuff defendant, asking him to put his hands behind his back. Defendant reacted by rushing Sergeant Suarez, swinging his arms. Defendant struggled with three of the officers until the fourth was able to wrestle one of defendant's arms behind his back. In the course of the struggle, Sergeant Suarez was injured when defendant struck her in the nose.

After defendant had been subdued, Sergeant Suarez retrieved the ringing cell phone from defendant's pocket and answered the phone. Mr. Hansen was on the other end of the call and confirmed that Sergeant Suarez was talking on his cell phone. Sergeant Jackson then secured the residence, a search warrant was obtained, and Mr. Hansen's handgun was discovered in a vehicle parked at the residence.

Defendant was indicted for breaking and entering a motor vehicle, two counts of felonious larceny and misdemeanor larceny, two counts of felonious possession of stolen goods and misdemeanor possession of stolen goods, two counts of assault on a government officer, and one count of resisting a public officer. On 1 July 2010, the

prosecutor dismissed one of the counts of assault on a government officer.

At trial, the jury found defendant not guilty of breaking or entering a motor vehicle, but guilty of assault on a government official, resisting a public officer, larceny of a firearm, and larceny of a cell phone. The trial court concluded that no verdict should be taken on the charges of felonious and misdemeanor possession of stolen goods as those charges merged into the larceny convictions.

The trial court sentenced defendant to a presumptive-range term of 10 to 12 months imprisonment for larceny of a firearm to be followed by a consecutive sentence of 120 days for misdemeanor larceny that in turn was followed by a consecutive sentence of 150 days for assault on a government official and resisting a public officer. Defendant timely appealed to this Court.

Discussion

[1] We must first address whether defendant's notice of appeal was adequate to appeal the judgments below. N.C. Gen. Stat. § 15A-1448(b) (2011) provides that "[n]otice of appeal shall be given within the time, in the manner and with the effect provided in the rules of appellate procedure."

Rule 4(a) of the North Carolina Rules of Appellate Procedure provides that an appeal in a criminal case may be taken either by "giving oral notice of appeal at trial" or by filing a written notice of appeal within 14 days after entry of judgment. Rule 4(b) provides that any written notice of appeal "shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken . . . ."

In this case, defendant did not give oral notice of appeal at trial, but rather filed a written notice of appeal on 13 July 2010. The notice of appeal specified that it was being filed under the file numbers for the two assault on a government official charges (although one was dismissed), the resisting arrest charge, and the breaking and entering a motor vehicle charge (although the jury had found defendant not guilty of that charge), as well as a file number that does not appear to be related to any of the charges at issue. The notice of appeal did not include the file numbers for the felonious and misdemeanor larceny charges.

The text of the notice of appeal stated:

> NOW COMES the Defendant, Christopher Hammonds, by and through his undersigned attorney, Kenneth D. Snow, and hereby gives notice of appeal to the State of North Carolina Superior Court Division for judgment entered in this case on July 1, 2010. Christopher Hammonds has requested that his case be appointed to the Appellate Defender's Office.

The notice of appeal included a signature line for defendant, but defendant's name was apparently signed and initialed by his trial counsel.

In this case, defendant's counsel filed a written notice of appeal that fails to list all the convictions that defendant is attempting to appeal and fails to properly name the court to which he is appealing. While this Court has held that " 'a mistake in designating the judgment . . . should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake[,]' " *Stephenson v. Bartlett*, 177 N.C. App. 239, 241, 628 S.E.2d 442, 443 (2006) (quoting *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156-57, 392 S.E.2d 422, 424 (1990)), we do not think that an intent to appeal all of defendant's convictions in this instance can be fairly inferred from his written notice of appeal. Accordingly, defendant's written notice of appeal does not comply with Rule 4.

Following that inadequate notice of appeal, defendant's counsel attempted to give oral notice of appeal to the trial court on 2 August 2003. Since that notice was not given "at trial" as required by Rule 4, it also was inadequate. N.C.R. App. P. 4(a)(1).

Our Supreme Court has said that a jurisdictional default, such as a failure to comply with Rule 4, "precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008). Defendant has, however, requested that we exercise our discretion under Rule 21 of the Rules of Appellate Procedure to review his arguments pursuant to a writ of certiorari. Rule 21(a)(1) provides that a writ of certiorari may issue to permit review of judgments and orders of trial tribunals "when the right to prosecute an appeal has been lost by failure to take timely action . . . ." The power to do so is discretionary and may only be done in "appropriate circumstances." *Id.*

Because, in this case, it is readily apparent that defendant has lost his appeal through no fault of his own, but rather as a result of sloppy drafting of counsel and because a failure to issue a writ of certiorari would be manifestly unjust, we exercise our discretion to allow defendant's petition for writ of certiorari and address the merits of defendant's appeal. *See In re I.T.P-L.* 194 N.C. App. 453, 460, 670 S.E.2d 282, 285 (2008) (dismissing appeal based on jurisdictional default but allowing review pursuant to Rule 21 because "the timely, albeit incomplete, notices of appeal together with the amended notices of appeal provide record evidence that Respondents desired to pursue the appeal, understood the nature of the appeal, and cooperated with counsel in filing the notice of appeal" and because allowing review would "avoid penalizing Respondents for their attorneys' errors"), *disc. review denied*, 363 N.C. 581, 681 S.E.2d 783 (2009).

[2] Turning to the merits of the appeal, defendant first contends that the trial court erred in refusing to allow him to exercise an unused peremptory challenge after the trial court reopened voir dire following the impanelling of the jury. At trial, just after the lunch break, defendant's trial counsel reported to the trial court that he had seen juror number 8 having lunch with a lawyer from the district attorney's office. Defendant's counsel explained that if he had known of juror number 8's connection with an attorney with the district attorney's office, he "probably would have used one of [his] strikes against them."

The trial court had the bailiff return the jurors to the courtroom and asked them whether any of them had lunch with a member of the district attorney's office. Juror number 8 indicated that he had, but that they had not discussed defendant's case in any way. The trial court then asked the jury to leave and allowed both defendant and the State to ask any questions that they had of juror number 8. Both defendant and the State questioned juror number 8.

After the juror was returned to the jury room, defendant made the following request to the trial court:

> [DEFENSE COUNSEL]: Judge, I certainly didn't want to cause any inconvenience, but I think I have a duty to ask that he be excluded because certainly that is a question, and given that he knew the attorney that intimately to have lunch with them, Judge, I think most of the attorneys would certainly have him removed, and that's a question he was aware of. I'm not saying that he had any conversation, but certainly, Judge, I had two strikes left. I certainly would have removed him. There's

> no doubt about that had I known that. So I would ask that the Court consider excluding him, and I say that with all due respect, Judge. I certainly understand the inconvenience, but I would ask that he be removed.

The State, however, argued that defendant should have specifically questioned the jurors regarding any relationship with the district attorney's office during voir dire and that defendant had ample opportunity to question the juror regarding his impartiality.

After hearing arguments, the trial court made the following ruling:

> THE COURT: I'll make these findings on the record. Juror No. 8 . . . has been inquired about out of the presence of the other jurors. It appears that [Juror No. 8] had lunch with a member of the district attorney's office, apparently a district attorney that is not associated with the supreme [sic] court division but is associated with the district court division who hasn't had any participation in this case. The juror also indicated he did not talk about this case. The juror also indicated after informing counsel that he did know two attorneys, he did not indicate either of those attorneys were with the district attorney's office. Jurors, by their very nature, generally respond to only what they are asked directly, and it does not appear any further inquiry was made about the practice of the attorneys that this juror knew in particular.
>
> The juror has indicated that he can remain fair and impartial and that his acquaintance would not affect his decision in this case. Only the juror can know whether or not something like that's going to affect their ability to decide this case. Therefore, this court will conclude that the juror is yet fair and impartial and the Court, in its discretion, will deny the motion to remove this juror and replace the same with the alternate.

This Court addressed almost identical facts in *Thomas*. In that case, after the jury was impanelled,

> the trial court learned that one of the seated jurors attempted to contact an employee in the District Attorney's Office prior to impanelment. The juror visited the District Attorney's Office with the intention of greeting a friend, but was unsuccessful in his attempts to speak with her. Voir dire was reopened, the trial court questioned the juror, and allowed the parties to do so as well.

195 N.C. App. at 594, 673 S.E.2d at 373. At the end of the voir dire, defense counsel reminded the trial court that he had an unused peremptory challenge remaining that he wished to use to excuse the juror. *Id.* at 595, 673 S.E.2d at 373. The trial court refused the defendant's request on the grounds that because the juror did not speak to his friend in the district attorney's office and did not talk about the case, " 'there would be no prejudice to either party' " by allowing the juror to sit. *Id.*

On appeal, this Court explained that although "[i]t is established that after a jury has been impaneled, further challenge of a juror is a matter within the trial court's discretion," a different rule applies when the trial court reopens voir dire: "However, '[o]nce the trial court reopens the examination of a juror, each party has the *absolute right* to exercise any remaining peremptory challenges to excuse such a juror.' " *Id.* at 596, 673 S.E.2d at 374 (emphasis added) (quoting *Holden*, 346 N.C. at 429, 488 S.E.2d at 527). Because it was undisputed that the trial court did in fact reopen voir dire, this Court held: "As a matter of law, Defendant was entitled to exercise his remaining peremptory challenge," and "the trial court committed reversible error by failing to permit Defendant to use his remaining peremptory challenge." *Id.* The Court, therefore, granted the defendant a new trial. *Id.*

In *Holden*, the authority relied upon by the *Thomas* panel, our Supreme Court concluded that the trial court did not err in allowing the State to exercise a peremptory challenge after the jury had already been impanelled—indeed, the State did not seek excusal of the juror until after the close of the evidence. 346 N.C. at 428, 488 S.E.2d at 526. The Court first pointed out that "the trial court may reopen the examination of a juror after the jury is impaneled and that this decision is within the sound discretion of the trial court." *Id.* at 429, 488 S.E.2d at 527. If, however, the trial court decides to exercise its discretion to reopen voir dire of a juror, then, at that point, " 'each party has *the absolute right* to exercise any remaining peremptory challenges to excuse such a juror." *Id.* (emphasis added) (quoting *State v. Womble*, 343 N.C. 667, 678, 473 S.E.2d 291, 297 (1996)). The Court concluded that the trial court had not abused its discretion in allowing further examination of the juror and, therefore, the State was entitled to exercise its peremptory challenge. *Id.*

Here, as in *Holden* and *Thomas*, it is undisputed that the trial court exercised its discretion to reopen voir dire and allow further

questioning of juror number 8 after the jury had been impanelled. Defendant had peremptory challenges remaining, and he sought to exercise one of those challenges to remove juror number 8. Under *Holden* and *Thomas*, because the trial court chose to reopen voir dire, defendant had an absolute right to do so. Consequently, the trial court committed reversible error in refusing to excuse juror number 8, and *Holden* and *Thomas* mandate that defendant is entitled to a new trial.

New trial.

Judges STROUD and THIGPEN concur.

COREY McADAMS, Employee, Plaintiff v. SAFETY KLEEN SYSTEMS, INC., Employer, AMERICAN INSURANCE COMPANY, Carrier, SEDGWICK CMS, Servicing Agent, Defendants

No. COA11-805

(Filed 17 January 2012)

Workers' Compensation—accident—insufficient findings of fact

An opinion and award by the Industrial Commission in a workers' compensation case was remanded for further findings of fact as to the circumstances of plaintiff's accident and based on the fact that the Commission relied upon the testimony of doctors who may have been provided with an inaccurate account of plaintiff's accident.

Judge BRYANT dissenting.

Appeal by defendants from Opinion and Award entered 24 March 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 November 2011.

Thomas and Godley, PLLC, by Ben S. Thomas, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Melissa R. Cleary and Tara D. Muller, for defendant-appellants.

STROUD, Judge.

On 24 March 2011, the Industrial Commission filed an Opinion and Award awarding plaintiff "temporary total disability compensation in the amount of $754.00 per week[.]" Defendants appealed. We need not substantively address defendants' arguments on appeal as we must remand for further findings of fact and appropriate conclusions of law based on those findings before such arguments can properly be addressed.

I. Background

It is undisputed that plaintiff sustained a compensable injury when he "was involved in a work-related motor vehicle accident" on 22 March 2007. The dispute involves the type and extent of plaintiff's injuries arising from this accident. In its Opinion and Award the Commission made the following findings of fact:

> 1. At the time of the hearing before the Deputy Commissioner, plaintiff was 42 years of age. Plaintiff has his GED, and an employment history of working as a truck driver or as a heavy equipment operator. Plaintiff was employed as a vacuum customer service representative with Safety Kleen beginning in July 2004.
>
> . . . .
>
> 8. On March 22, 2007, plaintiff was involved in a work-related motor vehicle accident. Defendants admitted the claim as compensable and have paid plaintiff temporary total disability benefits since that time at the maximum weekly compensation rate for 2007 of $754.00. Defendant's also have paid for all approved, related medical treatment.
>
> 9. Following the accident, plaintiff prepared a written accident report. Plaintiff checked a box on the form indicating that he was not injured in the accident.
>
> 10. In describing the accident on that form, plaintiff wrote:
>
> > While making a left hand turn across a two lane other driver was on the inside lane. I crossed the road with plenty of time to make my turn. She then veered to the outside lane for no apparent reason, resulting in hitting me in the rear.
>
> 11. The accident report prepared by the police officer who responded to the accident reported:
>
> I asked Driver Number 1 (plaintiff) what happened and he

> said he was turning left onto Old Tybee from Highway 80 and saw Vehicle Number 2 coming towards him. Driver Number 1 said Driver Number 2 struck the rear passenger side tires of his vehicle. I asked Driver Number 2 what happened and she said driver of Vehicle Number 1 turned in front of her.

12. Plaintiff's handwritten report and the report of the investigating officer were prepared in close proximity to the accident.

13. In his May 30, 2007 visit with Dr. Dockery, plaintiff indicated that his vehicle was stopped on the side of the road and that he had started to exit the vehicle when the other car, traveling at a speed of 74 mph, read ended his vehicle. He further reported that he was thrown about the cab and may have suffered a loss of consciousness. Plaintiff gave this same account to a physical therapist on June 26, 2007, to Dr. VanNess on July 16, 2007, and to Dr. Hill on November 20, 2007.

The Commission then makes numerous findings of fact regarding the opinions of the various doctors regarding plaintiff's alleged injuries. In summary, the doctors' conclusions ran the gamut, with some of the doctors concluding plaintiff had a variety of injuries and medical conditions and was "unable to return to work" and other doctors concluding that plaintiff had not sustained any serious injury and that "there was nothing preventing [plaintiff] from returning to work[.]" But the Commission failed to make any finding of fact as to what injuries plaintiff actually sustained as a result of his 22 March 2007 accident. The Commission did not reconcile the drastically different versions of the accident as described in findings of fact 9, 10, and 11 as compared to finding of fact 13, nor did it make any finding of fact as to what actually happened.

II. Necessary Findings of Fact

On review of a decision of the Commission, we are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law. An appellate court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.

> The Full Commission is the sole judge of the weight and credibility of the evidence. . . . Moreover, *the Commission must make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends.*

Sheehan v. Perry M. Alexander Constr. Co., 150 N.C. App. 506, 510-11, 563 S.E.2d 300, 303 (2002) (emphasis added) (citations and quotation marks omitted). Furthermore,

> [i]t is impossible to exaggerate how essential the proper exercise of the fact-finding authority of the Industrial Commission is to the due administration of the Workmen's Compensation Act. *The findings of fact of the Industrial Commission should tell the full story of the event giving rise to the claim for compensation. They must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them. It is obvious that the court cannot ascertain whether the findings of fact are supported by the evidence unless the Industrial Commission reveals with at least a fair degree of positiveness what facts it finds. It is likewise plain that the court cannot decide whether the conclusions of law and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties upon the matters in controversy if the Industrial Commission fails to make specific findings as to each material fact upon which those rights depend.*

Thomason v. Red Bird Cab Co., 235 N.C. 602, 605-06, 70 S.E.2d 706, 709 (1952) (emphasis added); *see also Lane v. American Nat'l Can Co.*, 181 N.C. App. 527, 531, 640 S.E.2d 732, 735 (2007), *disc. review denied*, 362 N.C. 236, 659 S.E.2d 735 (2008) ("This Court has long held that findings of fact must be more than a mere summarization or recitation of the evidence and the Commission must resolve the conflicting testimony.") "For an injury to be compensable under the Worker's Compensation Act, the claimant must prove three elements: (1) that the injury was caused by an accident; (2) that the injury was sustained in the course of the employment; and (3) that the injury arose out of the employment[;]" *Hollar v. Furniture Co.*, 48 N.C. App. 489, 490, 269 S.E.2d 667, 669 (1980), accordingly, findings of fact regarding these elements are "crucial facts upon which the question of plaintiff's right to compensation depends." *Sheehan*, 150 N.C. App. at 511, 563 S.E.2d at 303; *see Hollar*, 48 N.C. App. at 490, 269 S.E.2d at 669.

In *Sheehan*, this Court recognized the importance of a factual determination as to the history of an injury in the evaluation of the credibility of medical opinions regarding the injury. 150 N.C. App. at 514, 563 S.E.2d at 305. In *Sheehan*, the plaintiff argued that

> there is no competent evidence supporting the Commission's finding that the medical evidence that tends to corroborate plaintiff's account is based on an inaccurate history provided by plaintiff. . . .
>
> . . . .
>
> [The] [p]laintiff also assert[ed] that the history of the injury he provided to medical personnel is unrefuted and without contradiction in his medical records.

Id. at 511-13, 563 S.E.2d at 304-05 (quotation marks omitted). This Court determined that the Commission had not acted arbitrarily or unreasonably in making the contested finding of fact stating:

> Dr. Shaver indicated that plaintiff's condition was consistent with injury in a bulldozer accident, as plaintiff described, Dr. Shaver had no independent knowledge that such an incident occurred.
>
> Once the Commission determined that plaintiff's account of his injury was not credible, it acted within its authority in refusing to give much weight to Dr. Shaver's opinion based on the history supplied by plaintiff. Therefore, we conclude that the Commission's credibility determinations were within its discretion and its findings are supported by competent evidence.
>
> The only record evidence regarding how plaintiff injured his back consists of the account given by plaintiff and the statements of others that are based on plaintiff's account. Once the Commission rejected that account, no evidence remained indicating that plaintiff sustained his injury in a work-related accident. Accordingly the Commission did not act arbitrarily or contrary to reason in concluding that plaintiff failed to carry his burden of proving that his injury is compensable.

150 N.C. App. at 514, 563 S.E.2d at 305. Thus, in *Sheehan*, this Court concluded that the Commission could properly disregard the testimony of Dr. Shaver because his opinion was based upon plaintiff's account of his incident which the Commission had already discounted. *See id.*

Here, it is unclear which version of plaintiff's accident the Commission believed. Overall, the findings of fact seem to indicate that the plaintiff made many misrepresentations and exaggerations as to the accident and his medical condition to the doctors who evaluated him, but the Opinion and Award fails to address its assessment of plaintiff's credibility. The Commission simply states the drastically different tales but does not make any findings as to which is correct. Plaintiff made one report immediately after the accident that he was driving his vehicle which was struck while he was making a left turn, and he was not injured, but approximately two months later, plaintiff claimed "that his vehicle was stopped on the side of the road[,] and he" was getting out of it when the vehicle was struck by another vehicle traveling at 74 mph, causing him to be "thrown about the cab" and possibly losing consciousness. This is not a minor variation in the description of the accident; the two accounts are so different as to seem to be entirely different incidents, but neither party contends that plaintiff was involved in two accidents. The latter account was the one plaintiff provided to the two doctors to whose testimony the Commission "assign[ed] greater weight[.]" Furthermore, it is unclear whether the Commission properly relied on the testimony of the doctors who may have been basing their opinions upon an entirely inaccurate description of the accident. Accordingly, we remand this Opinion and Award to the Commission for further findings of fact regarding which version of plaintiff's accident the Commission believed and to re-evaluate the testimony of the doctors and its conclusions of law based upon the new findings of fact.

III. Conclusion

As the Commission failed to make findings of fact as to the circumstances of plaintiff's accident and as the Commission relied upon the testimony of doctors who may have been provided with an inaccurate account of plaintiff's accident, we remand for further findings of fact and conclusions of law consistent with such findings.

REMANDED.

Judge CALABRIA concurs.

Judge BRYANT dissents in a separate opinion.

BRYANT, Judge, dissenting.

In remanding this matter to the Industrial Commission the majority states that "further findings of fact [are needed] regarding which version of plaintiff's accident the commission believed", and orders the Commission to "re-evaluate the testimony of the doctors and its conclusions of law based upon the new findings of fact." Because I believe the record shows the Commission made findings on crucial facts necessary to support its conclusions of law, I must respectfully dissent from the majority opinion.

The majority is troubled by the seemingly disparate versions of plaintiff's descriptions of the accident. It is indeed disturbing that plaintiff provided differing accounts of the accident. However, as the majority opinion noted in great detail, the commission evaluated the disparate versions. Further, notwithstanding the different versions of the accident as reported by plaintiff, defendants admit compensability for plaintiff's work related accident and (except for a portion of one finding) do not specifically challenge the commission's findings.

The majority would remand the matter to the commission because the majority thinks "it is unclear whether the Commission *properly* relied on the testimony of the doctors who *may* have been basing their opinions upon an entirely inaccurate description of the accident." (emphasis added). I think remanding under such speculative circumstances would represent a change in the standard and extend the current limits of appellate review of decisions of the Industrial Commission. I am unaware of any appellate cases in which a decision of the Industrial commission has been reversed for failure to make findings to reconcile facts where the facts are not in dispute as to compensability of the injury. Therefore, we should be very careful not to extend our authority to areas solely reserved for the commission—credibility of the evidence. Our review is limited to determining whether the findings of fact support the conclusions of law. We may not reweigh the evidence, nor should we insist that evidence be reweighed when there is sufficient evidence to support the Commission's findings of fact and conclusions of law. *Gregory v. W.A. Brown & Sons*, 363 N.C. 750, 767, 688 S.E.2d 431, 442 (2010) (stating that "courts are not at liberty to reweigh the evidence . . . simply because other inferences could have been drawn and different conclusions might have been reached.).

It is well within the province of the Commission to accord greater weight to a doctor whose opinion is based on an accurate medical history than to a doctor whose opinion is based on inaccurate history.

See Sheehan v. Perry M. Alexander Const. Co., 150 N.C. App. 506, 514, 563 S.E.2d 300, 305 (2002). Here, it is apparent the Commission gave significant weight to the medical opinions of Dr. Hill and Dr. VanNess. The Commission found the following:

> 17. On July 16, 2007, Dr. VanNess . . . diagnosed plaintiff with torticollis[.]
>
> . . .
>
> 35. Dr Hill's medical opinion is that plaintiff's condition of torticollis, migraine headaches, seizure-like spasms, as well as depression and anxiety, are all a result of plaintiff's accident on March 22, 2007.
>
> . . .
>
> 38. The Full Commission assigns greater weight to the testimony of Drs. Hill and VanNess, and less weight to the testimony of Dr. Gualtieri, Belanger, and Clodfelter.

After evaluating the evidence, setting out its findings of fact that are supported by the evidence, even though evidence to the contrary does exist, the Full Commission then concluded "by the greater weight of the evidence that plaintiff's torticollis,[and other injuries] are a consequence of his compensable injury on March 22, 2007."

Because the Commission's findings of fact and conclusions are supported by the record as discussed herein, I would affirm the Opinion and Award of the Full Commission.

ODELL DECAROL WILLIAMSON AND LADANE WILLIAMSON, FORMERLY LADANE BULLINGTON, AS TRUSTEES UNDER INSTRUMENT DATED DECEMBER 29, 1988 WITH ODELL WILLIAMSON AND VIRGINIA COX WILLIAMSON, AS GRANTORS, PETITIONERS V. LONG LEAF PINE, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, AND EXUM FAMILY, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, RESPONDENTS

No. COA11-634

(Filed 17 January 2012)

Real Property—boundary dispute—summary judgment proper—expert did not perform survey

A *de novo* review revealed the trial court did not err by granting petitioners' summary judgment motion in a case involving a

boundary dispute. The affidavit prepared by respondents' expert was not substantial evidence that would persuade a person of reasonable mind to accept that the pertinent line was improperly located when respondents' expert had not performed a survey of his own but instead based his conclusions solely on an examination of documents prepared by others.

Appeal by respondents from amended judgment entered 19 January 2011 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 9 November 2011.

Trest & Twigg, Attorneys at Law, by Roy D. Trest, and BaxleySmithwick, PLLC, by Douglas W. Baxley, for petitioners.

Murchison, Taylor & Gibson, PLLC, by Michael Murchison, for respondents.

ELMORE, Judge.

On 17 October 2009, Odell D. Williamson and LaDane Williamson (petitioners), as trustees of Odell Williamson and Virginia C. Williamson, filed a petition in superior court to resolve a boundary dispute. This dispute was with Long Leaf Pine, LLC, and Exum Family, LLC (respondents). On 19 July 2010, petitioners filed a motion for summary judgment, which was granted on 23 December 2010. The trial court entered an amended judgment on 19 January 2011. Respondents appeal, alleging that the trial court erred in granting the motion because there was a triable issue of fact present. After careful consideration, we affirm the decision of the trial court.

On 27 June 1955, the George E. Brooks heirs conveyed to M.C. Gore by deed a parcel of land that comprised the eastern end of Sunset Beach. The eastern boundary of this tract was labeled the "M.C. Gore line," which itself was tied to measurements originating at the western chimney of the George E. Brooks residence.

In 1963, the North Carolina General Assembly established the Town of Sunset Beach and used the M.C. Gore line to denote the eastern boundary line of the town.

A year later, H.R. Hewett surveyed the property retained by the George E. Brooks heirs. This survey showed that the property contained lots labeled numbers 1 through 9, 1 being the easternmost lot and 9 being the westernmost. Lot 9 was bounded on the western side by the M.C. Gore line.

In December 1982, Bobby M. Long, a licensed North Carolina surveyor, surveyed the M.C. Gore line by reproducing the measurements described in the 1955 deed. Those original measurements originate from the western chimney of the George E. Brooks residence. Mr. Long was able to reproduce those measurements because the George E. Brooks residence was still in existence at that time.

On 29 December 1988, petitioners acquired Lot 9 of the George E. Brooks Heirs Subdivision. The deed that made this conveyance refers to the M.C. Gore line as shown on the 1964 H.R. Hewett survey map, on which the line serves as the western boundary of the property.

In March 1990, Bobby M. Long and Samuel T. Inman, who is also a licensed North Carolina surveyor, again surveyed the M.C. Gore line. The George E. Brooks residence was still in existence, so they based their measurements on its location and confirmed that it was in the same location of the line listed in the 1982 survey. The two surveyors confirmed the location of the M.C. Gore line again on two other occasions in July and August 2000.

On 26 October 2004, James R. Tompkins, R.L.S., surveyed Lot 10 of what would become the Palm Cove Subdivision. This plot of land is located to the immediate west of Lot 9. The survey showed the eastern boundary line of Lot 10 to be the M.C. Gore line.

On 10 May 2005, Respondent Exum Family, LLC, acquired Lot 10. This deed stated that the land being conveyed was "Lot 10 as shown on a survey map by James R. Tompkins[.]"

On 2 September 2008, respondent Long Leaf Pine, LLC, acquired by non-warranty deed from Sunset Beach & Twin Lakes, Inc., an area of land lying to the east of the M.C. Gore line, beyond the western border of petitioners' property.

The land which respondent Long Leaf Pine, LLC, acquired in 2008 is on the eastern side of the M.C. Gore line, an area that petitioners contend they own. As a result, on 17 October 2009, petitioners filed this proceeding to establish a true boundary line. On 19 July 2010, petitioners filed a summary judgment motion. Respondents opposed this motion and provided an affidavit from Jack Stocks, a licensed North Carolina surveyor. In his affidavit, Mr. Stocks stated his belief that the M.C. Gore line had been incorrectly platted based on his examination of the surveys listed above. He did not perform a survey of the area.

On 19 January 2011, in its amended judgment, the trial court granted petitioners' motion because there were no genuine issues of material fact present in the pleadings, affidavits, arguments of counsel and memoranda of law of the parties. Respondents now appeal.

"On appeal, an order allowing summary judgment is reviewed *de novo." Tiber Holding Corp. v. DiLoreto*, 170 N.C. App. 662, 665, 613 S.E.2d 346, 349 (2005) (citation omitted). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). "All inferences of fact must be drawn against the movant and in favor of the nonmovant." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (citation omitted). The granting of a motion for summary judgment is proper when "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) (2011).

"The moving party bears the initial burden of coming forward with a forecast of evidence tending to establish that no triable issue of material fact exists." *Briley v. Farabow*, 348 N.C. 537, 543, 501 S.E.2d 649, 653 (1998) (citation omitted).

> The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

Collingwood v. G.E. Real Estate Equities, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted). "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A–1, Rule 56(e) (2011). "[A]n issue is genuine if it is supported by substantial evidence, which is that amount of relevant evidence necessary to persuade a reasonable mind to accept a conclusion." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (quotations and citations omitted). It means "more than a scintilla or a permissible inference." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (quotations and citation omitted).

Respondents argue that the trial court erred by granting petitioners' motion for summary judgment because a genuine issue of fact existed as to the location of the boundary line. Respondents argue that the map and accompanying affidavit prepared by their expert is evidence that is substantial enough to prove that a triable issue of fact exists. We disagree.

As the moving party, petitioners bear the initial burden of establishing that no triable issue of material fact exists. They offered a large amount of evidence in support of their position sufficient to satisfy their burden.

Petitioners presented the 1955 deed that created the disputed M.C. Gore line. This deed contained a description of the line and where it lay, and it listed the measurements necessary to find the location of the line using the chimney of the George E. Brooks residence as a reference point. Petitioners submitted evidence illustrating that the M.C. Gore line was used by the North Carolina General Assembly to mark the eastern boundary of the Town of Sunset Beach when it incorporated the town in 1963. Petitioners submitted a 1964 survey done by H.R. Hewett for the George E. Brooks heirs showing the M.C. Gore line to be the western boundary line of the Brooks property. Petitioners submitted a 1982 survey done by Bobby M. Long in which Mr. Long found the M.C. Gore line to be fixed in the same location stated in the 1955 deed and 1964 survey. Petitioners submitted evidence of three other surveys done in March 1990, July 2000, and August 2000, all of which found the M.C. Gore line to be in the same location.

The evidence submitted by petitioners established that the M.C. Gore line is a well documented boundary line that has been in use for half a century. Petitioners, therefore, provided adequate evidence to shift the burden onto respondents, who had to prove the existence of a genuine issue of fact through substantial evidence.

The only evidence respondents have produced is an affidavit and map prepared by their expert, Jack Stocks. In these documents, Mr. Stocks explained how he analyzed the prior surveys done by petitioners' experts, Mr. Long and Mr. Inman, and concluded from his inspection of those documents that the M.C. Gore line has been inaccurately located. Mr. Stocks, though a licensed North Carolina surveyor, did not perform his own survey of the disputed area. Instead, he based his conclusions solely on an examination of the evidence provided by petitioners.

Respondents believe that this evidence is sufficient to establish the existence of a genuine issue of fact and cite *English v. Holden Beach Realty Corp.*, 41 N.C. App. 1, 254 S.E.2d 223 (1979), in support of this position. *English* involved a similar boundary dispute between several landowners and a road developer who was constructing a road on land the owners claimed was theirs. *Id.* at 2, 254 S.E.2d at 227. The trial court granted the owners' motion for partial summary judgment, and the developer appealed. *Id.* at 3, 254 S.E.2d at 228. The owners produced affidavits from two surveyors and who had surveyed the land in question in support of their position, while the developer produced an affidavit from a competing expert who had surveyed the land and had also examined the surveys done by the owners' experts. *Id.* at 4, 254 S.E.2d at 227-28. This Court held that the affidavit prepared by the developer's expert was sufficient to raise a genuine issue of fact. *Id.* at 11, 254 S.E.2d at 232.

Respondents argue that *English* stands for the idea that a genuine issue of fact can be raised in a boundary dispute through the opinion of an expert who has done nothing but review the maps prepared by other surveyors. We decline to accept respondents' interpretation, as *English* cannot be read to support such an argument and is distinguishable from the case at bar. The expert in *English* did not base his opinion solely on an examination of the surveys prepared by others; he performed his own survey of the land in question. *Id.* at 11, 254 S.E.2d at 232. Here, respondents' expert has not performed a survey of his own and he has based his conclusions solely on an examination of documents prepared by others.

The affidavit prepared by respondents' expert is not substantial evidence that would persuade a person of reasonable mind to accept that the M.C. Gore line was improperly located. Petitioners have put forward a sizeable amount of evidence speaking to the long recognized location of the M.C. Gore line. The line has been used as a boundary by several independent parties, including the State of North Carolina. The line has been surveyed on multiple occasions and found to lie in the same location in each survey.

Respondents must provide substantial evidence in favor of the existence of a material fact that amounts to "more than a scintilla or permissible inference," *DeWitt*, 355 N.C. at 681, 565 S.E.2d at 146 (quotations and citation omitted), and the trial court properly concluded that Mr. Stocks's affidavit was not such substantial evidence.

Accordingly, we hold that the trial court properly granted petitioners' motion for summary judgment.

Affirmed.

Judges BRYANT and STEPHENS concur.

WILLIAM DAVID CARDEN, PLAINTIFF-APPELLANT v. OWLE CONSTRUCTION, LLC, DEFENDANT-APPELLEE

No. COA11-298

(Filed 17 January 2012)

Native Americans—statutorily prescribed method of removing case from superior court to tribal court—consent order

The superior court did not err in a negligence case by denying plaintiff's motion to lift a stay based on its determination that the action was no longer pending in superior court. Although there was no statutorily prescribed method for the "removal" of a case from the General Court of Justice of North Carolina to the Tribal Court, the effect of the parties' consent order was "removal," and the parties were bound by the language of the order. Any argument concerning the jurisdiction of the Tribal Court should be raised in that forum.

Appeal by Plaintiff from order entered 16 December 2010 by Judge Shannon R. Joseph in Superior Court, Durham County. Heard in the Court of Appeals 27 September 2011.

Law Office of Michael W. Patrick, by Michael W. Patrick; and Suzanne Begnoche, for Plaintiff-Appellant.

Bryant, Lewis & Lindsley, P.A., by David O. Lewis, for Defendant-Appellee.

McGEE, Judge.

William David Carden (Plaintiff) was struck by a passing vehicle while standing at a crosswalk at an intersection of U.S. Highway 19, near Harrah's Cherokee Hotel and Casino on the Qualla Boundary. Owle Construction, LLC (Defendant) was carrying out improvements to the curb and sidewalk at that intersection. Plaintiff filed a com-

plaint in Durham County Superior Court (superior court), alleging he was injured as a result of the negligence of Harrah's Operating Company, Inc. and Harrah's N.C. Casino Company, LLC (collectively, Harrah's), as well as the negligence of Defendant.

In a motion dated 12 March 2008, Harrah's and Defendant moved to dismiss Plaintiff's complaint, arguing, *inter alia*, that the Tribal Casino Gaming Enterprise was a necessary party but could not be sued in a North Carolina court because of issues related to sovereign immunity. Harrah's moved, in the alternative, to "remove . . . to the" Cherokee Court of the Eastern Band of Cherokee Indians (the Tribal Court), pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(3). The superior court entered a consent order on 17 April 2008, which contained the following:

> CONCLUSIONS OF LAW
>
> 1. The issues in this matter present difficult issues of subject matter jurisdiction that have not been resolved by controlling decisions of the United States Supreme Court and the North Carolina Supreme Court.
>
> 2. This court makes no decision at present over whether it has subject matter jurisdiction in this matter.
>
> 3. As a matter of comity, . . . Plaintiff should exhaust his remedies before the [Tribal] Court before this court decides the difficult issue of subject matter jurisdiction. The Tribal Casino Gaming Enterprise should be added as party Defendant.
>
> 4. Further proceedings in this matter will be stayed in [superior court] pending the outcome of proceedings in the Tribal Court.
>
> 5. This matter is properly brought before the [Tribal] Court.
>
> NOW, THEREFORE IT IS ORDERED:
>
> 1. That the Tribal Casino Gaming Enterprise is hereby added as party Defendant.
>
> 2. That this matter is removed to the [Tribal] Court.
>
> 3. That after the Clerk [of superior court] transfers this file to the [Tribal] Court, Plaintiff shall file an Amended Complaint naming the Tribal Casino Gaming Enterprise as party defendant.

A jury trial was conducted before the Tribal Court and after "the longest civil trial in Tribal Court history" resulted in a mistrial on 15

December 2009. The Tribal Court thereafter ordered mediation, which resulted in a settlement of Plaintiff's claims against Harrah's and the Tribal Casino Gaming Enterprise. Plaintiff filed a notice of voluntary dismissal with prejudice on 19 May 2010 in the Tribal Court with respect to his claims against Harrah's and the Tribal Casino Gaming Enterprise.

Thereafter, Plaintiff filed a motion with the Tribal Court asking for an order "staying this case or dismissing it, effectively transferring the case to the Superior Court of Durham County." The record on appeal does not contain a copy of Plaintiff's motion, but does contain the Tribal Court's 2 September 2010 order denying Plaintiff's motion.

Plaintiff filed a motion on 21 October 2010, in Superior Court, Durham County, to "lift the stay" pursuant to N.C. Gen. Stat. § 1-75.12. Prior to the superior court's ruling on Plaintiff's motion to lift the stay, Plaintiff also filed in Tribal Court a voluntary dismissal without prejudice of his claims against Defendant. The superior court entered an order on 16 December 2010, denying Plaintiff's motion to lift the stay, concluding that "[b]ecause . . . [P]laintiff's action was removed to the [Tribal] Court and has been completely dismissed in the [Tribal] Court, no case regarding . . . [P]laintiff's claims in this matter is now open in Durham County Superior Court." Plaintiff appeals the superior court's order denying his motion to lift the stay.

I. Issue on Appeal

Plaintiff contends the superior court erred by denying his motion to lift the stay based on its erroneous determination that the action was no longer pending in superior court. Plaintiff asserts the superior court incorrectly determined that this case could be "started in the superior court [and then] removed or transferred from the General Court of Justice to the Cherokee Tribal Court[.]"

II. Standard of Review

A " 'trial court's conclusions of law . . . are fully reviewable on appeal.' " *State v. Robinson*, 187 N.C. App. 795, 797, 653 S.E.2d 889, 891-92 (2007) (citation omitted). " 'Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court.' " *In re Estate of Bullock*, 188 N.C. App. 518, 521, 655 S.E.2d 869, 871 (2008) (citation omitted).

III. Discussion

Plaintiff first argues that the superior court erred in determining that the action was no longer pending in superior court because "there is no mechanism in either federal or North Carolina law to 'remove' or transfer a case from a North Carolina court to Tribal Court." Defendant counters that there is only one action involved in the present case and it was filed in Durham County Superior Court, transferred to Tribal Court, and then dismissed. The fundamental issue in this case is whether the underlying civil action between Plaintiff and Defendant, filed originally in Durham County Superior Court, was "transferred" or "removed" from superior court to the Tribal Court or, instead, was simply stayed while the issue was tried in another jurisdiction.

Our review of case law and the North Carolina General Statutes leads us to the conclusion that Plaintiff is correct in his argument that there is no prescribed statutory method for the "removal" of a case from the General Court of Justice of North Carolina to the Tribal Court. This Court has stated the following concerning the Eastern Band of Cherokee:

> The general subject of Indian law is well beyond the scope of this opinion and we confine ourselves to the issue of jurisdiction over civil suits arising on tribal lands. A few, well-established principles of law bear repeating at the outset, beginning with the proposition that federal power to regulate Indian affairs is plenary and supreme. The states generally have only such power over Indian affairs on a reservation as is granted by Congress, while the tribes retain powers inherent to a sovereign state, except as qualified and limited by Congress.
>
> . . . .
>
> Federal recognition of the Eastern Band as an Indian tribe has at least two major implications for the issue of state jurisdiction: (1) the federal government continues to maintain plenary power over the Eastern Band, a fact which strictly limits extensions of state power . . ., and (2) the Eastern Band, like all recognized Indian tribes, possesses the status of a "domestic dependent nation" with certain retained inherent sovereign powers . . . . These two principles also constitute the test for determining the scope of state court jurisdiction over members of an Indian tribe, referred to by some authorities as the infringement-preemption test.

Wildcatt v. Smith, 69 N.C. App. 1, 3-6, 316 S.E.2d 870, 873-74 (1984) (citations and footnotes omitted). Further,

> "[t]he status of the tribes has been described as 'an anomalous one and of complex character,' for despite their partial assimilation into American culture, the tribes have retained 'a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as *a separate people, with the power of regulating their internal and social relations*, and thus far not brought under the laws of the Union or of the State within whose limits they reside.' "

Jackson Co. v. Swayney, 319 N.C. 52, 55, 352 S.E.2d 413, 415 (1987) (citation omitted).

Thus, the Tribal Court is a "semi-independent" entity. It is neither a division of the General Court of Justice of the State of North Carolina, nor a federal court for which procedures of removal are dictated by the United States Code. An analogue to the relationship between the Tribal Court and a North Carolina state court would be the relationship between a North Carolina state court and a court of another state. For example, if a party files an action in superior court in North Carolina, but the matter is properly a South Carolina action, the proper procedure is not "removal" to South Carolina, but rather for the party to file an action in South Carolina and either dismiss the North Carolina action or move for a stay. *See*, *e.g. Globe, Inc. v. Spellman*, 45 N.C. App. 618, 625, 263 S.E.2d 859, 864 (1980) ("Therefore, defendant's connection with the State of North Carolina is far too attenuated . . . . We hold that the trial court properly dismissed plaintiff's action for want of personal jurisdiction.").

When a petition for removal from state to federal court is filed, the state court shall not enter any further rulings in a case unless it is remanded by the federal court. *See* N.C. Gen. Stat. § 1A-1, Rule 12(a)(2) (2011) ("Upon the filing in a district court of the United States of a petition for the removal of a civil action or proceeding from a court in this State and the filing of a copy of the petition in the State court, the State court shall proceed no further therein unless and until the case is remanded."). Removal of an action from a state court to a federal court is governed by federal law. The determination of whether a case is removable is a determination left to the federal court. *See* 28 U.S.C. § 1332 and 1441; *Kerley v. Oil Co.*, 224 N.C. 465, 466, 31 S.E.2d 438, 439 (1944) ("Federal Courts have final authority in matters of removal[.]"). We have reviewed the Cherokee Code of the

Eastern Band of the Cherokee Nation, and have found no guidance therein for removal of an action from a state court to Tribal Court. We are cognizant that the parties and courts in the present case had no statutory guidance in dealing with the issues before them. The parties executed a consent order whereby the "matter [was] removed to the [Tribal] Court." Further, the superior court's order contained language indicating that the clerk of Durham County Superior Court "transfer[] this file to the [Tribal] Court[.]" The consent order contains language concerning both "a stay" and "removal."

Black's Law Dictionary provides the following definition of removal:

> 1. The transfer or moving of a person or thing from one location, position, or residence to another. 2. The transfer of an action from state to federal court.

Black's Law Dictionary 1409 (9th ed. 2009). In several of the Tribal Court's orders that are contained in the record on appeal before this Court, the Tribal Court refers to this case as having been "transferred to the Tribal Court[.]" In light of the facts that the file was indeed transferred to the Tribal Court and that the Tribal Court, in its own orders, referred to the case as having been "transferred," we are persuaded that the effect of the consent order was "removal," notwithstanding the statutory uncertainty in this area.

Thus, the parties consented to the language in the superior court's order "remov[ing]" the case to the Tribal Court and the entire file was transferred to the Tribal Court. "A consent judgment is a contract between the parties entered upon the records of a court of competent jurisdiction with its sanction and approval." *Price v. Dobson*, 141 N.C. App. 131, 134, 539 S.E.2d 334, 336 (2000) " 'The power of a court to sign a consent judgment depends upon the unqualified consent of the parties thereto[.]' " *Id.* (citation omitted). " 'A duly agreed to and entered consent order in a judicial proceeding is a final determination of the rights adjudicated therein and generally is a waiver of a consenting party's right to challenge the adjudication by appealing therefrom.' " *Id.* (citation omitted).

We therefore hold that, in the absence of clear statutory guidance from either the General Assembly or the legislative body of the Eastern Band of Cherokee, the parties in the present case are bound by the language of their consent order. We view the matter as Defendant characterizes it: this was one action, filed in Durham County, and then removed to the Tribal Court. As the action was

"removed" to Tribal Court and the file was transferred there as well, there was no longer any action pending in Durham County. Thus, the superior court did not err when it concluded: "Because . . . [P]laintiff's action was removed to the [Tribal] Court and has been completely dismissed in the [Tribal] Court, no case regarding . . . [P]laintiff's claims in this matter is now open in Durham County Superior Court." We affirm the superior court's order denying Plaintiff's motion to lift the stay.

Plaintiff also argues that the superior court "should have lifted the order staying the proceedings because in December 2010 no further jurisdiction existed in the Tribal Court for the dispute between Plaintiff and [Defendant]." Any argument concerning the jurisdiction of the Tribal Court would not be a matter for this Court to consider and rule upon. Rather, such issues should be raised before the Tribal Court and the appellate courts of that jurisdiction, as an exercise of "the self-governance of the Eastern Band of Cherokee Indians." *Jackson Co.*, 319 N.C. at 58, 352 S.E.2d at 417.

Affirmed.

Judges ELMORE and HUNTER, JR. concur.

IN THE MATTER OF A.R.P. AND J.B.A.P.

No. COA11-1116

(Filed 17 January 2012)

Termination of Parental Rights—findings of fact—conclusions of law—sufficiency

The trial court's 13 April 2011 order in a termination of parental rights case was reversed and remanded for a complete order including all of the required findings of fact and conclusions of law and a decree as to the disposition of the case.

Appeal by respondent-mother from order entered 13 April 2011 by Judge L. Suzanne Owsley in District Court, Burke County. Heard in the Court of Appeals 3 January 2012.

Stephen M. Schoeberle for petitioner-appellee Burke County Department of Social Services.

Levine & Stewart, by James E. Tanner III, for respondent-appellant mother.

Pamela Newell for guardian ad litem.

STROUD, Judge.

Respondent appeals from the trial court's order dated 13 April 2011. In *In re A.R.P.*, ___ N.C. App. ___, 708 S.E.2d 215, 2011 N.C. App. LEXIS 207 (N.C. App., Feb. 1, 2011) (unpublished), this Court addressed respondent's first appeal from a 17 June 2010 order which concluded that "[s]ufficient grounds exist pursuant to N.C.G.S § 7B-1111(a)(2) for the termination of the parental rights of [respondent]." This Court reversed and remanded the 17 June 2010 order as the "trial court failed . . . to make a specific finding of fact that respondent mother *willfully* left the children in foster care or other placement outside the home or even that she had the ability to show reasonable progress, but was unwilling to make the effort." *Id.* at *10 (emphasis in original). We further explained that

> [b]ecause of the significance of these decisions to the children as well as the parents, it is critical that we ensure that the trial court considered the issues in the correct legal light. Evidence exists in the record that would permit a finding of willfulness, but any such finding cannot be made in the first instance on appeal. Consequently, we must remand for further findings of fact regarding whether respondent mother willfully left her children in foster care for over 12 months. Because we are remanding for further findings of fact, we need not address respondent mother's remaining arguments.

Id. at *11.

On 24 March 2011, the trial court held a hearing on remand. In an order entered 13 April 2011, the trial court made the following "supplemental" findings of fact:

> 1. The Court hereby incorporates the transcript of the May 10, 2010 proceedings herein by reference.
>
> 2. [Respondent] came to the Department's attention after she drove with the minor children in her vehicle on February 19, 2008, after she had consumed prescription drugs. She continued to operate her vehicle in that condition, and on Sept-ember 18, 2008, she was involved in an accident with another vehicle wherein she crossed the center line and struck the other vehi-

> cle, killing the driver and critically injuring the passenger. She currently is serving an active sentence in the North Carolina Department of Corrections [sic] for convictions on charges arising out of that accident.
>
> 3. After the minor children came into the care of the Department in November of 2008 and the jurisdiction of the Court in December of 2008, the Court ordered her on numerous occasions to address her substance abuse issues. She did complete some hours of outpatient treatment and had 2 brief inpatient hospitalizations of 7-10 days for detoxification.
>
> 4. [Respondent's] treatment providers recommended inpatient treatment (28 days at Black Mountain) after both of her detoxifications. She admits that she understood that recommendation but chose not to comply with it on at least 2 occasions. An excuse for one such failure was a court date in these matters, but she didn't call her attorney, the Department or the guardian ad litem to discuss the possibility of a continuance in order for her to enter into and complete such inpatient treatment.
>
> 5. [Respondent] has obtained and used methadone through illegal means. She has continued to use prescription medication on which she has been diagnosed to be dependent.
>
> 6. [Respondent] has understood her substance abuse problems, the need for inpatient treatment, and the fact that the minor children would not be returned to her unless she successfully addressed the problem. She had the financial means and ability to seek such treatment, and in fact she sought detoxification on 2 occasions, but she chose not to seek the recommended 28-day program of inpatient treatment. Moreover, from November of 2008 until her incarceration after the May 20, 2010 hearing, she continuously had the ability to seek the recommended inpatient treatment, but she chose not to do so. That choice was willful.

Based on these findings, the trial court made only one "supplemental" conclusion of law:

> 1. [Respondent] willfully has left the minor children in foster care or placement outside of the home for more than 12 months without making any significant progress in addressing the issue that brought the minor children before the Court.

The 13 April 2011 order does not repeat any of the findings of fact or conclusions of law from the 17 June 2010 order. We first note that

finding of fact No. 1 is unclear. It incorporates a transcript dated 10 May 2010, but the only transcript in the record on appeal is dated 24 March 2011. The original 17 June 2010 order addressed in the first appeal states that a hearing was held as to the termination of respondent's parental rights on 20 May 2010. Therefore, it appears that this is most likely a clerical error in the 13 April 2011 order, and it was actually referring to the 20 May 2010 transcript. However, the incorporation of an entire transcript from the May 2010 hearing is clearly a recitation of facts and cannot constitute a finding of fact. *See In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984) (noting that "verbatim recitations of the testimony" do not "constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." (emphasis in original)). Even if the May 2010 transcript were included in the record on appeal, this Court has no way of knowing which testimony in the transcript the trial court found to be credible, to the extent that there is any conflict in the testimony, when the entire transcript is denominated as a "finding of fact."

Respondent appeals from the 13 April 2011 order arguing that (1) the trial court erred in determining that grounds existed to terminate her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2)(failure to make reasonable progress) and (2) the trial court abused its discretion in determining that it was in the best interest of the children to terminate her parental rights. In the 13 April 2011 order, it appears that the trial court made the necessary findings regarding willfulness, as directed by this Court in the previous appeal. But the trial court's order makes neither a conclusion of law that respondent's parental rights should be terminated nor a conclusion that termination is in the best interest of the children. It appears that the trial court might have assumed that the findings and conclusions from the previous 17 June 2010 order would somehow be incorporated into the 13 April 2011 order. However, the order does not so state, and the 17 June 2010 order was reversed, as noted above, by our previous opinion. *See A.R.P.*, 2011 N.C. App. LEXIS 207, at *11; *State v. Jordan*, 162 N.C. App. 308, 313, 590 S.E.2d 424, 428 (2004) (noting that "[a] reversal is defined as 'an appellate court's overturning of a lower court's decision[,]' " and "[i]n the legal context, 'overturn' means 'to invalidate.' " (quoting *Black's Law Dictionary* 1320 (7th ed. 1999) and *The American Heritage College Dictionary* 976 (3d ed. 1993))). Essentially, the trial court's order is asking us to piece together a complete order terminating respondent's parental rights from (1) the 17 June 2010 order which was previously reversed, (2) the 13 April 2011 order

which addresses only willfulness, and (3) a transcript which is incorporated into the 13 April 2011 order but not included in the record. Even if we could consider the 17 June 2010 order as incorporated into the 13 April 2011 order, as noted above, the transcript, which may have also included findings of fact and conclusions of law regarding termination rendered by the trial court in open court, is not included in the record on appeal.

In respondent's first appeal, this Court did not fully address respondent's substantive issues because the order lacked findings as to willfulness. *See A.R.P*, 2011 N.C. App. LEXIS 207, at *11. We reversed the order and remanded it for additional findings, which would also necessitate new conclusions of law based upon those findings. It was not a foregone conclusion that the trial court would come to the exact same decision on remand as it did in the first order. It appears that the trial court did come to the same decision on remand, but we still cannot address respondent's substantive arguments because we do not have a complete order containing findings of fact which support a conclusion of law that respondent's parental rights should be terminated. In fact, we do not have an order which decrees that respondent's parental rights are terminated. This Court reversed the 17 June 2010 order because it was incomplete and remanded so that the trial court could enter a new order addressing willfulness, but on remand the trial court must also enter an entire new order, as the first 17 June 2010 order was reversed. The final order in a proceeding for termination of parental rights is exceedingly important and it is not the place to take a short cut by entering an incomplete order.

We are well aware that this termination proceeding has been prolonged, and such delay is not in the best interest of the children or any party to this action. But we are simply unable to consider respondent's arguments, as raised in both the first appeal and this appeal, and which were not addressed in the first appeal, where we have no complete order addressing all of the facts and substantive issues. Accordingly, we reverse the trial court's 13 April 2011 order and remand for a complete order including all of the required findings of fact and conclusions of law and a decree as to the disposition of the case, consistent with both this opinion and the opinion issued in the first appeal.

REVERSED AND REMANDED.

Judges STEPHENS and BEASLEY concur.

IN RE J.A.P.

[218 N.C. App. 190 (2012)]

IN THE MATTER OF J.A.P.

No. COA11-1186

(Filed 17 January 2012)

Child Custody and Support—foreign order—lack of subject matter jurisdiction

The trial court lacked subject matter jurisdiction to terminate respondent father's parental rights. A prior child custody order had been entered in New Jersey, nothing in the record indicated New Jersey no longer had exclusive continuing jurisdiction or that a court of North Carolina would be a more convenient forum, nor did any court determine that respondent no longer lived in New Jersey.

Appeal by respondent-father from order entered 11 August 2011 by Judge Margaret Sharpe in District Court, Guilford County. Heard in the Court of Appeals 28 December 2011.

Nicholas S. Ackerman, for petitioner-mother-appellee.

Peter Wood, for respondent-father-appellant.

STROUD, Judge.

Respondent-father appeals from an order terminating his parental rights to his child. For the following reasons, we vacate the order.

Jack[1] was born to petitioner-mother and respondent-father in June 2003 in New Jersey. A New Jersey court entered orders granting custody of Jack to petitioner-mother and requiring respondent-father to pay child support. Respondent-father last saw Jack in 2006, and respondent-mother and Jack moved to North Carolina in 2007. On 9 March 2009, petitioner filed a petition to terminate respondent-father's parental rights in District Court, Guilford County, North Carolina. The petition alleged that respondent-father was "a citizen and resident of . . . New Jersey"[2] and also noted that "[t]he Parties agreed upon custody of the minor child in 2001 to be awarded to the Petitioner while going through mediation in the Mercer County[, New Jersey] Courts." On 31 May 2011, the trial court conducted a hearing on

1. A pseudonym will be used to protect the identity of the minor child.

2. The trial court failed to make any findings of fact regarding the residency of respondent-father. However, the petition and transcript state that respondent-father resides in New Jersey, and neither party contests this fact.

the termination petition, and on 11 August 2011, the trial court entered a written order terminating respondent-father's parental rights. Respondent-father appeals.

In his sole argument on appeal, respondent-father contends the trial court lacked subject matter jurisdiction to enter its termination order because New Jersey retained jurisdiction. Petitioner-mother does not challenge the legal basis of respondent-father's argument but contends that there is no custody order from New Jersey in the record. But petitioner-mother stated in her verified petition that the parties agreed through mediation in a New Jersey court that she would be awarded custody of Jack. Petitioner-mother was required to include this information in her verified petition. *See* N.C. Gen. Stat. § 50A-209 (2009).

N.C. Gen. Stat. § 50A-209 requires:

> (a) In a child-custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:
>
> > (1) Has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, the pleading or affidavit shall identify the court, the case number, and the date of the child-custody determination, if any[.]

N.C. Gen. Stat. § 50A-209. The petition included allegations regarding the child's residency for the prior five years, and although the petition did not state the case number of the prior proceeding, it did include allegations regarding the prior custody proceeding, identification of the court, and the year of the prior determination.

> It is well established in this jurisdiction that a party is bound by his pleadings and, unless withdrawn, amended, or, otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader. Allegations contained in the pleadings of the parties constitute judicial admissions which are binding on the pleader as well as the court.

Universal Leaf Tobacco Co. v. Oldham, 113 N.C. App. 490, 493, 439 S.E.2d 179, 181 (citation, quotation marks, and brackets omitted), *disc. review denied*, 336 N.C. 615, 447 S.E.2d 412 (1994). Thus, there is no real question that a prior custody order was entered in New Jersey, even if there is not a copy of the actual order in the record.

North Carolina General Statute § 7B-1101 provides in pertinent part that

> [t]he court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. Provided, that before exercising jurisdiction under this Article[, Termination of Parental Rights,] regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203[.]

N.C. Gen. Stat. § 7B-1101 (2009).

N.C. Gen. Stat. § 50A-201 addresses subject matter jurisdiction over an initial custody determination. N.C. Gen. Stat. § 50A-201 (2009). An "[i]nitial determination" is defined as "the first child-custody determination concerning a particular child." N.C. Gen. Stat. § 50A-102(8) (2009). Here, the initial custody determination was made by a New Jersey court. Thus, § 50A-201 is inapplicable. *See* N.C. Gen. Stat. § 50A-201.

The remaining possible basis for jurisdiction is N.C. Gen. Stat. § 50A-203, which outlines the requirements for a North Carolina court to have jurisdiction to modify an existing custody determination of another state. *See* N.C. Gen. Stat. § 50A-203 (2009). A North Carolina court cannot modify a custody determination made by another state unless, *inter alia*, one of the following two requirements is met:

> (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
>
> (2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

Id. Although the trial court concluded that it had "jurisdiction over the parties and the subject matter[,]" the trial court made no findings

of fact which would support this conclusion of law. Nothing in the record indicates that a New Jersey court determined that New Jersey "no longer has exclusive, continuing jurisdiction" or "that a court of this State would be a more convenient forum" or that any court has determined that respondent-father no longer lives in New Jersey. Accordingly, N.C. Gen. Stat. § 50A-203 is inapplicable. *See id.* Therefore, we conclude the trial court lacked subject matter jurisdiction over the termination of parental rights proceeding. The order of the trial court must be vacated and this case remanded for entry of an order dismissing petitioner's action. *See In re N.R.M.*, *T.F.M.*, 165 N.C. App. 294, 301, 598 S.E.2d 147, 151 (2004).

VACATED and REMANDED.

Judges STEPHENS and BEASLEY concur.

DOMINION RADIO SUPPLY, INC. D/B/A AUDIO EXPRESS, PLAINTIFF V. CHRISTOPHER COLCLOUGH, DEFENDANT

No. COA11-811

(Filed 17 January 2012)

Damages and Remedies—special probation—restitution—tolling of statute of limitations

The trial court erred by granting summary judgment in favor of defendant on plaintiff's claim seeking restitution in a case where defendant was not convicted of embezzlement, but placed on special probation and required to pay restitution. N.C.G.S. § 1-15.1 was tolled during the one year in which the agreement and order to defer prosecution was in effect.

Appeal by plaintiff from order entered 10 March 2011 by Judge Jane P. Gray in Wake County District Court. Heard in the Court of Appeals 14 November 2011.

Jay B. Green, attorney for plaintiff.

No brief filed by defendant.

ELMORE, Judge.

Dominion Radio Supply, Inc. D/B/A Audio Express (plaintiff) appeals from an order granting summary judgment in favor of Christopher Colclough (defendant). After careful consideration, we reverse the decision of the trial court.

Defendant was an employee of plaintiff from May 2005 until July 2005. Around this time, plaintiff noticed that funds and products were being taken without permission. Durham County law enforcement officers conducted an investigation, and defendant was arrested and charged with embezzlement. On 22 February 2006, the Durham County District Court entered a Motion/Agreement and Order to Defer Prosecution for the embezzlement charge. The order placed defendant on supervised probation for eighteen months. The order also required defendant to abide by special conditions, including the requirements to: 1) complete a TATC drug treatment program, 2) complete fifty hours of community service, 3) and pay restitution to plaintiff in the amount of $8,325.86.

On 1 November 2006, defendant was found to be non-compliant with the deferred prosecution order, because he 1) failed to pay any of the money owed, 2) failed to complete community service, and 3) tested positive for cocaine and opiates. Defendant's case then returned to the trial court. On 26 June 2007, defendant pled guilty to misdemeanor larceny for money taken from plaintiff. Defendant received a suspended sentence and supervised probation for eighteen months. Defendant's new probation did not include an obligation to pay restitution to plaintiff.

In March 2007, plaintiff discovered 1) that defendant had not complied with the terms of the deferred prosecution order, 2) that defendant pled guilty to misdemeanor larceny, and 3) that defendant's new probation did not include an order to pay restitution. On 15 June 2010, plaintiff filed a complaint seeking payment from defendant in the amount of $8,325.86 with interest. On 2 August 2010, defendant filed an answer, claiming that plaintiff's claim was barred by a three year statute of limitations, and requesting that the complaint be dismissed with prejudice. Then, on 20 January 2011 defendant filed a motion for summary judgment. On 10 March 2011, the trial court granted defendant's motion for summary judgment and dismissed plaintiff's complaint. Plaintiff now appeals.

Plaintiff's primary argument on appeal is that the applicable statute of limitations for its claim was tolled during the one year in

which the Motion/Agreement and Order to Defer Prosecution was in effect, pursuant to N.C. Gen Stat. § 1-15.1. We agree.

Here, defendant was ordered to pay restitution as a condition of his probation pursuant to a Motion/Agreement and Order to Defer Prosecution. That order delayed prosecution of defendant for the crime of embezzlement. Thus, defendant was not convicted of the crime. However, defendant was placed on eighteen months' probation and ordered, among other things, to pay restitution to plaintiff as a condition of his probation. Therefore, the facts before this Court establish that 1) defendant was not convicted of embezzlement but 2) defendant was placed on special probation, and required to pay restitution.

Our General Statutes establish that "if a defendant is convicted of a criminal offense and is ordered by the court to pay restitution or restitution is imposed as a condition of probation, special probation, work release, or parole, then all applicable statutes of limitation and statutes of repose, except as established herein, are tolled[.]" N.C. Gen. Stat. § 1-15.1(a) (2009). Plaintiff argues that this section of the statute should be read to mean that the statute of limitations is tolled 1) if defendant is convicted of a crime and ordered to pay restitution or 2) if defendant is ordered to pay restitution as a condition of special probation. We note that plaintiff's suggested interpretation of the word "or" in the statute essentially establishes two categories for tolling the statute of limitations: 1) when defendant is convicted and 2) when defendant is not convicted, but otherwise placed on probation. Likewise, we also note that the other logical manner in which to interpret the word "or" in the statute would be to mean that the statute of limitations is tolled when defendant is convicted and 1) ordered to pay restitution as part of his conviction or 2) ordered to pay restitution as a condition of probation associated with his conviction. By this interpretation, the statute would only toll the statute of limitations if the defendant was in fact convicted of the crime. Thus, we are faced with two possible interpretations of the same statute, and we must decide which interpretation is accurate. In essence, we must decide whether the statute only applies when a defendant is actually convicted of the crime.

> When the language of a statute is clear and unambiguous, 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. If a statute is unclear or ambiguous, however, courts

> must resort to statutory construction to determine legislative will and the evil the legislature intended the statute to suppress.

State v. Jackson, 353 N.C. 495, 501, 546 S.E.2d 570, 574 (2001) (quotations and citations omitted). Here, we conclude that the language of N.C. Gen. Stat. § 1-15.1 is ambiguous, or at the very least it lends itself to more than one interpretation. Accordingly, we will examine the legislative intent in enacting the statute.

The legislative intent in enacting § 1-15.1 has been codified in our General Statutes in N.C. Gen. Stat. § 15B-30. *See* 2004 N.C. Sess. Laws 159, § 3. That statute states in part that "[t]he General Assembly finds that the State has a compelling interest in ensuring that . . . victims of crime are compensated by those who have harmed them." N.C. Gen. Stat. § 15B-30 (2009). Furthermore, it states that "[n]o person who commits a crime should thereafter gain monetary profit as the result of committing the crime." N.C. Gen. Stat. § 15B-30(1) (2009).

It is clear from this language that the legislature intended to enact N.C. Gen. Stat. § 1-15.1 as a way to ensure that victims of crimes are actually compensated. Thus, we conclude that the legislature intended to provide victims with extra time to file suit against a defendant if he failed to pay restitution, by tolling the statute of limitations for the period of time that a defendant was under an obligation to pay restitution.

Here, defendant was obligated to pay restitution to plaintiff as a condition of his probation pursuant to the Motion/Agreement and Order to Defer Prosecution. That order was in place from 22 February 2006 until 26 June 2007, when defendant was found to be non-compliant, and he pled guilty to a lesser offense of misdemeanor larceny. Defendant has never paid any money to plaintiff as restitution. The trial court has determined that N.C. Gen. Stat. § 1-15.1 did not apply to plaintiff's claim, because defendant was not actually convicted of embezzlement. Since defendant has never paid any money to plaintiff, if this Court were to affirm the order of the trial court, defendant will have gained monetary profit as the result of committing a crime. We find that such an outcome would be in direct contradiction to the legislative intent in enacting N.C. Gen. Stat. § 1-15.1. Thus, we conclude that N.C. Gen. Stat. § 1-15.1 does apply to plaintiff's claim. Accordingly, the applicable statute of limitations for plaintiff's claim was tolled by this section during the months in which the Motion/Agreement and Order to Defer Prosecution was in effect. We

reverse the order of the trial court, and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Chief Judge MARTIN and Judge STEPHENS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 JANUARY 2012)

APAC-ATLANTIC, INC. v. FIREMENS INS. CO. No. 11-541	Scotland (08CVS792)	Reversed
CALIBER BUILDERS, LLC v. WASTE WATER SYS. OF N.C., INC. No. 11-652	Wake (08CVS14365) (09CVS25419)	Reversed and Remanded
CHARNOFF v. CALDER No. 11-777	New Hanover (0CVS1586)	Affirmed
FEDERATED FIN. CORP. OF AM. v. JENKINS No. 11-654	Wake (09CVS2084)	Affirmed
IN RE C.D. No. 11-763	Mecklenburg (10JA234)	Affirmed
IN RE C.L.R. No. 11-1195	Haywood (09JT33)	Affirmed
IN RE F.T. No. 11-851	Wake (10JA202)	Affirmed
IN RE G.C. No. 11-705	Orange (10JA95)	Affirmed in part and Reversed in part.
IN RE J.M. No. 11-823	Buncombe (10JA360)	Affirmed
IN RE J.S.S. No. 11-1038	Chatham (10JT43)	Affirmed
IN RE K.M.M. No. 11-943	Stokes (09JT75-76)	Affirmed
IN RE K.S. No. 11-719	Vance (08JA109)	Affirmed
IN RE L.M.R. No. 11-975	Haywood (09JT31-32)	Affirmed
IN RE M.D.B. No. 11-1001	Richmond (10J103) (10J104)	Affirmed
IN RE RICHARDSON No. 11-616	Wake (10SPC4210)	Affirmed remanded for correction of order

IN RE S.R. No. 11-1109	Burke (08J186-187)	Affirmed
IN RE S.S. No. 11-644	Forsyth (96J69)	Affirmed
KNOWLES v. WACKENHUT CORP. No. 11-716	Indus. Comm. (029574)	Affirmed in part; reversed and remanded in part
KRAUS v. WELLS FARGO SEC., LLC No. 11-687	Mecklenburg (10CVS22122)	Affirmed
MATTHEWS v. CMTY. NEWSPAPERS, INC. No. 11-912	Cherokee (10CVS561)	Reversed
MOOSE v. WATKINS No. 11-759	Indus. Comm. (804798) (PH1959)	Affirmed
NIX v. NIX No. 11-743	New Hanover (10CVD5646)	Affirmed in Part, Reversed in Part and Remanded
ORBAN v. WILKIE No. 11-678	Gaston (11CVS222)	Affirmed
ORBAN v. WILKIE No. 11-901	Gaston (11CVS222)	Affirmed
REASONER v. REASONER No. 11-755 Dismissed	Cabarrus (10CVD1784)	Dismissed
SHUMAKER v. WAKE FOREST UNIV. BAPTIST MED. CTR. No. 11-598	Forsyth (10CVS7611)	Reverse
SOLOMON v. N.C. STATE VETERANS NURSING HOME-FAYETTEVILLE No. 11-571	Indus. Comm. (930794)	Affirmed in Part, Remanded in Part
STATE v. BARBER No. 11-695	Wake (09CRS11916)	No Error
STATE v. CALDWELL No. 11-1068	Mecklenburg (08CRS252426) (08CRS252429)	No Error
STATE v. COLEMAN No. 11-486	Mecklenburg (09CRS211845) (09CRS21239)	No Error

STATE v. DANIELS No. 11-825	Wake (09CRS33746-49) (09CRS33839-42) (09CRS33844) (09CRS33917)	No Error
STATE v. DAVIS No. 11-412	Mecklenburg (10CRS19240) (10CRS206456) (10CRS206459)	No Error
STATE v. FRAZIER No. 11-653	Nash (09CRS54263) (09CRS54281) (09CRS54283-85)	No Error
STATE v. GOLDSTON No. 11-636	Wake (07CRS67090) (07CRS67781)	No Error
STATE v. JONES No. 11-287	Gaston (09CRS62874-75)	New Trial
STATE v. KHAN No. 11-368	Wake (08CRS85094) (10CRS652)	Affirmed, in part, vacated and remanded' in part
STATE v. LEWIS No. 11-672	Wake (07CRS84527)	Affirmed
STATE v. LUKER No. 11-699	Jackson (09CRS51335) (09CRS851)	No Error
STATE v. MERRITT No. 11-660	Cumberland (10CRS17094-98)	Affirmed
STATE v. MONTGOMERY No. 11-838	Wake (09CRS206901)	No Error
STATE v. MURPHY No. 11-778	Nash (10CRS7108)	Dismissed
STATE v. OAKES No. 11-979	Forsyth (10CRS8692) (99CRS49353)	No prejudicial error
STATE v. PANECKA No. 11-664	Cumberland (09CRS16623-24) (09CRS54371-72) (09CRS54377)	Dismissed in part; affirmed in part
STATE v. PARKER No. 11-736	Wake (05CRS27921) (08CRS21285)	Affirmed

STATE v. PAYSEUR No. 11-692	Gaston (10CRS51643) (10CRS51644) (10CRS51797)	No error in part; vacated and part
STATE v. PEGUES No. 11-530	Mecklenburg (09CRS201806) (09CRS201817-18)	No Error
STATE v. RAEWKIN No. 11-680	Lincoln (06CRS52635) (07CRS3058)	No Error
STATE v. SIMPSON No. 11-762	Forsyth (10CRS55627)	No Error
STATE v. SISK No. 11-741	Cleveland (10CRS1842) (10CRS52244)	No Error
STATE v. THOMAS No. 11-819	Hertford (07CRS3544-46)	No Error
STATE v. WELLS No. 11-909	Mecklenburg (10CRS217769) (10CRS217771)	No Error
STATE v. WHITE No. 11-558	Perquimans (08CRS50112) (08CRS50113)	No Error
STATE v. WHITE No. 11-656	Catawba (08CRS50884) (09CRS4322)	No error at trial; remand for correction of clerical errors in judgment
STATE v. WILSON No. 11-605	Guilford (09CRS23298) (09CRS89562) (09CRS90055)	No Error
STATE v. YOUNG No. 11-488	Wayne (08CRS54255)	No Error
WACHOVIA BANK OF DELAWARE, N.A. v. ASKEW No. 11-1039	Lenoir (07CVS1902)	Dismissed
WAYNE HOOD CONSTR., INC. v. HENNESSEY No. 11-771	Mecklenburg (10CVS22900)	Dismissed

STATE OF NORTH CAROLINA v. TANYA LAINE BALLANCE, FRANK PASCAL BALLANCE, and RICHARD A. SWAIN

No. COA11-620

(Filed 17 January 2012)

1. Animals—bear baiting—type of feed—one offense

The trial court did not err by failing to dismiss misdemeanor statements of charges arising from bear baiting where defendant argued that N.C.G.S. § 113-291.1(b)(2) set out eight separate offenses, depending upon the type of bait used, so that the statements of charges had to indicate which of the separate offenses the co-defendant had violated. However, the criminal pleadings in this case tracked the language of the statute, which did not create a separate offense for each type of listed bait.

2. Search and Seizure—bear baiting evidence—entry into open field

The trial court did not err in a bear baiting case by denying defendants' motion to suppress evidence that investigating officers obtained upon entering defendant Frank Balance's property without permission or a warrant. In light of the undisputed evidence reflected in the court's findings, the property in question constituted an "open field," so that the officers' entry and their observations did not constitute a search for Fourth Amendment purposes.

3. Evidence—harmless error—overwhelming evidence of guilt

Any error the trial court may have made in a bear baiting case by allowing the admission of photographs, videotapes, and physical evidence was harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt.

4. Animals—bear baiting—sufficiency of evidence—intent to violate law not required

The trial court did not err in a bear baiting case by denying defendant's motion to dismiss for insufficiency of the evidence. Although defendants argued that they must have acted knowingly and with a conscious intent to violate the law, the relevant statutory language does not include wording suggesting that the existence of any particular mental state is an essential element of the offense.

5. Constitutional Law—effective assistance of counsel—co-defendant's statements about defendant's guilt—no impact on trial

Trial counsel in a bear baiting case did not provide deficient representation to defendant Swain by failing to obtain a severance of the trial or by not objecting to the testimony during trial, ensuring that a codefendant's statements concerning Swain's guilt not be considered by the jury. There was ample evidence of defendant Swain's guilt.

6. Evidence—photographs and physical evidence—no material effect on trial

Given defendant Swain's admissions and an officer's testimony about his observations of Mr. Swain, any error in the admission of photographs, videotapes, and processed food items in a bear baiting case did not have any material effect on the trial.

Appeal by defendants from judgments entered 1 October 2010 by Judge Wayland J. Sermons in Hyde County Superior Court. Heard in the Court of Appeals 7 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General C. Norman Young, Jr., for the State.

Paul F. Herzog for Defendant Richard A. Swain.

McLean Law Firm, P.A., by Russell L. McLean, III, for Defendants Tanya Laine Ballance and Frank Pascal Ballance.

ERVIN, Judge.

Defendants Frank Pascal Ballance, Tanya Laine Ballance[1], and Richard A. Swain appeal from judgments imposing a 45 day suspended sentence upon Ms. Ballance based upon her conviction for taking a bear with the aid of bait, imposing a 45 day suspended sentence upon Mr. Ballance based upon his conviction for aiding and abetting Ms. Ballance in taking a bear with the aid of bait, and imposing a 45 day suspended sentence upon Mr. Swain based upon his convictions for taking a bear with the aid of bait and placing processed food as bait in an area designated for bear hunting. On appeal, all three Defendants argue that the trial court erred by denying their motion to suppress evidence seized from Mr. Ballance's

1. Tanya Ballance is the daughter of Frank Ballance.

property. In addition, Mr. and Ms. Ballance argue that the trial court erred by failing to dismiss the misdemeanor statements of charges that had been filed against them and denying their dismissal motions. Finally, Mr. Swain argues that he received ineffective assistance of counsel because his trial counsel failed to seek to have his trial severed from that of Ms. Ballance or to object to the admission of certain statements that Ms. Ballance made to investigating officers. After careful consideration of Defendants' challenges to the trial court's judgments in light of the record and the applicable law, we conclude that Defendants are not entitled to any relief on appeal.

I. Factual Background

A. Substantive Facts

1. State's Evidence

On 22 September 2008, North Carolina Wildlife Officers Robert Wayne and David Woods entered a tract of swampy and wooded property owned by Mr. Ballance that contained more than 100 acres. At a location near an old logging road that ran through the property, Officer Wayne discovered two barrels that had been chained to trees, one of which was a green barrel that contained corn and the other of which was a black barrel that contained sliced bread, and a "metal case made for a trail camera" that had also been chained to a tree. Having seen similar sights on "hundreds" of prior occasions, Officer Woods associated the use of such barrels with efforts to attract bears. In addition, Officer Wayne observed bear excrement near the barrels, game trails that appeared to have been made by bears, and claw marks on the trees.

On 25 September, Officers Wayne and Woods returned to the barrel site, where they observed additional food items that had not been present on 22 September, including watermelon, cantaloupe, pine apple, strawberries, "suckers, some princess snacks, ring pops, cheddar cheese nab crackers, raisins, Starburst fruit-flavored snacks, and Peeps." On 1 October, Officer Wayne returned to the barrel site with Officer Woods and North Carolina Wildlife Officer Parks Moss. At that time, some of the food items that Officers Wayne and Woods had previously observed were still present. In addition, Officer Wayne saw spent shotgun shells near the tree to which the green barrel had been attached[2] and indications that nearby limbs and vegetation had been cut.

2. Mr. Swain subsequently told Officer Wayne that the shotgun shells had been left when he shot holes into a barrel to facilitate chaining it to a tree.

When Officer Wayne returned to the barrel site on 7 October, he noticed fresh corn in the green barrel and a camera in the box chained to a tree. At about 9:30 p.m. on 9 October, Officers Wayne and Woods came to the barrel site and saw fresh corn in the green barrel, chocolate frosting near a box that had contained a commercially-prepared chocolate cake, and evidence of heavy black bear activity. The camera that had been inside the metal box was no longer there.

On 10 and 11 October, Officer Woods made video recordings of his observations at the site. Officer Woods noted that the ground near the barrels had been trampled on or matted down and that a lot of "bear scat" was present. On the second of these two dates, Officer Woods videotaped a bear eating from the green barrel. Several hours later, Officer Woods saw Mr. Ballance unload a deer carcass at the site and place it "right at the base of the barrel."

On 18 October, Officers Wayne and Woods encountered Defendants in Mr. Ballance's truck. At that time, Defendants told Officer Wayne that they had been hunting deer. Both officers saw a deer in the bed of Mr. Ballance's truck. On 24 October, Officers Wayne and Woods observed deer carcasses at the barrel site and "deer meat cut up and placed on top of the corn in the barrel."

Officer Woods returned to the barrel site on 28 and 30 October. On 28 October, Officer Woods "discovered an orange barrel with what appeared to be old corn inside the barrel and on the ground," "a white five-gallon bucket that had blood streaks inside the bucket itself," and "several deer carcasses and deer parts around the vicinity of the barrel." Branches had been cut from nearby trees so as to afford a clear view of the barrels from a nearby vantage point. On 30 October, Officer Woods saw Mr. Swain and Ms. Ballance driving slowly past the area in a truck with barrels in the bed.

Officer Woods next visited the barrel site on 3 November. At that time, Officer Woods saw a new orange barrel that contained blood and grains of corn. As Officer Woods observed the site, Mr. Swain arrived with a package of Oreo cookies and other processed food items. Mr. Swain distributed the cookies and other items near the barrels, filled a barrel with corn, picked up the orange barrel that contained blood and corn, and drove away. After Mr. Swain's departure, Officer Woods collected various items from the site, including sugar cookies and Halloween candy that Mr. Swain had deposited at the site. On 9 November, Officer Woods "found Apple Jacks cereal, taco shells, both soft and hard shell tacos, and zebra cakes actually inside the barrel mixed in with the corn" at the site.

On 10 November, the opening day of bear-hunting season, Officer Woods went to the barrel site at around 4:00 p.m. At that time, he saw Mr. Swain "wearing a reddish orange color shirt, camouflage pants, and blaze orange hat" and Ms. Ballance wearing "a light camouflage pattern shirt, blue jeans, [and] blaze orange hat." Both Mr. Swain and Ms. Ballance were carrying firearms. After their departure, Officer Woods observed sugary cereal mixed with corn in one of the barrels.

At around 3:30 p.m. on 11 November, Officer Woods saw Mr. Swain's truck drive by the barrel site. A few minutes later, Mr. Swain and Ms. Ballance walked past, accompanied by a young child. Both Mr. Swain and Ms. Ballance were carrying rifles and wearing the same camouflaged clothing that they had worn on the preceding day. Mr. Swain, Ms. Ballance, and the child sat down about 20 yards from the barrels in the vicinity of the area in which the tree limbs had been cut.

Just before 5:00 p.m., Officer Woods heard a rifle shot from the direction of the barrels, followed by the noise of a bear running away from the barrel site. Up until that point, Officer Woods had not seen or heard any indication of the presence of dogs. About fifteen minutes later, Mr. Ballance came to the vicinity of the barrels with a dog on a leash. At that point, Officer Woods informed Ms. Ballance and Mr. Ballance of his presence. Ms. Ballance told Officer Woods that "she'd shot at the bear, that she missed it, and they got the dogs out to try and find it." At another point, Ms. Ballance stated that she did not know whether she had hit the bear when she shot at it.

After learning that a shot had been fired near the barrel site, Officer Wayne came to the entrance to Mr. Ballance's property. At the time of his arrival, which occurred at about dusk, he saw Mr. Swain talking to Officer Moss. Mr. Swain told the investigating officers that "they" had shot a deer back in the Ballance woods; however, he did not identify his companions at that time.

Officer Wayne rode with Mr. Swain to the barrel site, where he saw Officer Woods, Mr. Ballance, Ms. Ballance, and a child. At that point, Mr. Ballance admitted having placed two deer carcasses near the barrels and said that, after Ms. Ballance shot at the bear, he brought one of his "bear dogs" to the trail and unsuccessfully attempted to track it. Similarly, Ms. Ballance acknowledged having been present when deer carcasses were left at the barrel site and that she had been with Mr. Swain when food was left there. However, Ms. Ballance did not recall what type of food had been left at the barrel site on those occasions. Ms. Ballance also admitted that she had been

at the barrel site with Mr. Swain and a child earlier that day and that, when a bear appeared, she had urged the child to shoot the bear. However, since the child was unable to shoot the bear, it began to walk away. At that point, Mr. Swain whistled at the bear and Ms. Ballance shot at it with a rifle. However, Ms. Ballance did not know whether she had hit the bear.

2. Defendant's Evidence

a. Testimony of Mr. Ballance

Mr. Ballance testified that he had owned the property on which the barrels were located for about thirty-five years. Although he generally used the property for hunting, "from time to time people would have a freezer go bad or a refrigerator go bad and they had some food or something that they needed to get rid of, carry it up yonder and dump it out." Since his trash was only collected once a week, if an item "was going to get smelly, [he'd] take it up to the property and discard . . . it." Mr. Ballance had dumped deer carcasses at the barrel site on prior occasions and admitted having done so on 11 October 2008. In addition, Mr. Ballance acknowledged that he had driven onto his property just behind Mr. Swain and Ms. Balance on 11 November 2008 and that, after doing so, he had stopped and waited. At around 5:00 p.m., Mr. Ballance had received a phone call from Ms. Ballance in which "[t]hey called [him] to try to help them find the bear." As a result, Mr. Ballance drove to the barrel site, "took [his] dog[,] and went out through the woods in the direction that they felt like the bear may have gone."

b. Testimony of Mr. Swain

Mr. Swain testified that he had used Mr. Ballance's property to "[d]ump garbage" and that, if "a refrigerator went to the bad, [or] a freezer went to the bad, [he] dumped all of that stuff out of there." Mr. Swain admitted having dumped Easter candy at the barrel site on one occasion and having dumped spoiled food there in June or July, 2008. In addition, Ms. Ballance had dumped deer carcasses at the barrel site. Between July and November, 2008, Mr. Swain had left corn at the barrel site as well. Mr. Swain had been at the barrel site on 3 November 2008 and had put corn in the barrels on that occasion. However, he denied having left candy or other processed food items at the barrel site at that time.

Mr. Swain and Ms. Ballance were in the area of the barrel site on 10 November for the purpose of assessing hunting prospects. At that

time, they saw four bears. On the following day, Mr. Swain and Ms. Ballance went to Mr. Ballance's property along with Ms. Ballance's six year old son, who wanted to shoot a bear. Although a bear came within ten or fifteen yards of their location, the boy was unable to fire the rifle. "He said he couldn't [shoot], so as it come on up and . . . it turned and started walking towards the truck, so as it turned to the truck, [Ms. Ballance] shot." The bear was about forty or fifty yards from the barrels when Ms. Ballance shot at it. At that point, Ms. Ballance called her father, who arrived shortly thereafter.

Subsequently, Mr. Ballance and Mr. Swain searched for the bear:

> From that point, we went—took [Mr. Ballance's] dog, went back into the woods. We walked-. . . there's a swamp run right here. You can see where the territory actually changes . . . and from that point we walked the edge of that trying to find something. We didn't ever find nothing, and then we walked back to the path where the bear actually made its turn and went back in the woods and then from that point I told him, I said, "Well, I'll just go to the house[.]"

After their unsuccessful search for the bear, Mr. Swain began to drive out of Mr. Ballance's property. As he did so, Officer Moss stopped Mr. Swain and asked what he had been doing. Although he acknowledged that he had told Officer Moss that he had shot a deer, Mr. Swain admitted on cross-examination that this statement was not true. In addition, Mr. Swain admitted that he had put corn out at the barrel site on 3 November, that he and Ms. Ballance had shot several deer during October 2008, that Ms. Ballance had disposed of one or more deer carcasses at the barrel site, and that he had erected a trail camera at the barrel site.

3. State's Rebuttal Evidence

On 11 November 2008, Officer Moss was assigned "to work the site that Officer Wayne and Officer Woods had located for a possible bear bait." Officer Moss hid near the entrance to Mr. Ballance's property, which was blocked by a cable. At approximately 3:30 p.m., he heard two vehicles stop at the cable, then heard someone lower the cable, and both vehicles drove onto the property. After entering Mr. Ballance's property, one truck drove into the interior of the property while the other waited near the gate. After hearing a shot fired at about 5:00 p.m., Officer Moss "heard the truck crank up and drive further into the property." Shortly thereafter, Mr. Swain's truck approached the gate, so Officer Moss revealed himself. At that point,

Mr. Swain told Officer Moss that he had just shot a deer and that his companions were looking for it. After speaking with Mr. Swain, Officer Moss drove farther onto the property and spoke to Ms. Ballance, who told him that she had just shot at a bear. Officer Moss saw the remains of several animals at the barrel site later that night.

B. Procedural History

On 11 November 2008, citations were issued charging all three Defendants with placing processed food as bait in an area where there is an open season for hunting black bear in violation of N.C. Gen. Stat. § 113-294(r), charging Ms. Ballance and Mr. Swain with unlawfully taking a black bear with the aid of bait in violation of N.C. Gen. Stat. § 113-294(c1), and charging Mr. Ballance with aiding Ms. Ballance in taking a black bear with the aid of bait in violation of N.C. Gen. Stat. § 113-294(c1). In the Hyde County District Court proceedings, misdemeanor statements of charges were filed charging (1) Ms. Ballance with placing processed food as bait in an area where there is an open season for hunting black bear in violation of N.C. Gen. Stat. § 113-294(r) and taking a black bear with the aid of bait in violation of N.C. Gen. Stat. § 133-291.1(b)(2); (2) Mr. Ballance with aiding and abetting Ms. Ballance in taking a black bear with the aid of bait in violation of N.C. Gen. Stat. § 113-291.1(b)(2) and placing processed food as bait in an area where there is an open season for hunting black bear in violation of N.C. Gen. Stat. § 113-294(r); and (3) Mr. Swain with taking a black bear with the aid of bait in violation of N.C. Gen. Stat. § 113-291.1(b)(2) and placing processed food as bait in an area where there is an open season for hunting black bear in violation of N.C. Gen. Stat. § 113-294(r).[3] On 25 November 2009, all three Defendants were convicted as charged in the Hyde County District Court. Each Defendant noted an appeal to the Hyde County Superior Court from the District Court judgments.

On 21 September 2010, Defendants filed a motion seeking the suppression of "all evidence seized or discovered" on Mr. Ballance's property. After a hearing held prior to the beginning of the trial, the trial court orally denied Defendants' motion. On 6 January 2011, the trial court entered a written order denying Defendants' suppression motion.

3. The District Court misdemeanor statements of charges are not contained in the record on appeal. However, counsel for the State and Defendants appeared to agree at the beginning of the Superior Court proceedings that the District Court misdemeanor statements of charges were identical to the Superior Court misdemeanor statements of charges discussed later in this opinion except for the clarification of a date-related issue.

The charges against Defendants came on for trial before the trial court and a jury at the 27 September 2010 Criminal Session of Hyde County Superior Court. On 27 September 2010, superseding misdemeanor statements of charges were filed charging (1) Ms. Ballance with placing processed food as bait in an area where there is an open season for hunting black bear in violation of N.C. Gen. Stat. § 113-294(r) and unlawfully taking a black bear with the aid of bait in violation of N.C. Gen. Stat. § 113-294(b)(2); (2) Mr. Ballance with aiding and abetting Ms. Ballance's unlawful taking of a black bear with the aid of bait in violation of N.C. Gen. Stat. § 113-294(b)(2) and placing processed food as bait in an area where there is an open season for hunting black bear in violation of N.C. Gen. Stat. § 113-294(r); and (3) Mr. Swain with placing processed food as bait in an area where there is an open season for hunting black bear in violation of N.C. Gen. Stat. § 113-294(r) and unlawfully taking a black bear with the aid of bait in violation of N.C. Gen. Stat. § 113-291.1(b)(2). At trial, the trial court granted Defendants' motion to dismiss the instruments charging Ms. Ballance and Mr. Ballance with placing processed food as bait in an area in which there is an open season for hunting black bear in violation of N.C. Gen. Stat. § 113-294(r). At the conclusion of the trial, the jury returned verdicts convicting Ms. Ballance of taking a black bear with the aid of bait in violation of N.C. Gen. Stat. § 113-291.1(b(2), convicting Mr. Ballance of aiding and abetting Ms. Ballance in the taking a black bear with the aid of bait in violation of N.C. Gen. Stat. § 113-291.1(b)(2), and convicting Mr. Swain of taking a black bear with the aid of bait in violation of N.C. Gen. Stat. § 113-291.1(b)(2) and with placing processed food as bait in an area in there is an open season for hunting black bear in violation of N.C. Gen. Stat. § 113-294(r). After accepting the jury's verdicts, the trial court sentenced all three Defendants to 45 days imprisonment, suspended each sentence, and placed Defendants on unsupervised probation for a period of 18 months, subject to certain terms and conditions. Defendants noted an appeal to this Court from the trial court's judgments.

II. Legal Analysis

A. Nature of Charged Offenses

As a preliminary matter, it would be helpful to review the nature of the offenses with which Defendants were charged. Mr. Swain was convicted of violating N.C. Gen. Stat. § 113-294(r), which provides that:

> It is unlawful to place processed food products as bait in any area of the State where the Wildlife Resources Commission

> has set an open season for taking black bears. For purposes of this subsection, the term "processed food products" means any food substance or flavoring that has been modified from its raw components by the addition of ingredients or by treatment to modify its chemical composition or form or to enhance its aroma or taste. The term includes substances modified by sugar, honey, syrups, oils, salts, spices, peanut butter, grease, meat, bones, or blood, as well as extracts of such substances. The term also includes sugary products such as candies, pastries, gums, and sugar blocks, as well as extracts of such products. . . .

In addition, all three Defendants were convicted of violating N.C. Gen. Stat. § 113-291.1(b)(2), which provides, in pertinent part, that "[n]o black bear may be taken with the use or aid of any salt, salt lick, grain, fruit, honey, sugar-based material, animal parts or products, or other bait[.]" According to N.C. Gen. Stat. § 113-130(7), the term "take," when used in the wildlife context, includes "[a]ll operations during, immediately preparatory, and immediately subsequent to an attempt, whether successful or not, to capture, kill, pursue, hunt, or otherwise harm or reduce to possession" a bear. As a result, in order to convict a defendant of violating N.C. Gen. Stat. § 113-291.1(b)(2), the State must prove that the defendant:

> 1. Performed or engaged in an operation "during, immediately preparatory, and immediately subsequent to an attempt, whether successful or not, to capture, kill, pursue, hunt, or otherwise harm or reduce to possession" a bear, and that
>
> 2. The taking was "with the use or aid of any salt, salt lick, grain, fruit, honey, sugar-based material, animal parts or products, or other bait[.]"

B. Appeal by Ms. Ballance and Mr. Ballance

1. Misdemeanor Statement of Charges

[1] In their initial challenge to the trial court's judgments, Mr. Ballance and Ms. Ballance argue that the trial court erred by failing to dismiss the misdemeanor statements of charges that had been filed against them for the purpose of alleging a violation of N.C. Gen. Stat. § 113-291.1(b)(2) on the grounds that these criminal pleadings were "fatally defective." We disagree.

N.C. Gen. Stat. § 15A-924(a)(5) provides that "a criminal pleading must contain:"

> (5) A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation. . . .

The misdemeanor statement of charges alleging that Ms. Ballance violated N.C. Gen. Stat. § 113-291.1(b)(2) states that, "on or about November 11, 2008 and in the county named above, the defendant named above unlawfully, willfully did take a big game animal, black bear, with the use and aid of animal parts or other bait." Similarly, the misdemeanor statement of charges charging Mr. Ballance with aiding and abetting a violation of N.C. Gen. Stat. § 113-291.1(b)(2) alleges that, "on or about November 11, 2008 and in the county named above, the defendant named above unlawfully, willfully did aid and abet [Ms. Ballance] in the taking of a big game animal, black bear, with the use and aid of animal parts or other bait." Since both criminal pleadings track the language of N.C. Gen. Stat. § 113-291.1(b)(2), *State v. Singleton*, 85 N.C. App. 123, 126, 354 S.E.2d 259, 262 (stating that "[a]n indictment couched in the language of the statute is generally sufficient to charge the statutory offense") (citing *State v. Palmer*, 293 N.C. 633, 637, 239 N.C. 406, 409 (1977), *disc. review denied*, 320 N.C. 516, 358 S.E.2d 530 (1987), we conclude that they sufficiently charge the commission of a criminal offense and are not "fatally defective."

In seeking to persuade us to reach a contrary conclusion, Defendants note that N.C. Gen. Stat. § 113-291.1(b)(2) provides that no black bear may be taken "with the use or aid of any salt, salt lick, grain, fruit, honey, sugar-based material, animal parts or products, or other bait" and claim that "[e]ach of these items if used is a separate offense." In other words, Defendants contend, in reliance upon *State v. Madry*, 140 N.C. App. 600, 537 S.E.2d 827 (2000), that N.C. Gen. Stat. § 113-291.1(b)(2) sets out eight separate offenses which differ based solely upon the specific type of bait allegedly utilized by the defendant to take a bear. We do not find this argument persuasive.

The defendant in *Madry* was charged with violating N.C. Gen. Stat. § 113-294(c1) under an aiding and abetting theory based upon a warrant alleging that he "unlawfully, willfully did aid and abet Richard G. McCormack by taking bear with use and aid of bait." *Madry*, 140 N.C. App at 601, 537 S.E.2d at 828. Although the warrant in question specified the manner in which the defendant allegedly aided and abetted his co-defendant, it failed to identify the offense

committed by that co-defendant. N.C. Gen. Stat. § 113-294(c1) makes it unlawful to "take[], possess[], transport[], sell[], possess[] for sale, or buy[] any bear or bear part" and specifies that "[e]ach of the acts specified shall constitute a separate offense." Thus, in order to properly charge the defendant with aiding and abetting a violation of N.C. Gen. Stat. § 113-294(c1), the warrant had to indicate which of these separate offenses the co-defendant had committed.

N.C. Gen. Stat. § 113-291.1(b)(2) does not, however, create a "separate offense" for each and every type of bait listed in the relevant statutory language. Instead, " 'a single wrong [may be] established by a finding of various alternative elements," since "[t]he crime of [taking a bear with the use or aid of bait] is a single offense which may be proved by evidence of the commission of any one of a number of acts.' " *State v. Jones*, 172 N.C. App. 308, 315, 616 S.E.2d 15, 20 (2005) (quoting *State v. Hartness*, 326 N.C. 561, 566-67, 391 S.E.2d 177, 180 (1990)) (discussing the offense of taking indecent liberties with a child). Having rejected the contention that N.C. Gen. Stat. § 113-291.1(b)(2) creates a separate offense for each type of bait allegedly used by the defendant, there is no basis for concluding that the criminal pleadings filed against Ms. Ballance and Mr. Ballance should have been dismissed.

2. Suppression Motion

[2] The record clearly establishes that, on several occasions between 22 September and 11 November 2008, investigating officers entered Mr. Ballance's property without obtaining either Mr. Ballance's permission or the issuance of a search warrant. At trial, these officers testified concerning the observations that they made during their investigation and identified photographs, videotapes, and items of food that had been taken from the barrel site. On appeal, Ms. Ballance and Mr. Ballance argue that the trial court erred by denying their motion to suppress the evidence that investigating officers obtained as the result of their entry onto Mr. Ballance's property on the grounds that this evidence had been obtained as a result of a violation of their federal and state right to be free from unreasonable searches and seizures. Defendant's argument lacks merit.

"The Fourth Amendment to the United States Constitution protects the 'right of the people to be secure [in their persons, houses, papers, and effects,] against unreasonable searches and seizures.' U.S. Const. amend. IV. . . . Article I, Section 20 of the North Carolina Constitution provides similar protection against unreasonable

seizures." *State v. Campbell*, 359 N.C. 644, 659, 617 S.E.2d 1, 11 (2005) (citing *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994)), *cert. denied*, 547 U.S. 1073, 126 S. Ct. 1773, 164 L. Ed. 2d 523 (2006). "Before resorting to the rules of search and seizure, it must first be determined whether the conduct complained of was within the sphere of Fourth Amendment protection. . . . '[C]apacity to claim the protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion.' " *State v. Boone*, 293 N.C. 702, 708, 239 S.E.2d 459, 463 (1977) (quoting *Mancusi v. DeForte*, 392 U.S. 364, 368, 88 S. Ct. 2120, 2134-24, 20 L. Ed. 2d 1154, 1159 (1968)). The "special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields." *Hester v. United States*, 265 U.S. 57, 59, 44 S. Ct. 445, 446, 68 L. Ed. 898, 900 (1924).

> [T]he term "open fields" may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither "open" nor a "field" as those terms are used in common speech. For example, . . . a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment. . . . [A]n individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers. . . . Nor is the government's intrusion upon an open field a "search" in the constitutional sense because that intrusion is a trespass at common law.

Oliver v. United States, 466 U.S. 170, 180, 104 S. Ct. 1735, 1742, 80 L. Ed. 2d 214, (1984) (citations omitted).

As a result of the fact that Defendants have not challenged the sufficiency of the evidence to support the trial court's findings, those findings "are deemed to be supported by competent evidence and are binding on appeal." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citation omitted). Among other things, the trial court found that:

> 5. The Ballance Land has previously been hunted upon by Defendant Ballance and others.
>
> 6. That the land consists of nearly 119 acres of wooded land . . . .
>
> 7. That Defendant, Frank Bal[l]ance's residence is four to five miles from the Ballance Land.

. . . .

28. There are no buildings or residences contained on this tract of land known as the Ballance Land.

29. Residential activities of any type do not take place upon this tract of land known as the Ballance Land.

30. That Hunting is the only activity that takes place upon this property other than the growing of trees.

In light of the undisputed evidence reflected in the trial court's findings, we conclude that the property in question constituted an "open field," so that the investigating officers' entry onto the property and the observations that they made while they were there did not constitute a "search" for Fourth Amendment purposes. *Hester*, 265 U.S. at 59, 44 S. Ct. at 446, 68 L. Ed. at 900[4] Although Mr. Ballance and Ms. Ballance urge us to reach a contrary conclusion on the grounds that, given the size, extent, and condition of Mr. Ballance's property, they had a legitimate expectation of privacy with respect to the tract's interior, the factors upon which they rely do not obviate the fact that the tract in question is, for purposes of "search and seizure" law, an "open field." As a result, the trial court properly rejected Defendants' challenge to the testimony of the investigating officers concerning the observations that they made while on Mr. Ballance's property during the course of their investigation.

[3] In addition, Ms. Ballance and Mr. Ballance challenge the taking of various photographs, the making of various videotapes, and the seizure of various items of physical evidence from the property on the grounds that this action violated their rights not to be subjected to unreasonable searches and seizures as guaranteed by the United States and North Carolina Constitutions. In support of this contention, Ms. Ballance and Mr. Ballance rely upon our decision in *State v. Nance*, 149 N.C. App. 734, 562 S.E.2d 557 (2002), in which we held invalid the seizure of certain emaciated horses on the grounds that, even though investigating officers had the right to make the observations that led to the seizure, they had no authority to enter onto the defendant's property for the purpose of seizing those horses. We conclude, however, that we need not decide whether the illustrative

4. In view of our conclusion that the property in question constituted an "open field" for Fourth Amendment purposes, we need not address (1) the scope of a Wildlife Officer's statutory authority to come on the property in question or (2) the extent to which Ms. Ballance or Mr. Swain had a standing to challenge a search conducted on Mr. Ballance's property.

and physical evidence that Ms. Ballance and Mr. Ballance sought to have excluded was unlawfully obtained because any error that the trial court may have committed in denying their suppression motion with respect to this evidence was harmless beyond a reasonable doubt given the overwhelming evidence of their guilt. N.C. Gen. Stat. § 15A-1443(b) (providing 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" and that "[t]he burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless"). "An error is harmless beyond a reasonable doubt if it did not contribute to the defendant's conviction." *State v. Nelson*, 341 N.C. 695, 701, 462 S.E.2d 225, 228 (1995).

A number of law enforcement officers testified that deer carcasses, animal parts, and processed foods were seen at the barrel site either separately or mixed with corn on numerous occasions between 22 September and 11 November 2008. In addition, both Ms. Ballance and Mr. Ballance made statements in in which they essentially admitted that they had unlawfully taken a bear. For example, Ms. Ballance admitted having left at least one deer carcass at the barrel site and having shot at a bear in the vicinity of the barrels on 11 November 2008. Similarly, Mr. Ballance admitted that he owned the property on which deer carcasses, corn, and processed food were found; that the land was used for hunting and refuse disposal, including the disposal of household garbage and deer carcasses; that he left a deer carcass at the barrel site on 11 October 2008; that he permitted Ms. Ballance and Mr. Swain to hunt on his property; that he entered his property on 11 November 2008 at the same time as Mr. Swain and Ms. Ballance; that Ms. Ballance called him after she shot at a bear; and that, after receiving this call, he took a hunting dog and attempted to track the bear. As a result, the evidence of Ms. Ballance's and Mr. Ballance's guilt was overwhelming, so that any error that the trial court may have committed by allowing the admission of the challenged photographs, videotapes, and items of physical evidence was harmless beyond a reasonable doubt.

3. Sufficiency of the Evidence

[4] In their next challenge to the trial court's judgments, Ms. Ballance and Mr. Ballance argue that the trial court erroneously denied their motions to dismiss for insufficiency of the evidence. We do not find their arguments persuasive.

As we have already noted, the State presented extensive evidence tending to show that (1) processed food, deer carcasses and parts, and corn were present at the barrel site; (2) Ms. Ballance shot at a bear in the vicinity of the barrel site on 11 November 2008; and (3), after this shot was fired, Mr. Ballance attempted to track the animal down. As we understand the relevant statutory language, the act of shooting at a bear near a location at which processed food items have been set out or of attempting to track a bear under the circumstances at issue here amounts to the unlawful "taking" of a bear "with the use or aid" of bait. Thus, we conclude that the trial court did not err by denying Defendants' dismissal motions.

In urging us to reach a different result, Defendants contend that, in order to establish a violation of N.C. Gen. Stat. § 113-291.1(b)(2), the State must elicit evidence tending to show that Mr. Ballance and Ms. Ballance acted "knowingly" and with a conscious intent to violate the law. Based upon this logic, Ms. Ballance and Mr. Ballance argue that they could not have been lawfully convicted of taking a bear with the aid of bait in the absence of evidence tending to show that they were aware of the specific contents of the barrels on 11 November 2008. We disagree.

"As a matter of both State and federal constitutional law, legislatures may make the doing of an act a criminal offense even in the absence of criminal intent." *State v. Smith*, 90 N.C. App. 161, 163, 368 S.E.2d 33, 35 (1988) (citing *United States v. Balint*, 258 U.S. 250, 252, 42 S. Ct. 301, 302, 66 L. Ed. 604, 605 (1922) (stating that "the State may in the maintenance of a public policy provide 'that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance'") (internal citation omitted), and *State v. Hales*, 256 N.C. 27, 30, 122 S.E. 2d 768, 771 (1961)), *aff'd*, 323 N.C. 703, 374 S.E.2d 866 (1989), *cert. denied*, 490 U.S. 1100, 109 S. Ct. 2453, 104 L.Ed.2d 1007 (1989). Simply put, "[i]t is within the power of the Legislature to declare an act criminal irrespective of the intent of the doer of the act. The doing of the act expressly inhibited by the statute constitutes the crime. Whether a criminal intent is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute in view of its manifest purpose and design." *Hales*, 256 N.C. at 30, 122 S.E. 2d at 771.

The position espoused by Ms. Ballance and Mr. Ballance rests on the assumption that "knowing" or "willful" action is an essential element of the offense specified in N.C. Gen. Stat. § 113-291.1(b)(2). The relevant statutory language simply does not include any wording

suggesting that the existence of any particular mental state is an essential element of the offense in question. For example, the statute does not require that the defendant act "willfully," "intentionally," "knowingly," or "purposefully." A careful examination of the brief submitted to this Court on behalf of Ms. Ballance and Mr. Ballance indicates that they have not cited any authority in support of their position with respect to this issue, and we have not discovered any such authority during the course of our own research. As a result, since "[t]he plain terms of [N.C. Gen. Stat. § 113-291.1(b)(2)] do not include any reference to criminal intent or *mens rea*," *State v. Haskins*, 160 N.C. App. 349, 352, 585 S.E.2d 766, 768, *disc. review denied*, 357 N.C. 580, 589 S.E.2d 356 (2003); *see also*, *e.g.*, *State v. Bryant*, 359 N.C. 554, 562, 614 S.E.2d 479, 484 (2005) (holding that an amendment to the sex offender registration statute "deleting the statutory *mens rea* requirement, which penalized only those offenders 'who, knowingly and with the intent to violate'" statute, demonstrated that "the General Assembly clearly expressed its intent to make failure to register as a sex offender a strict liability offense"), the offense of taking a bear with the aid of bait in violation of N.C. Gen. Stat. § 113-291.1(b)(2) does not require proof that the defendant possessed any particular mental state, including proof that he or she knew that impermissible bait had been placed at a particular location on a particular date. Thus, the trial court did not err by refusing to dismiss the taking a bear with the aid of bait charges lodged against Ms. Ballance and Mr. Ballance.

C. Appeal of Richard Swain

1. Ineffective Assistance of Counsel

[5] Initially, Mr. Swain contends that his trial counsel provided him with deficient representation by failing to seek to have his case severed from that of Ms. Ballance and failing to object to the admission of the statements that Ms. Ballance made to investigating officers. We disagree.

> To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test. First, he must show that counsel's performance fell below an objective standard of reasonableness. Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error.

State v. Blakeney, 352 N.C. 287, 307-08, 531 S.E.2d 799, 814-15 (2000) (internal citation omitted), *cert. denied*, 531 U.S. 1117, 121 S. Ct. 868, 148 L. Ed. 2d 780 (2001). The essential thrust of the ineffective assistance of counsel claims asserted by Mr. Swain is that his trial counsel failed to ensure, either by obtaining a severance or by means of an objection lodged during trial, that the jury did not consider Ms. Ballance's admissions in determining his guilt. However, after carefully reviewing the record, we conclude that the admission of Ms. Ballance's statements did not adversely affect Mr. Swain's chances for a more favorable outcome at trial, so that Mr. Swain is not entitled to appellate relief on the basis of the allegedly deficient performance of his trial counsel.

The undisputed evidence clearly establishes that the barrel site was located in an area in which an open season for hunting bear had been established. In his trial testimony, Mr. Swain conceded that he had dumped processed food at the barrel site and that he was with Ms. Ballance when she left at least one deer carcass there. Officer Woods testified that he observed Mr. Swain dumping cookies and other processed food items at the barrel site on 3 November 2008. Mr. Swain admitted at trial that he had been at the barrel site on 3 November and that he dumped corn in the barrels on that occasion. As a result, we conclude that the record contains substantial evidence of Mr. Swain's guilt of placing processed food for use as bait in an area in which there was an open season for hunting bear in violation of N.C. Gen. Stat. § 113-294(r).

In seeking to persuade us to overturn his conviction for taking a bear with the aid of bait in violation of N.C. Gen. Stat. § 113-291.1(b)(2), Mr. Swain argues that, "although [he] admitted that he was present on the 'Ballance Land' on November 11, 2008, he denied being part of [Ms. Ballance's] plan to encourage the child to take a bear." Mr. Swain does not, however, cite to any portion of the transcript in support of this assertion, and we found nothing in the record tending to show that Mr. Swain denied having been involved in Ms. Ballance's plan to make it possible for the child to shoot a bear. At trial, Mr. Swain testified that he and Ms. Ballance went to the barrel site on 10 November 2008 for the purpose of assessing the hunting possibilities that were available at that location and that they returned to the barrel site with Ms. Ballance's son on the following day because "he wanted to go see if he could kill a bear." In addition, Mr. Swain admitted that he and Ms. Ballance stopped about ten yards from the barrels, at "a point where . . . the little boy could sit down and wait and watch" in order

"to see if . . . the bear come to the trail." After a bear appeared approximately ten or fifteen yards from the trail and forty or fifty yards from the barrels, Ms. Ballance shot at it. At that point, Mr. Swain testified that he and Mr. Ballance attempted to track it down:

> Q. So the bear walked off. What did you and [Ms. Ballance] do and the boy?
>
> A. Well, I got up. We walked to where the bear was at . . . . I reckon that's when she called her daddy.
>
> . . . .
>
> Q. When did you first see [Mr. Ballance] pulling up?
>
> A. As I was putting the dog in the truck.
>
> . . . .
>
> A. From that point, we . . . took [Mr. Ballance's] dog, went back into the woods . . . . [A]nd from that point we walked the edge of that trying to find something. We didn't ever find nothing, and then we walked back to the path where the bear actually made its turn and went back in the woods[.]

As a result, given that Mr. Swain's acknowledged conduct amounts to the "taking" of a bear with the aid of bait, we conclude that the record contains ample evidence tending to show Mr. Swain's guilt of violating N.C. Gen. Stat. § 113-291.1(b)(2) separate and apart from Ms. Ballance's statements to investigating officers.

In his brief, Mr. Swain contends that Ms. Ballance's confession included the following statements about Mr. Swain and the events of November 11, 2008:

> (1) When asked if she was with Mr. Swain when he dumped food products at the barrel site on the "Ballance Land," she replied, "[Y]es, but she wasn't sure" [what type of food items were dumped];
>
> (2) She, Mr. Swain, and a juvenile had been hunting at the barrel site where they were located by the officers that day;
>
> (3) Her "intention" was for the child accompanying them to shoot the bear, but the juvenile couldn't pull the trigger on the rifle;
>
> (4) The bear started walking off;

(5) [Mr. Swain] whistled at the bear; and,

(6) [Ms. Ballance] shot at the bear, but didn't know if she had hit it since no blood was found.

After carefully reviewing the record, we conclude that the only information contained in Ms. Ballance's statements that did not appear in Mr. Swain's trial testimony was her claim that the bear "started walking off" after the shot was fired, that Mr. Swain whistled at the bear, and that Ms. Ballance did not know whether the shot she had fired hit the bear. The fact that the bear "started walking off" and that Ms. Ballance did not know whether she had hit the bear do not incriminate Mr. Swain. In addition, the fact that Mr. Swain may have "whistled at the bear" does not have much significance given his admission that he had attempted to track the bear after Ms. Ballance shot at it. As a result, the admission of Ms. Ballance's statements had little, if any, impact on the jury's decision to convict Mr. Swain of either placing processed food for use as bait in an area in which an open season for hunting bear had been declared or taking a bear with the use of bait, precluding Mr. Swain from making the showing of prejudice needed to obtain relief on ineffective assistance of counsel grounds.

2. Suppression Motion

[6] Secondly, Mr. Swain contends that the trial court erred by denying Defendants' motion to suppress evidence seized by the wildlife officers on the Ballance land. Earlier in this opinion, we held that the investigating officers could properly testify concerning the observations that they made while on Mr. Ballance's property and that any error that the trial court may have made by admitting photographs, videotapes, and physical evidence that they seized on Mr. Ballance's property was harmless beyond a reasonable doubt. Similarly, given the fact that Mr. Swain admitted having placed foodstuffs, including processed food products, at the barrel site; to having been with Ms. Ballance when she dumped a deer carcass at the site; and to having helped to track a bear at the barrel site after Ms. Ballance shot at it and given Officer Woods' testimony that he observed Mr. Swain placing processed food items at the barrel site during the weeks before bear hunting season opened, we cannot conclude that the admission of photographs, videotapes, and processed food items seized on Mr. Ballance's property had any material effect on the outcome of Mr. Swain's trial. As a result, Mr. Swain is not entitled to relief on the basis of his challenge to the denial of his suppression motion.

III. Conclusion

Thus, for the reasons discussed above, we conclude that none of Defendant's challenges to the trial court's judgments have merit. As a result, the trial court's judgments should, and hereby do, remain undisturbed.

NO ERROR.

Chief Judge MARTIN and Judge STOUD concur.

DEWEY G. CARTER AND WIFE, GAIL M. CARTER, PLAINTIFFS, V. TD AMERITRADE HOLDING CORPORATION, TD AMERITRADE TRUST COMPANY, FISERV HOLDING COMPANY, FISERV TRUST COMPANY, LINCOLN TRUST COMPANY, NTC & CO., CAPITAL INVESTOR GROUP, INC., WALTER R. REINHARDT, LIFE INSURANCE COMPANY OF THE SOUTHWEST, AND J. EVERETT JOHNSON, DEFENDANTS

No. COA11-254

(Filed 17 January 2012)

1. Arbitration and Mediation—motion to compel—forged signature on investment document—ratification

An order denying defendants' motion to compel arbitration was reversed and remanded where plaintiffs sued for investment losses, defendants moved for arbitration, and plaintiffs claimed that their signatures were forged on IRA and investment documents containing the arbitration clause. Reviewing the issue of ratification *de novo*, plaintiffs' conduct was consistent with an intent to affirm the unauthorized act and inconsistent with any other purpose, so that plaintiffs ratified any unauthorized act of the investment advisor as a matter of law.

2. Arbitration and Mediation—motion to compel—forged signature on investment documents—equitable estoppel

An order denying defendants' motion to compel arbitration was reversed and remanded where plaintiffs sued for investment losses, defendants moved for arbitration, and plaintiffs claimed that their signatures were forged on IRA and investment documents containing the arbitration clause. Reviewing the issue of equitable estoppel *de novo*, plaintiffs' claims were almost entirely

phrased in tort, but were dependent on duties arising from the documents that contained the arbitration clause.

Appeal by defendants from order entered 7 December 2010 by Judge Michael R. Morgan in Durham County Superior Court. Heard in the Court of Appeals 10 October 2011.

McDaniel & Anderson, L.L.P., by L. Bruce McDaniel, for plaintiffs-appellees.

Ellis & Winters LLP, by Leslie C. Packer, for defendants-appellants.

MARTIN, Chief Judge.

Plaintiffs, Dr. Dewey G. Carter and wife, Mrs. Gail M. Carter, filed their complaint in this action asserting various claims for losses they allegedly sustained in connection with certain investments they made beginning in 2001 with defendants Life Insurance Company of the Southwest (LSW), Walter R. Reinhardt and his company, Capital Investor Group, Inc., J. Everett Johnson, Fiserv Holding Company, its affiliate, Fiserv Trust Company, and their operating divisions, including Fiserv Investor Support Services (Fiserv ISS) and Lincoln Trust Company, and NTC & Co. Defendants TD Ameritrade Holding Corporation and its subsidiary, TD Ameritrade Trust Company, are the successors in interest to the Fiserv defendants (collectively, "defendants").

Entries of default were made against defendants Reinhardt, Capital Investor Group, Inc. and Johnson. The Fiserv defendants moved to compel arbitration and stay the litigation pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq.*, and § 1-569.7 of North Carolina's Revised Uniform Arbitration Act, contending plaintiffs' contracts with Fiserv ISS contained a mandatory arbitration clause. Specifically, the Fiserv defendants asserted that plaintiffs had each signed a Traditional IRA Application with Stretch Provisions included within Fiserv ISS's standard form Individual Retirement Account (IRA) contract and that the claims in plaintiffs' complaint were within the scope of the arbitration statements in those contracts. In their complaint and in their response to the motion to compel arbitration, plaintiffs asserted that they had never signed private equity investment forms directing their investments in LLCs or the IRA contracts establishing their IRAs and that their signatures were forged on those documents. Defendants replied, in relevant part, that

there was no support for plaintiffs' claim that their signatures were forged on the IRA contracts and, alternatively, plaintiffs were bound by the arbitration statements in the IRA contracts on the basis of (1) equitable estoppel, (2) agency, or (3) ratification.

From the record, it is made to appear that in 2001, plaintiffs entered into a Defined Benefit Plan and Trust with contributions made to and administered by defendant LSW. Plaintiffs allege that in late August 2004, LSW informed them they would need an investment representative in the North Carolina-area and suggested they contact defendant Reinhardt and his company, Capital Investor Group, Inc. According to plaintiffs' allegation, they "went along with the appointment" and in late August 2004, their "assets were held and administered by LSW."

In 2006, plaintiffs' plan was rolled over into self-directed IRAs with the Fiserv defendants. Plaintiffs' signatures appear on Traditional IRA Applications with Stretch Provisions included within Fiserv ISS's standard form IRA contracts establishing their individual IRAs. Directly above the signature line, the contracts state "I . . . specifically acknowledge that I have read, understand and agree to the Arbitration Statement that is part of the Plan Documents . . . ." The "Arbitration Statement" contained within the contracts establishing plaintiffs' IRAs provides the following, in relevant part:

> The Account Owner hereby agrees that all claims and disputes of every type and matter between the Account Owner and Fiserv Trust, including but not limited to claims in contract, tort, common law claims or alleged statutory violations, shall be submitted to binding arbitration pursuant to the rules of the American Arbitration Association; when the total damages by all claimants in an Arbitration Demand exceed $75,000 the proceedings and hearings in the case shall take place only in Denver, Colorado . . . . The Account Owner expressly waives any right he/she may have to institute or conduct litigation or arbitration in any other forum or location, or before any other body, whether individually, representatively or in another capacity. . . .

The investment authorization forms directing plaintiffs' investments in LLCs contain the same "Arbitration Statement."

Plaintiffs filed a motion requesting release of investigation and intelligence information and records from the Securities Division of

the North Carolina Secretary of State, which they contended would show that investment documents in the Securities Division's files either "contain[ed] or appear[ed] to contain forged, transposed, and/or transfixed signatures of the plaintiffs in connection with certain investments which are the subject of this litigation . . . ." Plaintiffs requested, among other things, "copies of those documents in order to properly prepare for trial with the authenticity of such alleged signatures being critical issues."

After a hearing, the trial court denied plaintiffs' motion for release of the records from the North Carolina Secretary of State and denied defendants' motion to compel arbitration, stating it "could rule [on defendants' motion] based upon legal principles." The trial court's order contains the following relevant findings of fact:

> 9. The Fiserv defendants have failed to carry their burden of proof controverting plaintiffs' showing that there was no ratification of contract . . . . Further, plaintiffs received no substantial or significant benefits from the arrangement with the Fiserv defendants in the first place.
>
> 10. The Fiserv defendants also failed to carry their burden of proof to show that the investment account documents were not forged.

It contains the following relevant conclusions of law:

> 1. The Fiserv defendants have not carried their burden of proof showing that the relevant account documents were not forged.
>
> 2. The Fiserv defendants have not carried their burden of proof showing that plaintiffs were equitably estopped from claiming their signatures were forged on relevant and indispensable investment account documents, including any Private Equity/Private Debt Investment Authorization forms.
>
> 3. Plaintiffs have requested rescission of these investment contracts throughout their verified complaint, and therefore equitable estoppel and agency principles do not preclude plaintiffs from objecting to the existence of the investment contracts.

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[1] Although a trial court's order denying a motion to compel arbitration is interlocutory, an interlocutory order depriving an appellant of a substantial right which would be lost absent immediate review

will be considered on appeal. *See Raspet v. Buck*, 147 N.C. App. 133, 135, 554 S.E.2d 676, 677 (2001). Because the right to arbitrate a claim is a substantial right, an order denying arbitration is immediately appealable. *See id.*

"[The] trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, reviewable *de novo* by the appellate court." *See id.* at 136, 554 S.E.2d at 678. The FAA "is enforceable in both state and federal courts." *Perry v. Thomas*, 482 U.S. 483, 489, 96 L. Ed. 2d 426, 435 (1987). Section 2 of the FAA provides that

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2006). The parties agree that the IRA contracts in this case are contracts "involving" interstate commerce and that the FAA therefore applies. *See Park v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 N.C. App. 120, 122, 582 S.E.2d 375, 378 (2003).

Defendants' motion to compel arbitration "was properly made and considered under [N.C.G.S. § 1-569.7(a)(2)]." *See Blow v. Shaughnessy*, 68 N.C. App. 1, 17, 313 S.E.2d 868, 877 (noting that, "[w]hen not in substantive conflict, state law controls questions of procedure," and that state law of procedure therefore applied to the defendants' motion to compel arbitration), *disc. review denied*, 311 N.C. 751, 321 S.E.2d 127 (1984); *see also Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10, 79 L. Ed. 2d 1, 15 n.10 (1984) ("[W]e do not hold that §§ 3 and 4 of the [FAA] apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state-court proceedings.").

North Carolina's Revised Uniform Arbitration Act provides that, "[o]n a motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement," "[i]f the refusing party opposes the motion, *the court shall proceed summarily to decide the issue* and order the parties to arbi-

trate *unless it finds that there is no enforceable agreement to arbitrate."* N.C. Gen. Stat. § 1-569.7(a)(2) (2011) (emphasis added). "Therefore, when the party contesting arbitration challenges the legitimacy of such an agreement, the trial court must 'summarily determine whether, as a matter of law, a valid arbitration agreement exists.' " *CIT Grp./Sales Fin., Inc. v. Bray*, 141 N.C. App. 542, 544, 539 S.E.2d 690, 691 (2000) (quoting *Routh v. Snap-On Tools Corp.*, 101 N.C. App. 703, 706, 400 S.E.2d 755, 757 (1991), *appeal after remand*, 108 N.C. App. 268, 423 S.E.2d 791 (1992)). "Failure of the court to resolve this issue, when properly raised, is reversible error." *Id.* at 544, 539 S.E.2d at 692.

Thus, the first issue presented to the trial court by defendants' motion to compel arbitration and plaintiffs' response thereto was whether there was an enforceable agreement to arbitrate. In support of their motion to compel arbitration, defendants introduced copies of the IRA contracts and investment authorization forms purportedly bearing plaintiffs' signatures by way of an affidavit attesting that plaintiffs established IRAs "by, among other things, signing a Traditional IRA Application with Stretch Provisions." In response, Dr. Carter attested that his signatures, and those of his wife, were forged on the IRA contracts as well as on the investment authorization forms. In their reply, defendants asserted that,

> on their face, [p]laintiffs' signatures on the IRA applications do not appear to be "scotch taped," as alleged by Mr. Carter in his [a]ffidavit. As the Court can readily determine, . . . [p]laintiffs' signatures on the IRA applications loop over the lines and letters on the document—contrary to an allegation they were "scotch taped."

Defendants also contended that other evidence indicated plaintiffs' signatures had not been forged on the IRA contracts, including evidence that, immediately after receiving documents for plaintiffs' account transfer to Fiserv, Fiserv sent plaintiffs a letter informing them the transfer was complete; that plaintiffs received quarterly account statements from Fiserv throughout the life of their accounts; that specific correspondence referred to the terms of "your current IRA Agreement"; and that the terms of the IRA contract were on the Fiserv website, which defendants' records indicated had been accessed by Mrs. Carter.

Because the evidence in this case does not compel a finding that plaintiffs' signatures were forged on the relevant contracts as contended by plaintiffs, the trial court should have resolved the disputed issue. *See Routh*, 101 N.C. App. at 706, 400 S.E.2d at 757 (remanding where the trial court failed to summarily determine whether a valid arbitration agreement existed). Had the trial court determined that plaintiffs executed the contracts containing the arbitration agreements, it could have then summarily determined that a valid arbitration agreement existed. Had the court determined that the signatures on the documents had not been placed there by plaintiffs, it could have then proceeded to resolve, as it ultimately did, the issues involving defendants' alternative contentions that plaintiffs were nevertheless bound to the arbitration agreements by principles of agency, ratification, or estoppel.

The error, however, does not require remand for a determination of the issue of forgery, because the trial court ruled as a matter of law that plaintiffs neither ratified the investment documents containing the arbitration agreement nor were equitably estopped from asserting that the lack of their signatures precluded enforcement of the arbitration provisions. We review those legal conclusions *de novo*. *See Griggs v. Stoker Serv. Co.*, 229 N.C. 572, 580, 50 S.E.2d 914, 919 (1948) (noting that, where "the facts relating to ratification are in dispute or if reasonable minds might draw different conclusions from the facts, the question of ratification is for the [fact-finder]" (internal quotation marks omitted)); *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 305, 603 S.E.2d 147, 162 (2004) ("With respect to equitable estoppel, if the evidence gives rise to only one inference from undisputed facts, then the doctrine of equitable estoppel is a question [of law]."), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717 (2005).

> [T]he text of § 2 [of the FAA] provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute: An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, "save upon such grounds as exist at law or in equity for the revocation of any contract."

Perry, 482 U.S. at 492 n.9, 96 L. Ed. 2d at 437 n.9 (citation omitted) (quoting 9 U.S.C. § 2). Section 2 does not "purport[] to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen LLP v. Carlisle*, 556 U.S. ____, ____, 173 L. Ed. 2d 832, 839

(2009). "[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry*, 482 U.S. at 493 n.9, 96 L. Ed. 2d at 437 n.9. "[T]raditional principles of state law allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver[,] and estoppel." *Carlisle*, 556 U.S. at ____, 173 L. Ed. 2d at 840 (internal quotation marks omitted).

Defendants contend plaintiffs are bound by the arbitration statements in the IRA contracts because plaintiffs authorized Reinhardt to open the IRAs. They alternatively contend plaintiffs ratified Reinhardt's act of executing the IRA contracts by accepting the tax benefits and administrative services provided by Fiserv ISS and by failing to repudiate the accounts. We agree that, assuming *arguendo* Reinhardt was without authority to bind plaintiffs to arbitration, plaintiffs ratified the unauthorized act.

> In order to establish the act of a principal as a ratification of the unauthorized transactions of an agent, the party claiming ratification must prove (1) that at the time of the act relied upon, the principal had full knowledge of all material facts relative to the unauthorized transaction, and (2) that the principal had signified his assent or his intent to ratify by word or by conduct which was inconsistent with an intent not to ratify.

Carolina Equip. & Parts Co. v. Anders, 265 N.C. 393, 400-01, 144 S.E.2d 252, 258 (1965) (citation omitted). Intent to ratify can be evidenced by a "course of conduct on the part of the principal which reasonably tends to show an intention on his part to ratify the agent's unauthorized acts." *Id.* at 401, 144 S.E.2d at 258. Although a principal must have full knowledge of all material facts relative to an unauthorized transaction to ratify the transaction, " 'knowledge . . . can be inferred . . . when [the principal] has such information that a person of ordinary intelligence would infer the existence of the facts in question.' " *Id.* (quoting Restatement (Second), Agency § 91 (1958)). "[T]o constitute ratification as a matter of law, the conduct must be consistent with an intent to affirm the unauthorized act and inconsistent with any other purpose." *Espinosa v. Martin*, 135 N.C. App. 305, 309, 520 S.E.2d 108, 111 (1999) (alteration in original).

Dr. Carter's affidavit states that, "[a]t or about the time our Plan account was taken over by the Fiserv ISS[-r]elated [d]efendants early

in September, 2006, we later learned that certain papers had been prepared to set up such account(s) with the Fiserv ISS[-r]elated [d]efendants." Dr. Carter's affidavit makes repeated reference to his knowledge that, beginning in 2006, Fiserv administered his and his wife's accounts. The affidavit of James Hoy, previously employed with Fiserv ISS, states that, immediately after Fiserv ISS received the transfer-in documents for the account transfer to Fiserv ISS, Fiserv ISS sent letters to both Dr. and Mrs. Carter informing them the transfer was complete and providing full contact information. Over the life of the IRA accounts, Fiserv ISS mailed quarterly account statements to Dr. and Mrs. Carter. A letter Fiserv ISS mailed to Dr. and Mrs. Carter on 31 October 2007 referred to the terms of "your current IRA Agreement." On 27 August 2009, another letter was sent addressing the terms of the IRA contract. Dr. Carter wrote a letter to Reinhardt in December 2008 discussing his and Mrs. Carter's IRAs and mentioning the "recent business merger replacing [plaintiffs'] Fiserv Trust money market savings account with a Trust Industrial Bank savings account." Additional undisputed evidence in the record shows plaintiffs accepted tax benefits and administrative services under the IRA contracts from 2006 until 2010, when they terminated the accounts. Based on these undisputed facts, we hold that plaintiffs had "such information that a person of ordinary intelligence would infer the existence of the facts in question." *See Carolina Equip.*, 265 N.C. at 401, 144 S.E.2d at 258. We further hold the undisputed evidence of plaintiffs' conduct was inconsistent with an intent not to ratify the IRA contracts. *See Espinosa*, 135 N.C. App. at 309, 520 S.E.2d at 111. Accordingly, even assuming plaintiffs never signed the IRA contracts and Reinhardt was not authorized to do so on their behalf, we hold plaintiffs' conduct was "consistent with an intent to affirm the unauthorized act and inconsistent with any other purpose" and that, as a matter of law, plaintiffs ratified any unauthorized act of Reinhardt. *See id.*

[2] Defendants also contend plaintiffs are equitably estopped from denying enforceability of the arbitration statement. Again, we agree.

" 'Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.' " *Ellen v. A.C. Schultes of Md., Inc.*, 172 N.C. App. 317, 321, 615 S.E.2d 729, 732 (2005) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000)), *cert. denied and disc. review denied*, 360 N.C. 575, 635 S.E.2d 430 (2006).

> "In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [FAA]."

Id. (first alteration in original) (quoting *Int'l Paper*, 206 F.3d at 418).

We find *American Bankers Insurance Group v. Long*, 453 F.3d 623 (4th Cir. 2006), relied on by defendants in their brief, persuasive here. In *Long*, the defendant, a nonsignatory to an arbitration agreement, moved to compel the plaintiffs, signatories to the agreement, to arbitrate. *Id.* at 625-26. The district court denied the motion, but the Fourth Circuit reversed on appeal, holding the plaintiffs were equitably estopped from denying applicability of the arbitration clause. *Id.* at 630.

In *Long*, a company had issued the plaintiffs a promissory note, which the plaintiffs later contended was worthless, and the note was incorporated into a subscription agreement containing an arbitration clause. *Id.* at 625. The plaintiffs' complaint alleged the defendant had persuaded the company to offer the worthless note and had structured the note so that the defendant would be in the position of first priority in the event of a default. *Id.* The company filed for bankruptcy, and the plaintiffs filed a complaint against the defendant, alleging several tort claims. *Id.* at 625-26. In reversing the district court's denial of the defendant's motion to compel arbitration on the basis of equitable estoppel, the Fourth Circuit explained that, where "the issue is whether the underlying claims are such that the party asserting them should be estopped from denying the application of the arbitration clause," a court should "examine whether the plaintiff has asserted claims in the underlying suit that, either literally or obliquely, assert a breach of a duty created by the contract containing the arbitration clause." *Id.* at 629. The Court reasoned that "each of the [plaintiffs'] individual claims—interference with contract, securities fraud and negligence, civil conspiracy, unjust enrichment and rescission, and violation of SCUPTA—are dependent upon their allegation that ABIG breached a duty created solely by [the Note]." *Id.* at 630 (second alteration in original) (internal quotation marks omitted). It

further noted that, "although each of the [plaintiffs'] individual claims is phrased in tort, the [plaintiffs] may [not] use artful pleading to avoid arbitration, because, at root, those claims attempt to hold [the defendant] to the terms of [the Note]." *Id.* (third and fifth alterations in original) (internal quotation marks omitted). In its analysis, the Court described and distinguished *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157 (4th Cir. 2004):

> [In *R.J. Griffin*] a builder had entered into a contract containing an arbitration clause with the landowner to build condominiums. After the landowner sold the individual units, the new unit owners complained that the units leaked water, and they sued the builder in state court for negligence and breach of the implied warranty of good workmanship. The builder filed a petition to compel arbitration of the owners' lawsuit, asserting that the owners should be equitably estopped from claiming that the arbitration clause did not apply to them because their state-court claims depended on the existence of the contract containing the arbitration clause. On appeal of the district court's denial of the petition, we rejected this argument, concluding that the owners' underlying suit did not seek a 'direct benefit' from the contract, because their negligence and warranty causes of action were not based on any breach of the contract, but were instead based on duties created by state tort law.

Id. at 629-30 (citations and internal quotation marks omitted). The *Long* Court noted, "[t]he [plaintiffs'] underlying complaint is different from the owners' complaint in *R.J. Griffin* in a significant way." *See id.* at 630. "In *R.J. Griffin*, the duties that the builder owed the owners (and allegedly breached by the faulty construction of the condominiums) were created entirely by state tort law; if the builder and landowner had never entered into the building contract, the builder still could have been liable in tort to the owners." *Id.* However, in *Long*, "if [the company] had never issued the Note, the [plaintiffs] would have no basis for recovery against [the defendant]." *See id.*

We have carefully examined plaintiffs' complaint; although their claims are almost entirely "phrased on tort," *see id.*, they are dependent on duties arising from the contracts establishing plaintiffs' IRAs with Fiserv or the investment authorization forms. Plaintiffs' claims are for North Carolina Securities Fraud for acts "[i]n connection with the transactions referred to hereinbefore"; common law fraud, alleg-

ing defendants made false statements and omitted material facts "concerning the fraudulent sale of notes to the plaintiffs"; conversion, alleging defendants directly and indirectly "took monies of the plaintiffs"; breach of contract, alleging defendants "breached their respective investment contracts with the plaintiffs"; breach of fiduciary duty, alleging Fiserv defendants were plaintiffs' "broker-dealers with whom plaintiffs had a special relationship of trust" who, by "[t]he above-described conduct," "breached their fiduciary duties"; gross negligence, alleging Fiserv defendants "had a duty to properly supervise defendant Reinhardt" and that "[t]he failure of these defendants to properly supervise Reinhardt constitutes gross negligence." At the very least, plaintiffs' complaint "obliquely[] assert[s] a breach of a duty created by the contract[s] containing the arbitration clause[s]." *See Long*, 453 F.3d at 629. We further note the losses for which plaintiffs seek relief were sustained under the investment authorization forms and those forms provide the "factual foundation" for each of plaintiffs' claims. *See Ellen*, 172 N.C. App. at 322, 615 S.E.2d at 732.

For the foregoing reasons, the trial court's order is reversed and this case is remanded for entry of an order compelling arbitration.

Reversed and Remanded.

Judges GEER and STROUD concur.

STATE OF NORTH CAROLINA v. HERBERT MARSHALL PENDER, JR

No. COA11-647

(Filed 17 January 2012)

1. Jury—selection—prior knowledge of case—excusal for cause not granted

The trial court did not abuse its discretion by not excusing a juror for cause where the juror indicated that he would do his best to ignore prior knowledge. The trial court was very careful to give considerable attention to whether the prior knowledge would impair the juror's ability to fairly evaluate the evidence as presented in court and in accordance with the directions of the trial court.

2. Jury—Batson challenge—race neutral explanations—burden of persuasion not carried

The trial court did not err by denying defendant's *Batson* challenge where the State offered race-neutral explanations for each of its peremptory challenges to the satisfaction of the trial court and defendant failed to meet his burden of persuasion.

3. Discovery—failure to supplement discovery—remedies

The trial court did not abuse its discretion by not granting a mistrial when the State failed to supplement discovery after a meeting with the co-defendant. The remedies ordered by the court were permitted by statute, were not arbitrary, and the trial court's actions were entirely appropriate under the circumstances of the case.

4. Criminal Law—self-defense—notice not provided—not supported by evidence

There was no error in a first-degree murder prosecution in the denial of defendant's requested jury instruction on voluntary manslaughter based on imperfect self-defense. Defendant did not provide the notice required by statute for self-defense and the evidence was not sufficient for the instruction; moreover, any error was harmless because the totality of the evidence indicated that defendant was the aggressor.

Appeal by defendant from judgment entered 15 December 2010 by Judge Milton F. Fitch, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 9 November 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Alexander McC. Peters, for the State.

Marilyn G. Ozer for defendant-appellant.

Bryant, Judge.

Where the trial court conducted a detailed inquiry and satisfied itself that a juror could be impartial and follow the court's instructions, there was no abuse of discretion. Where defendant failed to meet his burden of persuasion, the trial court did not err in denying defendant's *Batson* motion. Where the trial court took appropriate actions to minimize potential discovery violations, there was no abuse of discretion in denying defendant's motion for mistrial. Where defendant was the aggressor, the trial court did not err in denying defendant's request for a jury instruction on imperfect self-defense.

Facts and Procedural History

Herbert Pender ("Defendant") was indicted on 6 April 2009 for first-degree murder pursuant to N.C. Gen. Stat. § 14-17. His first trial, which began on 12 July 2010, ended in a mistrial. A second trial began on 29 November 2010.

The State's evidence at defendant's second trial tended to show the following: a fight broke out between rival gangs early in the morning of 16 August 2008. Defendant was set leader of one of the gang's members, Julius Barnes, involved in the fight. The other rival gang member involved in the fight was Curtis Wellington, who was killed by defendant later that day.

Around 7:00 a.m. on 16 August 2008, Sergeant Boykin of the Wilson Police Department responded to a (shots fired) call. At the scene, defendant informed Sergeant Boykin that he and his girlfriend had just been targeted by gunfire as they left a residence at 105 Lee Street. The shooters fled in a gold Ford Taurus.

After briefly speaking with Sergeant Boykin, defendant notified members of his set, including Barnes and William Brown, to come and meet him. Once they convened, the group loaded a van with various weapons and firearms as they looked for defendant's attackers. After driving around town for several hours, the group stopped for dinner at a local restaurant. While outside the restaurant, a security camera captured defendant making a hand gesture known as a "One-Eye Willie" toward someone across the street. Testimony from William Brown revealed that this hand signal meant that the individual marked was their intended target.

The group then drove to the target's house, but he was not there so they proceeded to A&J Food Mart, a nearby convenience store. While waiting in the parking lot of the convenience store, Curtis Wellington and other rival gang members stopped at the convenience store and confronted defendant. Wellington and defendant exchanged words before defendant went to the van and retrieved his .9 millimeter rifle. Defendant, Barnes, and Brown then opened fire at Wellington and the other rival gang members before ultimately killing Wellington and wounding another. Wellington, according to Brown, was unarmed and never pointed a gun at defendant. After the shooting, defendant and his group fled the scene in the van, leaving behind twelve or thirteen casings from their three weapons. Defendant was subsequently captured by police in Virginia while still in possession of a .9 millimeter rifle.

On 15 December 2010, a jury found defendant guilty of first-degree murder. Defendant was sentenced to life imprisonment without parole. Defendant appeals.

Defendant contends the trial court erred (I) in failing to excuse a juror for cause; (II) in denying defendant's *Batson* motion; (III) in denying defendant's motion for mistrial; and (IV) in denying defendant's request for a jury instruction on imperfect self-defense.

I

[1] Defendant first argues the trial court erred in failing to excuse a juror for cause in violation of defendant's right to an impartial jury. We disagree.

According to N.C.G.S. § 15A-1211(b), "[t]he trial judge must decide all challenges to the panel and all questions concerning the competency of jurors." The standard of review for a defendant's challenge to excuse a juror for cause is abuse of discretion. *State v. Reed*, 355 N.C. 150, 155, 558 S.E.2d 167, 171 (2002). "An abuse of discretion occurs where the trial judge's determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (internal quotations omitted). "With regard to a challenge for cause and the trial court's ruling thereon, 'the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record.' " *Id.* (quoting *Wainwright v. Witt*, 469 U.S. 412, 434, 83 L. Ed. 2d 841, 858 (1985)). In deciding whether a prospective juror should be excluded for cause, the trial court must determine whether the prospective juror's apprehension "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985).

Here, defendant alleges that Juror #8 should have been excused for cause based on his comments during voir dire, specifically that he knew "things that [he] probably shouldn't know, knowing some of the details." Asked to elaborate, Juror #8 stated that he learned about this case primarily by reading about it in the newspaper. Based on Juror #8's comments, the trial court and defendant inquired further as to whether he could in fact follow the law and be impartial. Juror #8 replied that he "would do my best. All I can tell you is that I will try." Not quite satisfied, the court and Juror #8 engaged in the following discussion:

> The Court: The question was, sir, having read what you read, number one, did you form an opinion about it? And, number two, now that you have read, if you remember what you read, can you put that aside, do your duty, hear the evidence as it comes from that witness stand and make a decision based on the evidence as you hear it come from the witness stand? That's the question.
>
> PROSPECTIVE JUROR #8: Yeah, I think I can.

Based on his response, defendant attempted to strike Juror #8 for cause but his motion was denied by the court. Defendant further inquired of Juror #8 as follows:

> [Defense Counsel]: You believe you could do the best you could. My question is, sir, do you think you can block out that? You said that you had reached—I can't remember my exact question—you reached an opinion as to guilt or innocence based on what you read. Are you certain, sir, that you can put that aside?
>
> PROSPECTIVE JUROR #8: Again, I think I can. I believe I could put it aside.

Still concerned, defendant renewed his motion to strike and requested an additional peremptory challenge. The court again denied the motion to strike and replied that "[b]ased on the answer given by [Juror #8] I deny the challenge."

After review, we find the trial court did not abuse its discretion in denying defendant's motion to strike Juror #8 for cause or his request for an additional peremptory challenge. In circumstances such as this "[w]here the trial court can reasonably conclude from the voir dire examination that a prospective juror can disregard prior knowledge and impressions, follow the trial court's instructions on the law, and render an impartial, independent decision based on the evidence, excusal is not mandatory." *State v. Green*, 336 N.C. 142, 167, 443 S.E.2d 14, 29, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). Further, "[t]he trial court has the opportunity to see and hear a juror and has the discretion, based on its observations and sound judgment, to determine whether a juror can be fair and impartial." *State v. Dickens*, 346 N.C. 26, 42, 484 S.E.2d 553, 561 (1997).

In the instant case the trial court was very careful to give considerable attention to its determination of whether Juror #8's prior

knowledge of the case would impair his ability to fairly evaluate the evidence as presented in court and in accordance with instructions of the trial court. Based on Juror #8's affirmative responses both to the court and to defense counsel, the trial court was satisfied that Juror #8 could be fair and impartial and that he could set aside any prior impressions he may have drawn from media coverage and follow the court's instructions as to the law. Therefore, the trial court did not err in denying defendant's challenge to excuse Juror #8 for cause.

II

[2] Defendant also contends the State used six of its peremptory challenges to excuse prospective African-American jurors in violation of defendant's constitutional right to equal protection. We disagree.

"[T]he Equal Protection Clause [of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution] forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89, 90 L. Ed. 2d 69, 83 (1986), *holding modified by Powers v. Ohio*, 499 U.S. 400, 113 L. Ed. 2d 411 (1991). In *Batson*, the Supreme Court "outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause." *Hernandez v. New York*, 500 U.S. 352, 358, 114 L. Ed. 2d 395, 405 (1991). Step one requires that defendant "make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race." *Id.* If defendant makes such a showing, then in step two "the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question." *Id.* at 358-59, 114 L. Ed. 2d at 405. Thereafter, step three requires the trial court to "determine whether the defendant has carried his burden of proving purposeful discrimination." *Id.* at 359, 114 L. Ed. 2d at 405. " 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 360, 114 L. Ed. 2d at 406 (quoting Personnel *Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, 60 L. Ed. 2d 870, 887-88 (1979) (footnote and citation omitted)).

However, "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on

the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *State v. Lemons*, 348 N.C. 335, 361, 501 S.E.2d 309, 325 (1998), *sentence vacated on other grounds*, 527 U.S. 1018, 144 L. Ed. 2d 768 (1999) (internal quotation omitted). At that point "the only issue for [] determin[ation] is whether the trial court correctly concluded that the prosecutor had not intentionally discriminated." *Id.* Because "the trial court is in the best position to assess the prosecutor's credibility, we will not overturn its determination absent *clear error.*" *Id.* (citation omitted) (emphasis added).

In response to defendant's assertion that six prospective jurors were excused by the State because of impermissible racial discrimination, the trial court conducted a *Batson* hearing. During this hearing, the State offered race-neutral explanations to the trial court explaining exactly why it excused each of these jurors. The State's reasons included unresponsiveness, deceit, failure to make eye contact, alleged acquaintance with defendant's former girlfriend, an extensive history of purchasing pawn tickets, and prior employment at the convenience store where the incident occurred. After weighing these race-neutral explanations, the trial court stated in its order denying defendant's *Batson* motion that:

> 11. The Court makes no finding that Defendant established a prima facie case of impermissible discrimination, and that "the strikes were not made based off race but were made based off of other factors to which the State does not have to disclose and the State in disclosing gave reasons to the satisfaction of this Court that the strikes were not based off of race," and Defendant has not demonstrated purposeful discrimination.

Defendant argues that he has indeed demonstrated purposeful discrimination and that the trial court clearly erred when it concluded in its order that the State's race-neutral reasons for striking each of these witnesses satisfied *Batson*. Contrary to defendant's assertion, we do not find clear error in the record that would support defendant's argument.

It is well-established that counsel's "explanations need not rise to the level justifying a challenge for cause, and need not be persuasive, or even plausible. In fact, the challenges may be based on . . . counsel's legitimate hunches and past experience." *State v. Cofield*, 129 N.C. App. 268, 277, 498 S.E.2d 823, 830 (1998) (internal citation and quotations omitted). "At this step of the inquiry, the issue is the facial

validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez* at 360, 114 L. Ed. 2d at 406 (internal quotation omitted). As a result, "evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province." *Id.* at 365, 114 L. Ed. 2d at 409 (internal quotation omitted).

After careful review, we cannot find error that would justify overturning the trial court's ruling. The State offered race-neutral explanations for each of its peremptory challenges to the satisfaction of the trial court. As a result, defendant has failed to meet his burden of persuasion regarding the prosecutor's racial motivation. *See Purkett v. Elem*, 514 U.S. 765, 768, 131 L. Ed. 2d 834, 839 (1995) ("[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike."). Accordingly, we hold the trial court did not err in denying defendant's *Batson* motion.

III

[3] Next, defendant argues his motion for a mistrial should have been granted when the State failed to supplement discovery after meeting with the co-defendant. We disagree.

"Defendant's rights to discovery are statutory. Constitutional rights are not implicated in determining whether the State complied with these discovery statutes." *State v. Ellis*, ____ N.C. App. ____, ____, 696 S.E.2d 536, 539 (2010). We review a ruling on discovery matters for an abuse of discretion. *State v. Shannon*, 182 N.C. App. 350, 357, 642 S.E.2d 516, 522 (2007). "An abuse of discretion will be found where the ruling was so arbitrary that it cannot be said to be the result of a reasoned decision." *State v. Tuck*, 191 N.C. App. 768, 771, 664 S.E.2d 27, 29 (2008).

Discovery applies to both oral and written statements made by witnesses. Regarding oral statements, N.C.G.S. § 15A-903(a)(1) requires that,

> [o]ral statements shall be in written or recorded form, except that oral statements made by a witness to a prosecuting attorney outside the presence of a law enforcement officer or investigatorial assistant shall not be required to be in written or recorded form unless there is *significantly new or different information* in the oral statement from a prior statement made by the witness.

(2011) (emphasis added). If the trial court determines that one of the parties has failed to comply with N.C.G.S. § 15A-903(a)(1), then the trial court can issue any or all of the following sanctions:

> (1) Order the party to permit the discovery or inspection, or (2) Grant a continuance or recess, or (3) Prohibit the party from introducing evidence not disclosed, or (3a) Declare a mistrial, or (3b) Dismiss the charge, with or without prejudice, or (4) Enter other appropriate orders.

N.C.G.S. § 15A-910(a) (2011). "Although the court has the authority to impose such discovery violation sanctions, it is not required to do so." *State v. Hodge*, 118 N.C. App. 655, 657, 456 S.E.2d 855, 856-57 (1995) (citations omitted).

Here, defendant argues that his motion for a mistrial should have been granted after the State failed to provide defendant with additional discovery after a meeting with William Brown gleaned new information crucial to the State's case. Defendant argues that the testimony of William Brown regarding the hand signal known as a "One-Eye Willie," the relative positions of the parties during the shootout, and an account of decedent Wellington's collapse to the ground during the shootout was significantly new or different information that should have been disclosed.

In response to Brown's direct testimony, the trial court recognized potential discovery violations by the State and instructed defense counsel to use cross-examination to uncover any discrepancies in Brown's testimony. During cross-examination, Brown admitted going over movements of the participants in the shootout during a meeting with the State that morning. Based on this testimony, defendant renewed his objection and motion for a mistrial. The trial court heard defendant's objection and recited the elements of N.C.G.S. § 15A-910(a)(1) to both parties before stating:

> I'll grant you a recess, Mr. Sutton, for you to delve into that particular matter. I do not at this time consider what you have said to be a failure to comply with the discovery such a material fact at this point in time [sic] that would warrant, under the totality of the circumstances, a dismissal with or without prejudice or a mistrial in this matter.

After recess, the trial court also ordered the State to memorialize all future discussions with Brown.

Despite defendant's arguments, we do not find that the trial court committed an abuse of discretion regarding its handling of these potential discovery violations by the State. "[T]he purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate." *State v. Remley*, 201 N.C. App. 146, 150, 686 S.E.2d 160, 162 (2009) (citation omitted). "Which of the several remedies available under G.S. 15A—910(a) should be applied in a particular case is a matter within the trial court's sound discretion." *State v. Kessack*, 32 N.C. App. 536, 541, 232 S.E.2d 859, 862 (1977).

First, the trial court did not abuse its discretion by instructing defendant to use cross-examination to test whether witness Brown's testimony revealed significantly new or different information. *See State v. Jaaber*, 176 N.C. App. 752, 627 S.E.2d 312 (2006) (holding the trial court did not abuse its discretion in denying defendant's request for discovery sanctions given that defendant was able to cross-examine the witnesses). Second, the trial court did not abuse its discretion when it decided to "[g]rant a continuance or recess" to defendant to review the testimony of Brown. N.C.G.S. § 15A-910(a)(2) (2011); *see State v. Hocutt*, 177 N.C. App. 341, 628 S.E.2d 832 (2006) (trial court did not abuse its discretion when it denied defendant's motions to dismiss and for mistrial as sanction for state's discovery violations in first degree murder prosecution because the trial court allowed defendant additional time to review evidence and to determine if expert witnesses would be required to counter evidence.); *see also Remley*, 201 N.C. App. at 150, 686 S.E.2d at 162 (holding the trial court did not abuse its discretion by granting a recess in order to provide defendant with an opportunity to prepare after the trial court determined that the State failed to provide the defendant's statement in a timely manner). Third, the trial court did not abuse its discretion by requiring the State to memorialize all future conversations with Brown. *See* N.C.G.S. § 15A-910(a)(4) (2011) (the court can "enter other appropriate orders" as sanctions for any discovery violations). We find that all of the remedies ordered by the trial court in the instant case are permitted by statute and are not arbitrary; that they are the result of a reasoned decision by the trial court after careful consideration of the objections made by defendant.

Further, we find that the trial court did not err by denying defendant's motion for a mistrial, since "[a] mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *See Jaaber*, 176 N.C.

App. at 756, 627 S.E.2d at 314. The trial court's actions were entirely appropriate under the circumstances presented in this case. Defendant's argument is overruled.

IV

[4] In his final argument, defendant contends the trial court erred in denying his request for a jury instruction on voluntary manslaughter based on imperfect self-defense. We disagree.

This Court reviews assignments of error regarding jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). According to N.C.G.S. § 15A-905 (c)(1), "the court must, upon motion of the State, order the defendant to:

> (1) Give notice to the State of the intent to offer at trial a defense of alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, *self-defense*, accident, automatism, involuntary intoxication, or voluntary intoxication. Notice of defense as described in this subdivision is inadmissible against the defendant. Notice of defense must be given within 20 working days after the date the case is set for trial pursuant to G.S. 7A-49.4, or such other later time as set by the court.

(emphasis added). "If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may . . . (3) [p]rohibit the party from introducing evidence not disclosed . . . ." N.C.G.S § 15A-910(a)(3) (2011). "Which of the several remedies available under G.S. 15A—910(a) should be applied in a particular case is a matter within the trial court's sound discretion." *See Kessack*, 32 N.C. App. at 541, 232 S.E.2d at 862. Accordingly, we will not reverse the trial court's decision unless there is an abuse of discretion. *State v. McClary*, 157 N.C. App. 70, 75, 577 S.E.2d 690, 693 (2003) (citation omitted). "An abuse of discretion results from a ruling so arbitrary that it could not have been the result of a reasoned decision or from a showing of bad faith by the State in its noncompliance." *Id.* (citation omitted).

Here, the State filed a motion requesting that defendant provide voluntary discovery outlining the defenses he intended to assert at trial. However, defendant failed to provide the State with the defenses or the requisite notice required to assert a theory of self-defense under N.C.G.S. § 15A-905 (c)(1). Further, because the evidence at trial was insufficient to require an instruction on self-

defense, the trial court did not err when it denied defendant's request to instruct the jury on voluntary manslaughter based on imperfect self-defense. N.C.G.S § 15A-910(a)(3) (2011). Accordingly, defendant's argument is overruled.

Assuming *arguendo* that the trial court did err by failing to instruct the jury on voluntary manslaughter based on imperfect self-defense, this error would be harmless. An instruction on imperfect self-defense should be given where a defendant "reasonably believes it necessary to kill the deceased to save himself from death or great bodily harm even if defendant (1) might have brought on the difficulty, provided he did so without murderous intent, and (2) might have used excessive force." *State v. Mize*, 316 N.C. 48, 52, 340 S.E.2d 439, 441-42 (1986).

Defendant asserts that the evidence showed that defendant was not armed, that he was just hanging out at the convenience store when Wellington drove up and jumped out of his car with a gun. However, the totality of the evidence at trial indicates that defendant was the aggressor in the confrontation between the rival gang members. The evidence tended to show the following: defendant stated "there would be consequences" after someone fired shots at him that morning; defendant barely spoke with police while they investigated the (shots fired) call; defendant and his gang members loaded up a van "more than usual" with weapons and drove around looking for the rival gang members; defendant made the "One-Eye Willie" signal to mark one of the rival gang members as their target; defendant and Wellington had a verbal confrontation at the convenience store; after the confrontation, defendant went to the van and retrieved his .9 millimeter rifle and started shooting at Wellington; and defendant and his gang members fired a total of twelve-thirteen shots at Wellington and the other rival gang members, ultimately killing Wellington and wounding another. Based on these facts, defendant's murderous intent therefore precludes a determination that defendant reasonably believed it necessary to kill decedent, which precludes an instruction on imperfect self-defense. *See Mize*, 315 N.C. at 52, 340 S.E.2d at 441-42 (holding that defendant was not entitled to an instruction on imperfect self-defense where defendant was the aggressor during the confrontation and possessed murderous intent according to the evidence presented at trial). As a result, the trial court did not err in declining to instruct the jury on voluntary manslaughter based on imperfect self-defense.

No error.

Judges ELMORE and STEPHENS concur.

STATE OF NORTH CAROLINA v. ARTHUR JUNIOR COOK, DEFENDANT

No. COA11-767

(Filed 17 January 2012)

1. Evidence—defendant's statement to officer—same or similar testimony repeated

The trial court did not err by allowing a federal special agent to testify about defendant's statement that defendant walked through office buildings and took things to sell for crack. Defense counsel did not object to similar testimony, himself repeated the challenged testimony during cross-examination, and invited the witness to confirm that defendant made such statements.

2. Evidence—defendant's statements—voluntariness—no pretrial motion to suppress—no challenge at trial

The trial court did not err by allowing a federal special agent to testify about incriminating statements made to him by defendant where defendant challenged the voluntariness and constitutionality of the statements on appeal, but did not move to suppress the evidence pretrial, as required by statute, and did not challenge the voluntariness of the statements at trial.

3. Evidence—surveillance video—sufficiently substantiated

The trial court did not abuse its discretion by admitting surveillance video of a federal office from which items were stolen where defendant did not challenge the chain of custody, the facilities manager of the office testified that the video was a live streaming recording on a server, that he viewed the video as a technician made a copy immediately following the incident, and that the footage presented in court was the same. Assuming error in admitting the video footage, there was substantial evidence of defendant's guilt and no prejudice.

4. Evidence—surveillance video—frozen frames—zoomed images

The trial court did not err by allowing the jury to view during deliberations still images made by freezing surveillance video where the video had been admitted over defendant's objections. Allowing the jury to view zoomed portions of the photographs in the courtroom was also not error.

5. Sentencing—prior record points—convictions not identified

Defendant's sentencing was remanded where the Court of Appeals did not identify the convictions to which it assigned prior record points, so that it could not be determined whether the State proved by a preponderance of the evidence that such convictions (in-state or out-of-state) existed and that defendant was the convicted perpetrator.

Appeal by defendant from judgments entered 27 January 2011 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 November 2011.

Roy Cooper, *Attorney General*, *by David P. Brenskelle*, *Special Deputy Attorney General*, *for the State.*

Anne Bleyman, *for defendant–appellant.*

MARTIN, Chief Judge.

Defendant Arthur Junior Cook appeals from judgments entered upon jury verdicts finding him guilty of the offenses of felonious breaking or entering, larceny after breaking or entering, and attaining habitual felon status. We remand for resentencing.

The evidence presented at trial tended to show that, shortly after 8:00 a.m. on 16 September 2009, two employees of the U.S. Treasury's Office of the Comptroller of the Currency in Charlotte, North Carolina, reported to the office's facilities manager, James Robert McDonald, that several items had been taken from their offices sometime after 6:00 p.m. the previous evening. The items missing included a gym bag with a pair of Mizuno running shoes, an OGO tan and black backpack with assorted athletic apparel, four pairs of tickets to four New York Giants football games and parking passes to each of the games, as well as a government-issued laptop computer and its power cord. The offices from which the items were missing were secured by an electronic card reader and accessible by electronically-keyed

identification badges issued only to those who were authorized to enter the restricted area.

Because the reported thefts occurred in a federal government office, which occupied the entire fifth floor of the Charlotte office building, both the Federal Bureau of Investigation and the Charlotte–Mecklenburg Police Department investigated. Mr. McDonald accompanied investigators to identify those areas that seemed to have items out of place. Mr. McDonald informed investigators that the television monitor in a small conference room was "moved away from it's [sic] normal place" and "looked like somebody was trying to disconnect it." Mr. McDonald also identified a blue t-shirt located near the "out of kilter" monitor in the conference room, which "obviously didn't seem to belong to anybody [in the office]."

Mr. McDonald also informed investigators that the offices were monitored by twenty-four-hour surveillance cameras, which were maintained and operated by a third-party vendor. Mr. McDonald arranged for a technician to come to the office to make a copy of the surveillance video footage for the investigators. As the technician copied the surveillance video footage, Mr. McDonald reviewed the footage and saw a person enter the restricted area carrying "a little T shirt in his hand." Although the person in the surveillance video footage did not enter the restricted area carrying a bag, Mr. McDonald observed that, upon exiting the area, the person carried a backpack on his shoulder and a white object in his hand. Mr. McDonald provided the copy of the surveillance video footage to the police.

Two days after the theft, while providing off-duty security at Central Piedmont Community College, Sergeant David Scheppegrell of the Charlotte–Mecklenburg Police Department responded to a call reporting a "suspicious person" in a restricted area of the school's library. After witnesses advised Sergeant Scheppegrell that the suspicious person was exiting the library, the officer made contact with the subject and asked him why he was in the restricted area. At trial, Sergeant Scheppegrell identified defendant as the person with whom he made contact that day. Defendant appeared to Sergeant Scheppegrell to be "very, very nervous" and his responses seemed to be "evasive." Defendant was placed in handcuffs and detained while security officers investigated the matter further. After defendant consented to a search, Sergeant Scheppegrell found a Bank of America identification card with a woman's name and photograph on it, as well as several New York Giants football tickets and parking passes, which

the sergeant later determined had been reported stolen from the Office of the Comptroller of the Currency, on defendant's person.

While defendant was in custody, the police obtained two search warrants: one to search the bin containing the belongings stored for defendant while he was being held, and one to obtain a buccal swab from defendant. Upon searching the bin, the police collected a pair of Mizuno running shoes, an OGO tan and black backpack, and some athletic apparel. At trial, these items were identified as the items taken from one of the fifth-floor offices of the Office of the Comptroller of the Currency.

The next day, Special Agent Gerald R. Garren with the U.S. General Services Administration Office of the Inspector General traveled to Charlotte to investigate the reported burglary in the Office of the Comptroller of the Currency. After speaking with Mr. McDonald and reviewing the surveillance video footage, Special Agent Garren learned that the police had arrested someone for an unrelated crime who was in possession of the New York Giants football tickets that were reported stolen from the federal government office; he arranged to interview the suspect, whom the agent identified at trial as defendant.

During his interview with defendant, Special Agent Garren asked whether defendant had been involved in a theft occurring in an office building from which a laptop computer and football tickets were taken. Defendant "admitted that he had been involved in several burglaries," and told Special Agent Garren "that he had taken a laptop and that it was gone, the computer was gone. He also told [the agent] in the same setting [sic] that he had used it to purchase crack cocaine." Special Agent Garren further testified that defendant "told [him] that he enters buildings, he walks in through the front door, and he's able to go through office space and take things, laptops, phones, cameras, that he sells for crack," and that defendant admitted that, "in the course of four days[,] [defendant] had literally been inside of a hundred different offices."

At trial, Rachael Scott, a criminalist in the biology section of the crime laboratory with the Charlotte-Mecklenburg Police Department, testified that she was asked to obtain a DNA profile from the blue t-shirt collected from the scene and to compare that profile to a buccal swab sample obtained from defendant. Ms. Scott determined that the DNA profile obtained from the t shirt matched the DNA profile obtained from the buccal sample from defendant, and that the "probability of selecting an unrelated person at random for the

source of this DNA profile is approximately 1 in 470 trillion for Caucasians, one in 370 trillion for African[-]Americans, and 1 in 1.81 quadrillion for Hispanics."

Defendant did not present any evidence at trial and moved to dismiss the charges at the close of all the evidence. Defendant also moved for a mistrial on the grounds that both the surveillance video footage and the testimony from Special Agent Garren regarding defendant's "histories of burglary, and entering hundreds of buildings and stealing a laptop" were "very prejudicial." Both motions were denied.

The jury found defendant guilty of felonious breaking or entering, and larceny after breaking or entering. After hearing additional evidence, the jury found defendant guilty of being a habitual felon. The trial court determined that defendant had a total of twenty four prior record points and was a prior record level VI offender. Defendant was sentenced to two consecutive terms of 120 months to 153 months imprisonment. Defendant appeals.

I.

[1] Defendant first contends the trial court erred by allowing Special Agent Garren to testify that, during his interview with defendant, defendant made statements that "he had been involved in several burglaries," that "he had in the course of four days[,] he had literally been inside of a hundred different offices," and that "he enters buildings, he walks in through the front door, and he's able to go through office space and take things, laptops, phones, cameras, that he sells for crack." Defendant argues that such statements "effectually [sic] stripped [him] of the presumption of innocence" and could not have properly been considered by the jury as proof of motive for the charged offenses. We overrule this issue on appeal.

"Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007), *aff'd per curiam*, 362 N.C. 342, 661 S.E.2d 732 (2008). Accordingly, "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). Additionally, "[w]here evidence is admitted without objection, the

benefit of a prior objection to the same or similar evidence is lost, and the defendant is deemed to have waived his right to assign as error the prior admission of the evidence." *State v. Wilson*, 313 N.C. 516, 532, 330 S.E.2d 450, 461 (1985).

Our review of the record reveals that, after the State elicited the challenged testimony from Special Agent Garren, on cross-examination, defense counsel repeated Special Agent Garren's testimony and invited Special Agent Garren to confirm that defendant made the challenged statements. For example, Special Agent Garren was invited to, and did, give affirmative responses to each of the following inquiries by defense counsel: "Even though [defendant] told you that he might have broke [sic] into so many buildings he told you he's not confessing to anything, correct?"; "[Defendant] said he doesn't break in doors, I open and walk in?"; and "[Defendant] told you that any items that he takes he sells for crack, correct?" Additionally, during direct examination, Special Agent Garren testified, without objection by defense counsel, that defendant "walked in through the front doors of office buildings, he didn't have to break and enter, that he took things to support his crack habit," and, when asked, "When you said [defendant] told you he's a thief[,] were those his words or are you just summarizing what he said?," Special Agent Garren responded, again without objection from the defense, "I'm summarizing what he said. He did state that he was a thief." Therefore, since defendant failed to object each time the same or similar now-challenged testimony was elicited from Special Agent Garren, and since defense counsel repeated the challenged testimony and invited Special Agent Garren to confirm that defendant made such statements to him, *see*, *e.g.*, *State v. Carter*, ___ N.C. App. ____, ____, 707 S.E.2d 700, 708 ("Even assuming *arguendo* that [the forensic interviewer's] statement that 'something happened' was erroneously admitted, immediately following her statement, defense counsel repeated her testimony, thereby inviting [the interviewer] to again give her opinion that she thought 'something must have happened.' "), *disc. review denied*, 365 N.C. 202, 710 S.E.2d 9 (2011), we decline to address this issue on appeal further.

II.

[2] Defendant next contends the trial court erred by allowing Special Agent Garren to testify about the incriminating statements that defendant made to him during his interview because defendant argues that any incriminating statements he made were given involuntarily during

a custodial interrogation, and that the admission of such statements through Special Agent Garren's testimony "was error of a constitutional magnitude," entitling defendant to a new trial. However, defendant did not move to suppress this evidence pre trial, in accordance with the procedures set forth in N.C.G.S. §§ 15A 975 through 15A 977, and defendant does not argue that his failure to file a timely motion to suppress this evidence was excused under any of the exceptions to the general rule that motions to suppress must be made pre-trial. *See State v. Satterfield*, 300 N.C. 621, 625, 268 S.E.2d 510, 514 (1980) ("A defendant may move to suppress evidence at trial only if he demonstrates that he did not have a reasonable opportunity to make the motion before trial; or that the State did not give him sufficient advance notice (twenty working days) of its intention to use certain types of evidence; or that additional facts have been discovered after a pretrial determination and denial of the motion which could not have been discovered with reasonable diligence before determination of the motion."). Moreover, we find no instance where, during the course of the trial, defendant challenged the voluntariness of the statements he made to Special Agent Garren. *See State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) ("In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent."). Accordingly, we decline defendant's invitation to exercise our discretion to consider this issue for the first time on appeal. *See id.* ("This Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal.").

III.

[3] Defendant next contends the trial court abused its discretion by admitting the surveillance video footage collected from the scene, because he argues that the footage was not sufficiently authenticated by the State's witnesses.

Pursuant to N.C.G.S. § 8 97, "[v]ideotapes are admissible into evidence for both substantive and illustrative purposes," *State v. Cannon*, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608 (1988), *rev'd in part on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990), and "may be admitted into evidence where they are relevant and have been properly authenticated." *State v. Billings*, 104 N.C. App. 362, 371, 409 S.E.2d 707, 712 (1991) (citing *State v. Strickland*, 276 N.C. 253, 258, 173 S.E.2d 129, 132 (1970)), *appeal dismissed*, 332 N.C. 347, 421

S.E.2d 155 (1992). "The prerequisite that the offeror lay a proper foundation for the videotape can be met by" any of the following: "(1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed"; "(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"; 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." *Cannon*, 92 N.C. App. at 254, 374 S.E.2d at 608–09 (alteration in original) (internal quotation marks omitted). Thus, there are "three significant areas of inquiry" for a court "reviewing the foundation for admissibility of a videotape: (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." *State v. Mason*, 144 N.C. App. 20, 26, 550 S.E.2d 10, 15 (2001).

Here, defendant does not challenge the chain of custody of the copy of the surveillance video footage. Instead, defendant suggests that the authentication of the surveillance video footage was deficient in a manner similar to the deficiencies identified by this Court in *State v. Mason*, 144 N.C. App. 20, 550 S.E.2d 10 (2001). In *Mason*, although the store's employee and general manager testified at trial that the surveillance system "was in working order" at the time that their store was robbed, "neither one knew anything about the maintenance or operation of the camera system"; one testified that she "could not even operate her home VCR," and the other "admitted that he did not know 'how the doggone thing works,' " and none of the State's witnesses testified that there was "any routine maintenance or testing of the . . . security system." *Mason*, 144 N.C. App. at 26, 550 S.E.2d at 15. In the present case, defendant directs us to Mr. McDonald's similar response to a question about how one of the surveillance cameras "work[s]," where Mr. McDonald answered, "Exactly—I mean it's on all the time. I don't know anything about how this works." However, defendant neglects to mention Mr. McDonald's response immediately following this statement to an almost identical question about how the camera "operate[s]," where Mr. McDonald answered: "It's a live streaming recording device that sends the imagine [sic] back to a server that records." Moreover, Mr. McDonald testified that he viewed the surveillance video as the technician made a

copy of the footage immediately following the incident, and further testified that the footage presented in court was the same as that which he viewed when the copy was being made from the surveillance system's server a few days after the theft. *See*, *e.g.*, *State v. Mewborn*, 131 N.C. App. 495, 499, 507 S.E.2d 906, 909 (1998) ("At trial, during *voir dire* . . ., Lieutenant Boyd stated that the images on the tape had not been altered and were in the same condition as when she had first viewed them on the day of the robbery. Because Lieutenant Boyd viewed the tape on both the day of the robbery and at trial and testified that it was in the same condition and had not been edited, there is little or no doubt as to the videotape's authenticity."). Taken together, we are not persuaded that the trial court abused its discretion by admitting the surveillance video footage in the present case.

Nevertheless, even assuming *arguendo* that the surveillance video footage was not sufficiently authenticated by the State's evidence, we are not persuaded that any error in its admission was prejudicial. *See Mason*, 144 N.C. App. at 27, 550 S.E.2d at 16. Here, a couple of days after the thefts from the Office of the Comptroller of the Currency, defendant was arrested and found to be in possession of the victim's missing Mizuno running shoes, the OGO tan and black backpack with some of the missing athletic apparel, and the four pairs of tickets to four New York Giants football games and parking passes which were reported as stolen. Further, defendant's DNA profile was matched to the blue t shirt found next to the jostled conference room monitor, and Special Agent Garren testified, without objection, that defendant told him that "[defendant] would have taken the monitor if he had had something to carry it out with." Since this evidence, taken together with defendant's other admissions to Special Agent Garren and the other evidence in the record, as well as defendant's failure to direct us to "[any]thing suggesting that the videotape in this case is inaccurate or otherwise flawed," *see State v. Jones*, 176 N.C. App. 678, 684, 627 S.E.2d 265, 269 (2006), was sufficient to establish that there was "substantial evidence of . . . defendant's guilt," *see Mason*, 144 N.C. App. at 28, 550 S.E.2d at 16, we hold that the admission of the surveillance video footage, even if erroneous, does not entitle defendant to any relief.

IV.

[4] Defendant next contends the trial court erred by allowing the jury to view still images during its deliberations, which were made by

freezing the surveillance video footage at specified intervals. Defendant does not argue that the still images were erroneously admitted based on an insufficient authentication of the surveillance video footage from which the still images were made; instead, he asserts only that the trial court acted in violation of N.C.G.S. § 15A 1233, which provides that the trial judge "may permit the jury to reexamine in open court the requested materials admitted into evidence." N.C. Gen. Stat. § 15A 1233 (2011). Specifically, defendant asserts that the trial court erred because it allowed the jury to review "evidence that had not been admitted into evidence." However, the still images made available to the jury during its deliberations *were* admitted, albeit over defendant's objections, as State's Exhibits 13 through 18. Therefore, there was no violation of N.C.G.S. § 15A 1233 in allowing the jury to review the still images, which had been admitted into evidence. Additionally, defendant suggests, without authority, that the court acted in contravention of this statute because it allowed the jury to "view zoomed in portions of the[se] photographs" while reviewing the images in the courtroom. Because defendant failed to provide any legal authority in support of his assertion that the court abused its discretion or acted beyond the scope of its statutory authority by allowing the jury to get a closer view of the admitted evidence, we overrule the remainder of this issue on appeal.

V.

[5] Finally, defendant contends the trial court erred by sentencing him as a prior record level VI offender, because defendant asserts that the court incorrectly determined that he had twenty four prior record points. Defendant argues that sixteen of the twenty four prior record points assigned by the court were derived from out of state convictions, and asserts that the State failed to prove by a preponderance of the evidence whether such convictions were felonies or misdemeanors.

"For each prior [North Carolina] felony Class H or I conviction, [an offender will be assigned] 2 points"; "[f]or each prior [Class A1 and Class 1 nontraffic North Carolina] misdemeanor conviction . . ., [an offender will be assigned] 1 point." N.C. Gen. Stat. § 15A 1340.14(b)(4)–(5) (2011). 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." N.C. Gen. Stat.

§ 15A 1340.14(e). "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 may be proved by "[s]tipulation of the parties," "[a]n original or copy of the court record of the prior conviction," or "[a] copy of records maintained by the Division of Criminal Information [("DCI")], the Division of Motor Vehicles, or of the Administrative Office of the Courts." N.C. Gen. Stat. § 15A 1340.14(f)(1)–(3).

The record shows that, in the present case, defense counsel declined to stipulate to defendant's prior convictions in open court and declined to sign the "Stipulation" section of the Prior Record Level Worksheet prepared by the State. Although the trial court found that, "[f]or sentencing purposes[,] . . . [defendant] has nine prior Class H or I felony convictions, and five prior class A 1 or 1 misdemeanor convictions for a total of twenty[ ]three points," the State only presented the trial court with certified copies of two DCI reports from Richland County, South Carolina, as evidence of defendant's February 2005 and September 2005 out of state felony convictions for burglary in the third degree and auto breaking, and with a certified copy of defendant's August 2007 Mecklenburg County, North Carolina, judgment and plea agreement for three counts of felony larceny. Thus, it is not clear to this Court from which of the thirty seven offenses listed in Section IV of defendant's Prior Record Level Worksheet the trial court assigned defendant's twenty three prior record level points. We further note that, based on the evidence presented with respect to the two South Carolina felony convictions, the court could only assign defendant four prior record points for these convictions. *Cf.* N.C. Gen. Stat. § 15A 1340.14(e) ("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 assigning prior record level points."). Since the court did not identify from which convictions it assigned its twenty three prior record points, we cannot determine whether the State proved by a preponderance of the evidence that such convictions—either from out of state or from within this jurisdiction—existed and that defendant was the convicted perpetrator. *See* N.C. Gen. Stat. §§ 15A 1340.13, 15A 1340.14 (2011). Accordingly, we must remand this matter to the trial court to identify on which of the thirty seven prior felonies and

misdemeanors the court based its prior conviction point assignments to determine that defendant was a prior record level VI offender.

No error; Remanded for resentencing.

Judges ELMORE and STEPHENS concur.

KLINGSTUBBINS SOUTHEAST, INC., PLAINTIFF v. 301 HILLSBOROUGH STREET PARTNERS, LLC AND THEODORE R. REYNOLDS, DEFENDANTS

No. COA11-549

(Filed 17 January 2012)

Guaranty—request to forbear collection and promise to pay—claim upon which relief could be granted

The trial court erred by granting a motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12 (b)(6) where plaintiff filed a complaint for payment following an exchange of letters with defendant Reynolds, a principal of defendant Hillsborough, about an unpaid debt for architectural services. While no specific requests for plaintiff to forbear legal redress appeared in defendant Reynolds' letters, the letters may have been interpreted as a request for plaintiff to forbear legal action and a promise to pay, and plaintiff alleged that it actually did forbear in reliance on those requests and promises.

Appeal by plaintiff from order entered 16 February 2011 by Judge Carl Fox in Superior Court, Wake County. Heard in the Court of Appeals 10 October 2011.

Creech Law Firm, P.A., by Peter J. Sarda, for plaintiff-appellant.

Harris Winfield Sarratt & Hodges LLP, by John Sarratt, for defendant-appellee Theodore R. Reynolds.

STROUD, Judge.

Plaintiff appeals the trial court order allowing defendant Theodore R. Reynolds's motion to dismiss. For the following reasons, we reverse.

I. Background

On 13 August 2010, plaintiff filed a verified complaint against defendants requesting payment for "architectural services" which plaintiff performed for the design of a building for defendant 301 Hillsborough Street Partners, LCC ("Hillsborough"). Plaintiff also alleged a claim against defendant Theodore R. Reynolds ("Reynolds") as guarantor of defendant Hillsborough's obligation to plaintiff. Attached to plaintiff's complaint were two exhibits, both letters from defendant Reynolds, who plaintiff alleges is a principal of defendant Hillsborough. The letter dated 27 May 2009 read in pertinent part:

> I am writing at this time to formally acknowledge to you and your firm my awareness of the balance I currently owe you for architectural services on our Hillsborough Street Project.
>
> You and I are both fully aware of the events leadings to our project being stopped and also the fact that these events were totally uncontrollable by me and by you. However, these facts by no means are an indication of my intentions regarding my financial obligations to you. Throughout my career in this city I have answered all of my obligations and it is my sincere intent to do the same with regards to this one.
>
> As stated yesterday, I will make every effort to satisfy this account or make a serious reduction on or before the end of this year. Regardless of my success in doing this the indebtedness will be paid.

The second letter, dated 8 December 2009, stated:

> I last corresponded with you on May 27 2009, stating my intention regarding our account with your firm. At that time this was a serious thought, however, as the year has progressed financial conditions have worsened.
>
> The one thing that has not changed is my commitment to honor this obligation.
>
> . . . .
>
> I regret not being able to meet our projection, however, the obligation will be honored.

On 21 October 2010, defendant Hillsborough filed an answer denying most of the substantive allegations in plaintiff's complaint and requesting that plaintiff's complaint be dismissed. Also on 21

October 2010, defendant Reynolds filed a motion to dismiss "pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure[.]" On 22 December 2010, plaintiff filed a motion for summary judgment. On 16 February 2011, the trial court allowed defendant Reynolds's motion to dismiss and allowed plaintiff's motion for summary judgment against defendant Hillsborough. Plaintiff appeals.

II. Motion to Dismiss

Plaintiff argues that the trial court erred in dismissing its claim against defendant Reynolds because "when a party promises to answer for the debt of another in writing, that person is bound to the debt if consideration supports the promise." (Original in all caps.)

> On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Block v. County of Person, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000) (citation and quotation marks omitted).

Our Court has previously stated,

> A guaranty contract is supported by sufficient consideration if it is based on a benefit passing to the guarantor or a detriment to the guarantee. When the guaranty, as in this case, involves a pre-existing debt, it must be supported by some new consideration other than the original debt.
>
> . . . .
>
> Although forbearance may constitute valid legal consideration, it must be based on a promise to forbear made at the time of the parties' contract. Plaintiff hereunder presented no evidence of an agreement that would have prevented plaintiff from bringing suit earlier. It is incumbent upon plaintiff to prove the consideration supporting a guaranty contract for a pre-existing debt; the law does not presume such consideration. Plaintiff, not having proved any agreement to forbear, failed to prove the consideration essential to the underlying contract.

Carolina Eastern, Inc. v. Benson Agri Supply, 66 N.C. App. 180, 182-83, 310 S.E.2d 393, 395 (1984) (citations omitted).

As defendant Reynolds concedes, "[t]he parties seem to agree" as to the law regarding a guaranty. However, the parties disagree as to the application of this law. Plaintiff contends that

> [t]he letters from a principal in the limited liability company were written to the Plaintiff and contained promises to pay the Plaintiff. In reliance on his promises, the Plaintiff took no action against the parties to collect the debt.
>
> Consideration that results from the forbearance to file a lawsuit is adequate consideration to support a contract. The letters of the Defendant Reynolds to stand for the debt of another are legally enforceable guaranties of Defendant Reynolds and the Court erred in dismissing the Complaint.

Defendant Reynolds counters that the complaint and attached letters fail to show that plaintiff had threatened legal action against Hillsborough and thus that he had not sought to induce forebearance by plaintiff. Defendant Reynolds argues

> the letters written by Mr. Reynolds and attached to the complaint appear on their face to be unilateral and gratuitous undertakings, which do little more than acknowledge that a debt is due by the defendant 301 Partners. There is no indication either in these letters or in any allegation of the complaint that Mr. Reynolds was writing to induce any conduct on the part of Klingstubbins or in response to any threat by Klingstubbins. While the complaint alleges a forbearance to pursue collection activity against 301 Partners, there is no allegation to suggest that Mr. Reynolds' letters were written in response to any threat of such legal action or to induce any such forbearance. As such, forbearance cannot constitute consideration for any purported guaranty.

We thus turn our attention to *Supply Co. v. Person*, 154 N.C. 456, 70 S.E. 745 (1911), a case which both parties cite as authority for their respective positions. In *Supply*, the "plaintiff, having an account for goods, sold and delivered, against S. H. Finch and W. R. Person for the amount of $611.46, sought to charge the defendant J. E. Person, the present appellant, as guarantor for a portion of said account." *Id.* at 456, 70 S.E. at 745. On 3 May 1906, defendant J.E. Person wrote a letter to the plaintiff stating that he would no longer be responsible for

the drafts of Finch & Person. *Id.* at 457, 70 S.E. at 745. On 4 May 1906, plaintiff responded via letter and stated in pertinent part,

> Our extension of credit to Finch & Person has been on the basis of a letter received from you, in which you stated that you were supporting this firm with your finances. We have depended entirely upon your responsibility in making accounts with them, knowing that you are perfectly responsible for any amounts which they would probably make in their joint interest. We shall have to ask you to reconsider your determination not to accept a paper from these parties, as we know nothing of their responsibility and should not have credited them to the extent we have unless we had felt authorized so to do from your letters. We would be glad to have you say whether you will accept a paper from them to sign and forward you, and which we are perfectly willing to make on the basis of one-half and three months, if you so desire, or whether you are unwilling to do this.

Id. at 457-58, 70 S.E. at 745-46.

On 10 May 1906, defendant J.E. Person responded to plaintiff's letter in pertinent part:

> Your letter of May 4th has been received. I am here at the mill of Finch & Person to see what progress they are making with their work. I find that the dry-kiln is not completed and when it is, which will be soon, I think you will get your money sooner than to sign a paper or papers for the time mentioned in your letter. Just as soon as the dry-kiln gets in operation I will see that your bill is paid.

Id. at 458, 70 S.E. at 746.

In response to the 10 May 1906 correspondence, on 11 May 1906, the plaintiff replied in pertinent part,

> Your letter of May 10th is before us, and entirely satisfactory. We presumed that the proposition to make a paper would probably be a greater accommodation to Messrs. Finch & Person than to wait on them for an early settlement; but it would appear from your letter that your preference which we presume is also theirs, is to have this paid in the ordinary way and after a short period.

Id.

A witness for plaintiff also testified

> [t]hat the letter of 11 May, 1906, was in reply to Dr. Person's letter to the company dated 10 May, 1906, and as a result of the letters referred to, the witness desisted from taking action with reference to collecting the account. That the plaintiff desisted from taking action to collect the account from Finch & Person because Dr. Person in his letter of 10 May led us to believe that he would see that our bill was paid as soon as the dry-kiln was in operation. That Dr. Person's letter of 10 May, 1906, was the cause or consideration which induced us to desist from taking any action looking to the collection of this account. That no part of this account which accrued prior to 10 May, 1906, has been paid.

Id. at 459-60, 70 S.E. at 746 (quotation marks omitted).

Considering the evidence noted above, our Supreme Court concluded judgment should be entered in favor of the plaintiff because

> on the question of consideration it is very generally held *that a binding contract to forbear suit on a valid claim, for a definite time, or expressed in language that the law would interpret as a reasonable time, constitutes a sufficient consideration for a guaranty. And an agreement with the promisor to forbear, followed by forbearance, for such time, would uphold the contract. And by the weight of authority actual forbearance for such time without express agreement, but at the instance or request of the promisor, is sufficient.*
>
> While the record in the former appeal left the matter in such uncertainty that the court did not feel justified in making a final decision of the case, and while there is some doubt even now as to whether the letter of plaintiff of date 11 May amounts to a distinct and definite agreement not to sue, there is no longer room for construction that the correspondence, taken in connection with the full and definite statements of the witness Burr, establishes the proposition that there was actual forbearance to sue the debtors, and that this was at the instance and request of the appellant [sic].

Id. at 461-62, 70 S.E. at 747 (emphasis added) (citations omitted). Thus, though none of the letters specifically reference a forbearance to sue, our Supreme Court concluded that the plaintiff had forborne from suing based upon defendant J.E. Person's request to forbear taking legal action and his promise to pay. *Id.* at 457-62, 70 S.E. at 745-47.

As the complaint must be "liberally construed" for purposes of a motion to dismiss, and the complaint should not be dismissed "unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support" the claim for relief, *Block*, 141 N.C. App. at 277-78, 540 S.E.2d at 419, we believe that the complaint has sufficiently pled a claim upon the guarantee. Plaintiff's verified complaint alleged that "[i]n reliance on the requests by defendant Reynolds and his promises to be personally liable for the amounts owing to plaintiff, the plaintiff delayed collection action against 301 Partners for over one year" and "[i]n reliance on the promises of defendant Reynolds, the plaintiff has forborne its opportunities to seek legal redress against the defendant 301 Partners." While we do not find any specific "requests" to forbear on the part of defendant Reynolds in his letters, the letters do tend to support the specific allegations of the plaintiff's complaint that defendant Reynolds requested forbearance and that plaintiff did actually forebear from collection against Hillsborough in reliance upon defendant Reynold's promise to pay. Defendant Reynolds's letters do unequivocally state that "the indebtedness will be paid" and that "the obligation will be honored." This is quite similar to J.E. Person's correspondence in *Supply* as his 10 May 1906 letter does not clearly request a forbearance to sue, but similarly states "I will see that your bill is paid." *Id.* at 458, 70 S.E. at 746. Furthermore, our Supreme Court interpreted J.E. Person's letters in *Supply* to be a request for the plaintiffs to forbear from suing: "there was actual forbearance to sue the debtors, and that this was at the instance and request of the appellant [sic]." *Id.* at 462, 70 S.E. at 747. Defendant Reynolds's letters may be interpreted as a request for plaintiff to forbear from taking legal action and a promise to pay, *see id.* at 457-62, 70 S.E. at 745-47, and plaintiff alleged that based upon these "requests" and "promises" it actually did forbear. Plaintiff's "reliance" upon the "requests" and "promises" is also evidenced by the fact that one of defendant Reynolds's letters dated 27 May of *2009* states that he will "make every effort to satisfy this account or make a serious reduction on or before the end of this year[,]" and plaintiff did not bring suit until August of *2010*. We also note that the court in *Supply* was addressing an appeal after a full trial of the case, while we are considering whether granting a motion to dismiss was appropriate. *See Supply*, 154 N.C. 456, 70 S.E. 745. Even if defendant claims that he did not intend his letters to be "requests" for forbearance, the questions of his actual intent at the time of the letters and plaintiff's understanding of the letters are material facts which cannot be resolved under Rule 12(b)(6). We therefore conclude that plaintiff has "state[d] a

claim upon which relief may be granted[.]" *Block*, 141 N.C. App. at 277, 540 S.E.2d at 419.

III. Conclusion

For the foregoing reasons, we reverse.

REVERSED.

Chief Judge MARTIN concurs.

Judge GEER dissents in a separate opinion.

GEER, Judge dissenting.

As the majority opinion points out, when a case involves a promise to guarantee an existing debt, in order for that promise to be enforceable, there must be some new consideration for that promise other than the original debt. Because I do not believe that plaintiff has pled consideration for defendant Theodore R. Reynolds' promise to pay the debt of 301 Hillsborough Street Partners ("301 Partners"), I would hold that the trial court properly granted defendant's motion to dismiss. I, therefore, respectfully dissent.

The consideration for the guaranty promise must exist at the time that the promise is made. In *Standard Supply Co. v. Person*, 154 N.C. 456, 461, 70 S.E. 745, 747 (1911), the Supreme Court indicated that there are two ways that "forbearance" by the promisee can result in an enforceable guaranty contract as to the promisor. First, there can be an express agreement: "[I]t is very generally held that a binding contract to forbear suit on a valid claim, for a definite time, or expressed in language that the law would interpret as a reasonable time, constitutes a sufficient consideration for a guaranty. And an agreement with the promisor to forbear, followed by forbearance, for such time, would uphold the contract." *Id.* Second, however, there can be something less than an express agreement: "[B]y the weight of authority actual forbearance for such time without express agreement, but at the instance or request of the promisor is sufficient." *Id.*

Plaintiff does not allege an express agreement. Instead, plaintiff seems to be relying on the second approach. There is no question that plaintiff alleges actual forbearance. The issue is whether the complaint alleges that the plaintiff's forbearance was at the request of defendant Reynolds.

In ¶ 16 of the complaint, plaintiff alleges that in two letters, identified in the complaint as Exhibits A and B to the complaint, defendant Reynolds "admitted to his personal liability for the amount owed"—or, in other words, Reynolds promised to pay the existing debt of defendant 301 Partners. In ¶ 17, plaintiff alleges that "[i]n reliance on the requests by defendant Reynolds and his promises to be personally liable for the amounts owing to plaintiff, the plaintiff delayed collection action against 301 Partners for over one year."

¶ 17 is the only paragraph including any reference to "requests" by Reynolds. While ¶ 17 does not specifically indicate what Reynolds was requesting, the paragraph can be construed as alleging that Reynolds requested that plaintiff delay any collection action on 301 Partners' debt. On the other hand, however, ¶¶ 16 and 17 allege that the only representations made by Reynolds are contained in Exhibits A and B to the complaint; the complaint references no other representations by Reynolds. This Court has held: "When reviewing pleadings with documentary attachments on a Rule 12(b)(6) motion, the actual content of the documents controls, not the allegations contained in the pleadings." *Schlieper v. Johnson*, 195 N.C. App. 257, 263, 672 S.E.2d 548, 552 (2009).

Based on *Schlieper*, therefore, the issue is whether Exhibits A and B reflect a request by Reynolds that plaintiff forbear from pursuing collection action or other legal redress against 301 Partners. After reviewing the two exhibits, I see nothing in either letter that could possibly be construed as the necessary request. All that the letters do is state Reynolds' intent to pay plaintiff.

The first letter, dated 27 May 2009, notes that the events leading to the 301 Partners' project being stopped "were totally uncontrollable by me and by you," but asserts that "these facts by no means are an indication of my intentions regarding my financial obligations to you." The letter continues: "Throughout my career in this city I have answered all of my obligations and it is my sincere intent to do the same with regards to this one." Reynolds then stated that he "will make every effort" to pay plaintiff by the end of the year, but promises that even if the payment is not made by the end of the year, the indebtedness will be paid. Nothing in the first letter makes any request that plaintiff take or refrain from taking any action or even references anything that plaintiff might or might not do. The letter contains not the slightest allusion to collection action. I believe that the letter contains only a promise to pay.

The second letter dated 8 December 2009 does not seem to add anything more. It describes the May letter as "stating *my intention* regarding our account with your firm" (emphasis added) and promises that while financial conditions have worsened, "[t]he one thing that has not changed is my commitment to honor this obligation." The letter acknowledges that "we, like most others, are struggling" and expresses "regret" at not being able to pay by the projected end-of-the-year date. It still asserts that "the obligation will [b]e honored," although it provides no anticipated time frame. Again, I do not see even an implicit request that plaintiff do anything or refrain from doing anything.

I cannot see how the letters—which control over the reference in the complaint to unspecified "requests"—can be read as providing the consideration necessary to render Reynolds' promise to pay an enforceable guaranty. I am concerned that reversing the order below that granted the motion to dismiss would allow a party to rely upon a bare promise to pay as an enforceable guaranty.

With respect to *Standard Supply Co. v. Person*, discussed by the majority, I believe it is important to look at the Court's earlier opinion in that same case: *Standard Supply Co. v. Finch*, 147 N.C. 106, 60 S.E. 904 (1908). The Supreme Court, in its first opinion, considered whether evidence of (1) a letter setting out a promise by a third party to pay a partnership's existing account as soon as the partnership's dry kiln was in operation when combined with (2) a letter from the plaintiff to the third party suggesting that delay was acceptable was sufficient to prove an enforceable guaranty. The Court concluded that the letters did not, standing alone, establish the consideration necessary to make the promise to pay an enforceable guaranty. *Id.* at 110, 60 S.E. at 905 ("The defendant is not responsible for the former portion of the account, for the lack of any valuable consideration for his promise.").

The Court, however, awarded plaintiff a new trial because of concerns about the accuracy of the "case on appeal," which had been "made up by agreement of counsel." *Id.* In the appeal from the subsequent re-trial, the Court explained that, in the first appeal, because of uncertainty about the trial court's instructions to the jury and concerns about "the true and proper interpretation of the testimony of" plaintiff's main witness, "the Court decided that it was safer to award a new trial, that the facts might be more fully developed." *Standard Supply Co.*, 154 N.C. at 459, 70 S.E. at 746. It appears, therefore, that there was a dispute in the first appeal regarding what plaintiff's wit-

ness had actually said at trial. The first opinion had, therefore, only addressed the sufficiency of the written correspondence to establish a guaranty.

In contrast to the majority opinion, I do not believe that the Supreme Court, in its second opinion, concluded that there was adequate consideration based on the parties' letters standing alone. The first opinion established that the letters did not amount to an enforceable guaranty, and nothing in the second opinion revisits that holding. Instead, in the second opinion, the Court wrote: "While the record in the former appeal left the matter in such uncertainty that the Court did not feel justified in making a final decision of the case, and while there is some doubt even now as to whether the letter of plaintiff of date 11 May amounts to a distinct and definite agreement not to sue, there is no longer room for construction that the correspondence, *taken in connection with the full and definite statements of the witness Burr*, establishes the proposition that there was actual forbearance to sue the debtors, and *that this was at the instance and request of the [defendant].*" *Id.* at 461-62, 70 S.E. at 747 (emphasis added). It thus appears from the Supreme Court's second opinion that the testimony of Burr was critical in finding a request as well as actual forbearance—elements necessary for an enforceable guaranty.

Plaintiff, in this case, could have included additional allegations in the complaint setting out any actual requests for forbearance—analogous to the Burr testimony in *Standard Supply*—but chose not to do so. The complaint contains no mention of any oral or other written representations by Reynolds relating to the promise to pay. We are, therefore, left only with the letters, which—like the letters in *Standard Supply*—cannot be construed as even implicitly seeking forbearance. If a letter promising to pay when a dry kiln was operational did not constitute an enforceable guaranty, then I do not see how letters promising to pay at the end of the year or at some unspecified later date could be sufficient. Accordingly, I would hold that the complaint failed to sufficiently allege consideration for Reynolds' promise to pay. I would, therefore, affirm.

STATE OF NORTH CAROLINA v. LESELLE CORNELIUS SPENCER, III, DEFENDANT

No. COA11-873

(Filed 17 January 2012)

1. Assault—driving a vehicle at an officer—vehicle used as deadly weapon—no instruction on lesser-included offense

The trial court did not err in a prosecution for assault with a deadly weapon on a police officer by not instructing on the lesser-included offense of misdemeanor assault on a government official where defendant drove his automobile toward an officer at a high rate of speed and the officer had to take affirmative action to avoid harm. The vehicle was used as a deadly weapon as a matter of law.

2. Constitutional Law—effective assistance of counsel—remanded for evidentiary hearing

Defendant's claim of ineffective assistance of counsel was dismissed without prejudice to his right to file a motion for appropriate relief, so that an evidentiary hearing could be held on whether he had consented to counsel's admissions in the closing arguments.

Appeal by defendant from judgments entered on or about 13 January 2011 by Judge Marvin K. Blount in Superior Court, Pasquotank County. Heard in the Court of Appeals 30 November 2011.

Attorney General Roy A. Cooper, III by Assistant Attorney General Thomas H. Moore, for the State.

Kimberly P. Hoppin, for defendant-appellant.

STROUD, Judge.

Defendant was convicted of eluding arrest with a motor vehicle, assault with a deadly weapon on a government official, and resisting a public officer. Defendant contends that the trial court erred in failing to instruct the jury on a lesser included offense and that he received ineffective assistance of counsel. For the following reasons, we find no error as to the trial court's failure to instruct the jury on a lesser-included offense, and we dismiss defendant's claim for ineffective assistance of counsel for him to file a motion for appropriate relief with the trial court so that an evidentiary hearing may be conducted.

I. Background

The State's evidence tended to show that around 1:24 a.m. on 15 December 2009, Officer Lamer Battle of the Elizabeth City Police Department was on general duty patrol when he received a call from a fellow officer stating "there was a vehicle trying to evade him[.]" As Officer Battle sat in a turn lane, he "observed a vehicle basically just run through the stop sign of Camelia Drive at a high rate of speed[;] the vehicle never stopped, never slowed down." Officer Battle "turned on [his] blue lights and [his] siren in order to stop the vehicle for a traffic stop." Officer Battle followed the vehicle "in excess of 90 miles an hour, very close to a hundred, maybe 110, trying to catch up to the vehicle." The vehicle eventually "spun out" and came "to rest on the sidewalk area of Dollar General." Officer Battle testified,

> At that point I exited out of my vehicle. I had my gun drawn, making my way from the rear of my vehicle to the front of . . . [defendant]'s vehicle in order to command him to get out of the car or go to the driver's side door and take him out of the car. At that point I'm making my way from the trunk of my vehicle to the front of his vehicle and I can see dirt starting to spin up from where he was trying to regain traction and make his way back onto the roadway. As I'm standing in front of his vehicle, I could see the headlights raise up and come down. At that point I realized . . . [defendant] had regained traction and he started heading directly towards me to run me over.

Standing approximately 10 to 12 feet from the moving vehicle, Officer Battle "jumped back" as "the vehicle was coming towards [him] at a very fast pace." Eventually defendant was apprehended and tried by a jury.

A jury found defendant guilty of felonious fleeing to elude arrest with a motor vehicle ("eluding arrest"); assault with a deadly weapon on a law enforcement officer ("AWDW"); and resisting, delaying, and obstructing a public officer ("resisting a public officer"). The trial court determined defendant had a prior record level of V and sentenced him to 25 to 30 months imprisonment for the eluding and AWDW convictions and to 60 days imprisonment for the resisting a public officer conviction. Defendant appeals.

II. Lesser Included Offense

[1] Defendant first contends "the trial court committed reversible and plain error by failing to instruct the jury or submit a verdict sheet

on misdemeanor assault on a government official, a lesser-included offense of assault with a deadly weapon on a government official." (Original in all caps.) Both defendant and the State direct this Court's attention to cases which they argue are dispositive of this case. Defendant contends that this case is controlled by *State v. Clark*, 201 N.C. App. 319, 689 S.E.2d 553 (2009) while the State contends it is controlled by *State v. Batchelor*, 167 N.C. App. 797, 606 S.E.2d 422 (2005). Turning first to our standard of review:

> Plain error occurs when the error is so fundamental that it undermines the fairness of the trial, or where it had a probable impact on the guilty verdict.
>
> It is well-established that
>
> the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that the defendant committed the lesser included offense. However, when the State's evidence is positive as to every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged, the trial court is not required to submit and instruct the jury on any lesser included offense. The determining factor is the presence of evidence to support a conviction of the lesser included offense.
>
> Failure to so instruct the jury constitutes reversible error not cured by a verdict of guilty of the offense charged.

State v. Boozer, ____ N.C. App. ____, ____, 707 S.E.2d 756, 762 (2011) (citations, quotation marks, and brackets omitted).

In *Batchelor*,

> on 29 August 2002, Gates County Sheriff Ed Webb, along with Deputies Wiggins, Noble and Bunch, and Hertford County Deputy Liverman of the Roanoke/Chowan Narcotics Task Force, went to defendant's home around 6:30 p.m. to execute a search warrant. Defendant was not home at the time, and the search warrant was served on defendant's wife. While the officers were in the yard of the home, defendant drove into the yard. His wife identified him to the officers. Deputy Liverman approached the vehicle with his hands in the air, yelling for defendant to stop. Instead, however, defendant drove around the U-shaped driveway, increased his speed, and headed back towards the road.

> Deputy Wiggins was standing in or near the driveway as defendant drove away. Defendant made no attempt to avoid hitting Deputy Wiggins, and as he passed, the side mirror of defendant's vehicle struck the deputy, knocking him off his balance, though he did not fall. Sheriff Webb observed: Deputy Wiggins was right directly in his path. He had to jump behind his patrol car[.] I saw him stumble.
>
> When defendant left the driveway, four of the officers got in three vehicles to pursue him, leaving Deputy Liverman behind to complete the search. They reached speeds in excess of 100 miles per hour while trying to keep defendant in sight. Sheriff Webb, accompanied by Deputy Noble, was driving the vehicle in front. As they rounded a curve, Sheriff Webb realized that defendant had turned around and was driving back towards the three patrol vehicles in their lane of travel. Sheriff Webb was forced to brake and pull off the road onto the shoulder. Deputy Wiggins, driving the vehicle directly behind Sheriff Webb, was forced to pull into the opposite lane to avoid a head-on collision. Deputy Bunch, driving the third vehicle slightly farther behind, stopped his car and pulled it sideways across one lane of travel hoping to stop the defendant. The other lane of travel was still open. Defendant collided with Deputy Bunch's vehicle and came to a stop on the side of the road in a ditch.

Batchelor, 167 N.C. App. at 798-99, 606 S.E.2d at 423 (quotation marks, ellipses, and brackets omitted). Defendant was convicted of four counts of assault with a deadly weapon on a government official and appealed arguing that the trial court should have instructed the jury on the lesser-included offense of misdemeanor assault on a government official. *Id.* at 798-99, 606 S.E.2d at 423-24.

This Court concluded that the trial court did not err in failing to instruct the jury on the lesser-included offense of misdemeanor assault holding that "an automobile driven at a high speed is a deadly weapon as a matter of law" and reasoning that

> [t]he key element in determining whether or not a weapon is deadly per se is the manner of its use:
>
> > The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the

> weapon itself. Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly is one of law, and the Court must take the responsibility of so declaring. But where it may or may not be likely to produce fatal results, according to the manner of its use its alleged deadly character is one of fact to be determined by the jury.
>
> A car sitting idle may not be deadly, but the manner of its use by defendant clearly put the officers in danger of death or great bodily harm. The evidence showed that defendant drove his car directly towards Deputy Wiggins who was standing in the driveway, and defendant drove at a high rate of speed directly at the officers' vehicles in their lane of travel. Two cars had to take evasive action to avoid a head-on collision with defendant, and defendant crashed into the third car with the officer in it. The evidence, therefore, leads to but one conclusion, which is the deadly nature of defendant's use of the car, and we find no error in the trial court's failure to submit the lesser charge of assault on a government official to the jury.

Id. at 800, 606 S.E.2d at 424 (citation, quotation marks, and ellipses omitted).

In *Clark*,

> Patrol Sergeant Victor Haynes was on duty with the Shelby Police Department on 26 July 2003. At approximately 5:30 p.m., he saw a dog fall off the back of a truck, landing in the middle of a busy street. Sergeant Haynes pulled his car over with his blue lights flashing and took the dog back to his patrol car.
>
> While standing at his car with the rear door open trying to get the dog into the back of his vehicle, Sergeant Haynes heard an engine racing. Soon after, defendant struck Sergeant Haynes with her pick-up truck. The truck pushed Sergeant Haynes against the back of the patrol car, and the mirror or another object on the side of defendant's truck hit his elbow and back side. Sergeant Haynes slapped the back of the vehicle, trying to get defendant's attention. Sergeant Haynes experienced pain in his elbow.
>
> Defendant continued to drive up the street and eventually backed into a driveway further down the road, still within

> Sergeant Haynes' view. Sergeant Haynes returned the dog to its owner and then proceeded up Monroe Street to where the truck was parked. When he approached defendant, she was angry and refused to give him her driver's license. When other officers arrived at the scene, defendant was yelling about a prior incident in which she had reported that her car was stolen, but Sergeant Haynes had determined that the car had actually been repossessed. When asked why she struck Sergeant Haynes with her truck, she responded by asking why he was not lying in the road or going to the hospital if he had been hit.

Clark, 201 N.C. App. at 320-21, 689 S.E.2d at 555-56. Here again, the defendant was convicted of assault with a deadly weapon on a government official and appealed, arguing that the jury should have been instructed on misdemeanor assault on a government official. *Id*. at 323, 689 S.E.2d at 557.

In *Clark*, this Court considered the reasoning in *Batchelor*, but ultimately distinguished the case from *Batchelor* based upon the facts:

> In this case, we cannot conclude that the evidence leads to only one conclusion. Sergeant Haynes testified:
>
> > Like I said, as I was trying to get the dog around the door into the car, I heard an engine racing. At that point, I looked and I saw a car—saw the tires of a vehicle moving right up against me. As I went to stand up, the vehicle struck me and pushed me against the back of the patrol car and the mirror or the object on the side of the car actually hit me on my elbow and the back side and pushed me up against my vehicle. And as I came off the car, I slapped the back of the vehicle, trying to get the driver's attention.
>
> As a result of this incident, Sergeant Haynes did not sustain any injuries requiring immediate medical attention. He did experience pain in his elbow where he was struck by the truck's mirror or another object on the truck. There was no evidence of any damage to the patrol car.
>
> Thus, although the truck was not sitting idle, there was no evidence that it was moving at a high rate of speed. Sergeant Haynes never testified regarding how fast the truck was going. The State argues, however, that the sound of the engine racing would indicate the car was traveling at a high rate of speed

when it hit Sergeant Haynes. A jury would not, however, necessarily draw that inference, since the sound could simply indicate that defendant was revving the motor. Indeed, the fact that Sergeant Haynes could slap the back of the truck as it went by would permit a jury to infer that the truck actually was not traveling very fast.

The State also points to Sergeant Haynes' testimony that he was pushed by the truck into the patrol car and was injured. The jury, however, could take into account the lack of serious injury to Sergeant Haynes resulting from his contact with defendant's vehicle. Based on that testimony, the officer was not hurt when pushed into the patrol car, allowing the finding that the truck did not impact him very hard. Instead, he only had pain in his elbow from being struck by the mirror or other object extending from the truck as it passed by. Given the lack of significant injury to Sergeant Haynes, the lack of any evidence of damage to the patrol car, and the fact that an object extending from the truck struck the officer's elbow, a jury could conclude that the truck was not aimed directly at the officer and the impact was more of a glancing contact.

The State's argument that the manner in which defendant drove the truck necessarily placed Sergeant Haynes in great danger of death or serious injury would require us to draw inferences from the evidence in favor of the State. In order, however, to decide whether the deadly weapon issue should have been presented to the jury or decided as a matter of law, the evidence must be viewed in the light most favorable to defendant—and not to the State.

Accordingly, we hold that given the evidence presented at trial, although a jury could find that the truck was used as a deadly weapon, it could also find that the truck was not likely to produce death or great bodily harm, under the circumstances of its use. The trial court, therefore, erred in failing to submit to the jury the lesser included offense of assault on a government official.

Id. at 325-27, 689 S.E.2d at 558-59 (citation, quotation marks, and brackets omitted). This Court went on to conclude that the trial court's error did amount to plain error. *See id.* at 327, 689 S.E.2d at 559.

We now turn to the essential question posed by both *Batchelor* and *Clark*: "whether the car involved in th[e] case [should be] considered a deadly weapon as a matter of law" remaining mindful

> that the key element in determining whether or not a weapon is deadly per se is the manner of its use. Thus, the deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself. An instrument is a deadly weapon as a matter of law only where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion. On the other hand, where the weapon may or may not be likely to produce fatal results, according to the manner of its use, its alleged deadly character is one of fact to be determined by the jury.

Id. at 325, 689 S.E.2d at 558 (quoting *Batchelor*, 167 N.C. App. at 799-800, 606 S.E.2d at 424) (citations, quotation marks, ellipses, and brackets omitted).

We conclude that this case is on point with *Batchelor* as both cases involved vehicles moving "at a high rate of speed" and required affirmative action by the officers involved in order to avoid harm. *Batchelor*, 167 N.C. App. at 800, 606 S.E.2d at 424. Here, Officer Battle testified that "the vehicle was coming towards me at a very fast pace[;]" "as the vehicle was coming towards me, I step[ped] out of the way[;]" "the vehicle started to head towards me and at that point I jumped back, jumped maybe eight or nine feet[;]" and "I knew . . . [defend-ant] had gained traction and he was accelerating back on the road. Due to my closeness of myself and his vehicle, at that point I felt like my life was in danger." Officer Caleb Hudson who witnessed the incident also testified that he "saw the vehicle move forward in the direction of where Officer Battle was standing[.]"

The facts here are similar to *Batchelor* wherein the "defendant drove his car directly towards Deputy Wiggins who was standing in the driveway" such that Deputy Wiggins "had to jump behind his patrol car" to avoid the defendant's vehicle, and the "defendant drove at a high rate of speed directly at the officers' vehicles in their lane of travel. Two cars had to take evasive action to avoid a head-on collision with defendant, and defendant crashed into the third car with the officer in it." *Id.* at 798-800, 606 S.E.2d at 423-24. Furthermore, these facts are distinguishable from *Clark*, wherein though Sergeant Haynes was actually hit by the vehicle he "did not sustain any injuries

requiring immediate medical attention" and "slapped the back of the vehicle" which could show "that the truck was not aimed directly at the officer and the impact was more of a glancing contact" and "that the truck actually was not traveling very fast." *Clark*, 201 N.C. App. at 326-27, 689 S.E.2d at 559. We thus conclude that as used here, the vehicle was a deadly weapon as a matter of law, and therefore the trial court did not err in failing to instruct the jury on a lesser-included offense. *See id.* at 325, 689 S.E.2d at 558.

III. Ineffective Assistance of Counsel

[2] Defendant also argues that he "was deprived the effective assistance of counsel where trial counsel made certain admissions during his opening and closing statements without obtaining . . . [defendant]'s consent." (Original in all caps.) Defendant directs this Court's attention to various statements made by his attorney which he argues concede guilt to resisting a public officer and eluding arrest. We need not consider all of these statements, as defendant's counsel's statements during closing argument that defendant "chose to get behind the wheel after drinking, and he chose to run from the police[,]" and "Officer Battle was already out of the way and he just kept on going, kept running from the police" were concessions of guilt to resisting a public officer and eluding arrest. *See State v. Johnson*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (*Dec. 20, 2011*) (No. COA11-677); *see also* N.C. Gen. Stat. § 20-141.5 (2009) ("It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties.").

As we recently noted in *Johnson*,

> Our Supreme Court has stated that ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent. *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985), *cert. denied*, 476 U.S. 1123, 90 L.Ed. 2d 672 (1986); *see State v. Maready*, ___ N.C. App. ___, ___, 695 S.E.2d 771, 775-79 (concluding that the *Harbison* standard controls in non-capital cases), *disc. review denied and appeal dismissed*, 364 N.C. 329, 701 S.E.2d 246-47 (2010). In order for defendant to be convicted of resisting a public officer the State must have shown that (1) defendant willfully and unlawfully resisted, delayed or obstructed a public officer in

> (2) discharging or attempting to discharge a duty of his office. N.C. Gen. Stat. § 14-223 (2005).

Id. at ___, ___, S.E.2d at ___ (quotation marks and brackets omitted). We further agree with *Johnson* that defendant's attorney's "statements cannot be construed in any other light than admitting the defendant's guilt" to both resisting a public officer and eluding arrest. *Id.; see* N.C. Gen. Stat. § 20-141.5.

> However, from the record before us, it is unclear whether defendant consented to the admission of guilt of this offense, which is minor in comparison to his other charges, by his attorney. As such, we dismiss this issue without prejudice in order for defendant to file a motion for appropriate relief so that a full evidentiary hearing may be held on this issue. *See Maready*, ___ N.C. App. at ___, 695 S.E.2d at 779-80 (noting this Court had previously remanded the case for an evidentiary hearing regarding the defendant's consent).

Id.

IV. Conclusion

For the foregoing reasons, we conclude that the trial court did not err in failing to instruct the jury on a lesser-included offense, and we dismiss defendant's ineffective assistance of counsel claim without prejudice to defendant's right to file a motion for appropriate relief, so that an evidentiary hearing may be held on the issue of whether defendant consented to his counsel's admissions in the closing argument.

NO ERROR in part; DISMISSED in part.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA v. JOHN DONALD MATTHEWS

No. COA11-356

(Filed 17 January 2012)

1. Criminal Law—final closing argument—cross-examination—not introduction of evidence

Defendant was awarded a new trial for breaking or entering and larceny where the trial court denied defendant the final closing argument based on testimony elicited during cross-examination. Defendant's attorney cross-examined an investigating officer and identified the officer's report as an exhibit, but did not introduce the actual report into evidence or have the officer read it to the jury. The evidence was relevant to the investigation.

2. Evidence—DNA—blood collection from cigarette cartons—cartons not collected

In an appeal decided on other grounds, the trial court did not err in denying defendant's motion to exclude DNA evidence where the cigarette cartons from which the blood samples were taken were not collected as evidence. Defendant did not argue bad faith on the part of law enforcement officers, nor did he identify any irregularities in the collection or analysis of the samples, and he did not demonstrate any exculpatory value attached to the cigarette cartons.

3. Evidence—subsequent crime—admissible

In an appeal decided on other grounds, the trial court did not err by denying defendant's motion to suppress evidence of a subsequent crime for which defendant had been arrested. The evidence was sufficient to connect defendant to the subsequent crime and it was probative of intent, identity, *modus operandi*, and common scheme or plan. The evidence was not unduly prejudicial.

Appeal by Defendant from judgments entered 13 and 18 October 2010 by Judge Eric L. Levinson in Superior Court, Mecklenburg County. Heard in the Court of Appeals 27 September 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph E. Herrin, for the State.

William D. Auman for Defendant-Appellant.

McGEE, Judge.

John Donald Matthews (Defendant) was indicted for felonious breaking or entering, larceny after breaking or entering, and larceny of a firearm related to a 2 March 2009 break-in at a gas station and convenience store (the Value Mart) located in Charlotte. Defendant was also indicted for having attained habitual felon status. The owner of the Value Mart, Abdelfattah Abdelmajid (Mr. Abdelmajid) called police after he arrived at the Value Mart on 2 March 2009 and discovered broken glass in the front door. Officer Steven Graham (Officer Graham) of the Charlotte-Mecklenburg Police responded to Mr. Abdelmajid's call regarding the break-in. Mr. Abdelmajid reported that cigarettes had been taken, along with some lighters and a handgun. Officer Graham viewed video surveillance footage from the Value Mart that showed that one man had been involved in the break-in. Officer Christopher Matlock (Officer Matlock) of the Charlotte-Mecklenburg Police also responded to the scene. Officer Matlock testified that he collected ten samples of what appeared to be blood from the front door, from shelves, and from cigarette cartons. These samples were analyzed by the Charlotte-Mecklenburg Police Department, and further external analysis was conducted by Labcorp, a private firm. The samples were determined to be human blood, and DNA analysis connected the blood samples recovered from the scene to Defendant.

The jury convicted Defendant of breaking or entering and larceny after breaking or entering. The jury found Defendant not guilty of larceny of a firearm. The jury further found Defendant guilty of having attained habitual felon status. The trial court determined Defendant had a prior record level IV, and sentenced him to two consecutive terms of 110 to 141 months in prison. Defendant appeals. Additional relevant evidence will be discussed in the body of the opinion.

I.

[1] Defendant contends in his third argument that, because Defendant did not present any evidence at trial, the trial court erred by denying his attorney the final closing argument. We agree.

> Rule 10 of the General Rules of Practice for the Superior and District Courts confers upon the defendant in a criminal trial the right to both open and close the final arguments to the jury, provided that "no evidence is introduced by the defendant[.]" N.C. Super. and Dist. Ct. R. 10 (2007). This right has been

> deemed to be critically important and the improper deprivation of this right entitles a defendant to a new trial.

State v. English, 194 N.C. App. 314, 317, 669 S.E.2d 869, 871 (2008) (citation omitted).

> When a defendant does not introduce evidence, he retains "the right to open and close the argument to the jury." Gen. R. Pract. Super. and Dist. Ct. 10, 1999 Ann. R. N.C. 66 (Rule 10). As a general proposition, any testimony elicited during cross-examination is "considered as coming from the party calling the witness, even though its only relevance is its tendency to support the cross-examiner's case." Indeed, the general rule also provides there is no right to offer evidence during cross-examination. Nonetheless, evidence may be "introduced," within the meaning of Rule 10, during cross-examination when it is "offered" into evidence by the cross-examiner, and accepted as such by the trial court. Although not formally offered and accepted into evidence, evidence is also "introduced" when new matter is presented to the jury during cross-examination and that matter is *not* relevant to any issue in the case. *See State v. Macon*, 346 N.C. 109, 114, 484 S.E.2d 538, 541 (1997) (cross-examination of State's witness about contents of defendant's statement, which had not been presented by the State and which "did not relate in any way" to testifying witness, constituted the "introduction" of evidence within meaning of Rule 10); N.C.G.S. § 8C-1, Rule 611(b) (1992) ("witness may be cross-examined on any matter relevant to any issue in the case"). New matters raised during the cross-examination, which are relevant, do not constitute the "introduction" of evidence within the meaning of Rule 10. *See* N.C.G.S. § 8C-1, Rule 401 (defining relevant evidence). To hold otherwise, "would place upon a defendant the intolerable burden of electing to either refrain from the exercise of his constitutional right to cross-examine and thereby suffer adverse testimony to stand in the record unchallenged and un-impeached or forfeit the valuable procedural right to closing argument."

State v. Shuler, 135 N.C. App. 449, 452-53, 520 S.E.2d 585, 588-89 (1999) (citations omitted); *see also English*, 194 N.C. App. at 318-19, 669 S.E.2d at 872 (2008) (citing *Macon* and *Shuler* and holding that testimony involving some new facts brought forward by defendant on cross-examination of investigating officer, based upon that officer's report, did not constitute new evidence for the purposes of Rule 10).

In the case before us, Defendant's attorney cross-examined Officer Graham, and identified Defendant's Exhibit 2, which was a report made by Officer Graham following his investigation of the break-in at the Value Mart. During Officer Graham's cross-examination, Defendant's attorney elicited confirmation from Officer Graham that, after viewing video surveillance footage of the Value Mart break-in, a man named Basil King was identified as a possible suspect. The trial court denied Defendant's motion to make the final closing argument because it believed Defendant's cross-examination of Officer Graham concerning Basil King constituted the introduction of evidence pursuant to Rule 10.

Defendant introduced for the first time evidence in Officer Graham's report that, based upon the video footage of the break-in, Basil King was a suspect. However, Defendant did not introduce Officer Graham's actual report into evidence, nor did Defendant have Officer Graham read the report to the jury. Furthermore, this evidence was relevant to the investigation of the crimes for which Defendant was convicted, and was contained in Officer Graham's own report. *See State v. Wells*, 171 N.C. App. 136, 139-40, 613 S.E.2d 705, 707-08 (2005). It was the State that first introduced testimony by Officer Graham and other witnesses concerning the investigation and the evidence leading the police to identify Defendant as a suspect. We cannot say that the identification of other suspects by the police constituted new evidence that was "*not* relevant to any issue in the case." *Shuler*, 135 N.C. App. at 453, 520 S.E.2d at 588. Therefore, this testimony cannot be considered the introduction of evidence pursuant to Rule 10. *Id.*; *see also English*, 194 N.C. App. 314, 669 S.E.2d 869; *State v. Hennis*, 184 N.C. App. 536, 646 S.E.2d 398 (2007); *State v. Bell*, 179 N.C. App. 430, 633 S.E.2d 712 (2006); *Wells*, 171 N.C. App. 136, 613 S.E.2d 705.

Furthermore, after Officer Graham's testimony, the following colloquy occurred between the State and Officer Steven Iyevbele (Officer Iyevbele) of the Charlotte-Mecklenburg Police Department:

> Q. Okay. And were you assigned to the case involving . . . [D]efendant John Matthews?
>
> A. Yes, ma'am.
>
> Q. What is the complaint number of the case you were assigned?
>
> A. 20090302003600.

> Q. And what did you do first when you were assigned this case?
>
> A. I read the entire report.
>
> Q. And what else?
>
> A. Officer Graham indicated that there was a possible suspect named Basil King. I looked Mr. King up on the computer and looked at his current address. I went to his house and I spoke to Mr. King.

Officer Iyevbele, upon being asked a general question concerning his actions in the investigation, testified that Basil King was initially identified as a suspect and that Basil King was investigated. Therefore, the State also introduced evidence at trial that Officer Graham considered Basil King to be a suspect.

Accordingly, we hold that Defendant did not introduce evidence within the meaning of Rule 10, and we must conclude that the trial court's error in denying Defendant the final closing argument entitles Defendant to a new trial. *English*, 194 N.C. App. at 317, 669 S.E.2d at 871.

II.

[2] Because there is a likelihood that, at a new trial, the following issues brought forward on appeal might reoccur, we address these issues now. In Defendant's first argument, he contends that the trial court erred in denying his motion to exclude DNA evidence. We disagree.

Officer Matlock testified that he collected ten blood samples at the scene from the following locations: four from cross bars used as a security measure on the front door, two from the "hand rail" on the interior of the front door, one from the top of a "Newport" cigarette container located on a shelf, one from a plastic shelf beneath the cash register, and two from a cigarette carton found near the "office computer." Officer Matlock took photographs of the areas from which the blood samples were taken that were admitted at trial. The door, shelves, and cigarette cartons from which the blood samples were retrieved were not collected as evidence. Defendant contends that, at a minimum, the cigarette cartons from which blood samples were taken should have been preserved by the police. Defendant's counsel asked Officer Matlock why he did not collect this evidence and secure it at the police station. Officer Matlock answered:

A. In my line of work, if we have an owner present and the property was not taken, that property is released back to the owner once the evidence is collected, i.e. why it's photographed. Otherwise we would have to remove door from the hinges, turn the door in to property, remove the shelves, turn them in to property. And there's obviously just not enough space at property control for—

Q. Oh, I understand that. But as far as the cigarette packs which are little small thing[s], it would be very easy to take them in to your custody and retain them as evidence, would it not?

A. Yes, sir, that is possible. However, I just keep it unanimous, take the photographs, collect the evidence, and then return the property back to the owner.

Q. So you made the decision not to take the cigarette packs and cigarette cartons in to possession as evidence to be presented in court today?

A. Yes, sir, that's how I was trained to do it.

Q. But there are certainly numerous times when you go on a crime scene when pieces of physical evidence are taken in to—you may take photographs of them, but they are taken in to possession and kept, are they not?

A. Yes, sir. However, we have actual crime scene technicians who will collect major pieces of evidences, i.e. homicides, robbery, things of that nature. For a B&E of a business that's what we're trained to collect fingerprints or blood samples off small pieces of material.

Q. It would be the detective's responsibility then to collect evidence from a scene like this as opposed to yours?

A. No, sir, not necessarily. Since we're primary on the scene and I am trained as a crime scene officer, we collect what appears to be the blood samples, what appears to be the fingerprints, and choose to release the property back to the owner, which is what we did in this matter.

Rachel Scott (Ms. Scott) of the Charlotte-Mecklenburg Police Department, an expert in DNA analysis, testified that she tested five of the blood samples, and the DNA profiles for all five samples

matched Defendant's DNA. Defendant hired a DNA expert to review the testing done by Ms. Scott. At the suppression hearing, Defendant's attorney stated that Defendant's expert "confirmed that [the samples] at least procedurally appeared to establish a connection between [the DNA recovered from the crime scene] and the DNA of [Defendant]." Defendant also moved for independent testing of the DNA, and the trial court ordered independent testing to be done by Labcorp, an independent bio-medical testing company.

Dwayne Winston (Mr. Winston), an expert in DNA analysis for Labcorp, testified at trial. Mr. Winston testified that he tested ten blood samples—eight from the crime scene and two samples drawn from Defendant. Mr. Winston testified that the eight samples from the crime scene matched the samples taken from Defendant with a probability of "1 in greater than 6.8 billion for African American, Caucasian and Hispanic population." The State questioned Mr. Winston concerning possible contamination of the samples as follows:

> Q. And this is not a hypothetical. In this particular case there was no evidence of a mixture, is that correct?
>
> A. Correct.
>
> Q. This was a straight one DNA profile?
>
> A. They were single source profiles from all items, yes.
>
> Q. Okay. And there was no evidence of any mixture or contamination in this particular case?
>
> A. That's correct.

Defendant cites no law indicating that the procedure used in this case for collecting and analyzing the blood samples was improper, and we can find none. Defendant cites cases where evidence collected by the police was subsequently lost or destroyed. Our Supreme Court has discussed the applicable law in such situations:

> Defendant also argues that the loss or destruction of the articles of evidence seized at defendant's home resulted in a violation of his rights to due process and a fair trial under the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution. "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially

> useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58, 102 L. Ed. 2d 281, 289, 109 S. Ct. 333 (1988), quoted in *State v. Mlo*, 335 N.C. 353, 373, 440 S.E.2d 98, 108, *cert. denied*, 512 U.S. 1224, 129 L. Ed. 2d 841, 114 S. Ct. 2716 (1994). The trial court's finding that there was no showing of bad faith or willful intent on the part of any law enforcement officer is supported by the record. We also note that defendant has not demonstrated that the missing evidence possessed an exculpatory value that was apparent before it was lost. *See California v. Trombetta*, 467 U.S. 479, 489, 81 L. Ed. 2d 413, 422, 104 S. Ct. 2528 (1984). For these reasons we conclude that the State's failure to preserve the articles of evidence seized at defendant's home did not violate his rights to due process and a fair trial.

State v. Hunt, 345 N.C. 720, 725, 483 S.E.2d 417, 420-21 (1997). Defendant does not argue any bad faith on the part of law enforcement officers, nor does he identify any irregularities in the collection or analysis of the samples collected that would call into question the results of the analysis; therefore, Defendant fails to demonstrate any exculpatory value attached to the cigarette cartons from which the blood samples were collected. Even assuming *arguendo* that the actual cigarette cartons should have been collected as evidence—a position we do not take—Defendant demonstrates no prejudice. *Id.* Defendant's first argument is without merit.

III.

[3] In Defendant's second argument, he contends the trial court erred in denying his motion to suppress evidence of a subsequent crime for which Defendant had been arrested. We disagree.

Over Defendant's objection, the State presented evidence relating to a break-in of a gas station and convenience store located within the city limits of Charlotte. This break-in occurred on 4 August 2009 (the 4 August break-in), after the break-in involved in the present case. Before trial, Defendant moved to suppress this evidence. Charlotte-Mecklenburg Police Investigator Dennis B. Simmons (Investigator Simmons) testified at the hearing on Defendant's motion to suppress. Investigator Simmons testified that he responded to an alarm at the gas station in the early morning hours of 4 August 2009. Investigator Simmons observed a broken window, which was determined to have been the point of entry. Cigarettes had been stolen from the station and substances were found in various locations inside the station that

appeared to be blood. Samples of these substances were collected and sent for DNA analysis. Once DNA analyses of the substances were completed and the results were received by investigators, a warrant was issued and Defendant was arrested. At the time of trial in the present matter, Defendant had not yet been tried for the 4 August break-in. The trial court denied Defendant's motion to suppress, based upon similarities between the two crimes: the method of entry, the larceny of cigarettes, the type of businesses targeted, the time of day the crimes were committed, the short period of time between the commission of the two crimes, the location of both businesses within Charlotte's city limits, and the blood evidence collected connecting Defendant to the crimes.

Rule of Evidence 404 provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Rule 404(b) is "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." Thus, as long as the evidence of other crimes or wrongs by the defendant " 'is relevant for some purpose *other than* to show [the] defendant['s] . . . propensity' " to commit the charged crime, such evidence is admissible under Rule 404(b).

State v. Locklear, 363 N.C. 438, 447, 681 S.E.2d 293, 301-02 (2009) (citations omitted). Defendant cites no case law and makes no argument that our appellate courts have found error in admitting 404(b) evidence in any cases involving fact situations similar to the facts before us. Defendant makes the following general declarative arguments: the "evidence was insubstantial to conclude that [Defendant] committed the [4 August break-in] offense[,]" "the evidence has no tendency to make the existence of any fact of consequence in this action more or less probative[,]" and that "Rule 403 should have caused the trial court to sustain objection to [the relevant] testimony, even if some remote probative value could attach."

First, we hold that the evidence presented at the suppression hearing was sufficient to link Defendant to the 4 August break-in. DNA evidence was collected at the scene of the 4 August break-in and, based upon the results of the analysis of that DNA evidence, Defendant was charged with that crime. This was sufficient to connect Defendant with the 4 August break-in for the purposes of Rule 404(b).

Second, the 404(b) evidence was probative of—at a minimum—intent, identity, *modus operandi*, and common scheme or plan. Therefore, this evidence was relevant for jury consideration on the issue of whether Defendant was the person who smashed the window at the Value Mart, entered that business, and stole cigarettes. This evidence had the tendency to make relevant facts of this case more or less probable. N.C. Gen. Stat. § 8C-1, Rule 401 (2009) (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

Finally, Defendant argues that the 404(b) evidence should have been excluded pursuant to Rule 403. Rule 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C. Gen. Stat. § 8C-1, Rule 403 (2009). Defendant argues that the 404(b) evidence was unduly prejudicial. We hold, in light of all the facts, that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Defendant's second argument is without merit.

IV.

In his final argument, Defendant contends that the trial court erred by denying his motion to dismiss. We disagree.

Defendant concedes that this argument hinges on his prior arguments that the DNA evidence, and the evidence of Defendant's involvement in the 4 August break-in, should have been excluded. Having held that the above evidence was properly admitted, we further hold that the State presented sufficient evidence to survive

Defendant's motion to dismiss. The trial court did not err in denying Defendant's motion. Defendant's final argument is without merit.

New trial.

Judges ELMORE and HUNTER, JR. concur.

CAMBRIDGE SOUTHPORT, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, PLAINTIFF-APPELLEE v. SOUTHEAST BRUNSWICK SANITARY DISTRICT, DEFENDANT-APPELLANT

No. COA11-438

(Filed 17 January 2012)

1. Sewage—application for subdivision—default and foreclosure—new developer—original application tolled

The trial court did not err by granting plaintiff's motion for summary judgment where a developer began a townhome development and obtained a permit for wastewater treatment and service; the developer defaulted and the bank foreclosed on the subdivision; plaintiff purchased the subdivision; defendant required plaintiff to reapply and pay the full amount of newly assessed allocation fees; and plaintiff's complaint alleged that this action was unlawful under an Act that extended certain government approvals affecting rest estate development. Construing the Act liberally to affect its purpose, the application constituted a developmental approval as contemplated by the Act, the application was governed by the Act, and summary judgment was proper.

2. Appeal and Error—trial court order—portion not appealed from

In an action concerning the tolling of the time for the validity of a wastewater treatment approval for a new subdivision, the issue of the trial court's determination of the end of the tolling period was not appealed by defendant and that portion of the trial court's order was not before the Court of Appeals.

3. Civil Procedure—summary judgment—findings not required

The trial court did not err by denying defendant's motion for findings in an action concerning the tolling of the validity period of a wastewater treatment approval where none of the material facts were in dispute and summary judgment was appropriate.

4. Jurisdiction—standing—real estate development—wastewater treatment approval—subsequent developer

Plaintiff had standing to enforce its rights under an application for a wastewater treatment approval where plaintiff had purchased the subdivision from the developer who had filed the original application.

Appeal by Defendant from judgment dated 6 January 2011 and order dated 11 February 2011 by Judge Ola M. Lewis in Superior Court, Brunswick County. Heard in the Court of Appeals 11 October 2011.

Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for Plaintiff-Appellee.

Kenneth P. Andresen, PLLC, by Kenneth P. Andresen, for Defendant-Appellant.

McGEE, Judge.

Town and Country Developers at Wilmington, Inc. (Town and Country) obtained a loan from Regions Bank (the Bank) to develop an 88-unit townhome subdivision (the subdivision) in Brunswick County. Town and Country signed an Application for Service Capacity Allocation (the Application) on 23 January 2006 with Southeast Brunswick Sanitary District (Defendant), a sanitary district formed and operating in accordance with Article 2 of section 130A of the North Carolina General Statutes. The Application was a necessary prerequisite for Town and Country to obtain wastewater collection and treatment services from Defendant. The Application stated that Town and Country had three years "to complete the project as described in [the] Application or the allocation for service capacity [would] expire and any proceeds [Town and Country had] paid for this allocation approval [would] be non-refundable." Town and Country was required to make a down payment in the amount of $88,000.00 at the time it filed the Application. Town and Country had paid Defendant the amount of $264,000.00 in total impact fees that

were required for Defendant to service the subdivision by 11 October 2006. The North Carolina Division of Water Quality (DWQ), a division of the North Carolina Department of Environment and Natural Resources (DENR), issued a permit (the permit) to Defendant on 4 August 2006, which allowed Defendant to service the subdivision. The permit was effective from 4 August 2006 "until rescinded[,]" and the record is devoid of any evidence that the permit was ever rescinded.

In mid-2008, Town and Country defaulted on its obligations and the Bank foreclosed on the subdivision. Defendant sent the Bank a letter dated 9 December 2009 in which Defendant stated that the allocations for wastewater treatment issued for the subdivision had expired on 23 January 2009, and that the Bank "or another party" could "reapply for a new allocation" for the subdivision. Defendant stated that, under a revised cost schedule for allocations, in order to move forward with the subdivision, new allocation total impact fees would cost $648,000.00. Defendant further stated that the total impact fees of $264,000.00 previously paid by Town and Country were nonrefundable and would not apply toward the $648,000.00 that Defendant claimed was owed with "reapplication"

Cambridge Southport, LLC (Plaintiff) is a real estate developer. Plaintiff purchased the subdivision from the Bank on 31 December 2009 with the intention of moving forward with Town and Country's original plan for the subdivision. Plaintiff contends, and Defendant does not dispute, that prior to foreclosure, Town and Country "completely built, installed and implemented all of the infrastructure necessary to service the wastewater needs of the entire [s]ubdivision[.]" DWQ received a "final engineering certification for the [subdivision] on March 15, 2007[,]" and accepted this certification. Initially, Plaintiff attempted to obtain direct approval from Defendant for a waiver of the "new" allocation fees. Though Defendant's initial response to Plaintiff was optimistic, Defendant ultimately decided, at a 23 February 2010 Board of Commissioners meeting, to require Plaintiff to reapply and to pay the full amount of the newly assessed allocation fees.

Plaintiff filed an amended complaint dated 29 July 2010 alleging that Defendant's action in requiring Plaintiff to reapply for wastewater service capacity allocation was unlawful. Defendant answered and counterclaimed. In a motion dated 12 October 2010, Plaintiff moved for "Summary Judgment and/or Declaratory Judgment." Plaintiff contended that the North Carolina General Assembly, through 2009 N.C. Session Law ch. 406 (as amended by 2009 N.C.

Session Law ch. 484, 2009 N.C. Session Law ch. 550, 2009 N.C. Session Law ch. 572, and 2010 N.C. Session Law ch. 177), "An Act to Extend Certain Government Approvals Affecting the Development of Real Property Within the State" (the Act), "applies to the [subdivision] and entirely precludes Defendant's [a]dditional [f]ees" as a matter of law.

The trial court granted Plaintiff's motion for summary judgment on 6 January 2011, ruling that the Act, as amended, applied to the Application and "precluded and prohibited" Defendant from charging Plaintiff additional fees. Defendant appeals.

I.

[1] Defendant argues that the trial court "erred in granting . . . Plaintiff's motion for summary judgment and/or declaratory judgment." We disagree.

Defendant contends that the Application is not subject to the Act because it was only a contract between Defendant and Town and Country. Defendant argues that the Act could not serve to toll the three-year validity period included in the terms of the Application. The Act provides:

> SECTION 1. This act shall be known and may be cited as the "Permit Extension Act of 2009."
>
> SECTION 2. The General Assembly makes the following findings:
>
> (1) There exists a state of economic emergency in the State of North Carolina and the nation, which has drastically affected various segments of the North Carolina economy, but none as severely as the State's banking, real estate, and construction sectors.
>
> (2) The real estate finance sector of the economy is in severe decline due to the creation, bundling, and widespread selling of leveraged securities, such as credit default swaps, and due to excessive defaults on sub-prime mortgages and the resultant foreclosures on a vast scale, thereby widening the mortgage finance crisis. The extreme tightening of lending standards for home buyers and other real estate borrowers has reduced access to the capital markets.
>
> (3) As a result of the crisis in the real estate finance sector of the economy, *real estate developers and redevelopers*, including home builders, and commercial, office, and industrial developers, *have experienced an industry-wide decline*,

including reduced demand, cancelled orders, declining sales and rentals, price reductions, increased inventory, fewer buyers who qualify to purchase homes, layoffs, and scaled back growth plans.

. . . .

(5) The process of obtaining the myriad of other government approvals, such as wetlands permits, treatment works approvals, *on-site wastewater disposal permits*, stream encroachment permits, flood hazard area permits, highway access permits, and numerous waivers and variances, can be difficult and expensive; further, changes in the law can render these approvals, if expired or lapsed, difficult to renew or reobtain.

(6) County and municipal governments, including local sewer and water authorities, obtain permits and approvals from State government agencies, particularly the Department of Environment and Natural Resources, which permits and approvals may expire or lapse due to the state of the economy and the inability of both the public sector and the private sector to proceed with projects authorized by the permit or approval.

. . . .

(8) The current national *recession has severely weakened the building industry*, and many landowners and *developers are seeing their life's work destroyed* by the lack of credit and dearth of buyers and tenants due to the crisis in real estate financing and the building industry, uncertainty over the state of the economy, and increasing levels of unemployment in the construction industry.

(9) *The construction industry and related trades are sustaining severe economic losses, and the lapsing of government development approvals would exacerbate, if not addressed, those losses.*

. . . .

(11) Due to the current inability of builders and their purchasers to obtain financing under existing economic conditions, more and more once-approved permits are expiring or lapsing, and, as these approvals lapse, lenders must reappraise

and thereafter substantially lower real estate valuations established in conjunction with approved projects, thereby requiring the reclassification of numerous loans, which, in turn, affects the stability of the banking system and reduces the funds available for future lending, thus creating more severe restrictions on credit and leading to a vicious cycle of default.

(12) As a result of the continued downturn of the economy and the continued expiration of approvals that were granted by State and local governments, it is possible that thousands of government actions will be undone by the passage of time.

(13) Obtaining an extension of an approval pursuant to existing statutory or regulatory provisions can be both costly in terms of time and financial resources and insufficient to cope with the extent of the present financial conditions; moreover, the costs imposed fall on the public as well as the private sector.

(14) *It is the purpose of this act to prevent the wholesale abandonment of already approved projects and activities due to the present unfavorable economic conditions by tolling the term of these approvals for a finite period of time as the economy improves, thereby preventing a waste of public and private resources.*

SECTION 3. Definitions.—As used in this act, the following definitions apply:

(1) Development approval.—*Any of the following approvals issued by* the State, any agency or subdivision of the State, or *any unit of local government, regardless of the form of the approval,* that are for the development of land or *for the provision of water or wastewater services by a government entity:*

. . . .

f. Any water or wastewater permit issued under Article 10 or Article 11 of Chapter 130A of the General Statutes.

. . . .

SECTION 4. For any development approval that is current and valid at any point during the period beginning January 1, 2008, and ending December 31, 2010, the running of the period of

the development approval and any associated vested right under G.S. 153A-344.1 or G.S. 160A-385.1 is suspended during the period beginning January 1, 2008, and ending December 31, 2011.

. . . .

SECTION 5. This act shall not be construed or implemented to:

. . . .

(8) [as added by 2010-177] Modify any person's obligations or impair the rights of any party under contract, including bond or other similar undertaking.

(9) [as added by 2010-177] Authorize the charging of a water or wastewater tap fee that has been previously paid in full for a project subject to a development approval.

SECTION 5.1, as added by 2009-572, s. 2:

(a) This act does not revive a vested right to the water or sewer allocation associated with a development approval that expired between January 1, 2008, and August 5, 2009, and is revived by the operation of this act if both of the following conditions are met:

(1) The water or sewer capacity was reallocated to other development projects prior to August 5, 2009, based upon the expiration of the development approval.

(2) There is not sufficient supply or treatment capacity to accommodate the project that is the subject of the revived development approval.

(b) A person whose development approval is revived under this act but whose water or sewer allocation is not revived under this section must be given first priority if additional supply or treatment capacity becomes available.

. . . .

SECTION 7. The provisions of this act *shall be liberally construed to effectuate the purposes of this act.*

2010 N.C. Session Law ch. 177 (ratified 10 July 2010) (emphases added).

Section 2(14) of the Act clearly states that the purpose of the Act is to prevent abandonment of already approved projects by tolling the

term of government approvals, including approvals granted by municipal governmental entities. Section 7 states: "The provisions of this act shall be liberally construed to effectuate the purposes of this act." Section 5.1(a) clearly anticipates that "sewer allocation associated with a development approval that expired between January 1, 2008, and August 5, 2009" is covered under the Act. Section 5.1(a)(1) further states that the only conditions under which the Act will not serve to revive or extend sewer allocation approval is if the "sewer capacity was reallocated to other development projects prior to August 5, 2009" and there is not sufficient treatment capacity to provide for the project covered by the expired approval.

In the present case, Town and Country applied to Defendant for wastewater treatment allocation for the subdivision. Town and Country completed the necessary tasks and submitted the necessary documents to receive all required permits and authorizations. Town and Country completed the necessary wastewater treatment infrastructure for the entire subdivision and received DWQ certification for the wastewater treatment system. Town and Country received the necessary approvals to begin construction on the subdivision townhomes, and completed some townhomes before it went into default. Certificates of Occupancy were issued by Brunswick County for several completed townhomes in the subdivision. Certificates of Occupancy will not issue unless the necessary permits have been obtained, and the homes have passed inspection. Further, Brunswick County will not issue a Certificate of Occupancy without Defendant's approval. Defendant gave its approval, and Certificates of Occupancy were issued for several townhomes in the subdivision before Town and Country defaulted. Defendant has been providing wastewater treatment for those townhomes without issue.

After purchasing the subdivision from the Bank, Plaintiff proceeded with construction of the remaining townhomes according to the original plan submitted by Town and Country and approved by the relevant authorities, including Defendant. Upon completion of a townhome in the subdivision, Plaintiff requested the appropriate inspections and a Certificate of Occupancy from Brunswick County. Defendant refused to allow the issuance of a Certificate of Occupancy because Defendant contended that the approval for wastewater allocation originally granted to Town and Country had expired on 23 January 2009. Defendant stated that Plaintiff was required to pay new wastewater allocation fees for any new structures Plaintiff wanted connected to Defendant's wastewater treat-

ment facility, and Defendant would not approve any new Certificates of Occupancy until Plaintiff paid the new wastewater allocation fees.

Defendant contends the Application is not part of any "developmental approval" as defined in the Act and, thus, the Act cannot serve to toll the three-year completion deadline included in the Application. Defendant contends that the Application was simply a contract for service between Defendant and Town and Country. Defendant's reading of "developmental approval" is too narrow. First, the clearly stated purpose of the Act is to encourage and facilitate the completion of development projects, such as the subdivision, by tolling the expiration of state and local government approvals necessary for the completion of these projects. Second, Section 7 of the Act states: "The provisions of this act shall be liberally construed to effectuate the purposes of this act." Third, the Act was clearly intended to cover authorizations for wastewater treatment, evidenced by Section 3(1)(f), and was further intended to cover wastewater capacity allocation, evidenced by Section 5.1. Fourth, were the provisions of the Act limited to the permit obtained by Defendant from DENR, as Defendant contends, Section 5.1, and in most instances Section 3(1)(f), would have no effect. Defendant and other municipal entities in control of wastewater capacity allocation and treatment could thwart the purpose of the Act by preventing the completion of development projects approved during the tolling period included in the Act. Fifth, by refusing to recognize the Application as part of a developmental approval, and by refusing to recognize that the expiration period had been tolled, Defendant is preventing the issuance of other developmental approvals for the subdivision that are clearly covered by the Act. Due to Defendant's refusal to authorize, no Certificates of Occupancy may be issued, no townhomes may be inhabited and, therefore, there is no point in further developing the subdivision.

Construing the provisions of the Act liberally to effect the purpose of the Act, we hold that the Application constitutes a developmental approval as contemplated by the Act and, therefore, the Application is governed by the Act.

II.

[2] The Application for wastewater capacity allocation was, by its terms, valid between 23 January 2006 and 23 January 2009. The Act tolls terminations on authorizations that were valid at any point during the period beginning 1 January 2008, and ending 31 December 2010. The trial court ordered:

> Defendant cannot assert its Position against Plaintiff, Plaintiff's Subdivision and the Application until after 23 January 2013, if at all. This date is 1 year and 23 days after the expiration of the . . . Act's protective tolling period that ends 31 December 2011 and represents the time remaining on the Application as of 1 January 2008.

Because Defendant did not appeal the trial court's determination of the date of the end of the tolling period, this portion of the trial court's order is not before us. N.C.R. App. P. 28(b)(6).

III.

[3] Defendant argues that the trial court erred in denying Defendant's motion for findings of fact pursuant to Rule 52 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 52. The trial court heard Plaintiff's motion for "summary and/or declaratory judgment."

> Summary judgment may be granted in a declaratory judgment proceeding where 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[.] On appeal, this Court's standard of review involves a two-step determination of whether (1) the relevant evidence establishes the absence of a genuine issue as to any material fact, and (2) either party is entitled to judgment as a matter of law.

Production Sys., Inc. v. Amerisure Ins. Co., 167 N.C. App. 601, 604, 605 S.E.2d 663, 665 (2004) (citations and quotation marks omitted). " '[I]t is not a part of the function of the [trial] court on a motion for summary judgment to make findings of fact and conclusions of law.' " *Childress v. Yadkin Cty.*, 186 N.C. App. 30, 43, 650 S.E.2d 55, 64 (2007) (citation omitted). Though findings and conclusions may be necessary in certain situations, the present case is not one of those situations.

> [I]n rare situations it can be helpful for the trial court to set out the *undisputed* facts which form the basis for his judgment. When that appears helpful or necessary, the court should let the judgment show that the facts set out therein are the undisputed facts. The judgment now before us does not so indicate. It does appear, however, that the *material* facts set out are not in dispute.

Capps v. City of Raleigh, 35 N.C. App. 290, 292, 241 S.E.2d 527, 529 (1978). None of the material facts are in dispute. There remains only a question of law: whether the provisions of the Act apply to the Application. Having determined that the provisions of the Act do apply to the Application, and that the expiration of the Application was therefore tolled, we hold that summary judgment was appropriate and, in this instance, no findings of fact were required.

IV.

[4] Defendant argues that Plaintiff lacked standing to bring this action. Defendant's argument concerning standing is predicated on the presumption that the Application was solely a contract between Defendant and Town and Country and conferred no rights upon Plaintiff when Plaintiff purchased the subdivision. Having held that the Act served to toll the expiration of the Application, and that Plaintiff is entitled to proceed with development of the subdivision pursuant to the tolled terms of the Application, we also hold that Plaintiff had standing to enforce its rights under the Application. *Slaughter v. Swicegood*, 162 N.C. App. 457, 463-64, 591 S.E.2d 577, 582 (2003).

Affirmed.

Judges HUNTER, Robert C. and CALABRIA concur.

SHEILA COFFEY, ADMINISTRATOR FOR THE ESTATE OF DENNIS H. BARBER, SR., DECEASED EMPLOYEE, AND SHEILA COFFEY, HARVEY BARBER, DENNIS HUBERT BARBER, JR., AND PATRICIA BARBER MANNING, CHILDREN OF DECEASED EMPLOYEE, PLAINTIFFS v. WEYERHAEUSER COMPANY, EMPLOYER, SELF-INSURED, DEFENDANT

No. COA11-791

(Filed 17 January 2012)

1. Workers' Compensation—death benefits claim—not timely

A workers' compensation claim for death benefits was not timely filed where the decedent died more than six years after his injury, a 1999 settlement agreement left nothing further to be decided and became a final determination of disability when it was approved by the Industrial Commission, and more than 2 years passed before decedent's death.

2. Workers' Compensation— death benefits claims—time limitation—not unconstitutional

N.C.G.S. § 97-38 is not unconstitutional. *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, involved a different statute.

Appeal by plaintiffs from opinion and award entered 1 March 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 November 2011.

Wallace and Graham, P.A., by Michael B. Pross, for plaintiff appellants.

Teague Campbell Dennis & Gorham, L.L.P., by Bruce A. Hamilton, Tracey L. Jones, and Leslie P. Lasher, for defendant appellee.

McCULLOUGH, Judge.

Plaintiffs appeal from an opinion and award by the North Carolina Industrial Commission denying plaintiffs' claim as untimely under N.C. Gen. Stat. § 97-38. We affirm.

I. Background

Dennis H. Barber, Sr. ("Barber") was employed by Weyerhaeuser Company ("defendant") at its Plymouth, North Carolina, facility from 1953 to 1974. On 30 May 1997, Barber was diagnosed with asbestosis, and on 28 April 1998, Barber was diagnosed with asbestos-related laryngeal cancer.

Barber filed a workers' compensation claim, and on 27 October 1999, Barber and defendant reached an Agreement of Settlement (the "1999 Agreement") regarding compensation for Barber's laryngeal cancer and asbestosis. As part of the 1999 Agreement, defendant agreed to pay Barber the total amount of $101,699.86 in full and final settlement of his accrued workers' compensation benefits, as well as lifetime weekly benefits in the amount of $537.80 per week for Barber's "total and permanent disability."

In addition, the 1999 Agreement contained the following paragraph:

> 6. It is the sense of the Agreement that the parties have resolved all issues which have arisen to date involving the contraction of these asbestos related diseases by the Plaintiff-Employee; provided, however that the Plaintiff-Employee

> specifically reserves the right to bring an action under the North Carolina Workers' Compensation Act for further benefits, which shall be limited to a claim for death benefits pursuant to N.C. Gen. Stat. § 97-38 and medical compensation pursuant to N.C. Gen. Stat. § 97-25, should he die of either of these diseases and/or subsequently develop or be diagnosed with other asbestos related diseases. For purposes of a potential claim for benefits under N.C. Gen. Stat. § 97-38, the parties agree that the date of approval of this Agreement shall be the date of final determination of disability by the Industrial Commission.

On 1 November 1999, Deputy Commissioner W. Bain Jones, Jr., issued an order approving the 1999 Agreement.

On 4 January 2009, Barber died as a result of the asbestosis. At the time of his death, Barber was survived by his four children: Sheila Barber Coffey, Harvey Barber, Dennis Hubert Barber, Jr., and Patricia Barber Manning (collectively, "plaintiffs"). On 13 April 2009, plaintiffs filed a Form 18B with the North Carolina Industrial Commission (the "Commission"), seeking death benefits under N.C. Gen. Stat. § 97-38. On 1 May 2009, defendant filed a Form 61, amended on 20 May 2009, denying plaintiffs' claim and contending that plaintiffs' claim was barred by the time limitations imposed under N.C. Gen. Stat. § 97-38.

The matter was heard by Deputy Commissioner Stephen T. Gheen ("Deputy Commissioner Gheen"), who entered an opinion and award in favor of plaintiffs, finding that plaintiffs' claim was timely filed under N.C. Gen. Stat. § 97-38 and awarding death benefits to plaintiffs. Defendant appealed Deputy Commissioner Gheen's opinion and award to the Full Commission.

On 1 March 2011, the Full Commission entered an opinion and award reversing Deputy Commissioner Gheen's opinion and award. The Full Commission found that the Commission's 1 November 1999 Order of Approval of the 1999 Agreement resolved the issues of permanent and total disability and constituted a final determination of disability for purposes of N.C. Gen. Stat. § 97-38. Plaintiffs timely appealed to this Court.

II. Standard of review

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360

N.C. 41, 43, 619 S.E.2d 491, 492 (2005). The Commission's findings of fact are conclusive on appeal if supported by any competent evidence. *Barbour v. Regis Corp.*, 167 N.C. App. 449, 454, 606 S.E.2d 119, 124 (2004). We review the Commission's conclusions of law *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

III. Time limitation on claim for death benefits

[1] Section 97-38 of the Workers' Compensation Act provides that "[i]f death results proximately from a compensable injury or occupational disease and within six years thereafter, or within two years of the final determination of disability, whichever is later," the employer shall pay death benefits to certain beneficiaries defined under that section. N.C. Gen. Stat. § 97-38 (2009). Consequently, an injured employee's beneficiaries have a statutory claim for the payment of death benefits under this section, so long as the statute's limitations period on the filing of such claims has not run. "Death benefits accrue only if death occurs within the maximum statutorily set time after the accident." *Joyner v. J.P. Stevens & Co.*, 71 N.C. App. 625, 627, 322 S.E.2d 636, 637 (1984) (internal quotation marks omitted).

We first note that plaintiffs do not dispute the following finding of fact in the Commission's order, which is therefore binding on appeal:

> 8. [Barber] was diagnosed with asbestosis on May 30, 1997 and laryngeal cancer on April 28, 1998. Pursuant to the November 1, 1999 Industrial Commission Order, [Barber] received disability benefits starting January 1, 1998. [Barber]'s date of disability was at the latest April 28, 1998. [Barber]'s death on January 4, 2009 was more than six years after [Barber]'s date of disability.

Because it is undisputed that Barber died more than six years following his injury, our review concerns only whether his death occurred within two years of the Commission's final determination of disability.

In their appeal, plaintiffs challenge only the Commission's finding that "[t]he Industrial Commission made a final determination of disability when it approved the parties' Settlement Agreement on November 1, 1999." "Generally, 'any determination requiring the exercise of judgment . . . or the application of legal principles . . . is more properly classified as a conclusion of law.' " *Lamm v. Lamm*, ____N.C. App. ____ , ____ , 707 S.E.2d 685, 691 (2011) (omissions in original) (quoting *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672,

675 (1997) (citations omitted)). Therefore, this finding is essentially a conclusion of law and is fully reviewable by this Court. *Id.*

Plaintiffs' arguments on appeal postulate that their claim for death benefits under section 97-38 cannot be limited by the provisions of the 1999 Agreement. Specifically, the 1999 Agreement provides that "[f]or purposes of a potential claim for benefits under N.C. Gen. Stat. § 97-38, the parties agree that the date of approval of this Agreement shall be the date of final determination of disability by the Industrial Commission." Plaintiffs contend their death benefits claim cannot be bound by such provision, as they were not parties to the 1999 Agreement.

However, plaintiffs' arguments that the provision setting the date of final determination in the 1999 Agreement is not binding on their claim is inapposite, as plaintiffs are not seeking to enforce any rights under the contractual agreement. Rather, as noted above, plaintiffs' claim for death benefits in the present case is a statutory claim created under section 97-38 of the Workers' Compensation Act. As such, the express provisions of the statute at issue, N.C. Gen. Stat. § 97-38, govern plaintiffs' rights in bringing their death benefits claim. Thus, the only question for this Court is whether the Commission's approval of the 1999 Agreement, a compromise settlement agreement, constituted a "final determination" of Barber's disability under the facts of this case.

"A 'clincher' or compromise agreement is a form of voluntary settlement used in contested or disputed cases." *Ledford v. Asheville Housing Authority*, 125 N.C. App. 597, 599, 482 S.E.2d 544, 546 (1997). The North Carolina Workers' Compensation Act permits parties to enter into such settlement agreements pursuant to the provisions of N.C. Gen. Stat. § 97-17, so long as such settlement agreements are "approved by the Commission." N.C. Gen. Stat. § 97-17 (2009). "In interpreting and applying G.S. 97-17 . . . , it has been uniformly held that an agreement for the payment of compensation, when approved by the Commission, is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal." *Pruitt v. Publishing Co.*, 289 N.C. 254, 258, 221 S.E.2d 355, 358 (1976). " 'In approving a settlement agreement the Industrial Commission acts in a judicial capacity and the settlement as approved becomes an award enforceable, if necessary, by a court decree.' " *Morrison v. Public Serv. Co. of N.C., Inc.*, 182 N.C. App. 707, 709, 643 S.E.2d 58, 60-61

(2007) (quoting *Pruitt*, 289 N.C. at 258, 221 S.E.2d at 358). "The Commission's approval of settlement agreements is as conclusive as if made upon a determination of facts in an adversary proceeding." *Pruitt*, 289 N.C. at 258, 221 S.E.2d at 358.

Plaintiffs posit that the Commission's 1 November 1999 approval of the 1999 Agreement cannot constitute a "final determination of disability" for purposes of their death benefits claim because the Commission is not required to make such a determination when reviewing settlement agreements for approval. Plaintiffs also posit that the parties to a settlement agreement cannot agree to make findings of fact for the Commission and that compromise settlement agreements should be considered differently than other types of settlements using various Industrial Commission forms. Nonetheless, as the foregoing cases hold, any settlement agreement approved by the Commission, including the findings and conclusions therein, constitutes a binding and enforceable opinion and award of the Commission, is conclusive as to the issues contained therein, and is treated no differently than an opinion and award of the Commission entered after a full adversary proceeding. Thus, despite plaintiffs' arguments to the contrary, compromise settlement agreements, upon approval by the Commission, can constitute a "final determination of disability," just as any other method for resolving a workers' compensation claim, including settlement agreements on Industrial Commission forms or a full adversary proceeding. The statute affording an injured employee's beneficiaries a claim for death benefits makes no distinction in the method of resolving the injured employee's workers' compensation claim, and we see no reason to treat the various types of settlement agreements differently for purposes of section 97-38. The plain language of the statute simply contemplates a "final determination of disability" by the Commission, regardless of the form.

Moreover, given our opinions in *Estate of Apple v. Commercial Courier Express, Inc.*, 165 N.C. App. 514, 598 S.E.2d 625 (2004), and *Meares v. Dana Corp.*, 193 N.C. App. 86, 666 S.E.2d 819 (2008), we agree with the Commission's conclusion of law that "[f]or purposes of the two year statute of limitations following a final determination of disability, there is a final determination of disability when the Industrial Commission determines that an employee is permanently and totally disabled." *See Apple*, 165 N.C. App. at 518-19, 598 S.E.2d at 628 (holding a Form 21 agreement for disability compensation was not a final determination of disability where the agreement evidenced

uncertainty regarding the injured employee's condition and there was no determination that the injured employee was permanently and totally disabled until the Commission resolved the issue at the request of the parties); *Meares*, 193 N.C. App. at 94-95, 666 S.E.2d at 825-26 (approving the Commission's reasoning that employer unreasonably litigated the permanence of the plaintiff-employee's disability in order to "expedite the running of the limitations period in N.C. Gen. Stat. § 97-38 with a final determination of the plaintiff's disability").

Notably, in the present case, the Commission found as fact that "[o]n October 27, 1999, [Barber and defendant] reached an Agreement of Settlement . . . resolving the issues in dispute at the time, *including the issues of permanent and total disability.*" (Emphasis added.) Indeed, the 1999 Agreement specifically states that Barber "shall be entitled to weekly compensation for his *total and permanent disability*" and specifies the amount of lifetime benefits Barber was to receive. (Emphasis added.) Thus, the 1999 Agreement left nothing further to be decided by the Commission regarding Barber's disability, and the record shows that following the Commission's approval of the 1999 Agreement on 1 November 1999 until Barber's death over nine years later, no other issues regarding Barber's disability was brought before the Commission. Accordingly, based on our reading of our opinions in *Apple* and *Meares*, under the facts of this case, we conclude the 1999 Agreement finding Barber to be totally and permanently disabled became a final determination of Barber's disability when the Commission approved the Agreement on 1 November 1999 and no further action was taken. The Commission properly concluded that "[t]he Industrial Commission's November 1, 1999 Order of Approval of the Agreement resolving issues of permanent and total disability constituted a final determination of disability for purposes of N.C. Gen. Stat. § 97-38."

In upholding the statutory time limits in the present case, we adhere to our Supreme Court's statement that the "overriding policy" of the statute is to "provid[e] death benefits, at a fixed rate for a fixed period, to the individual dependents of an employee who has met with *an untimely and unexpected demise.*" *Deese v. Lawn and Tree Expert Co.*, 306 N.C. 275, 281, 293 S.E.2d 140, 145 (1982) (emphasis added). Indeed, our Supreme Court "noted that it was never contemplated that the Workers' Compensation Act would . . . be the equivalent of general accident, health or life insurance. Instead, this legislation was enacted to afford certain and reasonable relief against *peculiar hardship.*" *Id.* at 281-82, 293 S.E.2d at 145 (emphasis added) (citations omitted).

> "We recognize that application of G.S. 97-38 may sometimes have the effect of barring an otherwise valid and provable claim simply because the employee did not die within the requisite period of time . . . . The remedy for any inequities arising from the statute, however, lies not with the courts but with the legislature."

Joyner, 71 N.C. App. at 627-28, 322 S.E.2d at 638 (omission in original) (quoting *Booker v. Medical Center*, 297 N.C. 458, 483-84, 256 S.E.2d 189, 205 (1979)).

[2] Finally, although plaintiffs argue the death benefits statute at issue here, N.C. Gen. Stat. § 97-38, is unconstitutional, we find their argument relying on this Court's holding in *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 616 S.E.2d 356 (2005), is without merit. *Payne* did not hold the statute at issue here is unconstitutional. Rather, *Payne* addressed the constitutionality of N.C. Gen. Stat. § 97-61.6, which imposed a shorter time limitation for the filing of a death benefits claim in asbestosis and silicosis cases, as compared to all other occupational diseases. *Id.* at 502-03, 616 S.E.2d at 361. *Payne* held that a plaintiff suffering from asbestosis or silicosis is similarly situated to all other persons suffering from occupational diseases, and therefore N.C. Gen. Stat. § 97-61.6, which treated the two diseases "differently from other latent occupational diseases" violated the Equal Protection Clause. *Id.* at 504-06, 616 S.E.2d at 362-63.

Further, after holding section 97-61.6 unconstitutional, *Payne* specifically upheld the Commission's determination that the plaintiff's death benefits claim was timely filed, since the "plaintiff's claim was within the time limitation applicable to other occupational diseases, N.C. Gen. Stat. § 97-38," the particular statute at issue in the present case. *Id.* at 506-07, 616 S.E.2d at 363. Thus, *Payne* does not hold that N.C. Gen. Stat. § 97-38 is unconstitutional, and we do not so hold now.

For the foregoing reasons, we affirm the Commission's order denying plaintiffs' claim for death benefits as untimely.

Affirmed.

Judges McGEE and STEELMAN concur.

STATE OF NORTH CAROLINA v. KELLY SHAWN HOGAN

No. COA11-580

(Filed 17 January 2012)

Criminal Law—right to open and close argument—reading from witness's statement on cross-examination—not introduction of evidence

Defendant received a new trial where the trial judge deprived him of the right to open and close argument to the jury based on a ruling that defendant introduced evidence during his cross-examination of the victim. Defense counsel read aloud several portions of the victim's statement in an apparent attempt to point out inconsistencies with his trial testimony, but those statements were directly related to the direct examination and defendant did not formally introduce the statements into evidence.

Appeal by defendant from judgment entered 28 October 2010 by Judge Gary L. Locklear in Robeson County Superior Court. Heard in the Court of Appeals 14 November 2011.

Roy Cooper, Attorney General, by J. Aldean Webster III, Assistant Attorney General, for the State.

J. Clark Fischer, for defendant-appellant.

MARTIN, Chief Judge.

In 2001, defendant Kelly Shawn Hogan was charged in an indictment with robbery with a dangerous weapon. However, the charge was dismissed with leave on 16 January 2003, the box on the dismissal form indicating "defendant failed to appear for a criminal proceeding at which the defendant's attendance was required and the prosecutor believes that the defendant cannot readily be found." Later, in July 2010, the charge was reinstated for trial and, on 28 October 2010, the trial court entered judgment upon a jury verdict finding defendant guilty of the charge. Defendant gave oral notice of appeal. For the following reasons, we hold defendant is entitled to a new trial.

The following evidence was presented at defendant's trial. On 30 June 2000, then-Officer Renea White of the Lumberton Police Department responded to a call about an incident in the Freedom Drive-area of Robeson County. When Officer White arrived at the scene, she got a statement from the victim, Robert McQueen.

At defendant's trial, McQueen testified that he had been at a poker game that night and described the events as follows: during one round, McQueen bet, two other players and defendant folded, and McQueen announced, "[Y]ou all let me win with a pair of deuces," and "grabbed [his] money." Defendant responded, "I didn't fold, I ain't fold." The owner of the house told defendant he had folded. McQueen testified that, although he offered defendant $20 to get back in the game, he and defendant had "little words" and then defendant "just got up and left." McQueen left the house a couple of hours after defendant had gone. As McQueen walked outside, he heard the double click of a shotgun. Then he heard defendant say, "Don't move, don't move." Defendant ran in front of McQueen, faced him, and told him to take off his shoes and pants. Defendant went through the pockets of McQueen's pants and took money and then made McQueen lie on his stomach. McQueen testified that defendant then said, "I should kill you now[,] you b---h-ass," and then "popped" him in the back of his head with the gun and shot at the ground. McQueen testified that defendant took his shoes and about $650 in cash from him that night. On 16 August 2000, then-Officer Johnny Coleman with the Lumberton Police Department stopped a vehicle carrying defendant and took defendant into custody.

On appeal, defendant contends the trial court erred by denying him the right to the final argument to the jury based on its ruling that he had "introduced" evidence within the meaning of Rule 10 of the General Rules of Practice for the Superior and District Courts (Rule 10) during his cross-examination of McQueen by reading aloud from McQueen's 30 June 2000 statement to Officer White.

Rule 10 provides that, "[i]n all cases, civil or criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him." N.C. Super. and Dist. Ct. R. 10. The general rule is that "any testimony elicited during cross-examination is 'considered as coming from the party calling the witness, even though its only relevance is its tendency to support the cross-examiner's case.' " *State v. Shuler*, 135 N.C. App. 449, 452, 520 S.E.2d 585, 588 (1999) (quoting 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 170, at 559 (5th ed. 1998)). The general rule "also provides there is no right to offer evidence during cross-examination." *Id.* However, evidence is nevertheless " 'introduced,' within the meaning of Rule 10, when the cross-examiner either formally offers the material into evidence, or when the cross-examiner presents new matter to the jury that is not relevant to the case." *State*

v. Hennis, 184 N.C. App. 536, 537, 646 S.E.2d 398, 399, *supersedeas and disc. review denied*, 361 N.C. 699, 653 S.E.2d 148 (2007). Evidence is "offered" when "a party has offered [it] as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of the witness." *Id.* at 538, 646 S.E.2d at 399 (internal quotation marks omitted).

In *State v. Wells*, 171 N.C. App. 136, 613 S.E.2d 705 (2005), this Court held that, where the defendant "questioned [the witness] about statements directly related to the witness'[s] own testimony on direct examination," the defendant had not introduced any evidence within the meaning of Rule 10. *Id.* at 140, 613 S.E.2d at 708. In *Wells*, during its case-in-chief, the State introduced as substantive evidence a witness's statement to detectives. *Id.* at 139, 613 S.E.2d at 707. In it, the witness said the defendant "stood in the middle of the street and fired at the victim[s] . . . as they fled, then casually drove away." *Id.* On cross-examination, the defendant asked the witness about another statement he had given to detectives one day before the statement introduced by the State. *Id.* In this statement, the witness said the defendant was "running away from [a] recording studio as he fired at the victims." *Id.* The defendant's counsel "read the entire statement, line by line, asking [the witness] if he agreed with each sentence." *Id.* However, the defendant's counsel never "formally introduced the statement" and the defendant presented no evidence. *Id.*

In this case, during his cross-examination of McQueen, defendant's counsel read aloud several portions of McQueen's 30 June 2000 statement in what appears to have been an attempt to point out inconsistencies between McQueen's trial testimony and his prior statement. Specifically, defendant's counsel asked McQueen twice whether he had told Officer White "everything that happened" when he provided his 30 June 2000 statement. After McQueen testified that he continued playing cards a "couple of hours" after defendant left, referring to McQueen's statement, defendant's counsel asked whether McQueen had told Officer White that defendant left the card game and then returned a "short time later." McQueen said yes, and then added that "a couple of hours is a short time, yes." Defendant's counsel pointed out that Officer White did not write down that defendant had fired the shotgun into the ground, which defendant had testified to on direct examination. Defendant's counsel also asked McQueen if he could remember what time Officer White arrived at the scene. McQueen testified he could not. In sum, our review of the transcript reveals that statements read and referenced by defendant's counsel

were "directly related to [McQueen's] own testimony on direct examination." *See Wells*, 171 N.C. App. at 140, 613 S.E.2d at 708. Furthermore, as in *Wells*, defendant's counsel never "formally introduced the statement" into evidence. *Id.* at 139, 613 S.E.2d at 707. Accordingly, we must hold that defendant never "introduced" evidence within the meaning of Rule 10.

Improperly depriving a defendant the right to open and close argument to the jury, a right "deemed to be critically important," "entitles . . . defendant to a new trial." *See State v. English*, 194 N.C. App. 314, 317, 669 S.E.2d 869, 871 (2008).

In view of our holding, we do not reach defendant's second issue on appeal related to statements by the trial judge during sentencing regarding defendant's decision to plead not guilty. *See Shuler*, 135 N.C. App. at 455, 520 S.E.2d at 590 ("We have reviewed the additional assignments of error brought forth by Defendant but, because they are unlikely to recur at a new trial, we do not address them.").

New trial.

Judges ELMORE and STEPHENS concur.

STATE OF NORTH CAROLINA v. HEATHER R. SURRATT

No. COA11-239-2

(Filed 17 January 2012)

1. Criminal Law—court's use of "victim"—no plain error

There was no plain error in a prosecution for felony child abuse and other offenses in the trial court's use of the term "victim" to describe the prosecuting witness.

2. Satellite-Based Monitoring—appeal—notice not in writing

An appeal from a satellite-based monitoring order was dismissed where the notice of appeal was not in writing and defendant did not petition for a writ of *certiorari*.

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. Vacated by the Supreme Court on 12 December 2011 and remanded to this Court for consideration of defendant's remaining issues on appeal.

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. For the following reasons, we find no error in part and dismiss in part.

I. Background

On 18 October 2011, this Court determined in *State v. Surratt*, ____ N.C. App. ____, 717 S.E.2d 47 (Oct. 18, 2011) (No. COA11-239), that defendant received ineffective assistance of counsel and ordered that defendant receive a new trial. On 12 December 2011, our Supreme Court issued an order

> vacating the opinion of the Court of Appeals and remanding the case to the Court of Appeals with instructions to consider defendant's remaining issues. This Order is issued without prejudice to defendant's right thereafter to file a Motion for Appropriate Relief in the trial division raising the issue of ineffective assistance of counsel.

In accordance with the order of the Supreme Court, we will therefore address defendant's remaining issues, which are (1) whether the trial court committed plain error in referring to the complainant as "victim;" and (2) whether the trial court erred in requiring defendant to enroll in satellite-based monitoring ("SBM"). A detailed factual background was provided in this Court's original opinion; *see Surratt*, ____ N.C. App. ____, 717 S.E.2d 47, thus, here we provide only those facts which are necessary to address defendant's remaining issues on appeal.

II. Use of the Word "Victim"

[1] Defendant argues that "the trial court committed plain error in using the term 'victim' to describe the complainant." (Original in all caps.) Defendant directs this Court's attention to the trial court's

instructions to the jury in which the term "victim" is used several times. Our Supreme Court has stated,

> Plain error is fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . . . We cannot hold that the reference to the prosecuting witness as the victim was an error so basic and lacking in its elements that justice could not have been done. This assignment of error is overruled.

State v. McCarroll, 336 N.C. 559, 566, 445 S.E.2d 18, 22 (1994) (citation and quotation marks omitted). Accordingly, this argument is overruled.

III. Satellite-Based Monitoring

[2] Lastly, defendant contends that "the trial court erred in requiring the defendant to submit to satellite[-]based monitoring." (Original in all caps.) However, defendant failed to file a written notice of appeal which is required to appeal from a SBM order. *See State v. Clark*, ____ N.C. App. ____, ____, 714 S.E.2d 754, 761 (2011) ("[A] defendant seeking to challenge an order requiring his or her enrollment in SBM must give written notice of appeal in accordance with N.C.R. App. P. 3(a) in order to properly invoke this Court's jurisdiction . . . . In view of the fact that Defendant noted his appeal from the trial court's SBM order orally, rather than in writing, he failed to properly appeal the trial court's SBM order to this Court, necessitating the dismissal of his appeal." (citation omitted)). As defendant has also failed to petition this Court for a writ of *certiorari* due to her failure to file a written notice of appeal, we dismiss this issue. *Compare id.*

NO ERROR in part; DISMISSED in part.

Judges GEER and THIGPEN concur.

COX v. ROACH

[218 N.C. App. 311 (2012)]

KRISTA DAWN COX ET AL., PLAINTIFFS V. DAVID ROACH ET AL., DEFENDANTS

No. COA11-905

(Filed 7 February 2012)

1. Immunity—sovereign—Virginia—comity—encouraged in North Carolina—no evidence of consent to suit

The trial court did not err in allowing defendant University of Virginia's (UVA) motion to dismiss a false arrest, false imprisonment, battery, malicious prosecution, violation of the North Carolina Constitution, conversion, and conspiracy case on the ground of sovereign immunity. Virginia's extension of sovereign immunity to UVA is in line with North Carolina's public policy, comity is encouraged in North Carolina as long as extending comity to a particular situation would not be against public policy, and plaintiffs did not contend nor was there any evidence that defendant UVA consented to the suit.

2. Pretrial Proceedings—motion for continuance denied—no abuse of discretion

The trial court did not abuse its discretion in a false arrest, false imprisonment, battery, malicious prosecution, violation of the North Carolina Constitution, conversion, and conspiracy case by denying plaintiffs' motions for continuance of summary judgment motion in order to complete necessary discovery. Plaintiffs failed to state a valid reason for the necessity of a continuance after approximately ten months of litigation, and plaintiffs did not direct the Court of Appeals' attention to any evidence which forecasted prejudice they may have suffered due to the failure of the trial court to allow a continuance.

3. False arrest—false imprisonment—probable cause—bond summary judgment proper

The trial court did not err in a false arrest, false imprisonment, battery, malicious prosecution, violation of the North Carolina Constitution, conversion, and conspiracy case by granting summary judgment in favor of defendants Roach, Adkins, Schatzman, and Hartford. Roach, Adkins, and Schatzman acted with probable cause in determining there was a probability or substantial chance of criminal activity and on such a basis obtaining and acting on the search and arrest warrants. Thus, the claim against Hartford for a bond based upon defendants unfaithful performance and violation of their duties necessarily failed.

Appeal by plaintiffs from orders entered 17 December 2010 by Judge R. Stuart Albright and 25 April 2011 by Judge Judson D. DeRamus, Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 14 December 2011.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for plaintiffs-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James C. Adams, II, John S. Buford, and Clint S. Morse, for defendants-appellees David Roach and The Rector & Visitors of the University of Virginia.

The Forsyth County Attorney's Office, by Kevin J. McGuckin, for defendant-appellees Joe William Adkins, Jr., William T. Schatzman and the Hartford Fire Insurance Company.

STROUD, Judge.

Plaintiffs appeal trial court orders allowing a motion to dismiss and granting a summary judgment motion in favor of defendants which resulted in the dismissal of all of plaintiffs' claims. For the following reasons, we affirm.

I. Background

On 9 and 11 June 2010, plaintiff filed two complaints with different file numbers against defendants[1] bringing causes of action for false arrest, false imprisonment, battery, malicious prosecution, violation of the North Carolina Constitution, conversion, conspiracy, and recovery under the sheriff's bond. On or about 8 July 2010, defendants Joe Williams Adkins, Jr. ("Adkins") and William T. Schatzman ("Schatzman") answered plaintiffs' complaint and substantially denied the material allegations therein; defendants Adkins and Schatzman also raised various defenses. On or about 20 August 2010, defendant Travelers answered plaintiffs' complaint and also alleged various defenses. On 25 October 2010, Hartford Fire Insurance Company ("Hartford") was substituted for defendant Travelers. On or about 29 October 2010, defendant David Roach ("Roach") answered plaintiffs' complaint by substantially denying the material allegations; defendant Roach also asserted various defenses and made a motion to dismiss. Also on or about 29 October 2010, defendant The Rector

1. At the time of the filing of the 9 and 11 June 2010 complaints, defendants included Travelers Insurance Company ("Travelers"); however, defendant Hartford Fire Insurance Company was later substituted for Travelers.

and Visitors of the University of Virginia ("UVA") made a motion to dismiss alleging several defenses, including sovereign immunity.

On 22 November 2010, plaintiff filed a "MOTION TO SUBSTITUTE AMENDED COMPLAINT FOR ORIGINAL COMPLAINT[.]" The amended complaint alleged:

> 10. A principal business of plaintiff is to recover x-ray films from hospital radiology departments which are being discarded, to remove and shred all papers containing patient identification and medical information, to process and dissolve the film with heated chemicals, and remove therefrom silver, which this plaintiff sells. Over the years plaintiff Chesapeake Microfilm, Inc., has provided these services for hundreds of hospitals.
>
> 11. At all times material hereto, plaintiffs Krista Dawn Cox and Joshua Scott Wallace were employees of plaintiff Chesapeake Microfilm, Inc.
>
> . . . .
>
> 13. On or about June 1, 2007, plaintiff Krista Dawn Cox called defendant University of Virginia's radiology department and asked if there were any radiological film to be discarded. An agent and employee of defendant University of Virginia, then and there acting within the course and scope of his authority, told Krista Dawn Cox that defendant University of Virginia had 32 drums of radiological film that was being discarded and needed to be picked up. Arrangements were made between plaintiff Krista Dawn Cox and this employee of defendant University of Virginia for the film to be picked up on June 2, 2007.
>
> 14. On June 2, 2007, pursuant to the above arrangements, plaintiff Joshua Scott Wallace, driving a truck belonging to plaintiff Chesapeake Microfilm, Inc., went to the radiology department of defendant University of Virginia in Charlottesville, Virginia; with the assistance of employees of defendant University of Virginia, who were then and there acting within the course and scope of their agency and authority, picked up the 32 barrels of radiological film, which defendant University of Virginia desired to discard; and transported that film back to the place of business of plaintiff Chesapeake Microfilm, Inc., in Forsyth County, North Carolina.
>
> 15. Soon after the radiological film from defendant University of Virginia arrived at the place of business of plaintiff Chesapeake Microfilm, Inc., employees of this plaintiff shredded and destroyed

the paper film jackets and all other paper accompanying the film bearing any identifying information of patients or medical information of any type.

. . . .

17. On June 13, 2007, defendants David Roach and the University of Virginia, knowing that plaintiffs had been acting lawfully in all respects and had not violated the laws of any jurisdiction, caused to be issued a felony warrant of arrest for plaintiff Joshua Scott Wallace, charging him with theft in violation of Article 18.2-95 of the Code of Virginia.

18. On June 26, 2007, defendants David Roach and the University of Virginia, knowing that plaintiffs had been acting lawfully in all respects and had not violated the laws of any jurisdiction, caused to be issued a felony warrant of arrest for plaintiff Krista Dawn Cox, charging her with theft in violation of Article 18.2-95 of the Code of Virginia.

19. Defendant David Roach came to Forsyth County, North Carolina, and obtained the assistance and participation of defendants Joe William Adkins, Jr., and William T. Schatzman in arresting plaintiff Joshua Scott Wallace, causing him to be placed in the Forsyth County jail, causing him to be transported to Charlottesville, Virginia, causing him to be placed in a jail in Charlottesville, Virginia, and causing him to be brought to the criminal court of the Commonwealth of Virginia.

20. Defendant David Roach came to Forsyth County, North Carolina, and obtained the assistance and participation of defendants Joe William Adkins, Jr., and William T. Schatzman in arresting plaintiff Krista Dawn Cox, causing her to be placed in the Forsyth County jail, requiring her to drive to Charlottesville, Virginia, causing her to be placed in a jail in Charlottesville, Virginia, and causing her to be brought to the criminal court of the Commonwealth of Virginia.

21. Incidental to the arrest of plaintiff Joshua Scott Wallace, defendants acting in concert and cooperation, arranged for the seizure, and carried out the seizure, of silver owned by plaintiff Chesapeake Microfilm, Inc., from the safe at its place of business with a value of approximately $15,000, approximately 30,000 pounds of radiological film owned by plaintiff Chesapeake Microfilm, Inc., at its place of business with a value of approxi-

mately $30,000, a panel truck owned by plaintiff Chesapeake Microfilm, Inc., with a value of approximately $25,000, and silver owned by plaintiff Chesapeake Microfilm, Inc., at the premises controlled by it in Knoxville, Tennessee, with a value of approximately $300,000.

22. Plainly no crime whatever had been committed by plaintiffs or anyone else in connection with the radiological film which defendant University of Virginia was discarding. In the course of making the arrests and the seizures, additional information came to the attention of defendants, which made it even more clear, definite, and certain, that no crime had been committed, or could have been committed. Nevertheless, in the complete absence of probable cause that any criminal activity had taken place, defendants in concert and participation proceeded in the manner described above. Defendants displayed malicious motivations in various ways, including discussing how the forfeitures of the money and property would be split between the law enforcement agencies, trying to coerce a guilty plea from Ronnie W. Cox, the chief executive officer of plaintiff Chesapeake Microfilm, Inc., (even though he had not been and never was charged with any crime), threatening plaintiff Krista Dawn Cox that her father Ronnie W. Cox would be put in prison for the rest of his life if she did not cooperate, timing the arrest of Krista Dawn Cox for a Friday evening to insure that she could not get out of jail until the following Monday, causing false testimony to be given at probable cause hearing in criminal court in Charlottesville, Virginia, and threatening to have additional criminal charges brought against plaintiffs Joshua Scott Wallace and Krista Dawn Cox directly to the grand jury in Charlottesville, Virginia.

23. Plaintiff Joshua Scott Wallace was acquitted for all charges in the circuit court of the city of Charlottesville, Virginia, on July 16, 2008.

24. The charges against Krista Dawn Cox did not come to trial, but defendants have agreed to the entry of an order in the Superior Court of Forsyth County, North Carolina, that no crime was committed in the state of North Carolina, and for the expunction of all of the criminal records of plaintiffs Krista Dawn Cox and Joshua Scott Wallace in the Commonwealth of Virginia.

25. Defendants agreed to, and eventually did, return all of the property of Chesapeake Microfilm, Inc., that had been seized.

> 26. Defendants made contact with other hospital radiology departments from which plaintiff Chesapeake Microfilm, Inc., picked up radiological film to be discarded on a regular basis. Defendant told these hospitals that the plaintiffs had been engaged in criminal conduct in picking up the radiological film. Directly and proximately as a result of these contacts by defendants, plaintiff Chesapeake Microfilm, Inc., lost one of its most valuable sources for radiological film to be discarded, causing this plaintiff to lose net profit in the amount of approximately $250,000 per year.

Plaintiffs brought causes of action for false arrest, false imprisonment, battery, and malicious prosecution, on behalf of Joshua Scott Wallace ("Wallace") and Krista Dawn Cox ("Cox"); conversion on behalf of Chesapeake Microfilm, Inc. ("Chesapeake"); and conspiracy, gross negligence, and recovery under the sheriff's bond on behalf of all plaintiffs. On 29 November 2010, the trial court consolidated the two cases which were a result of the two complaints originally filed under different file numbers, into one. On or about 14 December 2010, the trial court granted plaintiffs' motion to substitute complaints.

On 17 December 2010, the trial court allowed UVA's motion to dismiss based upon sovereign immunity. On or about 21 December 2010, defendant Hartford answered plaintiffs' complaint and raised various defenses. On or about 13 January 2011, defendant Roach answered plaintiffs' amended complaint again substantially denying the material allegations of plaintiffs' complaint and asserting various defenses.

On or about 10 March 2011, defendant Roach made a motion for summary judgment "based on the existence of probable cause." On or about 18 March 2011, defendants Adkins, Schatzman, and Hartford made a motion for summary judgment "based upon the existence of probable cause, public officer's immunity, [and] qualified immunity[.]" Thus, all defendants remaining in the case filed a motion for summary judgment. Plaintiffs made a "MOTION FOR CONTINUANCE OF SUMMARY JUDGMENT HEARING IN ORDER TO OBTAIN EVIDENTIARY MATERIALS PURSUANT TO RULE 56(f) OF THE RULES OF CIVIL PROCEDURE" ("Rule 56(f) motion"). On 25 April 2011, the trial court denied plaintiffs' Rule 56(f) motion and granted defendants' motions for summary judgment. The trial court then dismissed plaintiffs' case with prejudice. Plaintiffs appeal both the 17 December 2010 order allowing defendant UVA's motion to dismiss and the 25 April 2011 order denying plaintiffs' Rule 56(f) motion and granting the remaining defendants' summary judgment motions.

II. Motion to Dismiss

[1] Plaintiffs first contend that the trial court erred in allowing defendant UVA's motion to dismiss on the ground of sovereign immunity.

> Rule 12(b)(1) of the Rules of Civil Procedure allows for dismissal based upon a trial court's lack of jurisdiction over the subject matter of the claim. Our Court has held that the defense of sovereign immunity is a Rule 12(b)(1) jurisdiction defense. The standard of review on a motion to dismiss under Rule 12(b)(1) for lack of jurisdiction is *de novo*. The standard of review on a motion to dismiss under Rule 12(b)(6) is whether, if all the plaintiff[s'] allegations are taken as true, the plaintiff[s are] entitled to recover under some legal theory.

Welch Contr'g, Inc. v. N.C. Dep't. of Transp., 175 N.C. App. 45, 50, 622 S.E.2d 691, 694 (2005) (citations, quotation marks, and brackets omitted).

Sovereign immunity is "[a] government's immunity from being sued in its own courts without its consent." Black's Law Dictionary 818 (9th ed. 2009); *see also Carl v. State*, 192 N.C. App. 544, 550, 665 S.E.2d 787, 793 (2008) ("Sovereign immunity protects the State and its agencies from suit absent waiver or consent." (citation and quotation marks omitted)), *disc. review and cert. denied*, 363 N.C. 123, 672 S.E.2d 684 (2009); *DiGiacinto v. Rector and Visitors of GMU*, 704 S.E.2d 365, 370 (Va. 2011) ("Sovereign immunity is an established principle of sovereignty that a sovereign State cannot be sued in its own courts without its consent and permission." (citation, quotation marks, ellipses, and brackets omitted)).

The Supreme Court of Virginia has stated, "As an agency of the Commonwealth, UVA is entitled to sovereign immunity under the common law absent an express constitutional or statutory provision to the contrary. There is no such waiver in the Act or elsewhere."[2] *The Rector And Visitors v. Carter*, 591 S.E.2d 76, 78 (Va. 2004). Indeed, plaintiffs concede in their brief that "under Virginia law, the University of Virginia would be shielded by sovereign immunity for the acts it and its agents committed within its own jurisdiction[.]" Therefore, the question before us as presented by plaintiffs is

> whether or not the sovereign immunity that applies to the University of Virginia within the confines of that state, spreads to

2. The "Act" refers to the Virginia Tort Claims Act. *See The Rector And Visitors v. Carter*, 591 S.E.2d 76, 77 (Va. 2004).

> its wrongful conduct outside its own territory and within the boundaries of another sovereign state, the state of North Carolina, when it has been hailed before the courts of that state.

In *Nevada v. Hall*, the Supreme Court concluded that though states were welcome to recognize the sovereign immunity of one another, they were not required to do so. 440 U.S. 410, 59 L.Ed. 2d 416 (1979). *Hall* was later summarized by the Court in *Alden v. Maine*:

> In *Hall* we considered whether California could subject Nevada to suit in California's courts and determined the Constitution did not bar it from doing so. We noted that the doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign. We acknowledged that the immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity, that the notion that immunity from suit is an attribute of sovereignty is reflected in our cases, and that this explanation adequately supports the conclusion that no sovereign may be sued in its own courts without its consent. We sharply distinguished, however, a sovereign's immunity from suit in the courts of another sovereign:
>
> > But this explanation affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.
>
> Since we determined the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another, California was free to determine whether it would respect Nevada's sovereignty as a matter of comity.

527 U.S. 706, 738, 144 L.Ed. 2d 636, 668 (1999) (citations, quotation marks, and brackets omitted). Therefore, though North Carolina courts are not required to respect Virginia's claim of sovereign immunity, they may do so "as a matter of comity." *Id.*

As to comity, our Supreme Court has stated,

> While comity is a rule of practice and not a rule of law, it has substantial value in securing uniformity of decision; it does not command, but it persuades; it does not declare how a case shall be decided, but how with propriety it may be decided. It is more than mere deference to the opinion of another, for by virtue of the doctrine rights acquired under a statute enacted or a judgment rendered in one State will be given force and effect in another, if not against public policy; and, as pointed out in *R. R. v. Babcock*, 154 U.S., 190, 38 Law Ed., 958, to justify a court in refusing to enforce a right which accrued under the law of another State, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens. And this is a matter which each State must decide for itself.

In re Chase, 195 N.C. 143, 148, 141 S.E. 471, 473 (citations omitted), *cert denied*, 278 U.S. 600, 73 L.Ed. 529 (1928); *see Cannaday v. Atlantic Coast Line R. Co.*, 55 S.E. 836, 838 (N.C. 1906) ("[T]he rule of comity is not a right of any state or country, but is permitted and accepted by all civilized communities from mutual interest and convenience, and from a sense of the inconvenience which would otherwise result, and from moral necessity to do justice in order that justice may be done in return.") Accordingly, comity is encouraged in North Carolina as long as extending comity to a particular situation would not be against public policy. *See Chase*, 195 N.C. at 148, 141 S.E. at 473. Furthermore,

> the mere fact that the law of the forum differs from that of the other jurisdiction does not mean that the foreign statute is contrary to the public policy of the forum. To render foreign law unenforceable as contrary to public policy, it must violate some prevalent conception of good morals or fundamental principle of natural justice or involve injustice to the people of the forum state. This public policy exception has generally been applied in cases such as those involving prohibited marriages, wagers, lotteries, racing, gaming, and the sale of liquor.

Boudreau v. Baughman, 322 N.C. 331, 342, 368 S.E.2d 849, 857-58 (1988) (citations omitted).

As North Carolina extends sovereign immunity to its own public universities, we conclude that Virginia's extension of sovereign

immunity to UVA is in line with North Carolina's public policy. *See*, *e.g.*, *Kawai Am. Corp. v. Univ. of N.C. at Chapel Hill*, 152 N.C. App. 163, 165, 567 S.E.2d 215, 217 (2002) ("The University [of North Carolina at Chapel Hill] is a state agency to which the doctrine of sovereign immunity applies. Therefore, unless the University consented to suit or waived its immunity regarding these claims, the claims are barred." (citations omitted)). Furthermore, although plaintiffs cite *Corum v. Univ. of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992) to support the proposition that "sovereign immunity would have been no bar" to their claims in North Carolina, we find Corum to be inapplicable as it was based upon claims under the North Carolina Constitution, and plaintiffs have not raised constitutional claims in this case.[3] *See id.* at 785-86, 413 S.E.2d at 291-92. ("The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their *rights guaranteed by the Declaration of Rights*. . . . [W]e hold that plaintiff does have a direct cause of action *under the State Constitution* for alleged violations of his freedom of speech rights, guaranteed by Article I, Section 14." (emphasis added)), *cert. denied*, 506 U.S. 985, 121 L.Ed. 2d 431 (1992). Accordingly, we choose to exercise comity as to defendant UVA's claim of sovereign immunity. As plaintiffs do not contend nor is there any evidence that defendant UVA consented to this suit, the trial court did not err in allowing defendant UVA's motion to dismiss, as plaintiffs are barred from recovering against defendant UVA due to sovereign immunity. *See generally Carl*, 192 N.C. App. at 550, 665 S.E.2d at 793.[4] As such, this argument is overruled.

III. Motion for Continuance

[2] Plaintiffs next contend that "the Superior Court abused its discretion in denying plaintiffs' motions for continuance of summary judgment motion in order to complete necessary discovery." (Original

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3. Plaintiffs' 9 June and 11 June 2010 complaints both had causes of action for violations of the North Carolina Constitution. However, plaintiffs dropped these claims in their amended complaint. Plaintiffs acknowledge that they dropped their constitutional claims as they state in their brief that "[t]he amended complaint . . . eliminated claims for violation of the state constitution."

4. We note that plaintiffs' argument regarding the 17 December 2010 order allowing defendant UVA's motion to dismiss heavily focused on the actions of defendant Roach as an employee of defendant UVA. However, defendant Roach was not a party to the motion to dismiss but was instead dismissed from the case due to his own summary judgment motion; therefore, we will consider all arguments regarding defendant Roach when we address plaintiffs' arguments regarding the 25 April 2011 summary judgment order.

in all caps.) "A trial court is not barred in every case from granting summary judgment before discovery is completed. Further, the decision to grant or deny a continuance is solely within the discretion of the trial judge and will be reversed only when there is a manifest abuse of discretion." *Young v. Fun Services-Carolina, Inc.*, 122 N.C. App. 157, 162-63, 468 S.E.2d 260, 264 (citations and quotation marks omitted), *disc. review denied*, 344 N.C. 444, 476 S.E.2d 134 (1996). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Stovall v. Stovall*, ___ N.C. App. ___, ___, 698 S.E.2d 680, 683 (2010) (citation and quotation marks omitted). Plaintiffs' argument focuses on the lack of harm that would have been created if their motion had been granted; this is irrelevant. The fact that the trial court may have allowed plaintiffs' motion without abusing its discretion does not mean that the trial court must have abused its discretion by not allowing the motion. Furthermore, plaintiffs fail to state a valid reason for the necessity of a continuance after approximately ten months of litigation, and plaintiffs do not direct this Court's attention to any evidence which forecasts prejudice they may have suffered due to the failure of the trial court to allow a continuance; accordingly, we do not conclude that the trial court abused its discretion. *See Young*, 122 N.C. App. at 162-63, 468 S.E.2d at 263-64 (determining that the trial court had not erred in granting a summary judgment motion simply "because discovery was incomplete": "Plaintiffs filed their complaint on 18 April 1994. Summary judgment was granted in a judgment filed 16 March 1995, fully eleven months later. There is no evidence in the record that the trial judge abused her discretion in granting the motion for summary judgment, and we hold that she did not.")

IV. Motion for Summary Judgment

[3] Lastly, plaintiffs contend the trial court erred in granting summary judgment in favor of defendants Roach, Adkins, Schatzman, and Hartford.

> We review a trial court order granting or denying a summary judgment motion on a *de novo* basis, with our examination of the trial court's order focused on determining whether there is a genuine issue of material fact and whether either party is entitled to judgment as a matter of law. As part of that process, we view the evidence in the light most favorable to the nonmoving party.

Arrington v. Martinez, ___ N.C. App. ___, ___, 716 S.E.2d 410, 414 (2011) (citations, quotation marks, and brackets omitted). Plaintiffs

argue that defendants Roach, Adkins, and Schatzman acted without probable cause.

> Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances strong in themselves to warrant a cautious man in believing the accused to be guilty. The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.

State v. Teate, 180 N.C. App. 601, 606-07, 638 S.E.2d 29, 33 (2006) (citations, quotation marks, and brackets omitted). As to search warrants, it has been said that "[t]he existence of probable cause is a commonsense, practical question that should be answered using a totality-of-the-circumstances approach. Probable cause is a flexible, common-sense standard. It does not demand any showing that such a belief be correct or more likely true than false." *State v. McKinney*, 361 N.C. 53, 62, 637 S.E.2d 868, 874-75 (2006) (citations and quotation marks omitted). Virginia law is in accord with North Carolina law as it has determined that as to arrests

> probable cause exists where the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.
>
> The determination of probable cause by police officers depends upon practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act[.]

West v. Com., 678 S.E.2d 836, 840 (Va. Ct. App. 2009) (citation and quotation marks omitted) and as to search warrants

> [p]robable cause, as the very name implies, deals with probabilities. These are not technical; they are factual and practical considerations in every day life on which reasonable and prudent men, not legal technicians, act. Probable cause exists where the totality of the circumstances set forth in the affidavit supports a common sense decision by the magistrate that there is a fair probability that contraband or evidence of a crime will be found in a particular place. Probable cause is a

> fluid concept--turning on the assessment of probabilities in particular factual contexts-not readily, or even usefully, reduced to a neat set of legal rules. Because it is a fluid concept based on probabilities, the continued existence of probable cause at a particular time is dependent upon the circumstances. So long as probable cause continues to exist, the search will be valid.

Maye v. Com., 605 S.E.2d 353, 362 (Va. Ct. App. 2004) (citations, quotation marks, and brackets omitted).

A. Defendant Roach

As to defendant Roach, plaintiffs contend that he "knew, or recklessly failed to realize, that he was presenting false and misleading information to the magistrates and judges" in obtaining warrants. Plaintiffs direct this Court's attention to *Franks v. Delaware*, 438 U.S. 154, 57 L.E. 2d 667 (1978) arguing *Franks*

> and its progeny make it plain that, as a constitutional matter, officers cannot be insulated from inquiry into the truthfulness [of] their affidavits and testimony supporting warrants. The court held that where a substantial preliminary showing is made that a false statement was knowingly or recklessly made and is included in the affidavit or testimony to support the warrant, and if that statement is necessary to a finding of probable cause, the subject of the warrant is entitled to a hearing to challenge the truthfulness of the factual statements.

In *Franks*, the Supreme Court actually stated,

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted

> today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

Id. at 171-72, 57 L.E. 2d at 682 (footnote omitted). We thus turn to plaintiffs' "offer of proof" showing "deliberate falsehood or . . . reckless disregard for the truth" on behalf of defendant Roach. *Id.* at 171, 57 L.E. 2d at 682.

Plaintiffs' first piece of self-proclaimed "ample evidence" is that defendant Roach informed the court "that plaintiff . . . Wallace had given false identification, handing the security guard a business card and telling him he was from a company located in Roanoke." However," in truth, as is evidenced by a video recording, plaintiff Wallace handed nothing to the security guard and "indeed plaintiff Wallace's hands were in his pockets the entire time of the discussion." Plaintiffs fail to direct our attention to any evidence in the record, such as an affidavit or the alleged videotape, which would substantiate their assertions. Plaintiffs have thus failed to provide an "offer of proof." *Id.* Furthermore, even if such evidence were before us, we do not find it to be the sort of evidence which would eviscerate probable cause on behalf of defendant Roach; rather, this would be evidence that the security guard either mistakenly remembered his interaction with plaintiff Wallace or at worst, fabricated it; in either case it does not implicate defendant Roach.

Second, plaintiffs argue that "[w]hen defendant Roach was shown the tape and saw that no card had been handed by Mr. Wallace to the security guard, defendant Roach said, 'I guess he lied, too.' " Plaintiff's evidence here is based upon the deposition of Ronnie Cox ("Mr. Cox"), president of Chesapeake, wherein Mr. Cox admits he was not present for the statement by defendant Roach but was informed of it by another individual. Accordingly, such evidence is hearsay, and is not properly considered during a summary judgment hearing or by this Court. *See Rankin v. Food Lion*, ___ N.C. App. ___, ___, 706 S.E.2d 310, 315 (2011) (considering a summary judgment motion before the trial court and stating "hearsay [is] a statement, other than

one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and determining that documents containing hearsay were "inadmissible at trial and were properly ignored by the trial court" and thus "[i]n view of the inadmissibility of the documents upon which Plaintiff relies, we need not address Plaintiff's arguments concerning their legal significance" (quotation marks omitted)).

Third,

> [p]laintiff Wallace left about 20 empty barrels at the University of Virginia Medical Center, when he picked up the full barrels of film. Later, defendant Roach and his colleagues listed the empty barrels as evidence which link plaintiffs to the alleged "crime scene." It is entirely inconsistent with criminal behavior for plaintiff Wallace to have left behind empty containers that could have been traced to his place of work.

Though we could list *ad nauseam* the numerous cases in which criminals have left behind evidence linking them to the crime scene, we will not do so here. Suffice it to say that we do not conclude that plaintiffs leaving evidence at the crime scene is necessarily evidence of an innocent intent such that defendant Roach did not have probable cause to believe that a crime had been committed.

Next, plaintiffs note that the arrest warrants for Mr. Cox were eventually "quashed on the basis of mistaken identity[;]" the "mistake could have been avoided if the University's staff had done what it should have done, by calling a supervisor or a manager prior to allowing the film loading to proceed[,]" "Defendant Roach made clear his personal animosity and his personal intention of harming the plaintiffs[;]" and "defendants Roach and Adkins were overheard discussing how the forfeiture of money and property would be split between the two law enforcement agencies." We do not find any of plaintiffs' remaining arguments to be persuasive or to have any impact on a determination of probable cause: The fact that Mr. Cox's arrest warrants were quashed for mistaken identity has no bearing on whether defendant Roach acted with probable cause regarding plaintiffs; whether this "mistake" could have been avoided is also irrelevant in analyzing whether defendant Roach acted with probable cause; any "animosity" or bad intent on the part of defendant Roach towards plaintiffs would still not demonstrate that defendant Roach acted without probable cause; and defendants Roach's and Adkins' discussion regarding splitting "the forfeiture of money and property" is

entirely consistent with defendant Roach's belief that there was probable cause, that plaintiffs would be convicted, and thus the law enforcement agencies would be able to keep the money and property. *See Franks*, 438 U.S. at 171, 57 L.E. 2d at 682 (stating that "mistake[s]" and "deliberate falsity or reckless disregard" on the part of those other than the affiant are insufficient bases to challenge probable cause). In conclusion, plaintiffs have not presented a single piece of evidence indicating that defendant Roach lacked probable cause; *i.e.*, that he told a "deliberate falsehood or . . . "reckless[ly] disregard-[ed] . . . the truth[.]" *Id.*

Here, plaintiffs do not contest that defendant Roach was informed that some property was stolen; furthermore, plaintiffs do not claim that they did not take the missing property, but instead argue that the taking was lawful. Accordingly, we conclude that defendant Roach acted with probable cause in determining there was "a probability or substantial chance of criminal activity" and on such a basis obtaining and acting on the search and arrest warrants. *Teate*, 180 N.C. App. at 606-07, 638 S.E.2d at 33; *see McKinney*, 361 N.C. at 62, 637 S.E.2d at 874-75,

Here, plaintiffs brought causes of action against defendant Roach for false arrest, false imprisonment, battery, malicious prosecution, gross negligence, conversion, and conspiracy. Plaintiffs have not made allegations of conduct out of the norm for law enforcement officers in performing their duties; thus, all of plaintiffs' claims against defendant Roach stem from the normal course of search, arrest, and prosecution thereafter. However, "[p]robable cause is an absolute bar to a claim for false arrest." *Williams v. City of Jacksonville Police Dept.*, 165 N.C. App. 587, 596, 599 S.E.2d 422, 430 (2004).

Furthermore, probable cause is also a bar for recovery for false imprisonment in both North Carolina and Virginia. *See Thomas v. Sellers*, 142 N.C. App. 310, 316, 542 S.E.2d 283, 287 (2001) ("Officer Morton had probable cause to make the arrest, and the trial court did not err in granting summary judgment dismissing plaintiff's claim for false imprisonment."); *Lewis v. Kei*, 708 S.E.2d 884, 891 (Va. 2011) ("Kei had sufficient, if minimal, probable cause to obtain the warrant, properly issued by the magistrate, under which Lewis was arrested. Thus, we hold that Kei did not falsely imprison Lewis[.]").

As plaintiffs' claims for battery hinge upon the "bodily contact" due to the alleged false arrest and imprisonment, plaintiffs' battery claims must also fail. *See State v. Thompson*, 27 N.C. App. 576,

577-78, 219 S.E.2d 566, 568 (1975) ("A battery is the *unlawful* application of force to the person of another by the aggressor himself or by some substance which he puts in motion." (emphasis added)), *disc. review denied*, 289 N.C. 141, 220 S.E.2d 800 (1976); *Koffman v. Garnett*, 574 S.E.2d 258, 261 (Va. 2003) ("The tort of battery is an unwanted touching which is neither consented to, excused, nor justified.")

Plaintiffs Wallace and Cox were prosecuted in Virginia. However, probable cause is a bar to a claim for malicious prosecution in Virginia. *See O'Connor v. Tice*, 704 S.E.2d 572, 575 (Va. 2011) ("To prevail in a malicious prosecution action, Tice had to prove by a preponderance of the evidence that the prosecution was (1) malicious, (2) instituted by or with the cooperation of the O'Connors, (3) *without probable cause*, and (4) terminated in a manner not unfavorable to him." (emphasis added)).

Furthermore, plaintiffs' claims for gross negligence are dependent upon defendant Roach falsely arresting, falsely imprisoning, battering, and maliciously prosecuting plaintiffs. Plaintiffs alleged that defendant "Roach acted with gross negligence, when he committed actions that caused criminal process to be issued against" plaintiffs. As the "criminal process" plaintiffs were subject to was lawful, plaintiffs have no wrongful action upon which to base their claim of gross negligence.

Probable cause would also be a bar to conversion as conversion requires an "unauthorized" taking of property. *Stratton v. Royal Bank of Canada*, ___ N.C. App. ___, ___, 712 S.E.2d 221, 227 (2011) ("A conversion is an *unauthorized* assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." (emphasis added) (citation and quotation marks omitted)).

Lastly, plaintiffs' conspiracy claim was also dependent on plaintiffs' other claims which we have already rejected. Plaintiffs alleged "[e]ach of the defendants agreed with each of the other defendants, to do unlawful acts, including committing false arrests and false imprisonments, committing batteries, committing malicious prosecutions, and converting property." As we have already determined that none of plaintiffs' other claims would entitle them to relief, this conspiracy claim must also fail. As plaintiffs are not "entitled to recover"

upon any of their claims against defendant Roach, the trial court properly granted summary judgment in defendant Roach's favor.[5] *Welch Contracting*, 175 N.C. App. at 50, 622 S.E.2d at 694.

B. Defendants Adkins and Schatzman

As to defendants Adkins and Schatzman, plaintiffs also argue that they acted without probable cause; plaintiffs present no evidence to support their assertion beyond that offered regarding defendant Roach. As we have already determined that plaintiffs' evidence is not sufficient to show a "deliberate falsehood or [a] reckless disregard for the truth[,]" *Franks* at 171, 57 L.E. 2d at 682, on the part of defendant Roach, it is certainly not enough to show the same for defendants Adkins and Schatzman; not only do the facts regarding defendant Roach support our determination that defendants Adkins and Schatzman acted with probable cause, but defendants Adkins and Schatzman had an additional basis for probable cause as they were properly relying on the statements and actions in obtaining warrants made by another law enforcement officer acting with probable cause, defendant Roach. The causes of action against defendant Adkins and Schatzman are the same as those against defendant Roach except for gross negligence. As we have already determined that all of the torts claimed against defendant Roach were properly dismissed via summary judgment upon the basis of probable cause, we conclude the same as to defendant Adkins and Schatzman.

C. Defendant Hartford

Lastly, while it is unclear exactly which causes of action plaintiffs are bringing against defendant Hartford, it is apparent that defendant Hartford is the insurance company which provided a public official bond for defendants Adkins and Schatzman; thus defendant Hartford could only be liable to the extent of any wrongful conduct on the part of defendants Adkins and Schatzman. As we have already determined that all of the causes of action against defendants Adkins and Schatzman were properly disposed of through the trial court's summary judgment order on the basis of probable cause, and the only remaining claim against Hartford is for a bond based upon defendants Adkins' and Schatzman's "unfaithful performance and . . . violation of their duties[,]" this cause of action must also necessarily fail as defend-

5. As we have concluded that the trial court properly granted summary judgment in favor of defendant Roach on the basis of probable cause, we need not address plaintiffs' arguments regarding defendant Roach and sovereign immunity.

ants Adkins and Schatzman were acting with probable cause, and thus not in violation of their duties, so that the trial court properly granted summary judgment in favor of defendant Hartford.

V. Conclusion

For the foregoing reasons, we conclude that the trial court properly allowed defendant UVA's motion to dismiss on the grounds of sovereign immunity, properly denied plaintiffs' Rule 56(f) motion, and properly granted summary judgment in favor of defendants Roach, Adkins, Schatzman, and Hartford on the grounds of the existence of probable cause. Therefore, we affirm.

AFFIRMED.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA v. BETTY BARR

No. COA11-619

(Filed 7 February 2012)

1. Crimes, Other—illegally accessing a government computer—aiding and abetting in the illegal access of a government computer—sufficient evidence

The trial court did not err by denying defendant's motion to dismiss the charges of illegally accessing and aiding and abetting in the access of a government computer for insufficient evidence. The State presented sufficient evidence that defendant accessed a government computer to obtain services by fraud and that she acted willfully.

2. Crimes, Other—illegally accessing a government computer—aiding and abetting in the illegal access of a government computer—same purpose of transaction—indictment defective

The trial court erred in an illegally accessing and aiding and abetting in the access of a government computer case by entering convictions for violations of both N.C.G.S. § 14-454.1(a)(2) and (b) for the same "purpose" and transaction. N.C.G.S. § 14-454.1(b) requires that the purpose for accessing a government computer

must be one "other than those set forth" in subsection (a). The second count failed to state a purpose "other than those set forth" in subsection (a), and the portion of the indictment charging a violation of N.C.G.S. § 14-454.1(b) was, therefore, fatally defective.

3. Jury—instructions—entrapment by estoppel—governmental authority—defendant not government official

The trial court did not err in an illegally accessing and aiding and abetting in the access of a government computer case by denying defendant's request for a jury instruction on the defense of entrapment by estoppel or governmental authority. Defendant was not a government official for purposes of the application of the entrapment by estoppel defense.

4. Jury—instructions—illegally accessing a government computer—aiding and abetting in the illegal access of a government computer—generic—no error

The trial court did not commit plain error in an illegally accessing and aiding and abetting in the access of a government computer case by giving a generic instruction to the jury for the categories of the charges. Defendant failed to explain in her brief how any alleged error by the trial court in categorizing the jury instructions prejudiced her trial.

Appeal by defendant from judgment entered 22 December 2010 by Judge Kevin M. Bridges in Davidson County Superior Court. Heard in the Court of Appeals 10 November 2011.

Ellis & Winters LLP, by Paul K. Sun, Jr., and Jeremy M. Falcone and Clifford, Clendenin & O'Hale, by Locke T. Clifford, for Defendant.

Attorney General Roy Cooper, Assistant Attorney General Robert K. Smith, for the State.

THIGPEN, Judge.

Betty Barr ("Defendant") was charged and convicted of illegally accessing and aiding and abetting in the access of a government computer in violation of N.C. Gen. Stat. § 14-454.1(a)(2) and (b). On appeal, we must determine whether the trial court erred in denying Defendant's motion to dismiss, whether an indictment was fatally defective, and whether the trial court erred in its instructions to the jury. We conclude there was no prejudicial error in the judgments

convicting Defendant in Case Nos. 10 CRS 1557, 10 CRS 1558, and 10 CRS 1559. However, the portion of the judgment convicting Defendant in Case No. 10 CRS 1560 for a violation of N.C. Gen. Stat. § 14-454.1(b) must be arrested.

I: Factual and Procedural History

The evidence of record tends to show the following: Defendant was the owner and operator of Lexington License Plate Agency No. 29 ("Lexington Agency"). When a car dealer completes a vehicle sale, he must transfer title of the vehicle to the new owner, which entails delivering relevant paperwork, such as the bill of sale and application for new title, to a license plate agency such as the Lexington Agency. Defendant underwent training at the North Carolina Department of Motor Vehicles ("DMV") in order to operate the Lexington Agency, and Defendant applied for and was granted a contract from DMV as the operator of the Lexington Agency. Defendant was also a licensed RAC-F Title Clerk ("title clerk"). When a car dealer requests that a license plate agency transfer title of a vehicle, a title clerk checks the paperwork for accuracy and accesses a computer system called State Title and Registration System ("STARS") by entering the title clerk's unique number called an RACF number, which is issued to the title clerk by DMV; the title clerk also enters a private entry code number that the title clerk creates as her password. STARS allows the title clerk to process the transfer of title, but only after the title clerk enters the relevant information for the transfer into STARS, including the car dealer's identification number. All North Carolina vehicles are titled and registered through STARS.

Defendant worked with four other title clerks at the Lexington Agency, Bettina Granados ("Granados"), Arlene Cornatzer ("Cornatzer"), Mary Byerly ("Byerly"), and Miranda Stokes ("Stokes"). On average, the Lexington Agency handled 700 to 800 vehicle title transfers and 200 to 300 telephone calls per day.

The Lexington Agency had a policy for occasions when title transfer issues or questions arose. First, the title clerk would consult the DMV manual. If the title clerk did not find the answer in the DMV manual, the title clerk would next ask other title clerks for guidance. If other title clerks had not encountered that particular issue before, the title clerk would then call a DMV help desk in Raleigh, North Carolina. The help desk, staffed with DMV personnel, would provide an answer and instruct title clerks on the proper resolution to the issue.

Randall K. Lanier ("Lanier") was a car dealer who owned Lanier Motor Company. For more than thirty-five years, Lanier had bought salvaged vehicles, repaired them, and sold them at Lanier Motor Company. In 2007, due to "tremendous financial losses" affecting Lanier's credit, Lanier's bonding company refused to renew the company's bonds for 2008-2009. On 12 August 2008, Lanier's license, Lic. #7736, was terminated. Lanier, however, continued to sell vehicles without a license.

It is undisputed that the Lexington Agency transferred title for sixteen of Lanier Motor Company's vehicle sales while Lanier Motor Company was unlicensed. However, there is conflicting evidence regarding the details of the transfers.

According to several title clerks and Defendant, the following transpired: On 25 September 2008, Lanier went to the Lexington Agency to transfer title for two recent vehicle sales. Defendant was not present. Lanier gave the relevant paperwork to the title clerk, Stokes. Stokes entered Lanier's dealer identification number into STARS, and the computer responded, "invalid dealer number." Stokes asked Granados how to resolve the issue. Granados typed "OS" for the dealer number and told Stokes to continue. "OS" was an abbreviation for out-of-state. When Stokes asked Granados why she had entered "OS[,]" Granados explained that Lanier "was in the process of combining two lots or moving a lot to make his dealer number present. It was in the stage of being perfected by Raleigh, and that's what we were told to do." Stokes understood that Granados had called the DMV help desk to confirm that entering "OS" was the proper procedure for Lanier Motor Company. Entering "OS" for Lanier's transfers of title became the recognized procedure for the office. Several days after 25 September 2008, Lanier again came to the Lexington Agency to transfer title for another vehicle. Defendant entered Lanier's dealer number into STARS, and the system indicated Lanier was an inactive dealer, which means the car dealer has not renewed his dealer license. Granados again told Defendant, "I called [the help desk] and they told me that you could enter those . . . because he's just in the process of getting his bonds together." Granados explained that Defendant should enter "OS[.]"

However, according to Granados, she never called the DMV help desk, and, in fact, Defendant had instructed her to enter "OS" for Lanier Motor Company's transfers.

Defendant was directly involved in only three transfers. In total, Defendant earned $59 in fees for the sixteen title transfers.

On 5 April 2010, Defendant was indicted on three counts of accessing a government computer and two counts of aiding and abetting accessing a government computer pursuant to N.C. Gen. Stat. § 14-454.1(a) and (b). The indictments charging violations of N.C. Gen. Stat. § 14-454.1(a) were based on title transfers personally made by Defendant on 30 September 2008, 23 October 2008, and 3 November 2008. The indictment charging violations of N.C. Gen. Stat. § 14-454.1(a) and (b) was based on a title transfer by Mary Byerly on 30 January 2009, which Defendant allegedly aided and abetted. The matter came on for trial at the 13 December 2010 session of Davidson County Superior Court. Defendant moved to dismiss the charges at the close of the State's evidence and renewed the motion at the close of all evidence. The jury entered verdicts finding Defendant guilty of three counts of unlawfully accessing a government computer for a fraudulent purpose, and two counts of aiding and abetting the unlawful access of a government computer. The trial court entered a consolidated judgment sentencing Defendant to thirteen to sixteen months incarceration; however, the trial court suspended the sentence and placed Defendant on supervised probation for eighteen months. Defendant was also fined $59.20. From these judgments, Defendant appeals.

II: Motion to Dismiss

[1] Defendant first argues the trial court erred by denying her motion to dismiss because there was no substantial evidence that (1) she accessed a government computer to obtain services by fraud; (2) or that she acted willfully. We disagree and address each argument in turn.

When reviewing a challenge to the denial of a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines "whether the State presented substantial evidence in support of each element of the charged offense." *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005) (quotation omitted). "Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (quotation omitted). "In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence." *Id.* (quotation omitted). Additionally, a "substantial evidence inquiry examines the sufficiency of the evidence presented but not its weight," which remains a matter for the

jury. *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005) (quotation omitted). Thus, "[i]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Id.* (quotation omitted).

N.C. Gen. Stat. § 14-454.1(a)(2) provides the following: "It is unlawful to willfully, directly or indirectly, access or cause to be accessed any government computer for the purpose of . . . [o]btaining property or services by means of false or fraudulent pretenses, representations, or promises." N.C. Gen. Stat. § 14-454.1(b) provides that "[a]ny person who willfully and without authorization, directly or indirectly, accesses or causes to be accessed any government computer for any purpose other than those set forth in subsection (a) of this section is guilty of a Class H felony."

A: Obtaining Services

In Defendant's first argument on appeal, she contends the State did not present substantial evidence that she accessed a government computer "for the purpose of obtaining services[.]" We disagree.

N.C. Gen. Stat. § 14-454.1(a)(2) provides, in part, that "[i]t is unlawful to . . . access or cause to be accessed any government computer for the purpose of . . . *[o]btaining property or services*[.]" (emphasis added). The indictments charging Defendant with violations of N.C. Gen. Stat. § 14-454.1(a)(2) stated that Defendant "did access a government computer . . . for the purpose of *obtaining services.*" (emphasis added).

N.C. Gen. Stat. § 14-453(4a) defines "[c]omputer services" as "computer time or services, including data processing services, Internet services, electronic mail services, electronic message services, or information or data stored in connection with any of these services." Moreover, N.C. Gen. Stat. § 14-453(9) defines "[s]ervices" as including "computer time, data processing and storage functions."

The following evidence of record supports that Defendant accessed a government computer for the purpose of "obtaining . . . services" pursuant to N.C. Gen. Stat. § 14-454.1(a)(2). Assistant Supervisor Danny Barlow ("Supervisor Barlow") from the DMV testified that during the course of his investigation, he discovered that transfers were made by the Lexington Agency using the "OS" code for Lanier Motor Company. Defendant admitted on cross-examination

that she personally accessed STARS and made the "transfer on September 30th, 2008, for Lanier Motor Company[.]" Defendant also admitted she accessed STARS and personally made the transfers for Lanier Motor Company on 23 October 2008 and 3 November 2008. Likewise, Defendant admitted that on 30 January 2009, Defendant told "Mary Byerly . . . to run a Lanier Motor Company title through as out of state dealer[.]" For the foregoing transfers, Defendant admits that she was "paid $59.20[.]"

We believe the foregoing evidence is substantial evidence to support the element of "[o]btaining . . . services" pursuant to N.C. Gen. Stat. § 14-454.1(a)(2), as defined by N.C. Gen. Stat. § 14-453(4a) and N.C. Gen. Stat. § 14-453(9). Defendant had "computer time" on STARS; Defendant also accessed "information or data stored in connection with" STARS. We therefore conclude the trial court did not err by denying Defendant's motion to dismiss on the basis that there was not substantial evidence that Defendant "[o]btain[ed] . . . services[.]"

B: Willfulness

In Defendant's second argument on appeal, she contends the trial court erred by denying her motion to dismiss because the State did not present substantial evidence that Defendant acted willfully as required by N.C. Gen. Stat. § 14-454.1(a)(2). We disagree.

N.C. Gen. Stat. § 14-454.1(a)(2) provides, in part, that "[i]t is unlawful to *willfully*, directly or indirectly, access or cause to be accessed any government computer[.]" (emphasis added).

"Ordinarily, [w]ilful as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law." *State v. Williams*, 284 N.C. 67, 72, 199 S.E.2d 409, 412 (1973) (quotation omitted).

> The word wilful, used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent without which one cannot be brought within the meaning of a criminal statute.

In re Adoption of Hoose, 243 N.C. 589, 594, 91 S.E.2d 555, 558 (1956) (quotation omitted).

Defendant argues on appeal that there is no evidence of willfulness because evidence showed that Defendant believed the DMV help desk had instructed the Lexington Agency to enter Lanier Motor Company transfers as "OS." Although there is evidence to support the foregoing assertions by Defendant—in particular, the testimony of Stokes and Defendant—there is also evidence to the contrary—Granados' testimony. When asked, "did you ever call the Department of Motor Vehicle Division in Raleigh to receive any information or assistance regarding that particular issue?" Granados responded, "No, sir." Granados also gave the following testimony at trial:

> Q. Bringing your attention back to September or October of 2008 regarding some of those dealer packets that you picked up that belonged to Lanier Motor Company, can you tell the jury whether or not anything unusual happened when you attempted to process them?
>
> A. I went to open up the dealer folder under Lanier Motors and when I went in to start processing a piece of work I already entered the customer[']s identification. I entered the title number and went over to mileage. I done (sic) the mileage. When it came to the screen to enter what was on the bill of sale, it said "inactive dealer".
>
> Q. What did that mean to you as an individual that worked as a title clerk for a license plate agency?
>
> A. That means he didn't renew his dealer's license.
>
> Q. As an employee with the experience that you had, were you at that point in time allowed to transfer that title through the STAR System?
>
> A. No, sir.
>
> Q. As long as the dealer number was in the STAR computer and it showed inactive, would the computer allow that transfer?
>
> A. No, sir.
>
> Q. At that point in time what did you do?
>
> A. I brought it to Betty Barr's attention, it was not active.
>
> Q. And how did you do that? Tell the jury what contact or interaction you had with Betty Barr at that time.

A. I took the pieces of work and I went and told her that Mr. Lanier Motors[']' dealer number had been expired, it would not let me process it. And at that time she said she would handle it, contacting him.

Q. What did Betty Barr say?

A. She would handle contacting him.

. . .

A. . . . About two or three days later [Lanier] came back into the office.

. . .

Q. At that point in time did you see any interaction between Mr. Randall Lanier and Betty Barr?

A. They went to the back and spoke, sir. They didn't speak out front.

. . .

Q. Can you indicate to the ladies and gentlemen of the jury how long a time that you observed or found that Mr. Lanier, Randall Lanier, and the defendant, Betty Barr, remained in that back area?

A. Around 10 to 15 minutes.

. . .

Q. What, if anything, did you see Mr. Randall Lanier do when he returned several days after he had received those title packets, if anything?

A. Well, at the time when he came back with them he didn't enter the office. They had had a conversation outside.

. . .

Q. . . . Now, from the time that you first learned that Lanier Motor Company dealer number was invalid, did you ever contact any governmental official at the Division of Motor Vehicles, Department of Transportation orally that would relate to license plate agency operation?

A. No, sir.

. . .

Q. At any time during your employment and after you learned of the dealer number invalidation, did you ever tell Betty—I'm sorry—Mary Byerly that you had called a governmental agency orally?

A. No, sir.

. . .

Q. Are you familiar with the key code on the STAR System, O S, do you know what that is?

A. Yes. It is out of state.

Q. Based upon your training and the protocols that you were to follow as a title clerk, when would you use the key code O S?

A. When it was an out of state dealer.

Q. Did you ever key into the computer that Miranda Stokes used in any of the transfers for Lanier Motor Company out of state? Did you ever key that in on her computer at any time when she was addressing a Lanier Motor Company transaction?

A. No, sir.

. . .

Q. Did you ever tell Miss Cornatzer to use the key code out of state dealer in any transfers that she did for Lanier Motor Company after you learned that that company had an invalid dealer number?

A. No, sir.

Q. Ma'am, I want to bring your attention to the date January 6, 2009. Did you have occasion to again process titles for Lanier Motor Company on that date?

A. Yes, sir.

Q. Could you indicate to the ladies and gentlemen of the jury how that came about and what, if anything, unusual took place?

A. I picked up the dealer packet out of the back room again.

. . .

Q. What did you do with that Lanier Motor packet on January 6th, 2009, what did you do with it?

A. I brought it to my work station.

Q. What took place at that location?

A. I opened up the dealer packet and proceeded to see if I could do the work and it still said the dealer was inactive.

Q. Was the defendant Betty Barr present in the office on that date and time?

A. Yes, sir.

Q. What conversation, if any, did you have with Betty Barr regarding the finding that you just learned on your computer as it relates to the Lanier Motor Company transfer?

A. I told her that the dealer number was inactive. And she said to go ahead and process it as an O S and that when Raleigh received it they would see that he had applied for his dealer number or had his dealer stuff in trying to get it passed and they would go ahead and send it through.

Q. Based upon your training and education and experience as a title clerk for the license plate agency, was that a proper protocol that you have learned or experienced as a clerk?

A. No, sir.

Q. How many transfers did you make for Lanier Motor Company on January 6, 2009, if any?

A. I recall about three pieces.

. . .

Q Indicate to the ladies and gentlemen of the jury how you did those three transfers, what key code did you utilize in transferring each of those three motor vehicle titles?

A. O S for out of state dealer.

Q. Why did you use the O S, out of state dealer key code, to make those transfers on January 6, 2009?

A. My supervisor, Betty Barr, told me to process it.

Q. Did any person ever tell you from the Department of Motor Vehicles Division of Transportation that that was a proper method to transfer a dealer's motor vehicle that was invalid?

A. No, sir.

. . .

Q In regard to Mr. Randall Lanier, was that different or the same as she dealt with other dealers?

. . .

[A]: Yes, sir, it was different.

. . .

Q. How was it different?

A. He was running for a political thing there and they carried on a conversation about that.

Q. What do you mean when you say him, who are you referring to?

A. Mr. Lanier.

Q. What political thing was he running for if you are aware of it?

A. I don't know. I just heard him talking that he was running for a thing and her mother is over the Board of Election.

"It is elementary that the jury may believe all, none, or only part of a witness' testimony[.]" *State v. Miller*, 26 N.C. App. 440, 443, 216 S.E.2d 160, 162, *aff'd*, 289 N.C. 1, 220 S.E.2d 572 (1975). Therefore, it was within the province of the jury to disbelieve the testimony of Defendant and several title clerks, but believe Granados' testimony. Taking Granados' testimony in the light most favorable to the State, we believe there was substantial evidence of Defendant's willfulness to violate N.C. Gen. Stat. § 14-454.1(a)(2). Granados' testimony is substantial evidence that Defendant "[did] the act purposely and deliberately, indicating a purpose to do it without authority—careless whether he has the right or not—in violation of law[.]" *In re Adoption of Hoose*, 243 N.C. at 594, 91 S.E.2d at 558. Therefore, we conclude the trial court did not err by denying Defendant's motion to dismiss for lack of substantial evidence of willfulness.

III: Indictment

[2] In Defendant's next argument, she contends she cannot be convicted of a violation of both N.C. Gen. Stat. § 14-454.1(a)(2) and (b) for the same "purpose" and transaction. We agree.

N.C. Gen. Stat. § 14-454.1(a)(2) provides that "[i]t is unlawful to willfully, directly or indirectly, access or cause to be accessed any government computer for the *purpose* of: . . . Obtaining property or services by means of false or fraudulent pretenses, representations, or promises." *Id.* (emphasis added). N.C. Gen. Stat. § 14-454.1(b) provides that "[a]ny person who willfully and without authorization, directly or indirectly, accesses or causes to be accessed any government computer *for any purpose other than those set forth in subsection (a)* of this section is guilty of a Class H felony." *Id.* (emphasis added).

The indictment alleging violations on 30 January 2009 sets forth two counts, one for a violation of N.C. Gen. Stat. § 14-454.1(a), alleging Defendant aided and abetted the access of a government computer "for the purpose of obtaining services . . . . by processing the transfer of a motor vehicle title[,]" and the second for a violation of N.C. Gen. Stat. § 14-454.1(b), alleging Defendant aided and abetted the access of a government computer for the purpose of "improperly processing the transfer of a motor vehicle title[.]"

The plain language of N.C. Gen. Stat. § 14-454.1(b) requires that the purpose for accessing a government computer must be one "other than those set forth" in subsection (a). *Id.* As both the count charging Defendant with a violation of N.C. Gen. Stat. § 14-454.1(a) and the count charging Defendant with a violation of N.C. Gen. Stat. § 14-454.1(b) allege that Defendant aided and abetted the access of a government computer for the purpose of "processing the transfer of a motor vehicle title[,]" the second count fails to state a purpose "other than those set forth" in subsection (a), and the portion of the indictment charging a violation of N.C. Gen. Stat. § 14-454.1(b) is, therefore, fatally defective. *See State v. Patterson*, 194 N.C. App. 608, 612, 671 S.E.2d 357, 360, *disc. review denied*, 363 N.C. 587, 683 S.E.2d 383 (2009) ("A defect in an indictment is considered fatal if it wholly fails . . . to state some essential and necessary element of the offense of which the defendant is found guilty[;] [w]hen such a defect is present, it is well established that a motion in arrest of judgment may be made at any time in any court having jurisdiction over the matter, even if raised for the first time on appeal") (internal quotations omitted); *see also State v. Martin*, 47 N.C. App. 223, 231, 267 S.E.2d 35, 40, *disc. review denied*, 301 N.C. 238, 283 S.E.2d 134-35 (1980) (stating, "if the facts alleged in one indictment, if given in evidence, would sustain a conviction under a second indictment, or if the same evidence would support a conviction in each case, a defendant may not be tried, convicted and punished for both offenses[;] . . . [i]f, however, a

single act constitutes an offense against two statutes and each statute requires proof of an additional fact which the other does not, the offenses are not the same in law and in fact and a defendant may be convicted and punished for both") (internal citations omitted). We conclude the judgment convicting Defendant of aiding and abetting the access of a government computer in violation of N.C. Gen. Stat. § 14-454.1(b) must be arrested.[1]

IV: Jury Instruction

[3] In Defendant's next argument, she contends the trial court erred by denying Defendant's written request for a jury instruction on the defense of governmental authority. We disagree.

The standard of review for appeals regarding jury instructions to which Defendant has properly lodged an objection at trial is the following:

> This Court reviews jury instructions . . . 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, *appeal dismissed*, *disc. review denied*, 360 N.C. 651, 637 S.E.2d 180-81 (2006) (quotation omitted). "If a party requests a jury instruction which is a correct statement of the law and which is supported by the evidence, the trial judge must give the instruction at least in substance." *State v. Ligon*, 332 N.C. 224, 242, 420 S.E.2d 136, 146 (1992) (citation omitted).

In this case, Defendant argues the law and evidence supported a jury instruction on entrapment by estoppel or governmental authority. Our United States Supreme Court has explained the doctrine of entrapment by estoppel as follows: "[C]itizens may not be punished

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1. Because we arrest judgment on Defendant's conviction of aiding and abetting in violation of N.C. Gen. Stat. § 14-454.1(b), we need not address Defendant's remaining arguments pertaining to this conviction, specifically that (1) the indictment was fatally defective because it did not plead that Defendant was "without authorization" to access the government computer as required by N.C. Gen. Stat. § 14-454.1(b), and (2) that the trial court erred by denying Defendant's motion to dismiss the N.C. Gen. Stat. § 14-454.1(b) aiding and abetting charge, because the State did not present substantial evidence that Defendant acted "without authorization[.]"

for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach." *United States v. Laub*, 385 U.S. 475, 487, 87 S. Ct. 574, 581, 17 L. Ed. 2d 526, 534 (1967). A jury may not convict "a citizen for exercising a privilege which the State clearly had told him was available to him." *Raley v. Ohio*, 360 U.S. 423, 438, 79 S. Ct. 1257, 1266, 3 L. Ed. 2d 1344, 1355 (1959).

This Court recently addressed entrapment by estoppel in *State v. Pope*, ___ N.C. App. ___, ___, 713 S.E.2d 537, 541, *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (2011), stating that "[a] criminal defend- ant may assert an entrapment-by-estoppel defense when the government affirmatively assures him that certain conduct is lawful, the defendant thereafter engages in the conduct in reasonable reliance on those assurances, and a criminal prosecution based upon the conduct ensues."[2] *Id.* (quotation omitted). "In order to assert an entrapment-by-estoppel defense, [the defendant] must do more than merely show that the government made vague or even contradictory statements. Rather, he must demonstrate that there was active misleading in the sense that the government actually told him that the proscribed conduct was permissible." *Id.* (quotation omitted).

In this case, Defendant requested the following jury instruction pertaining to entrapment by estoppel and governmental authority:

> If you find by a preponderance of the evidence:
>
> 1.) That defendant Betty Barr, acting on her own or through her agents and employees who were authorized Division of Motor Vehicles RAC-F title clerks at her License Plate Agency, was told by Bettina Granados in her official capacity as an authorized RAC-F title clerk, that she, Ms. Granados, had called the DMV help desk, and had explained that a well-known longtime car dealer in Lexington, NC had a problem with trying to consolidate his two car lots under one bond, and
>
> 2.) That Ms. Granados said to Betty Barr and the other title clerks, that she received an authorization to process the Lanier Motor Company vehicle title transfers as though the Lanier Motor Company was an out of state dealer, and

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2. We note this opinion was handed down on 12 January 2011, which was after the trial in this case. The trial court correctly applied the law existing at the time of trial, which consisted only of federal opinions. This notwithstanding, *Pope* is not inconsistent with the law applied by the trial court in determining whether to give the requested jury instruction in this case.

3.) That Ms. Granados had the real or apparent authority to make such a representation, and

4.) That Betty Barr, in reasonable reliance upon that representation by Ms. Granados entered and allowed her clerks to enter "OS" for out of state dealer in the 16 Lanier Motor Company vehicle title transfers in question,

Then you should return a verdict of "not guilty" as to each of the counts in the indictment.

The pertinent question on appeal is whether Granados, "an authorized RAC-F title clerk[,]" was a government official for purposes of entrapment by estoppel. Among the numerous examples of government officials in the context of entrapment by estoppel in the law of this State and federal courts are "officials" of the "Town of Coats[,]" *Pope*, ___ N.C. App. ___, ___, 713 S.E.2d 537, 542, the Un-American Activities Commission, which told witnesses they had a right to rely on the privilege against self-incrimination, *Ohio*, 360 U.S. 423, 79 S. Ct. 1257, 3 L. Ed. 2d 1344, and a Police Chief and Sheriff, *Cox v. Louisiana*, 379 U.S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965).

In Defendant's request for the jury instruction, she relied on *United States v. Tallmadge*, 829 F.2d 767, 774 (9th Cir. 1987), in which the majority opinion held the government official was "a federally licensed gun dealer[,]" who the Court described as "a licensee of the federal government[.]" However, we find the dissenting opinion in *Tallmadge* to be more persuasive. The dissent in *Tallmadge* disagreed with the majority's conclusion that the federally licensed gun dealer was a governmental official, stating, "I believe the panel errs in allowing *Tallmadge* to rely on statements purportedly made by the gun dealer, who is not even a federal employee, much less an official authorized to bind the government." *Id.* at 776 (Kozinski, J., dissenting).

In this case, Defendant contends that Granados, a licensed and "authorized RAC-F title clerk[,]" was a government official for purposes of the entrapment by estoppel defense and jury instruction. Granados was an employee of the Lexington Agency, not the State of North Carolina, and the Lexington Agency was a private contractor. We agree with the federal line of cases aligned with the *Tallmadge* dissenting opinion, which reason that "a federal license . . . does not transform private licensees into government officials[,]" *United States v. Billue*, 994 F.2d 1562, 1569 (11th Cir. 1993), and "[because] [w]e do not have before us the situation where a government official, such as a judge, a prosecuting attorney, an ATF official, or a proba-

tion officer, [made a representation][,] . . . we cannot agree that . . . [a] license . . . is sufficient to transform [the licensee] into government officials[.]" *United States v. Austin*, 915 F.2d 363, 367 (8th Cir. 1990).[3] We do not believe that Granados' capacity as a licensed RAC-F title clerk was sufficient to establish that Granados was a government official. We therefore conclude that Granados was not a government official for purposes of the application of the entrapment by estoppel defense, and resultantly, the trial court did not err by concluding that the evidence did not support an instruction on entrapment by estoppel.

V: Plain Error

[4] In Defendant's final argument on appeal, she contends the trial court committed plain error by failing to instruct the jury on each element of each charge, and Defendant is therefore entitled to a new trial. We disagree.

Defendant did not properly preserve this issue for appeal because she failed to lodge an objection at trial. Defendant requests that the Court review for plain error. "Plain error analysis applies to evidentiary matters and jury instructions." *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (2009) (citation omitted). "A prerequisite to our engaging in a 'plain error' analysis is the determination that the instruction complained of constitutes error at all[;] [t]hen, [b]efore deciding that an error by the trial court amounts to plain error, the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468, *cert denied*, 479 U.S. 836, 107 S. Ct. 133, 93 L. Ed. 2d 77 (1986) (quotation omitted). Our Courts have further stated, with regard to plain error review, the following:

> [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] isgrave error which amounts to a denial of a fundamental right of the accused, or the error has

3. This Court is not bound by the decisions of the Ninth Circuit, and is free to adopt the rule of the dissenting opinion in *Tallmadge* and the Eighth and Eleventh Circuits. *In re Truesdell*, 313 N.C. 421, 428-29, 329 S.E.2d 630, 634-35 (1985) (stating that "[a]lthough we recognize that this Court is not bound by the decision from the Federal court, we are nevertheless mindful of the legal maxim, *ratio est legis amina*, reason is the soul of the law"); *Brown v. Centex Homes*, 171 N.C. App. 741, 744, 615 S.E.2d 86, 88 (2005) ("Although we are not bound by federal case law, we may find their analysis and holdings persuasive").

> 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) (quotation omitted) (emphasis in original). Defendant bears the burden of showing that an error arose to the level of plain error. *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

"The trial judge has great discretion in the manner in which he charges the jury, but he must explain every essential element of the offense charged." *State v. Young*, 16 N.C. App. 101, 106, 191 S.E.2d 369, 373 (1972).

In this case, we note that Defendant does not argue that the trial court failed to explain to the jury every essential element of the crimes charged, but rather, Defendant takes issue with the fact that the trial court gave "a generic instruction to the jury for the categories of the charges." This Court has held that similar jury instructions, categorizing multiple identical charges in one instruction, did not constitute plain error. *State v. Evans*, 162 N.C. App. 540, 544, 591 S.E.2d 564, 566 (2004). The trial court in this case provided the jury with a copy of the instructions and separate verdict sheets clearly identifying the separate charges. However, the dispositive point on this issue is that Defendant has failed to explain in her brief how any alleged error by the trial court in categorizing the jury instructions prejudiced her trial. Because Defendant bears the burden of showing that an error arose to the level of plain error, *Bishop*, 346 N.C. at 385, 488 S.E.2d at 779, and because Defendant failed to meet this burden, we conclude the trial court did not commit plain error in its jury instructions on the elements of the offenses in this case.

In summary, we conclude there was no prejudicial error in the judgments convicting Defendant in Case Nos. 10 CRS 1557, 10 CRS 1558, and 10 CRS 1559. However, we further conclude the portion of the judgment convicting Defendant in Case No. 10 CRS 1560 for a violation of N.C. Gen. Stat. § 14-454.1(b) must be arrested.

NO ERROR, in part, JUDGMENT ARRESTED, in part.

Judges STEELMAN and BEASLEY concur.

STATE OF NORTH CAROLINA v. MICHAEL RAY KING

No. COA11-568

(Filed 7 February 2012)

1. Appeal and Error—lack of transcript or adequate alternative narration—meaningful review—precluded in habitual felon proceeding—not precluded on remaining issues

The almost complete lack of transcript or adequate alternative narration of the habitual felon phase of the proceedings in the trial court precluded any meaningful appellate review of the proceeding. The matter was remanded for a new determination of defendant's habitual felon status and sentencing. The incompleteness of the record did not preclude meaningful review of the remaining charges.

2. Evidence—police officer testimony—defendant's post-Miranda silence—defendant's inquiry on cross-examination

The trial court did not commit plain error in a possession with intent to sell or deliver cocaine, selling cocaine, and possession of drug paraphernalia case by allowing a police officer to testify that defendant refused to make a statement after being read his *Miranda* rights. Even if the prosecutor's questions were intended to focus the jury's attention on defendant's silence and lack of cooperation with law enforcement following his arrest, the error did not amount to plain error when defendant made the same inquiry on cross-examination.

3. Constitutional Law—effective assistance of counsel—incomplete transcript—dismissed without prejudice

Defendant's argument that his trial counsel rendered ineffective assistance of counsel by admitting defendant's guilt to the charge of possession of drug paraphernalia during her closing argument without defendant's consent was dismissed without prejudice to defendant's right to file a motion for appropriate relief requesting an evidentiary hearing on the matter. The incomplete record before the Court of Appeals contained no indication that defendant's trial counsel obtained defendant's consent to concede his guilt to the charge of possession of drug paraphernalia or that an inquiry was made into the basis for the concession.

Appeal by defendant from judgments entered 11 September 2008 by Judge Beverly T. Beal in Buncombe County Superior Court. Heard in the Court of Appeals 26 October 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Elizabeth Leonard McKay, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for defendant-appellant.

BRYANT, Judge.

Because neither a verbatim transcript nor adequate alternative is available to conduct a meaningful review of defendant's habitual felon status hearing, we reverse and remand for a new habitual felon status hearing. We hold there was no error in defendant's drug trial. However, because trial counsel conceded defendant's guilt to the charge of possession of drug paraphernalia and the record is incomplete as to whether defendant consented to such a concession, we dismiss this issue without prejudice to defendant's right to file a motion for appropriate relief in the trial court.

In June 2008, defendant Michael King was indicted on charges of possession with intent to sell or deliver cocaine, selling cocaine, possession of drug paraphernalia, and attaining habitual felon status. The matter was brought on for trial before a jury on 8 September 2008.

At trial, the evidence presented showed that on 4 January 2008 at 1:00 a.m., two plain-clothed officers with the Asheville Police Department Drug Suppression Unit were driving in the area of the Lee Walker Heights Apartment complex, an area from which the department had received a number of complaints regarding drug activity. The officers were in an unmarked vehicle. Defendant approached the vehicle and one of the officers asked if he could purchase thirty dollars worth of "crack cocaine." Defendant took the money, entered the apartment complex, and within five minutes returned and handed drugs to the officer. A marked police car, surveilling the transaction, then arrived and arrested defendant.

Defendant was found guilty of possession with intent to sell or deliver cocaine, sale of cocaine, and possession of drug paraphernalia. Subsequently, defendant was found guilty of attaining habitual felon status. The trial court entered judgment in accordance with the jury verdict, sentencing defendant to thirty days for possession of drug paraphernalia, and consecutive sentences of 150 to 189 months

for possession with intent to sell or deliver cocaine and selling cocaine. Defendant appealed.

As an indigent person with appointed appellate counsel, defendant requested a transcript of the proceeding. A partial transcript was provided; however, sections were missing and deemed unrecoverable.

On appeal, defendant raises the following questions: (I) Whether defendant is entitled to a new trial because of the State's inability to provide a complete transcript of the proceedings; (II) whether the trial court committed plain error by allowing a witness to testify to defendant's refusal to make a statement; and (III) whether defendant was provided ineffective assistance of counsel.

I

[1] Defendant argues that he is entitled to a new trial on all charges because the State has failed to provide him with a complete transcript of the proceedings. Defendant contends that he has attempted to reconstruct the missing portions of the transcript but to no avail. As a result, he is unable to procure meaningful appellate review and is entitled to a new trial. We agree, in part.

Under North Carolina General Statutes, section 7A-452,

> [i]n cases in which an indigent person has entered notice of appeal and appellate counsel has been appointed by the Office of Indigent Defense Services, the clerk of superior court shall make a copy of the complete trial division file in the case, make a copy of documentary exhibits upon request, and furnish those files and any requested documentary exhibits to the appointed attorney.

N.C. Gen. Stat. § 7A-452(e) (2009).

> Although due process does not "require[] a verbatim transcript of the entire proceedings," *Karabin v. Petsock*, 758 F.2d 966, 969 (3d Cir. 1985), *cert. denied*, 474 U.S. 857, 106 S. Ct. 163 (1985), the United States Supreme Court has held that an appellate "counsel's duty cannot be discharged unless he has a transcript of the testimony and evidence presented by the defendant and also the court's charge to the jury, as well as the testimony and evidence presented by the prosecution." *Hardy v. United States*, 375 U.S. 277, 282, 11 L. Ed. 2d 331, 335 (1964).

State v. Hobbs, 190 N.C. App. 183, 185, 660 S.E.2d 168, 170 (2008).

> The unavailability of a verbatim transcript does not automatically constitute error. *See Hunt v. Hunt*, 112 N.C. App. 722, 726, 436 S.E.2d 856, 859 (1993). To prevail on such grounds, a party must demonstrate that the missing recorded evidence resulted in prejudice. [*In re Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003)]. General allegations of prejudice are insufficient to show reversible error. *Id.*; *In re Peirce*, 53 N.C. App. 373, 382, 281 S.E.2d 198, 204 (1981) (finding an insufficient showing of prejudice where appellee did not indicate the content of the lost testimony in the record). As to unavailable verbatim transcripts, a party has the means to compile a narration of the evidence through a reconstruction of the testimony given. *In re Clark*, 159 N.C. App. at 80, 582 S.E.2d at 660 (citing *Miller v. Miller*, 92 N.C. App. 351, 354, 374 S.E.2d 467, 469 (1988)); N.C.R. App. P. 9(c)(1).

State v. Quick, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006). "Without an adequate alternative, this Court must determine whether the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review, in which case a new trial would be warranted." *Hobbs*, 190 N.C. App. at 187, 660 S.E.2d at 171 (citation and quotations omitted).

In an attempt to reconstruct the missing portions of the transcript, defendant requested a statement of any detailed memory of what occurred at trial or detailed notes taken during the trial from the following court officers: Judge Beverly Beal, who presided over the trial; Buncombe County Clerk of Superior Court; the assistant district attorney who prosecuted the matter; defendant's public defender; and the Deputy Clerk of Court who was present during the trial. Specifically, defendant noted the following portions of the proceedings that were missing from the transcript:

> 1) several answers given by the defendant during Judge Beal's colloquy with him regarding his decision not to testify; 2) several portions of both [the prosecutor's] and [defense counsel's] closing arguments; 3) the substantive jury instruction on the charge of selling cocaine in case number 08 CRS 50163; 4) the substantive jury instruction on the charge of possession of drug paraphernalia in case number 08 CRS 50164; 5) the concluding jury instructions regarding jury unanimity, the requirement that the judge be impartial, the juror's duty to recall all of the evidence, etc; 6) anything that occurred during jury delib-

erations and/or any questions that may have arisen during jury deliberations in the possession with intent to sell or deliver cocaine, selling cocaine, and possession of drug paraphernalia trial; 7) the return of the verdicts in the possession with intent to sell or deliver cocaine, selling cocaine, and possession of drug paraphernalia trial; and 8) the entire habitual felon trial, including opening statements, evidence, closing arguments, instructions, and jury deliberations.

Judge Beal responded that his notes from the trial state "Defendant does not wish to present evidence. I conducted a voir dire examination of Defendant on his decision not to testify" and that "the verdicts on the underlying charges were announced at 4:14 p.m., and the verdicts were 'Guilty.' There was no motion to poll the jury. In the second phase of the trial evidence was presented. The jury was presented with three charges of Habitual Felon status, and all were returned 'Guilty.' " With the exception of Judge Beal, no official had a detailed memory of the trial or notes on the proceedings.

Reviewing the record, we note that defendant does not contest the completeness and accuracy of the transcript with regard to the following portions of the trial: defendant's arraignment; defendant's motions for complete recordation and sequestration of witnesses; the State's motion to join the charges for trial; jury selection and impaneling; opening statements by the prosecution and defense counsel; the testimony of the State's witnesses—direct and cross-examinations through the prosecution resting its case; the hearing on defendant's motion to dismiss, as well as, the trial court's ruling; the defense resting its case; a Rule 21 conference—discussing what instructions were to be provided the jury; the verdict in the Habitual Felon proceeding; the sentencing hearing; and the judgment.

Defendant contends, however, that the transcript is incomplete with regard to significant portions of the trial proceedings, including some of defendant's answers during the trial court's colloquy regarding defendant's decision not to testify:

Court: [Defendant], do you understand as a defendant charged in a criminal case you are not required to testify. Do you understand that?

Defendant: I do.

Court: Do you understand that if you do testify, or did decide to testify, that you would be subject to cross-examination by the district attorney?

Defendant: I do.

Court: And do you understand that if you testify he can cross-examine you about prior convictions as well as other things involving this case? Do you understand that?

Defendant: I do.

Court: Do you understand that, on the other hand, that if you felt like it was in your best interest to testify that you could testify in the case?

Defendant: Yes.

Court: But that if you do not testify that I will instruct the jury that they're not to hold that against you; do you understand that?

Defendant: Yes.

. . .

Court: Do you want to talk about it with your lawyer?

Defendant: No.

Court: Do you understand that, again, you could if you wanted to, but I'm not telling you to do so. I'm just being sure you understand you could if you wanted to. Do you understand that?

Defendant: Yes.

Court: But you've made the decision not to testify; is that right?

Defendant: (Answer not audible enough to transcribe.)

Court: All right.

Defense counsel: . . . we have talked about it.

Defendant: Well, we haven't talked about it today.

Court: Right. But you understand—and I would not want you to think "I can't testify." You could if you wanted to.

Defendant: I know.

Court: But you don't want to; is that right?

Defendant: (Answer not audible enough to transcribe.)

Court: All right; all right. You can have a seat. And the Court will instruct 101.30 [effect of the defendant's decision not to testify].

On the record, the trial court's inquiry and defendant's responses regarding his decision not to testify is substantially complete. Therefore, this record will not support defendant's contention that meaningful review of this issue is precluded. Defendant cannot show prejudice from the inaudible responses.

Defendant also contends that he is prejudiced on appeal by the transcript's failure to fully reflect the closing arguments of both the prosecutor and defense counsel.

In his closing argument, as reflected by relevant portions of the transcript, the prosecutor states that he will go through "the three charges that the defendant's facing and tell you what the elements are and show you how [the State has] proved [its] case beyond any reasonable doubt." The prosecutor first discusses the charge of selling a controlled substance—cocaine. The prosecutor discusses the individual elements of the offense and makes an argument as to how the facts should be applied to satisfy each element. There is no interruption in the transcript. Next, the prosecutor discusses the charge of possession with intent to sell or deliver cocaine. The prosecutor avers that the State must prove "defendant knowingly possessed cocaine . . . ." The transcript then acknowledges a break in the recording. The transcript resumes with the prosecutor's statements "So those are the only two elements that the State has to prove is that he knowingly possessed it and that he intended to sell it. And we know that he possessed it because he had it in his hands, and we know he intended to sell it because he got the money, went, came back and sold him the cocaine." Last, the prosecutor discusses the charge of possession of drug paraphernalia.

Because the only omission reflected in the transcript of the prosecutor's closing arguments relates to statements on the charge of possession with intent to sell or deliver cocaine and because the prosecutor recaps his discussion of the elements of that offense in his argument explaining the application of the facts to the elements, we find that meaningful appellate review of this issue is not precluded. Therefore, defendant is not prejudiced by the omissions.

As to defense counsel's closing argument, there is no indication that any portion of the transcript is missing; rather, in one sentence, defense counsel's words were not audible:

> You know the officer said, "We don't find pagers anymore." Well, they didn't find that. They didn't find baggies. He didn't have drugs in his pocket ready to (not audible enough to transcribe.) He's not adealer. He is not a drug dealer. They didn't find any money. No money on the defendant. None. Especially not that twenty dollars they gave him."

It appears that defense counsel's words which were "not audible enough to transcribe" amount to only a fragment of one sentence. This does not preclude meaningful appellate review.

Defendant contends that he is prejudiced on appeal by the transcript's omission of the substantive jury instruction on the charges of selling cocaine and possession of drug paraphernalia, as well as, the trial court's concluding instructions regarding jury unanimity, the judge's impartiality, the juror's duty to recall all of the evidence, etc., and anything that occurred during jury deliberations.

It does not appear that the transcript of the trial court's charge to the jury is incomplete. The transcript includes the trial court's instruction on the following: the jury has a duty to decide the facts from the evidence presented; defendant has entered a plea of "not guilty" entitling him to a presumption of innocence until proven guilty beyond a reasonable doubt; and the jury is the sole judge of a witness's credibility, as well as, the weight to be given the evidence. The transcript reflects the trial court's instruction on the charge of possessing cocaine with intent to sell or deliver but indicates that the device recording the proceedings stopped. The transcript continues with the trial court addressing the jury which had already begun deliberations. Omitted are the instructions on the charges of selling cocaine and possession of drug paraphernalia, and the trial court's instructions regarding jury unanimity, the judge's impartiality, the juror's duty to recall all of the evidence, etc. However, during the Rule 21 conference, which was recorded and appears in the record, the trial court discussed with the parties the instructions to be given to the jury. Specifically, the court stated pattern jury instructions N.C.P.I.—Crim. 101.05, the function of the jury; N.C.P.I.—Crim. 101.10, the burden of proof and reasonable doubt; N.C.P.I.—Crim. 101.15, credibility of witness; N.C.P.I.—Crim. 101.20, weight of the evidence; N.C.P.I.—Crim. 104.94, testimony of expert witness;

N.C.P.I.—Crim. 101.30, effect of the defendant's decision not to testify; N.C.P.I.—Crim. 105.20, impeachment or corroboration by prior statement; and N.C.P.I.—Crim. 104.05, circumstantial evidence. With regard to the charges of possession of a controlled substance with intent to sell or deliver and possession of drug paraphernalia, as well as, concluding instructions for the jury, the court stated to the parties the following:

> Then[,] possession of controlled substance with intent to sell or deliver, and the Court will instruct the jury on the elements first: The defendant knowingly possessed cocaine. Cocaine's a controlled substance. A person possesses cocaine when he is aware of its presence and has both the power and intent to control its disposition or use. Second, the defendant intended to sell or deliver it. I'm just briefly stating it. And then the mandate on that, [N.C.P.I.—Crim.] 260.21, sale of controlled substance. The defendant's been charged with selling it and the State must prove that beyond a reasonable doubt.
>
> [N.C.P.I.—Crim.] 260.95, possession or use of drug paraphernalia. I'm just going to say "possession of drug paraphernalia." I'm not going to use that phrase "use." First, he possessed the paraphernalia, and that describes what it is, and second, that he did this knowingly. And third, that the defendant did so with the intent to use the paraphernalia in order to consume a controlled substance which would be unlawful to possess, cocaine.
>
> Now, then, instructions on the—concluding instructions, 101.35 [concluding instructions—jury consider all evidence, judge not express opinion, unanimous verdict, selection of foreperson], with which you guys are familiar.

The trial court later asked if defendant requested any additional instructions. Defendant asked that the court give a "full instruction" on reasonable doubt and also asked for an instruction on entrapment. The record includes a transcript of the recorded discussion and the trial court's denial of defendant's request for an entrapment instruction. We also note that Judge Beal did not remember "any questions the jury may have asked or actions that [he] took in response to any questions or the giving of further instructions to the jury."

Based on the forecast of the jury instructions and the lack of any indication that the instructions provided deviated from those proposed, the incompleteness of the record does not deny defendant meaningful appellate review.

Defendant further contends that he is prejudiced on appeal by the transcript's omission of the return of the verdicts on the charges of possession with intent to sell or deliver cocaine, selling cocaine, and possession of drug paraphernalia trial.

As previously stated, where verbatim transcripts are unavailable, a reconstruction of the proceedings may be achieved by narration. *Quick*, 179 N.C. App. at, 651, 634 S.E.2d at 918. Here, Judge Beal's response to defendant's request for any notes or memory he had of the proceedings include the following:

> My notes on the verdicts just record: "Verdicts 4:14 Guilty, no motion to poll; second phase—evidence "H-1 H-2 H-3" Guilty." That means to me that the verdicts on the underlying charges were announced at 4:14 p.m., and the verdicts were "Guilty." There is no motion to poll the jury. In the second phase of the trial evidence was presented. The jury was presented with three charges of Habitual Felon status, and all were returned "Guillty." [sic]

Notwithstanding the lack of a transcript regarding the return of the verdicts on the charges of possession with intent to sell or deliver cocaine, selling cocaine, and possession of drug paraphernalia trial, Judge Beal's detailed reconstruction is sufficient for defendant to obtain meaningful appellate review of this issue.

Last, defendant contends that the lack of a verbatim transcript in the second phase of the trial, for a determination of defendant's habitual felon status, including opening statements, evidence, closing arguments, instructions, and jury deliberations, precludes meaningful appellate review. We agree.

The almost complete lack of a transcript or adequate alternative narration of the habitual felon phase of the proceedings in the lower court precludes our ability to review defendant's contentions on the habitual felon hearing and precludes any meaningful appellate review. *See Hobbs*, 190 N.C. App. at 187, 660 S.E.2d at 171. Accordingly, we remand this matter for a new determination of defendant's habitual felon status and sentencing.

II

[2] Next, defendant argues that the trial court committed plain error by allowing Officer Rice to testify that defendant refused to make a statement after being read his *Miranda* rights. We disagree.

> [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. Cummings, 361 N.C. 438, 470, 648 S.E.2d 788, 807 (2007) (citation omitted).

> [I]t is well established that a criminal defendant has a right to remain silent under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and under Article I, Section 23 of the North Carolina Constitution. A defendant's decision to remain silent following his arrest may not be used to infer his guilt, and any comment by the prosecutor on the defendant's exercise of his right to silence is unconstitutional. "A statement that may be interpreted as commenting on a defendant's decision to remain silent is improper if the jury would naturally and necessarily understand the statement to be a comment on the exercise of his right to silence."

State v. Ezzell, 182 N.C. App. 417, 420, 642 S.E.2d 274, 278 (2007) (quoting *State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001) (alterations in original)); *accord State v. Alexander*, 337 N.C. 182, 446 S.E.2d 83 (1994) (holding that where the prosecutor's questions were "relatively benign," the prosecutor made no attempt to emphasize the fact that defendant did not wish to speak after being read his rights, and evidence of the defendant's guilt was substantial, the officer's testimony did not amount to plain error).

Regardless of these rules, it is axiomatic that "[a] defendant is not prejudiced . . . by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2009); *see also State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971) ("Ordinarily one who causes (or we think joins in causing) the court to commit error is not in a position to repudiate his action and assign it as ground for a new trial. The foregoing

is not intended as any intimation the court committed error in this instance; but to point out the legal bar to the defendant's right to raise the question. Invited error is not ground for a new trial." (citations omitted)).

Here, Officer Rice gave the following testimony on direct examination.

> Q So after you placed him under arrest what did you do?
>
> A Transported him to jail.
>
> Q Did the defendant make any statements?
>
> A He didn't make anything worthy of writing down. We always speak with—or typically I speak with the suspect, you know, try to get information from them like "where did you buy drugs," "how long have you been doing this." I usually give them an opportunity to help themselves out. By that, I mean helping us. Maybe move up a level and catch the person that supplied him with the drugs. Obviously he was uncooperative as there were no statements or notes taken by me from him.

Officer Rice was further questioned about the investigation on cross-examination.

> Q Did you do any further investigation after you arrested [defendant]?
>
> A Such as the statements I spoke about earlier?
>
> Q Yes.
>
> A As I said earlier, we try to do a brief investigation with them depending on how cooperative they are. I did speak with him—or I'm sure I spoke with him. There was nothing worth writing down. He did not make any written statement. I didn't take any notes from it. It didn't yield anything useful.

While we do not believe the prosecutor's questions were intended to focus the jury's attention on defendant's lack of cooperation with law enforcement following his arrest, even elevating this inquiry to a condemnation of defendant's silence cannot amount to plain error when defendant made the same inquiry on cross examination. N.C.G.S. § 15A-1443(c); *see also Payne*, 280 N.C. at 171, 185 S.E.2d at 102. Accordingly, defendant's argument is overruled.

III

[3] Lastly, defendant argues that his trial counsel rendered ineffective assistance of counsel by admitting defendant's guilt to the charge of possession of drug paraphernalia during her closing argument without defendant's consent. We dismiss this argument.

> A defendant's right to plead "not guilty" has been carefully guarded by the courts. When a defendant enters a plea of "not guilty," he preserves two fundamental rights. First, he preserves the right to a fair trial as provided by the Sixth Amendment. Second, he preserves the right to hold the government to proof beyond a reasonable doubt. A plea decision must be made exclusively by the defendant. "A plea of guilty or no contest involves the waiver of various fundamental rights such as the privilege against self-incrimination, the right of confrontation and the right to trial by jury." *State v. Sinclair*, 301 N.C. 193, 197, 270 S.E.2d 418, 421 (1980). Because of the gravity of the consequences, a decision to plead guilty must be made knowingly and voluntarily by the defendant after full appraisal of the consequences. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L. Ed. 2d 274 (1969); N.C.G.S. § 15A-1011 through § 15A-1026; *State v. Sinclair*, 301 N.C. 193, 270 S.E.2d 418 (1980).

State v. Maready, ___ N.C. App. ___, ___, 695 S.E.2d 771, 775 (2010) (quoting *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985)). In *Harbison*, our Supreme Court noted that 'ineffective assistance of counsel, *per se* in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent.' " *State v. Matthews*, 358 N.C. 102, 106, 591 S.E.2d 535, 539 (2004) (quoting *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507-08).

> The gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands. When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

Id. at 108-09, 591 S.E.2d at 540 (quoting *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507).

Here, defendant's counsel stressed, during her closing argument, that defendant was not a drug dealer but rather a drug user. With regard to the charge of possession of drug paraphernalia, defendant's trial counsel stated "[s]o he could get four months total for the drug paraphernalia. *And finding him guilty of the drug paraphernalia I would agree is about as open and shut as we can get in this case*, but finding him guilty of the selling, you don't have the seller." (emphasis added).

Though clearly a strategic decision, such a statement concedes defendant's guilt to the charge of possession of drug paraphernalia. The incomplete record before us contains no indication that defendant's trial counsel obtained defendant's consent to concede his guilt to the charge of possession of drug paraphernalia or that an inquiry was made into the basis for the concession. Therefore, we dismiss this issue without prejudice to defendant's right to file a motion for appropriate relief requesting an evidentiary hearing on whether trial counsel admitted defendant's guilt to the charge of possession of drug paraphernalia without defendant's consent. *State v. Johnson*, ___ N.C. App. ___, ___ S.E.2d ___ (filed 20 December 2011) (No. COA11-677) (dismissing the defendant's ineffective assistance of counsel argument without prejudice to file a motion for appropriate relief in the trial court where the record on appeal was unclear as to whether defendant consented to trial counsel's concession of guilt).

No error in part; new trial on habitual felon status; dismissed in part.

Judges ELMORE and STEPHENS concur.

WILLIAMS v. UNITED CMTY. BANK

[218 N.C. App. 361 (2012)]

JEROME E. WILLIAMS, JR., M.D., JEROME E. WILLIAMS, JR., M.D. CONSULTING LLC, AND ADELLE A. WILLIAMS, M.D., PLAINTIFFS v. UNITED COMMUNITY BANK, ET AL., DEFENDANTS

JEROME E. WILLIAMS, JR., M.D., JEROME E. WILLIAMS, JR., M.D. CONSULTING LLC, AND ADELLE A. WILLIAMS, M.D., PLAINTIFFS v. ANTHONY R. PORTER, ET AL., DEFENDANTS

FIFTH THIRD BANK, PLAINTIFF v. SONJA Y. GORMAN, DEFENDANT AND THIRD-PARTY PLAINTIFF v. ANTHONY R. PORTER, RANDY A. CARPENTER, ARNOLD GREG ANDERSON, EDWARD BRENT ANDERSON, NEIL G. O'ROURKE, PEERLESS REAL ESTATE SERVICES, INC., COMMUNITIES OF PENLAND, LLC, VILLAGE OF PENLAND, LLC, AND COP LAND HOLDINGS, LLC, THIRD-PARTY DEFENDANTS

FIFTH THIRD BANK, PLAINTIFF v. KEVIN J. YOUNG, DEFENDANT AND THIRD-PARTY PLAINTIFF v. ANTHONY R. PORTER, RANDY A. CARPENTER, ARNOLD GREG ANDERSON, EDWARD BRENT ANDERSON, NEIL G. O'ROURKE, PEERLESS REAL ESTATE SERVICES, INC., COMMUNITIES OF PENLAND, LLC, VILLAGE OF PENLAND, LLC, AND COP LAND HOLDINGS, LLC, THIRD-PARTY DEFENDANTS

No. COA11-532

(Filed 7 February 2012)

1. Appeal and Error—motion to amend record allowed—motion to dismiss appeal denied

The Williams plaintiffs' motion to amend the record on appeal to include a file-stamped notice of appeal from the trial court's summary judgment order was allowed and defendant's motion to dismiss the Williams plaintiffs' purported appeal from the summary judgments was denied.

2. Appeal and Error—interlocutory order—substantial right—possibility of inconsistent verdicts

The Court of Appeals addressed the merits of plaintiffs' appeal from the trial court's interlocutory order granting summary judgment in favor of defendants as the order created the possibility of separate trials involving the same issues which could lead to inconsistent verdicts.

3. Unfair Trade Practices—reliance—no forecast of evidence

The trial court did not err in a case arising out of a failed land development project by granting summary judgment in favor of defendants on plaintiffs' unfair and deceptive trade practices claims. Plaintiffs forecast no evidence that they actually relied on the appraisals procured by defendants in deciding to make their investments.

4. Negligence—negligent misrepresentation—real property appraisals—reliance—no forecast of evidence

The trial court did not err in a case arising out of a failed land development project by granting summary judgment in favor of defendants on plaintiffs' negligence and negligent misrepresentation claims. Plaintiffs failed to forecast evidence of reliance on the appraisals procured by defendants in deciding to make their investments.

5. Conspiracy—civil—summary judgment on underlying tort claims proper

The trial court did not err in a case arising out of a failed land development project by granting summary judgment in favor of defendants on plaintiffs' civil conspiracy claims. As summary judgment for defendants on the underlying tort claims was proper, plaintiffs' claim for civil conspiracy also failed.

6. Costs—victorious party—summary judgment proper

Plaintiffs' argument that the trial court erred in allowing costs to defendants in a case arising out of a failed land development project was overruled as the trial court did not err in granting summary judgment in favor of defendants.

7. Evidence—exclusion of witness—no meaningful opportunity to depose

The trial court did not abuse its discretion in a case arising out of a failed land development project by excluding an expert witness pursuant to Rule 37 of the Rules of Civil Procedure. Plaintiffs' failed to afford defendants a meaningful opportunity to depose their expert witness on his opinions of their appraisals, and the trial court's decision to exclude him as an expert witness did not reflect a lack of a reasoned decision.

Appeal by Plaintiffs Jerome E. Williams, Jr., M.D., Jerome E. Williams, Jr., M.D. Consulting LLC, and Adelle A. Williams, M.D., and Defendants and Third-Party Plaintiffs Sonja Y. Gorman and Kevin J. Young from judgments and orders entered 14 January 2011 and orders entered 10 February 2011 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 November 2011.

Fuller & Barnes, LLP, by Trevor M. Fuller and Michael D. Barnes, for Plaintiffs Jerome E. Williams, Jr., M.D.; Jerome E. Williams, Jr., M.D. Consulting LLC; and Adelle A. Williams, M.D.; and Defendants and Third-Party Plaintiffs Sonja Y. Gorman and Kevin J. Young.

Young Moore and Henderson, P.A., by Walter E. Brock, Jr., and Patrick M. Aul, for Defendants Arnold Greg Anderson and Edward Brent Anderson.

STEPHENS, Judge.

These appeals emanate from four cases, two of which were consolidated for trial and all four of which have been designated exceptional and assigned the secondary docket number 09 CVS 9191 for case management purposes. All of the cases arise from a scheme to develop land in the mountain community of Spruce Pine, which went badly awry. As the caption of this opinion suggests, this scheme and the resulting legal actions are complex and involve numerous parties. However, for purposes of the appeals addressed herein, the relevant cast of characters and procedural history are significantly more limited and the issues straightforward.

Pre-trial discovery has tended to show the following: In 2002, a group of developers purchased over 1,200 acres of land in Spruce Pine near the renowned Penland School of Crafts. They proposed a large residential community, divided the land into lots, and prepared marketing materials describing the project. After reviewing these materials, appellants Jerome E. Williams, Jr., M.D. ("Dr. Williams"); Jerome E. Williams, Jr., M.D. Consulting LLC; and Adelle A. Williams, M.D. (collectively, "the Williams Plaintiffs"), Sonja Y. Gorman ("Gorman") and her son, Kevin J. Young ("Young"), (collectively, all five appellants will be referred to as "Plaintiffs") became investors in the development in early 2006. Rather than paying cash for lots in the development to build on and hold for resale or paying cash to "buy into" the development as a whole, Plaintiffs were told they must purchase groups of lots by taking out bank loans. These loans would provide the developers with cash flow to finance the development. In turn, the developers promised to (1) provide Plaintiffs with money for the loan down payments, (2) repurchase the lots after two years, (3) cover Plaintiffs' interest payments until the repurchase, (4) pay Plaintiffs a premium or return equal to 125% of the value of the loans they took out, (5) pay all taxes, assessments, and other costs associ-

ated with the lots, and (6) personally guarantee the development's repurchase obligations. Essentially, the developers would use Plaintiffs' excellent credit and high net worth to secure bank loans to finance the development, and Plaintiffs would be compensated for providing this service.

On 17 January 2006, Young and Gorman jointly signed a purchase contract for lots 265-75. On 9 February 2006, Gorman signed a purchase contract for lots 276-79. Young also signed a purchase agreement for lots 280-84, but this purchase contract bears no signing date, although it does contain two fax time/date stamps, 8 February and 28 February 2006. In February 2006, Dr. Williams signed purchase contracts for lots 607-11. The purchase contract does not bear a signature date, but has a fax time/date stamp of 7 February 2006. Dr. Williams also purchased 15 additional lots in the development, but no purchase contracts for those lots appear in the record. In total, Dr. Williams agreed to pay $2.5 million for 20 lots, and Gorman and Young also agreed to purchase a total of 20 lots for $2.5 million.

Each purchase contract listed a price of $125,000 per lot. None of the contracts claimed that this price was based on an appraisal, required any appraisal, or made Plaintiffs' obligations to buy the lots contingent on the results of any appraisal. After the purchase contracts were signed, an employee of the developers was assigned to assist the Plaintiffs in obtaining bank loans to finance the purchases. Plaintiffs completed loan applications and returned them to this employee, who subsequently sent them to various banks. The banks, in turn, selected Defendants-Appellees Arnold Greg Anderson and Edward Brent Anderson (collectively, "the Andersons"), to appraise the lots. Brent Anderson appraised the Williams Plaintiffs' lots 596-606 on 27 January 2006 and Gorman's and Young's lots 265-75 on 1 February 2006. Greg Anderson appraised the Williams Plaintiff's lots 613-15 on 27 February 2006, the Williams Plaintiffs' lots 607-12 on 2 March 2006, Gorman's lots 276-79 on 7 March 2006, and Young's lots 280-84 on 15 March 2006. The Andersons appraised each lot at the same value, $125,000, which was also the exact price set forth in the purchase contracts Plaintiffs had previously signed. The loans were all approved and went forward.

In 2007, the development scheme collapsed because, *inter alia*, no sanitary district was ever approved by the relevant municipal authorities, and the lots had (and have) no municipal water and sewer services. The developers spent much of the money from the bank loans on personal items or to fund other failed development

projects. In the end, Plaintiffs were left in possession of the lots and responsible for the bank loans. County tax assessments place the value of the lots at approximately $20,000 or less in their current state.

On 4 April 2008 and 23 February 2009, the Williams Plaintiffs filed complaints in Mecklenburg County Superior Court against, *inter alia*, First Charter Bank,[1] now Fifth Third Bank ("the Bank"), and the Andersons, alleging claims of, *inter alia*, Unfair and Deceptive Trade Practices ("UDTP"), Fraud, Constructive Fraud, Aiding and Abetting Fraud, Fraud in the Inducement, Negligent Misrepresentation, Conversion, Negligence, Tortious Action in Concert and Civil Conspiracy, Breach of Fiduciary Duty, Breach of Contract, Breach of the Duty of Good Faith and Fair Dealing, Breach of Surety Agreement, and Violation of the Mortgage Lending Act (N.C. Gen. Stat. § 53-243.01 e*t seq.*). The Bank replied, filing various counterclaims, and then filed actions against Gorman and Young, alleging that they defaulted on promissory notes, committed fraud against the Bank, and engaged in UDTP against the Bank. Gorman and Young answered and filed various counterclaims against the Bank, and then, on 31 March and 7 April 2009, commenced a third-party action against the Andersons, alleging, *inter alia*, claims of UDTP.

The Andersons moved to dismiss Plaintiffs' claims against them. The trial court granted the motion as to the Williams Plaintiffs' claims for Aiding and Abetting Fraud, Conversion, Breach of Fiduciary Duty, Breach of Surety Agreement, and Violation of the Mortgage Lending Act, and as to all of Gorman's and Young's claims except those for UDTP. Thereafter, Gorman and Young appealed from several trial court orders regarding depositions and sanctions, which this Court dismissed in a pair of unpublished opinions. *See In re Fifth Third Bank*, ___ N.C. App. ___, ___ S.E.2d ___ (2011) (COA10-596); *In re Fifth Third Bank*, ___ N.C. App. ___, ___ S.E.2d ___ (2011) (COA10-1233).

While those appeals were pending, the Bank filed motions for summary judgment with respect to the claims asserted by Plaintiffs and its own claim based on promissory notes executed by Plaintiffs. On 5 October 2010, the court granted the Bank's motions, and Plaintiffs appealed. Gorman and Young settled with the Bank and

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1. Plaintiffs initially filed suit against First Charter Bank, from whom they obtained the loans for the development. After First Charter was acquired by Fifth Third Bank, Fifth Third was substituted for First Charter as the named defendant in this case.

withdrew their appeal. In an opinion filed 6 December 2011, this Court affirmed summary judgment in favor of the Bank against the Williams Plaintiffs. *In re Fifth Third Bank*, ___ N.C. App. ___, ___ S.E.2d ___ (2011) (COA11-310).

Also on 23 April 2010, the Andersons moved for summary judgment, seeking dismissal of all of Plaintiffs' remaining claims against them. The Andersons also filed a motion to exclude expert witness testimony from real estate appraiser John Capewell, Jr., as to the claims of Gorman and Young. Following a hearing, on 14 January 2011, the trial court entered orders excluding testimony from Capewell and granting summary judgment in favor of the Andersons and against Plaintiffs. On 2 February 2011, the Andersons filed verified bills of costs, and on 10 February 2011, the court entered orders allowing them. From these summary judgments and orders, Plaintiffs appeal.

Discussion

On appeal, Plaintiffs argue that the trial court erred in granting summary judgment to the Andersons on their UDTP claims. The Williams Plaintiffs also argue that the trial court erred in granting summary judgment to the Andersons on their negligence, negligent misrepresentation, and civil conspiracy claims. Plaintiffs further argue that the trial court abused its discretion in allowing the Andersons' verified bills of costs. Gorman and Young argue that the trial court abused its discretion in excluding evidence under Rule 37. We affirm.

The Andersons' Motion to Dismiss

[1] By motion filed 19 October 2011, the Andersons seek dismissal of the Williams Plaintiffs' purported appeal from the summary judgments entered in the trial court for failure to include a file-stamped notice of appeal from those judgments. "[A] default precluding appellate review on the merits necessarily arises when the appealing party fails to complete all of the steps necessary to vest jurisdiction in the appellate court. It is axiomatic that courts of law must have their power properly invoked by an interested party." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 364 (2008). "Without proper notice of appeal, this Court acquires no jurisdiction." *Brooks v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984) (citations omitted).

The original record on appeal reveals a single notice of appeal from the Williams Plaintiffs, giving notice of appeal from the 10

February 2011 order allowing the Andersons' verified bills of costs. The original record on appeal contained no notice of appeal from the Williams Plaintiffs as to the 14 January 2011 summary judgment in favor of the Andersons.[2] However, on 2 November 2011,[3] the Williams Plaintiffs moved to amend the record on appeal pursuant to Rules 9(b)(5) and 37 of the North Carolina Rules of Appellate Procedure. We allow the Williams' Plaintiffs' motion to amend the record on appeal to include the notice of appeal from the Williams Plaintiffs as to the 14 January 2011 summary judgment in favor of the Andersons, which we note was properly and timely filed and served on the Andersons on 11 February 2011. In turn, we deny the Andersons' motion to dismiss and reach the merits of this appeal.

Grounds for Appellate Review

[2] This appeal is interlocutory because

> the trial court's order[s and judgments did] not dispose of the case, but [left] it for further action by the trial court in order to settle and determine the entire controversy. An interlocutory order is immediately appealable if the trial court certifies that: (1) the order represents a final judgment as to one or more claims in a multiple claim lawsuit or one or more parties in a multi-party lawsuit, and (2) there is no just reason to delay the appeal, [as certified pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b)] . . . . Absent a Rule 54(b) certification, an interlocutory order may be reviewed if it will injuriously affect a substantial right unless corrected before entry of a final judgment.

Hamby v. Profile Prods., L.L.C., 361 N.C. 630, 633-34, 652 S.E.2d 231, 233-34 (2007) (citation omitted). As noted *supra*, the claims against the Andersons and the various other parties to the underlying cases all arise from the same complex land development scheme. Our Supreme Court has held "that a substantial right is affected [where, as here,] the trial court's order granting summary judgment to some, but not all, [of the] defendants creates the possibility of separate trials involving the same issues which could lead to inconsistent verdicts." *Id.* at 634, 652 S.E.2d at 234. Accordingly, we address the merits of Plaintiffs' appeal.

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2. The record does contain proper notices of appeal from Gorman and Young.

3. On the same date, counsel for the Williams Plaintiffs also moved for leave to file opposition to the Andersons' motion to dismiss out of time, acknowledging that such opposition was due one day earlier (on 1 November 2011) by operation of Rules 27(b) and 37(a) of the North Carolina Rules of Appellate Procedure. We allow this motion.

UDTP Claims

[3] Plaintiffs argue that the trial court erred in granting summary judgment to the Andersons on Plaintiffs' UDTP claims. We disagree.

"We review a trial court's summary judgment rulings *de novo.*" *Odell v. Legal Bucks, LLC*, 192 N.C. App. 298, 307, 665 S.E.2d 767, 773 (2008) (citation omitted), *disc. review denied*, 363 N.C. 258, 676 S.E.2d 905 (2009). Summary judgment is proper only

> 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).

It is well established that

> [a] claim for unfair and deceptive trade practices under N.C. Gen. Stat. § 75.1-1 must allege that: (1) the defendant committed an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to the plaintiff's business. Where an unfair or deceptive practice claim is based upon an alleged misrepresentation by the defendant, the plaintiff must show actual reliance on the alleged misrepresentation in order to establish that the alleged misrepresentation proximately caused the injury of which plaintiff complains.

Sunset Beach Dev., LLC v. Amec, Inc., 196 N.C. App. 202, 211, 675 S.E.2d 46, 53 (2009) (internal citation, quotation marks and brackets omitted). "Actual reliance is demonstrated by evidence [the] plaintiff acted or refrained from acting in a certain manner due to [the] defendant's representations." *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 663, 464 S.E.2d 47, 57 (1995) (citation omitted). Where a plaintiff cannot forecast evidence of actual reliance, summary judgment for the defendants is proper. *Sunset Beach Dev., LLC*, 196 N.C. App. at 212, 675 S.E.2d at 54.

Although Plaintiffs claim that, "[i]f the Andersons had disclosed any of the flaws in their appraisal reports or if the Borrowers knew that the lots were overvalued," they would not have invested and subsequently lost money, their own admissions and the facts in the record belie this assertion. Plaintiffs' complaints state that they "had

no knowledge of, contact with, nor control over the appraisal process[,]" which was instead "controlled by [the developers] and the banks." Plaintiffs acknowledge that they did not see any of the appraisals prior to signing the purchase contracts, which in any event, were not contingent on the appraised values for the lots. In deposition testimony, Dr. Williams was asked whether the Andersons made any verbal or written misrepresentations to him about the lots, and he responded, "Not to my knowledge, no, prior to closing." His wife also testified that the appraisal reports had not played any role in her decision to purchase the lots. Young testified that he had not even seen the appraisals as of the date of his deposition, years after his purchase of the lots. Likewise, Gorman could not recall relying on any information beyond the marketing and other materials provided by the developers.

Further, Young and Gorman signed the purchase contract for lots 265-75 on 17 January 2006 and Brent Anderson did not appraise those lots until 1 February 2006. Gorman signed the purchase contract for lots 276-79 on 9 February 2006 and Greg Anderson did not appraise those lots until 7 March 2006. Young appears to have signed the purchase agreement for lots 280-84 in February 2006, but they were not appraised until 15 March 2006. In addition, Dr. Williams signed the purchase contract for lots 607-12 in February 2006, but no appraisals were conducted on those lots until 2 March 2006. The purchase contracts for lots 596-606 and 613-15 are not contained in the record. Thus, Dr. Williams was committed to purchase at least six of his 20 lots and Young and Gorman were committed to purchase all 20 of their lots at a price of $125,000 each *before any appraisals had been conducted.*

All of the evidence shows that Plaintiffs made their decisions to invest in the development and contracted to do so without any awareness of, much less reliance on, the Andersons' appraisals. Even had the Andersons appraised the lots differently, Plaintiffs would still have been obligated to purchase them at the prices agreed to in the purchase contracts. Plaintiffs cannot have relied on information they did not see and did not know existed (some of which did not, in fact, yet exist) at the time of their decisions. Because Plaintiffs forecast no evidence that they actually relied on the appraisals in deciding to make their investments, the trial court properly granted summary judgment to the Andersons. Accordingly, we affirm.

Negligence Claims

[4] The Williams Plaintiffs argue that the trial court erred in granting summary judgment to the Andersons on their negligence and negligent misrepresentation claims. We disagree.

In *Ballance v. Rinehart*, we considered "whether a licensed real estate appraiser who performs an appraisal of real property at the request of a client owes a prospective purchaser of such property *who relies on the appraisal* a duty to use reasonable care in the preparation of the appraisal." 105 N.C. App. 203, 205, 412 S.E.2d 106, 107 (1992) (emphasis added). We expressly adopted the approach for determining negligence by accountants as set forth by our Supreme Court in *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 201, 367 S.E.2d 609, 610 (1988). *Raritan*, in turn, relied on the following language from the Restatement (Second) of Torts:

> Information Negligently Supplied for the Guidance of Others.
>
> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to *liability for pecuniary loss caused to them by their justifiable reliance upon the information*, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) . . . [T]he liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) *through reliance upon it in a transaction* that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Ballance, 105 N.C. App. at 206-07, 412 S.E.2d at 108 (emphasis added) (quoting Restatement (Second) of Torts § 552 (1977)). Thus, just as is the case with UDTP claims, plaintiffs asserting negligence claims against appraisers must forecast evidence of reliance in order to establish a *prima facie* case of negligence and negligent misrepresentation and survive a motion for summary judgment.

Here, as discussed above, the Williams Plaintiffs cannot show that they relied on the Andersons' appraisals in making their investment decisions, where they signed the purchase contracts without reviewing appraisals and before at least some of the appraisals were even performed. The Williams Plaintiffs having failed to forecast evidence of reliance on the appraisals, the trial court's grant of summary judgment to the Andersons was proper. Accordingly, we affirm.

Civil Conspiracy Claims

[5] The Williams Plaintiffs argue that the trial court erred in granting summary judgment in favor of the Andersons on the civil conspiracy claims. We disagree.

> It is well established that there is not a separate civil action for civil conspiracy in North Carolina. Instead, civil conspiracy is premised on the underlying act. Where this Court has found summary judgment for the defendants on the underlying tort claims to be proper, we have held that a plaintiff's claim for civil conspiracy must also fail.

Piraino Bros., LLC v. Atl. Fin. Group, Inc., ___ N.C. App. ___, ___, 712 S.E.2d 328, 333-34 (2011) (internal citations and quotation marks omitted). Thus, because we affirm summary judgment for the Andersons on their underlying tort claims, we also affirm the trial court's summary judgment order as to the Williams' Plaintiffs' civil conspiracy claims.

Allowance of Costs

[6] "North Carolina General Statutes, section 6.1 establishes the general rule that costs may be allowed to the party in favor of whom judgment has been awarded." *Cail v. Cerwin*, 185 N.C. App. 176, 187, 648 S.E.2d 510, 517 (2007) (citation omitted). Plaintiffs premise their contention that the trial court erred in allowing costs to the Andersons on their assertion that the court erred in its grant of summary judgment. Having affirmed summary judgment for the Andersons, we overrule Plaintiffs' argument regarding allowance of costs.

Rule 37 Order

[7] Young and Gorman argue that the trial court abused its discretion in excluding an expert witness pursuant to Rule 37. We disagree.

"Rule 26 [of the North Carolina Rules of Civil Procedure] embodies the general provisions relating to all of the discovery rules." *Bumgarner v. Reneau*, 332 N.C. 624, 629, 422 S.E.2d 686, 689 (1992)

(citing N.C. Gen. Stat. § 1A-1, Rule 26(e)(2) (1990)). "The trial court not only has the inherent authority to regulate trial proceedings [pursuant to Rule 26], but it has the express authority under Rule 37, to impose sanctions on a party who balks at discovery requests." *Id.* at 630, 422 S.E.2d at 689 (citation and quotation marks omitted). "If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, . . . among others . . . an order . . . prohibiting [the disobedient party] from introducing designated matters in evidence . . . ." N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(b) (2009).

> The imposition of sanctions under Rule 37 is in the sound discretion of the trial judge and cannot be overturned absent a showing of abuse of that discretion. An abuse of discretion may arise if there is no record evidence which indicates that [the disobedient party] acted improperly, or if the law will not support the conclusion that a discovery violation has occurred.

In re Pedestrian Walkway Failure, 173 N.C. App. 237, 246, 618 S.E.2d 796, 803 (2005) (citation omitted).

Here, Case Management Order No. 2 directed Plaintiffs to identify their expert witnesses on or before 15 August 2009, and stated that any witnesses not identified in accordance with the order "shall not be permitted to testify at trial absent a showing of good cause." The order also required disclosure of the subject matter, facts, and opinions to which the expert was expected to testify and a summary of the grounds for each opinion pursuant to Rule 26. Plaintiffs purported to disclose the opinion of proposed expert witness Capewell on 20 August 2009, and the Andersons moved to exclude Capewell due to Plaintiffs' untimely disclosure. Plaintiffs then moved to amend the case management order to extend the time for them to disclose their expert witnesses until 2 October 2009, and the trial court granted this motion. Plaintiffs then purported to disclose Capewell and his opinions on 2 October 2009. Specifically, Plaintiffs stated that Capewell would review the Andersons' appraisals and other evidence in the case and opine that the Andersons violated the applicable standard of care for real-estate appraisals and made fraudulent appraisals.

However, when the Andersons deposed him on 14 January 2010, Capewell stated that he had not yet reviewed the Andersons' appraisals of any of the lots. This admission indicates that Plaintiffs' 2 October 2009 disclosure regarding Capewell was untrue; Capewell still not having reviewed the relevant evidence in January 2010,

Plaintiffs can hardly have "disclosed" Capewell's opinions and the basis therefor months earlier in October 2009. More significantly, Capewell's failure to have reviewed the appraisals and formed opinions of them rendered Capewell's deposition a waste of time for the Andersons.

In response to the Andersons' 23 April 2010 motion for summary judgment, Gorman and Young submitted an expert report dated 14 February 2010 and an affidavit from Capewell. The Andersons then moved to exclude Capewell pursuant to Rules 26 and 37, which motion the trial court granted on 14 January 2011. In light of Plaintiffs' failure to afford the Andersons a meaningful opportunity to depose Capewell on his opinions of their appraisals, the trial court's decision to exclude him as an expert witness does not reflect a lack of a reasoned decision. The trial court did not abuse its discretion, and accordingly, we affirm.

AFFIRMED.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. JONATHAN LYNN BURROW

No. COA11-773

(Filed 7 February 2012)

1. Evidence—SBI report—testimony regarding report—non-testifying analyst—plain error

The trial court committed plain error in a trafficking in oxycodone case by admitting into evidence a State Bureau of Investigation (SBI) report detailing the chemical analysis of pills discovered in defendant's pocket when the SBI analyst who put together the report did not testify at trial. Further, the trial court committed plain error in allowing a police detective to read the contents of the report during his testimony when he did not participate in the analysis in any way.

2. Drugs—trafficking in oxycodone—sufficient evidence—competent and incompetent evidence considered

The trial court did not err by denying defendant's motion to dismiss the charge of trafficking in oxycodone. Although it was error for the trial court to admit a State Bureau of Investigation report and testimony concerning the results of the report into evidence, the trial court must consider both competent and incompetent evidence when ruling on a motion to dismiss. The State presented sufficient evidence of each essential element of the offense charged, or of a lesser offense included therein, and of defendant's being the perpetrator of such offense.

Appeal by Defendant from judgment entered 24 February 2011 by Judge Beverly T. Beal in Lincoln County Superior Court. Heard in the Court of Appeals 16 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General Barry H. Bloch, for the State.

James N. Freeman, Jr., for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Jonathan Lynn Burrow ("Defendant") appeals from a jury verdict finding him guilty of trafficking in oxycodone. Defendant argues the trial court violated his Sixth Amendment right of confrontation by allowing into evidence a non-testifying analyst's forensic analysis report (the "SBI report") and testimony of a detective regarding the results of the SBI report. Defendant also argues the trial court erred by denying his motion to dismiss for lack of substantial evidence to support the charges. We disagree that the trial court erred in denying Defendant's motion to dismiss. However, we agree the trial court erred by allowing the SBI report and testimony regarding the results of the report into evidence. Therefore, we grant Defendant a new trial.

I. Factual & Procedural Background

On 11 January 2010, a Lincoln County grand jury indicted Defendant for trafficking opium or heroin. Defendant was tried during the 21 February 2011 criminal session of the Lincoln County Superior Court before the Honorable Beverly T. Beal. The State's evidence tended to show the following. On 2 December 2009, Patrol Sergeant Spencer Sumner of the Lincolnton police department responded to a call between 11:00 p.m. and 11:30 p.m. to investigate a car parked in

the "Cheers and Wings" restaurant parking lot on North Aspen Street in Lincolnton. Sergeant Sumner parked his patrol car and walked up to the car. He found Defendant in the driver's seat, one female in the front passenger seat, and another female in the back seat.

Defendant consented to a search of his vehicle, and Sergeant Sumner found a pill grinder between the driver's seat and the front passenger seat. Defendant told the Sergeant he had a prescription for hydrocodone and used the pill grinder to grind the pills because he could not swallow them whole. While the Sergeant completed the search of the vehicle, other officers conducted a pat down search of Defendant and the two females. A prescription pill bottle with the name "Michael Burrow" was found in Defendant's pocket. Defendant indicated Michael Burrow was his brother and that they lived together. Twenty-four pills were in the bottle, and Defendant and the bottle's label indicated the pills were Endocet (the brand name version of oxycodone). Defendant told Sergeant Sumner he had a prescription for hydrocodone, and the Sergeant told Defendant he would give him the pills back if Defendant brought him the prescription. Defendant did not produce a prescription. Sergeant Sumner confirmed that Michael Burrow was never interviewed before Defendant was charged for having his pills in another person's bottle. Sergeant Sumner also confirmed there was no evidence the pills were going to be sold.

Detective Jason Munday of the Lincolnton police department called poison control, described the pills, and sent them to the SBI lab for testing. The State introduced the SBI report into evidence as "State's Exhibit 5" during Detective Munday's testimony, although the analysis on the pills was conducted by Brad Casanova. Detective Munday testified the report identified the pills as containing oxycodone and weighing 10.7 grams. The exhibit was published to the jury. Neither Mr. Casanova nor any analyst testified at trial.

At the close of the State's evidence and after stating he would present no evidence, Defendant moved to dismiss the charge due to lack of sufficient evidence. The trial court denied both motions. The jury convicted Defendant of trafficking in oxycodone on 24 February 2011. The trial court sentenced Defendant to a term of imprisonment of 70 to 84 months with a 108 day pre-trial confinement credit and fined him $50,000. Defendant gave oral notice of appeal in open court.

II. Jurisdiction & Standards of Review

As Defendant appeals from the final judgment of a superior court, an appeal lies of right with this court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

If Defendant shows that error has occurred, this Court's review of the issue is limited to plain error because Defendant made no objections at trial regarding the admission of the forensic report or the detective's testimony regarding the report. *See* N.C. R. App. P. 10(a)(4). Plain error

> 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 . . . mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Flaugher, ___ N.C. App. ___, ___, 713 S.E.2d 576, 582-83 (2011) (citation and quotation marks omitted).

"This Court reviews the trial court's denial of a motion to dismiss de novo." S*tate v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

III. Analysis

[1] The first question in the plain error analysis is whether the trial court committed any error at all. *State v. Ellison*, ___ N.C. App. ___, ___, 713 S.E.2d 228, 234 (2011). Defendant argues it was error for the trial court to admit the SBI report into evidence as Brad Casanova, the SBI analyst who put together the report, did not testify at trial in violation of Defendant's confrontation right under the Sixth Amendment. Defendant also argues it was error to allow Detective Munday to read the contents of the report during his testimony when he did not participate in the analysis in any way. We agree.

"The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to tes-

tify 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 (2004)). The U.S. Supreme Court has recently applied the holding in *Crawford* to documents or reports that the government seeks to enter into evidence that are "testimonial" in nature, holding that "[t]he Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits, and the admission of such evidence [is] error." *Melendez-Diaz v. Massachusetts*, 557 U.S. ____, ____, 174 L. Ed. 2d 314, 332 (2009).

This Court has developed a four part test to apply the rules laid out by *Locklear and Melendez-Diaz*:

> (1) determine whether the document at issue was testimonial, (2) if the document was testimonial, ascertain whether the declarant was unavailable at trial and defendant was given a prior opportunity to cross-examine the declarant, (3) if the defendant was not afforded the opportunity to cross-examine the unavailable declarant, decide whether the testifying expert was offering an independent opinion or merely summarizing another non-testifying expert's report or analysis, and (4) if the testifying expert summarized another non-testifying expert's report or analysis, determine whether the admission of the document through another testifying expert was reversible error.

State v. Brewington, ___ N.C. App. ___, ___, 693 S.E.2d 182, 189 (2010). In this case, the law is clear that the report admitted into evidence and referred to by Detective Munday was testimonial in nature. *Melendez-Diaz*, 557 U.S. at ___, 174 L. Ed. 2d at 321 (testimonial evidence includes " 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial' " (citation omitted)). There is also nothing to indicate Mr. Casanova, the analyst who prepared the report, was unavailable at trial or that Defendant had a prior opportunity to cross-examine Mr. Casanova. Therefore, we hold the report was inadmissible testimonial evidence.

We next determine whether Detective Munday's testimony regarding the report was an independent expert opinion or merely a summation of inadmissible testimonial evidence. Detective Munday was not qualified as an expert regarding the analysis, and he did not participate in the analysis in any way. He testified that he sent the pills to SBI for analysis and received the results in the report. The

court admitted the report into evidence without any objection from Defendant. Detective Munday then read directly from the report, stating, "It says, results of examination Item 1, oxycodone-Schedule II; weight 10.7 grams[,]" and the report was published to the jury. Because Detective Munday merely summarized inadmissible testimonial evidence and had no independent expert opinion to offer, we hold it was error to allow Detective Munday to testify concerning the composition of the confiscated substance at issue in this case.

We now turn to the question of whether this error constitutes plain error requiring reversal. Under plain error, a defendant must show " 'not only that there was error, but that absent the error, the jury probably would have reached a different result.' " *Ellison*, ___ N.C. App. at ___, 713 S.E.2d at 234 (citation omitted). "Accordingly, [the] defendant must show that absent the erroneous admission of the challenged evidence, the jury probably would not have reached its verdict of guilty." *State v. Cunningham*, 188 N.C. App. 832, 835, 656 S.E.2d 697, 699-700 (2008).

Besides the inadmissible SBI report and the testimony regarding it, the only other evidence offered by the State concerning the composition of the pills was Sergeant Sumner's testimony that Defendant claimed the pills were his hydrocodone pills, that he had a prescription for them, and that he grinded them up because he could not swallow them. Additionally, in response to defense counsel's question regarding whether the ingredients on the pill bottle matched what the SBI lab determined was in the bottle, Detective Munday responded, "Yes. They said it was oxycodone." However, such "identifying" statements by the defendant and police officers are insufficient to show what a substance is; the State must present evidence of the chemical makeup of the substance at issue. *See State v. Williams*, ___ N.C. App. ___, ___, 702 S.E.2d 233, 238 (2010) (where, despite the officers' credentials and experience, the testimony of the officers and the defendant identifying the substance at issue as cocaine was not sufficient to show the substance the defendant possessed was actually cocaine). " '[E]xisting precedent suggests that controlled substances defined in terms of their chemical composition can only be identified through the use of a chemical analysis rather than through the use of lay testimony based on visual inspection.' " *State v. Meadows*, 201 N.C. App. 707, 712-13, 687 S.E.2d 305, 309 (quoting *State v. Ward*, 199 N.C. App. 1, 26, 681 S.E.2d 354, 371 (2009), *aff'd*, 364 N.C. 133, 694 S.E.2d 738 (2010)), *cert. denied*, 364 N.C. 245, 699 S.E.2d 640 (2010).

We note our Supreme Court's decision in *State v. Nabors*, ___ N.C. ___, ___, 718 S.E.2d 623, ___ (2011), permitted testimony of the defendant's lay witness that the substance at issue was "cocaine" as sufficient evidence to identify the controlled substance as cocaine. However, we find this case distinguishable from the case at hand because, here, Defendant *incorrectly* identified the pills as "hydrocodone" and not "oxycodone." No witness, not even a lay witness, correctly identified the pills in this case. Detective Munday's testimony regarding the pills was based solely on the inadmissible SBI report and was thus also insufficient to identify the substance at issue as oxycodone beyond a reasonable doubt. Although "it might be permissible" for an officer to render a lay opinion as to a substance with a "distinctive color, texture, and appearance[,]" it is not appropriate for an officer to render an opinion regarding a non-descript substance. *State v. Llamas-Hernandez*, 189 N.C. App. 640, 654, 659 S.E.2d 79, 87 (2008) (Steelman, J., concurring in part and dissenting in part) (where it was impermissible for an officer with extensive training in the field of narcotics to render an opinion that a non-descript white powdery substance was crack cocaine), *rev'd and dissent adopted*, 363 N.C. 8, 673 S.E.2d 658 (2009).

Here, Detective Munday did not testify based on his own experience and training as a narcotics officer as to what he believed the substance to be. Even if he had testified, a review of the briefs, record, and transcript shows there is no evidence presented that the pills had a distinctive color, texture, or appearance that would permit such testimony. Absent the erroneous admission of the SBI report and testimony regarding the report, no chemical analysis evidence was presented to the jury to show the pills were oxycodone. Without such evidence, we hold a jury could not have convicted Defendant of trafficking in oxycodone. Therefore, we hold the error of admitting the SBI report and testimony regarding it to be plain error.

We note the dissent believes the response of Detective Munday elicited by Defendant that "They said it was oxycodone" is sufficient to prevent the erroneous admission of the SBI report evidence to be classified as plain error. The dissent refers to *State v. Nobles*, 350 N.C. 483, 515 S.E.2d 885 (1999), *State v. Johnson*, 337 N.C. 212, 446 S.E.2d 92 (1994), and *State v. Van Landingham*, 283 N.C. 589, 197 S.E.2d 539 (1973), for support for the proposition that "even where a defendant objected to the admission of *inadmissible* evidence, defendant was not prejudiced by the admission because he brought forth the same evidence on cross-examination." However, each of these cases is distinguishable from the situation at hand.

In *Nobles*, the defendant, charged with murder, argued the trial court erred by allowing allegations for and the contents of a warrant into evidence, though he did not properly object to this evidence at trial. 350 N.C. at 500, 515 S.E.2d at 896. Our Supreme Court agreed that warrant evidence is generally considered inadmissible hearsay but did not grant the defendant a new trial because the defendant elicited information regarding the assault, the defendant testified on both direct and cross-examination regarding the assault, and another witness testified "at length" about the assault without objection. *Id.* at 501, 515 S.E.2d at 896. The Court noted that the " 'admission of evidence without objection waive[d] prior or subsequent objection to the admission of evidence of a similar character.' " *Id.* (citation omitted).

In *Johnson*, the defendant, charged with murder, burglary, kidnapping, robbery, and conspiracy, argued the trial court erred in admitting evidence of prior bad acts. 337 N.C. at 222, 446 S.E.2d at 98. Our Supreme Court ruled that the error was not prejudicial because the defendant had elicited the same evidence from another witness and because the "defendant [ ] failed to show any reasonable possibility that the jury would have reached a different result." *Id.* at 223, 446 S.E.2d at 99.

In *Van Landingham*, the defendant, charged with murder, argued the trial court erred by admitting an officer's testimony regarding what the victim told him. 283 N.C. at 602, 197 S.E.2d at 548. Our Supreme Court ruled that the statements were inadmissible hearsay statements and that the trial court erred. *Id.* at 603, 197 S.E.2d at 548. However, the Court ruled the error was cured when similar testimony was admitted thereafter without objection. *Id.* The Court noted, "The well established rule in this State is that 'when incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost." *Id.* (citation omitted). However, "[This] does not mean that the adverse party may not, on cross-examination, explain the evidence, or destroy its probative value, or even contradict it with other evidence upon peril of losing the benefit of his exception." *Id.* (quotation marks and citation omitted).

Here, Defendant, charged with trafficking opium or heroin, argues the trial court erred in admitting a non-testifying analyst's SBI report and the testimony of Detective Munday regarding the report into evidence. We and the dissent agree that such admission was error. We also hold the error constitutes plain error because, unlike in

Nobles, we have only one statement by Detective Munday that the substance at issue is oxycodone. Defendant did not testify, and no other witnesses testified even briefly regarding identification of the substance at issue. Unlike in *Johnson*, here, Defendant has not failed to show any reasonable possibility the jury would have reached a different result if the contested evidence had not been admitted. In fact, without the admission of the SBI report, we find it very likely the jury would have reached another result. And finally, though the *Van Landingham* Court emphasizes the rule that the erroneous admission of evidence is cured when similar testimony is admitted thereafter without objection, our Supreme Court expressly stated that this does not prevent the defendant from "explain[ing] the evidence." *Van Landingham*, 283 N.C. at 603, 197 S.E.2d at 548. Here, defense counsel simply asked Detective Munday if the ingredients on the pill bottle matched what the SBI lab determined was in the bottle. Defendant elicited no at length discussion regarding the identification of the substance as oxycodone and simply asked a clarifying question to explain the evidence. Thus, we find this case distinguishable from *Nobles*, *Johnson*, and *Van Landingham*. Moreover, none of these cases involves evidence admitted regarding the identification of a drug. Accordingly, they provide no guidance regarding whether Detective Munday's statement is competent evidence the State can use to prove its case. Therefore, we rely on established precedent that statements by a police officer are insufficient to identify a nondescript substance such as the one at issue in this case. We hold the trial court committed plain error by admitting the SBI report evidence and testimony concerning the report.

[2] Defendant also argues the trial court erred when it denied Defendant's motion to dismiss because the evidence, taken in the light most favorable to the State, was insufficient as a matter of law to convict him. "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. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light

most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Here, there was substantial evidence that a reasonable mind might accept as adequate to support that Defendant committed the charged offenses. Taking the evidence in the light most favorable to the State, the evidence shows that Defendant told Sergeant Sumner he used the pill grinder found between the driver's seat and the front passenger seat to grind his hydrocodone pills. A prescription pill bottle containing 24 pills and labeled Endocet (the brand name version of oxycodone) was found in Defendant's pocket. The SBI report confirmed the pills were oxycodone, and Detective Munday testified to the SBI report's results. Although it was error for the trial court to admit the SBI report and testimony concerning the results of the report into evidence as discussed above, the trial court must consider both competent *and* incompetent evidence when ruling on a motion to dismiss. Thus, we hold the trial court did not err in denying Defendant's motion to dismiss. Nevertheless, we grant Defendant a new trial due to the violation of his Sixth Amendment right to confrontation.

IV. Conclusion

For the foregoing reasons, Defendant is deserving of a new trial.

New trial.

Judge GEER concurs.

Judge HUNTER, Robert C., dissents in a separate opinion.

HUNTER, Robert C., Judge, dissenting

I agree with the majority that admission of the SBI report and Detective Munday's regurgitation of the contents of that report were erroneously admitted when presented by the State. However, because defendant elicited substantially the same information during cross-examination of Detective Munday, which established that the SBI identified the substance at issue as oxycodone, defendant has failed to establish plain error. Consequently, I respectfully dissent from the majority opinion.

Defendant did not object to admission of the State's evidence and now contends plain error occurred. Plain error arises when the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *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), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d. 513 (1982)).

The general rule established by our caselaw is that "[w]here evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984). Our Supreme Court has consistently held that even where a defendant objected to the admission of *inadmissible* evidence defendant was not prejudiced by the admission because he brought forth the same evidence on cross-examination. *See, e.g.*, *State v. Nobles*, 350 N.C. 483, 501, 515 S.E.2d 885, 896 (1999) ("Even assuming *arguendo* that defendant has properly preserved this issue, he is still not entitled to a new trial. During cross-examination of [the State's witness], defendant elicited information regarding the assault . . . ."); *State v. Johnson*, 337 N.C. 212, 223, 446 S.E.2d 92, 99 (1994) ("Assuming arguendo that the court erred in reversing its ruling and admitting the evidence, the error could not have been prejudicial. Defendant had just elicited the same evidence from [the State's witness.]"); *State v. Van Landingham*, 283 N.C. 589, 603, 197 S.E.2d 539, 548 (1973) (holding that admission of an officer's testimony was error, but the error was "cured when testimony of like import was admitted" on cross-examination).

Here, defendant failed to object to the State's evidence concerning the SBI report and then proceeded to elicit the result of the SBI report from Detective Munday on cross-examination. Even though this evidence violated defendant's Confrontation Clause rights when admitted by the State, based on our caselaw, defendant has failed to demonstrate prejudicial error, much less plain error, such that a new trial is warranted. Because the jury was informed, through defendant's cross-examination, that the SBI determined that the pills in defendant's possession were oxycodone pills, we fail to see how the jury would have reached a different result.

I acknowledge that a defendant may question a witness along the same lines as the State without losing the benefit of his objection (had he made one), but only "for the purpose of impeaching his testimony or establishing its incompetency." *Van Landingham*, 283 N.C. at 604, 197 S.E.2d at 549. Here, it is clear that "the cross-examiner's

questions were general ones, propounded for the sole purpose of amplifying the information [Officer Munday] had given on direct examination." *Id*. Even if Officer Munday was simply "clarifying" a point for the jury, as the majority contends, that clarification reiterated the result of the SBI report. "[I]t is imperative that defendant decide at trial whether he wants the statement admitted or not." *State v. Stokes*, 319 N.C. 1, 15, 352 S.E.2d 653, 661 (1987). Not only did defendant fail to object to the result of the SBI report, he went on to clarify the result of that report for the jury.

In sum, because the result of the SBI report was elicited by defendant on cross-examination before the jury, defendant cannot establish plain error on appeal. I must, therefore, dissent from the majority opinion.

STATE OF NORTH CAROLINA v. VALERIE DAWN RATHBONE KING

No. COA11-526

(Filed 7 February 2012)

1. Criminal Law—plea agreement—specific performance of provision—risk conviction—plea agreements encouraged

The superior court erred in a trafficking in opiate, possession of drug paraphernalia, and simple possession of clonazepam case by setting aside a plea agreement and proceeding to trial. Defendant's motion for return of seized property requested specific performance of a provision of the plea agreement and requiring defendant to risk conviction merely by seeking specific performance of the State's obligation under the plea agreement would chill the practice of plea bargaining, which should be encouraged.

2. Criminal law—plea agreement—specific performance—funds returnable

The superior court erred in a trafficking an opiate, possession of drug paraphernalia, and simple possession of clonazepam case by denying specific performance of a plea agreement to return money which had been seized from defendant or which was derived from money seized from defendant. It was within the State's power to return funds in the amount seized from defend-

ant, regardless of whether the *exact* cash seized could have been returned.

Appeal by defendant from order filed 16 June 2010 by Judge Bradley B. Letts and judgment entered 9 December 2010 by Judge James U. Downs in Haywood County Superior Court. Heard in the Court of Appeals 25 October 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood, for the State.

Kevin P. Bradley, for defendant-appellant.

CALABRIA, Judge.

Valerie Dawn Rathbone King ("defendant") appeals from an order setting aside the plea disposition and a judgment entered upon jury verdicts finding her guilty of trafficking an opiate, possession of drug paraphernalia, and simple possession of clonazepam. We vacate the judgment and reverse the order.

I. Background

As a result of surveillance conducted on defendant's home and others residing within her home, defendant, Renee Williams ("Williams") and Leonard Caskey were stopped by law enforcement with the Waynesville Police Department ("WPD"), on 4 November 2008, while riding in a vehicle. Williams, the driver of the car, consented to a search of the car. During the search, the officers found cash, two pill bottles and 105 marijuana seeds. According to the labels on the bottles, one was prescribed to Robert Blanton ("Blanton") and contained eight hydrocodone tablets. The other pill bottle was prescribed to Vonda Williams and contained a half tablet of Oxycontin. Subsequently, defendant was detained and her cash, jewelry and drugs were seized. The total amount of cash seized from defendant on 4 November was $6,150.

On 14 November 2008, pursuant to a warrant, defendant's home was searched. As a result of the search, officers found ammunition, marijuana rolling papers and a Tylenol bottle containing Tylenol and two other pills in defendant's home. Officers also searched an outside storage building where they found scales and a grinder, both of which were characterized as drug paraphernalia and a bottle of cough syrup containing hydrocodone prescribed to Blanton. Finally, the officers seized $873 from defendant.

For the 4 November offenses, defendant was indicted for two counts of trafficking, possession with intent to sell and deliver a controlled substance, and possession with intent to manufacture, sell and/or deliver marijuana. For the 14 November offenses, defendant was indicted for trafficking in opium or heroin, possession of drug paraphernalia and simple possession of Clonazepam, a schedule IV controlled substance.

On 3 August 2009, the prosecutor and defendant's attorney informed the Court of the terms and conditions of defendant's *Alford* plea. The prosecutor agreed if defendant pled guilty to one count of misdemeanor possession of a schedule III controlled substance, the State would dismiss the remaining charges pursuant to the plea agreement. One of the conditions of the plea agreement was that the State agreed to return defendant's personal property, money and jewelry. The plea agreement was signed by the prosecutor and defendant and accepted by Judge Bradley B. Letts ("Judge Letts").

On 6 August 2009, Judge Letts ordered defendant to serve a 45-day sentence, suspended the sentence, placed defendant on supervised probation for twelve months, and various other conditions were imposed. Judge Letts included in the judgment "defendant to receive her personal property, which is money and jewelry, from the [WPD]; said money to be paid to defendant's fines and costs." Defendant's monetary obligations totaled $1,758.50.

On 28 August 2009, defendant filed a motion for return of seized property. That same day, Judge Letts ordered that the balance of the cash, after payment of fines and costs that were held by the WPD, was to be turned over to the defendant. Included in Judge Letts's order to return defendant's seized property, was an exception to returning the balance of the funds to defendant. If the funds had been forfeited, the exception required the district attorney to provide documentation of the forfeiture to defendant's counsel. On 1 September 2009, the District Attorney filed a receipt documenting that $6,150 seized from defendant had been forfeited to the Drug Enforcement Administration ("DEA") for federal forfeiture proceedings.

Defendant complied with the terms and conditions of her probation, her probation was modified and she was transferred to unsupervised probation. However, the State did not return the balance of the funds or any funds to defendant. On 23 February 2010, defendant, represented by new counsel, re-filed the motion for return of seized property.

On 27 April 2010, at a hearing before Judge Letts, the State indicated that the $6,150, seized as result of the 4 November 2008 arrest, had been turned over to the DEA on 26 November 2008 pursuant to federal law. Although the $873 seized as a result of the 14 November 2008 arrest remained in the custody of WPD, the North Carolina Department of Revenue had already agreed to seize those funds, but had not yet taken possession of them. On 23 April 2009, the DEA disbursed $4800.68 to WPD.

On 16 June 2010, Judge Letts entered an order finding that the State had breached the plea arrangement. However, Judge Letts also found that specific performance was not a viable option and therefore the only option was rescission of the plea agreement. The court withdrew the plea and all the charges in the indictments that had been dismissed were reinstated, calendared and set for trial by the State.

On 3 December 2010, defendant made a motion to dismiss all charges, claiming trial would subject her to double jeopardy. On 9 December 2010, pursuant to defendant's motion, Judge James U. Downs dismissed all charges stemming from the events of 4 November 2008, but allowed the State to proceed to trial on all charges in the indictment with the 14 November 2008, date of offense. The jury returned verdicts finding defendant guilty of all charges: trafficking in opium or heroin, misdemeanor possession of drug paraphernalia and misdemeanor simple possession of a schedule IV controlled substance. Defendant was sentenced to a minimum of 225 months and a maximum of 279 months in the Department of Correction. In addition, she was also fined $500,000. Defendant appeals.

II. Judicial Notice

On 21 October 2011, defendant filed a motion requesting the Court take judicial notice of the records of the Clerk of Superior Court in Haywood County showing that defendant paid $1,758.50. This amount was the total amount due for court costs and fines on the 6 August 2009 judgment. With this payment, defendant had completed all monetary obligations from the original judgment.

Judicial notice is governed by statute, indicating "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201(b) (2011). "This Court may take judicial notice of the public records of other courts within the state judicial system."

State v. Thompson, 349 N.C. 483, 497, 508 S.E.2d 277, 286 (1998). If a party requests that the court take judicial notice and provides the necessary information, it is mandatory that a court take judicial notice. N.C. Gen. Stat. § 8C-1, Rule 201(d) (2011). "Judicial notice may be taken at any stage of the proceeding[,]" including on appeal. N.C. Gen. Stat. § 8C-1, Rule 201(f) (2011); *State ex rel. Utilities Comm. v. Southern Bell Telephone Co.*, 289 N.C. 286, 288, 221 S.E.2d 322, 323 (1976).

Here, the copy of the defendant's payment of the $1,758.50 is marked "True Copy" and signed by an assistant clerk. Therefore, the document is a public record and we may take judicial notice of the fact that defendant paid $1,758.50 to Haywood County for the monetary obligations of the original judgment. The State does not object to the Court taking judicial notice of the copy of defendant's payment of $1,758.50 to Haywood County Superior Court. Therefore, we grant defendant's motion.

III. Withdrawal of Plea Agreement

[1] Defendant alleges the superior court erred by setting aside the plea agreement and proceeding to trial when defendant's motion requested specific performance of a provision of the plea agreement. We agree.

A plea agreement is "in essence a contract[,]" and thus the law of contracts governs judicial interpretation of plea agreements. *State v. Tyson*, 189 N.C. App. 408, 413, 658 S.E.2d 285, 289 (2008). Normally, plea agreements are in the form of unilateral contracts and the "consideration given for the prosecutor's promise is not defendant's corresponding promise to plead guilty, but rather is defendant's actual performance by so pleading." *State v. Collins*, 300 N.C. 142, 149, 265 S.E.2d 172, 176 (1980). Once defendant begins performance of the contract "by pleading guilty or takes other action constituting detrimental reliance upon the agreement[,]" the prosecutor can no longer rescind his offer. *Id.*

Due process requires strict adherence to a plea agreement and "this strict adherence requires holding the State to a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in plea agreements." *State v. Blackwell*, 135 N.C. App. 729, 731, 522 S.E.2d 313, 315 (1999) (internal quotations, brackets and citation omitted). Therefore, "the risk of mistake in plea agreements lies with the State, and the State may not withdraw or have set aside a plea

agreement based upon an uninduced mistake contained therein." *State v. Rico*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2012).

In *Rico*, the defendant and the State entered into a plea agreement whereby the State used the defendant's use of a deadly weapon as an aggravating factor. *Id.* However, our statutes indicated that "the State could not use defendant's use of a firearm as an aggravating factor to enhance his sentence for voluntary manslaughter." *Id.* The Court recognized that the State was in a better position to know the law and refused to "relieve the State of what it now considers a bad bargain where the plea agreement was the result of uninduced mistake." *Id.* (citation omitted).

In the instant case, defendant and the State entered into a plea agreement and defendant was sentenced accordingly. As a condition of the agreement, the State agreed to return defendant's money and jewelry. In August 2009 and again in February 2010, defendant sought specific performance of the agreement. Contrary to the terms of the agreement, the State did not return the balance of defendant's funds. Therefore, the State breached the plea agreement.

At the April 2010 hearing, Judge Letts found:

> 21. That the prosecuting attorney did not take steps to ascertain whether or not, in fact, [the funds] were still in the custody of the [WPD], and the [WPD] took no steps to inform the District Attorney's Office that they no longer had custody of these funds.
>
> 22. That the [c]ourt finds that, at the time of the entry of the plea on August 3, 2009, there was a mutual mistake of fact with respect to the plea arrangement in that the $6,150.00 was no longer in the custody of the [WPD] and had, in fact, been previously seized by the [DEA] and forfeited.

Although Judge Letts found that the district attorney "clearly breached the plea arrangement[,]" and that defendant was entitled to a remedy, since the judge stated that specific performance was not appropriate, "the only option available to the [c]ourt . . . would be rescission of the plea agreement."

While the mistake in the instant case was one of fact, not law, the State was still in a better position to know whether WPD still had possession of the funds. At the time the district attorney entered into the plea agreement, he was capable of confirming the status of the funds

prior to agreeing to return them to defendant. The money was seized from defendant and sent to the DEA the same month. The parties did not enter into the plea agreement until approximately nine months after the forfeiture, in August 2009. The State could have easily confirmed the availability of the funds prior to the execution of the agreement but failed to do so. Therefore, the State must bear the risk of that mistake and the Court erred by rescinding the plea agreement based on a mistake of fact.

When the State "fails to fulfill promises made to the defendant in negotiating a plea bargain" the defendant is entitled to relief, typically in the form of "specific performance of the plea agreement or withdrawal of the plea itself (i.e. rescission)." *Blackwell*, 135 N.C. App. at 732, 522 S.E.2d at 316 (internal citations omitted). Other courts have found that while rescission is an available remedy, it is not always appropriate under the circumstances. When a prosecutor breaches a plea agreement, "the purpose of the remedy is, to the extent possible, to repair the harm caused by the breach." *Buckley v. Terhune*, 441 F.3d 688, 699 (9th Cir. 2006) (internal quotations and citations omitted). In *Buckley*, the defendant had already fulfilled his obligations under the plea agreement and the Court held rescission could not repair the harm, but rather the "harm [could] best be addressed by holding the state to its agreement and affording [the defendant] the benefit of his bargain[,]" i.e. specific performance. *Id. See also Gibson v. State*, 803 S.W.2d 316, 318 (Tex. Crim. App. 1991) (where the appellant had "served a substantial portion of his sentence under the guilty plea" the Court found that specific performance was the only appropriate remedy.); *State v. Gaddy*, 858 S.W.2d 81, 84 (Ark. 1993) (where the Court stated that rescission seemed "paltry relief indeed for the state's breach of a binding plea agreement.").

In the instant case, Judge Letts found that specific performance was not a viable option, and therefore rescinded the agreement. While Courts have found that either rescission or specific performance are appropriate remedies for breach of a plea agreement, we find that rescission was not appropriate here. Just as the court held rescission could not repair the harm to the defendant in *Buckley*, the remedy of rescission, in the instant case, could also not repair the harm caused by the State's breach. Defendant had already completed approximately nine months of her probation and complied with all the terms of the plea agreement, including payment in full for all her fines and costs. The State failed to adhere to its end of the bargain. Rescission of the plea agreement created a situation where defendant

not only received an increased sentence but was also ordered to pay a fine of $500,000.

This Court has stated that the "defendant should not be forced to anticipate loopholes that the State might create in its own promises." *Blackwell*, 135 N.C. App. at 731, 522 S.E.2d at 315. Specific performance only compels the State to do what it should have done initially, comply with the terms of the plea agreement and return the balance of the funds seized from defendant. *See Rose v. Rose*, 66 N.C. App. 161, 165, 310 S.E.2d 626, 629 (1984) (internal quotations and citations omitted) (where this Court held that specific performance "does no more than compel [defendant] to do precisely what he ought to have done without being coerced by the court."). Furthermore, we agree with defendant that requiring a defendant to risk conviction merely by seeking specific performance of a state's obligation under a plea agreement would chill "[t]he economically sound and expeditious practice of plea bargaining [which] should be encouraged, with both sides receiving the benefit of that bargain." *State v. Alexander*, 359 N.C. 824, 831, 616 S.E.2d 914, 919 (2005).

Therefore, Judge Letts's ruling, that the only option available to defendant was rescission, was error. We reverse Judge Letts's order, reinstate the plea agreement and vacate the 9 December 2010 judgment.

IV. Specific Performance of Plea Agreement

[2] Defendant contends the superior court erred in denying specific performance of the plea agreement to return the money which had been seized from defendant or which was derived from money seized from defendant. Specifically, defendant contends the court's findings of fact did not support its conclusion of law that specific performance was unavailable to defendant. We agree.

On appeal, a trial judge's "findings of fact are conclusive . . . if supported by competent evidence" but its "conclusions of law are reviewed *de novo.*" *State v. Ripley*, 360 N.C. 333, 339, 626 S.E.2d 289, 293 (2006). When reviewing a matter *de novo*, "the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632—33, 669 S.E.2d 290, 294 (2008) (internal quotations and citations omitted).

This Court has not previously addressed the issue of returning a defendant's seized property pursuant to a plea agreement. Cases in other jurisdictions dealing with the return of a defendant's seized property are distinguishable because they do not involve a defendant

seeking return of seized property pursuant to a plea agreement with the State.

In North Carolina, "[a]ny property seized by a State, local, or county law enforcement officer shall be held in safekeeping . . . until an order of disposition is properly entered by the judge." N.C. Gen. Stat. § 90-112(c) (2011). The statute also indicates that any money "acquired, used, or intended for use, in selling, purchasing, manufacturing, compounding, processing, delivering, importing, or exporting a controlled substance" is subject to forfeiture. N.C. Gen. Stat. § 90-112(a)(2) (2011).

In the instant case, instead of holding the funds in safekeeping until a disposition was entered by the judge, the WPD sent the funds to the DEA in November 2008, approximately four months before defendant was even indicted for the charges. Pursuant to the U.S. Department of Justice Equitable Sharing program, the WPD submitted a request to the DEA for a return of a portion of the funds. On 23 April 2009, the DEA disbursed a total of $4,800.68 to the WPD. The money was transferred upon an "Application for Transfer of Federally Forfeited Property" which requires funds that are transferred back to the police department to be used for law enforcement purposes such as salaries, purchase of equipment, and purchase of vehicles.

Judge Letts found

> 20. That, contrary to State law, N.C. Gen. Stat. § 90-112(c), the $6,150.00 was not maintained in the custody of the [WPD], and the District Attorney's Office was unaware that the money had been transmitted and forfeited to the [DEA]. Specifically, the District Attorney's Office and Defendant's attorney . . . worked under the assumption that all monies were still present at the [WPD].
>
> . . .
>
> 29. . . . While the [WPD] did not adhere to N.C. Gen. Stat. § 90-112(c), the [WPD] was acting consistent with federal drug seizure and forfeiture provisions. The conduct of the [WPD] to turn those funds over was in all respects lawful and allowed by federal law. Federal law is in conflict with the state law and, as such, this Court no longer has any control over those federally-forfeited funds and, as such, specific performance is no longer an option for this Court.

The court concluded that since the particular funds seized from defendant were no longer available, it did not have the option to order specific performance of the plea agreement.

Judge Letts correctly stated that the particular funds seized were no longer available. However, there is no requirement that the *exact funds seized* must be returned to defendant and the State cannot avoid its obligation on this basis. "The majority view is that a [criminal defendant] is entitled to 'return' of the money, even though the government no longer has the [defendant's] specific currency." Colleen P. Murphy, *Money as a "Specific" Remedy*, 58 Ala. L. Rev. 119, 148-49 (2006) (also recognizing that since "the seized currency was not lost or destroyed but instead deposited by the government into an account," then "[a]llowing the plaintiff to recover money for cash taken by the government is functionally indistinguishable from allowing the plaintiff to recover account funds in a bank account that the government seized."); *See also U.S. v. Minor*, 228 F.3d 352, 355 (4th Cir. 2000) (court reasoned that because plaintiff sought return of "the very thing" to which he claimed an entitlement, he was not seeking "damages in substitution for a loss").

While we recognize that in forfeiting the funds to the DEA, the WPD was acting pursuant to federal law, we do not find that this forfeiture precludes the State from adhering to the plea agreement. Money is fungible. Defendant is not seeking return of a unique item. It is within the State's power to return funds in the amount seized from defendant, regardless of whether the *exact* cash seized can be returned. Therefore we hold that, pursuant to the plea agreement, the State must return all funds seized to defendant.

V. Conclusion

Defendant sought specific performance, not rescission of the plea agreement. Judge Letts erred when he rescinded defendant's plea agreement and reinstated the charges against her since the State breached the plea agreement. Although the particular funds seized were no longer available, the State was capable of specific performance of the terms of the plea agreement. Therefore, we reinstate the plea agreement. In addition, we find that the State must return to defendant an amount equal to the amount of funds seized, pursuant to the plea agreement. We vacate the judgment and reverse the order.

Vacated in part and reversed in part.

Judges McGEE and HUNTER, Robert C. concur

VICTORIA KLOTZ GRECO, PLAINTIFF v. PENN NATIONAL SECURITY INSURANCE COMPANY, PENN NATIONAL HOLDING CORPORATION, PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY, CAROLINA HOME EXTERIORS, L.L.C., AND DONALD JOSEPH MCKINNON, DEFENDANTS

No. COA11-483

(Filed 7 February 2012)

Insurance—declaratory judgment—duty to cooperate

The trial court erred in a declaratory judgment action concerning the parties' rights and responsibilities under an insurance policy by granting summary judgment in favor of defendant insurance company. Defendant failed to demonstrate that defendants McKinnon and Hanson had breached their duty to cooperate under the insurance policy.

Appeal by plaintiff from order entered 17 February 2011 by Judge Jay D. Hockenbury in Craven County Superior Court. Heard in the Court of Appeals 12 October 2011.

Whitley Law Firm, by Robert E. Whitley, for plaintiff.

Pinto Coates Kyre & Brown, PLLC, by Deborah J. Bowers and David G. Harris II, for defendants.

ELMORE, Judge.

Victoria Klotz Greco (plaintiff) appeals from an order of summary judgment entered in favor of Penn National Security Insurance Company, Penn National Holding Corporation, and Pennsylvania National Mutual Casualty Insurance Company (collectively, Penn National). Because Penn National has not shown that the insured in this case, defendant Donald Joseph McKinnon and Sharon Hanson (Hanson), failed to cooperate with defendant Penn National, we reverse the order of the trial court.

The parties have stipulated to the following facts for purposes of Penn National's summary judgment motion: On 1 May 2006, McKinnon and Hanson were driving in a Ford truck owned by Hanson and pulling a utility trailer owned by Carolina Home Exteriors, L.L.C. (CHE), on Highway 17 in Craven County. The trailer detached from the truck and collided with plaintiff's vehicle. Plaintiff was seriously injured. McKinnon worked for Rusty Hanson, who had subcontracted with CHE to replace vinyl siding at a house in Richlands. McKinnon had permission to use the utility trailer, which was insured by Penn National. The Ford truck was insured by Nationwide.

Plaintiff sued, though the complaint and other materials of the underlying tort claim are not part of the record on appeal. In September 2009, plaintiff filed a declaratory judgment action seeking a declaration of the rights of the parties as to the Penn National insurance policy. In her complaint, plaintiff alleged that the Penn National insurance policy, which had a $1 million limit, was in full force and effect at the time of the collision and, under that policy, Penn National must indemnify plaintiff for her damages arising out of the accident. She asked the trial court for a declaration of the rights and obligations of the parties as to the Penn National policy, specifically asking the court to rule that the policy provides full liability coverage for plaintiff's benefit.

Penn National moved for summary judgment, which the trial court granted following a hearing and its review of an affidavit by Janet Fusaiotti, a senior claim representative for Penn National, and its supporting exhibits. Plaintiff now appeals.

Plaintiff argues that the trial court erred by granting defendant Penn National's motion for summary judgment because Penn National failed to demonstrate that McKinnon and Hanson had breached their duty to cooperate under the insurance policy. The insurance policy includes several duties in the event of accident, claim, suit or loss. It states, in relevant part, that Penn National has "no duty to provide coverage under this policy unless there has been full compliance with the following dut[y]: . . . [Y]ou and any other involved 'insured' must . . . [c]ooperate with us in the investigation or settlement of the claim or defense against the suit[.]" The essence of the parties' disagreement on appeal is whether Penn National proved that McKinnon and Hanson did not cooperate with the investigation. We hold that it did not.

We review an order of summary judgment *de novo*. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). "Summary judgment is appropriate when there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law." *Id.* (quotations and citations omitted).

Our courts do not follow "the strict contractual approach when construing cooperation clauses in insurance contracts and have held that, in order to relieve an insurer of its obligations, the failure to cooperate must be both material and prejudicial." *Great Am. Ins. Co. v. C. G. Tate Constr. Co.*, 303 N.C. 387, 393 n.2, 279 S.E.2d 769, 773 n.2 (1981) (citing *Henderson v. Rochester American Insurance Co.*, 254 N.C. 329,

332, 118 S.E.2d 885, 889 (1961)). Our Supreme Court has explained the purpose of both cooperation clauses and the requirement that a failure to cooperate must be material and prejudicial as follows:

> The provisions are to be given a reasonable interpretation to accomplish the purpose intended, that is, to put insurer on notice and afford it an opportunity to make such investigation as it may deem necessary to properly defend or settle claims which may be asserted, and to cooperate fairly and honestly with insurer in the defense of any action which may be brought against insured, and upon compliance with these provisions to protect and indemnify within the policy limits the insured from the result of his negligent acts. An insurer will not be relieved of its obligation because of an immaterial or mere technical failure to comply with the policy provisions. The failure must be material and prejudicial. . . . "While there is some contrary authority, the better reasoned cases hold that the failure to co-operate in any instance alleged must be attended by prejudice to the insurer in conducting the defense. Blashfield, Automobile Law, Vol. 6, sec. 4059, p. 78."

Henderson, 254 N.C. at 332, 118 S.E.2d at 887 (additional citations omitted). "[F]ailure to cooperate under an insurance policy is an affirmative defense upon which [the insurer] has the burden of proof[.]" *Lockwood v. Porter*, 98 N.C. App. 410, 411, 390 S.E.2d 742, 743 (1990) (citing *MacClure v. Accident & Casualty Insurance Co. of Winterthur, Switzerland*, 229 N.C. 305, 49 S.E.2d 742 (1948)). "What constitutes co-operation or lack thereof is usually a question of fact for the jury[.]" *MacClure*, 229 N.C. at 311, 49 S.E.2d at 747 (quotations and citation omitted).

Our appellate courts have reviewed few cases in which failure to cooperate under an insurance policy was at issue, and none of those cases directly addressed whether the complete unavailability of the insured constitutes a failure to cooperate. However, read together, the decisions show that some kind of affirmative action by the insured is required before a court can conclude, as a matter of law, that the insured failed to cooperate. For example, in *Lockwood v. Porter*, the insured contacted the insurer and cooperated with the insurer for a period of time before refusing to submit to the medical evaluations that the insurer required. 98 N.C. App. 410, 411, 743, 390 S.E.2d 742, 743 (1990). The action was dismissed by motion of summary judgment, and we affirmed on appeal, explaining that the

insured's "unjustified refusal to be so examined violated the cooperation clause of the policy and bar[red] his action as a matter of law." *Id.*, 390 S.E.2d at 743-44.

In *MacClure*, the Supreme Court reversed a judgment of nonsuit in favor of the defendant insurer based on a failure to cooperate when the insured was unreachable and thus unavailable. *MacClure*, 229 N.C. at 306, 313, 49 S.E.2d at 744, 748. The plaintiff, the estate of a child killed by a car driven by the insured, was nonsuited because the driver of the car could not be located despite "continuous efforts to locate [him] by letters written to [him] and by inquiries of persons thought likely to know [his] whereabouts[.]" *Id.* The insured worked at a traveling carnival, and the letters apparently went to his home while he was traveling. *Id.* at 306-07, 49 S.E.2d at 744. As soon as he did receive one of the letters, he responded by telegraph the next morning. *Id.* at 307, 49 S.E.2d at 745. Unfortunately, his attorneys, retained by the insurer, had filed a motion to withdraw the day before, and the trial court entered judgment by default against the insured a few days later. *Id.* The trial court then dismissed the plaintiff's claim against the defendant insurer. *Id.* at 309, 49 S.E.2d at 746. On appeal, the Supreme Court reversed the judgment of nonsuit. *Id.* at 313, 49 S.E.2d at 748. Although the Court based its reversal on the rule that "[a] judgment of nonsuit is never permissible in favor of the party having the burden of proof upon evidence offered by him," *id.* at 312, 49 S.E.2d at 748, there are enough similarities for the case to be instructive.

In *Henderson*, the Supreme Court made the following observation about the appropriateness of nonsuiting on the basis of failure to cooperate:

> Where there has been evidence tending to show collusion between the injured and the insured, courts have been careful to protect the insurer. Courts usually hold that misstatements persisted in until the trial or subsequent to the filing of pleadings by insured requiring a shifting of ground and a new and different defense suffice as a matter of law to establish a failure to cooperate. Except for these classes of cases, courts generally hold the question of materiality and prejudice is a question for the jury.

Henderson, 254 N.C. at 333, 118 S.E.2d at 888. Though *Henderson* does not absolutely limit a court's ability to establish a failure to cooperate as a matter of law to those situations in which the insured

has engaged in deception or collusion, it is consistent with the notion that an insured's unavailability is not *per se* failure to cooperate on the part of the insured.

The Fourth Circuit directly addressed the question of unavailability and failure to cooperate in *Continental Casualty Co. v. Burton.* Interpreting Virginia law, the court explained that, "to establish that the insured has breached a cooperation clause by being unavailable, the insurer must prove that the insured willfully breached the clause in a material or essential particular and that the insurer made a reasonable effort to secure the insured's cooperation." 795 F.2d 1187, 1193-94 (4th Cir. 1986).

Here, neither party presented any evidence that McKinnon or Hanson had ever communicated with Penn National at any stage of the proceedings, had ever received any of Penn National's communications, or had undertaken any affirmative action with respect to the suit. In fact, Penn National's evidence clearly states that McKinnon and Hanson have never communicated with Penn National, either on their own initiative or in response to communications from Penn National. Penn National received notice of the accident from CHE, and it received notice of the suit as well. Penn National was not deprived of its *opportunity* to investigate the accident by a lack of notice or misrepresentations by any of the insureds, and thus it cannot show prejudice; it has only been unsuccessful in its *actual* investigation of the accident vis-a-vis McKinnon. Nothing in the record indicates significant impairment of Penn National's ability to investigate, defend, or settle this matter. It is also not clear exactly what efforts Penn National made to contact McKinnon and Hanson, much less whether those efforts were diligent. Although both parties would certainly benefit from speaking with McKinnon or Hanson about the particulars of the accident, they appear, at this stage, to simply be unavailable. That alone is not sufficient to demonstrate a failure to cooperate as a matter of law and, thus, a breach of their duty to cooperate under the Penn National policy. It was not appropriate for the trial court to grant summary judgment on that basis alone.

Accordingly, we reverse the order of summary judgment and remand to the trial court for further proceedings.

Reversed and remanded.

Judge BRYANT concurs.

Judge STEPHENS dissents by separate opinion.

STEPHENS, Judge, dissenting.

I respectfully dissent. As noted by the majority, summary judgment is appropriate where there is no genuine issue of material fact. *Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). I also agree with the majority's summary of our State's case law on cooperation clauses in insurance policies and emphasize in particular the following language:

> The provisions are to be given a reasonable interpretation to accomplish the purpose intended, that is, to put insurer on notice and afford it an opportunity to make such investigation as it may deem necessary to properly defend or settle claims which may be asserted, and to cooperate fairly and honestly with insurer in the defense of any action which may be brought against [the] insured, and upon compliance with these provisions to protect and indemnify within the policy limits the insured from the result of his negligent acts. An insurer will not be relieved of its obligation because of an immaterial or mere technical failure to comply with the policy provisions. The failure must be material and prejudicial.

Henderson v. Rochester Am. Ins. Co., 254 N.C. 329, 332, 887 118 S.E.2d 885, 887 (1961). Thus, I believe resolution of this appeal requires consideration of three questions: (1) was McKinnon an insured; (2) if McKinnon was an insured, did he fail to cooperate with Penn National; and (3) if McKinnon did fail to cooperate, was that failure material and prejudicial to Penn National's ability to defend or settle the claim brought by Plaintiff, rather than a mere technical failure? Because I believe Penn National produced uncontradicted evidence that the answer to each of these questions is "yes," I would affirm the trial court's grant of summary judgment to Penn National.

First, in an answer dated 7 October 2008, filed in the underlying tort action brought by Plaintiff against McKinnon, Hanson, and CHE, CHE admitted that McKinnon was using the trailer with the permission of CHE, the named insured and holder of the Penn National policy.[1] The policy defines an "insured" to include anyone who borrows

1. CHE is bound by this admission. "[J]udicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation." *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005) (citation and quotation marks omitted).

an insured vehicle with the permission of the named insured. Thus, there is no issue that McKinnon is an insured under the policy.

Second, Penn National has shown that it obtained current contact information for McKinnon and attempted to contact him numerous times, to no avail. In an affidavit dated 10 September 2010, Janet Fusaiotti, a senior claims representative with Penn National, stated that Penn National had attempted to contact McKinnon "on numerous occasions" starting on 14 September 2006, but that "all messages . . . went unreturned" and McKinnon "refused to respond in any way to the communications sent [] by Penn National." No evidence in the record indicates that McKinnon cooperated whatsoever with Penn National in this matter, nor does the record contain even an allegation by Plaintiff or any other party of cooperation by McKinnon. Thus, there is no issue that McKinnon has failed to cooperate with Penn National in its attempts to investigate, defend, and/or settle Plaintiff's claim.

The majority asserts that our case law establishes that "some kind of affirmative action by the insured is required before a court can conclude as a matter of law that the insured failed to cooperate." While I agree that failure to cooperate *may* be shown by an affirmative action, such as lying, nothing in the cases cited by the majority suggests that an affirmative action is *the only way* to establish failure to cooperate. Indeed, refusing to communicate with or respond to an insurance company seems to me the very definition of a "failure to cooperate."

In particular, I reject the majority's claim that *MacClure v. Accident & Cas. Ins. Co.*, 229 N.C. 305, 49 S.E.2d 742 (1948), is "instructive." Not only did the result in *MacClure* turn on proper placement of the burden of proof, rather than the evidence presented on the motion for nonsuit, *Id.* at 310, 49 S.E.2d at 746, but the Supreme Court *explicitly* cautioned against making *any type of inference* about the evidence presented at trial:

> It is the practice of this Court to *refrain*, as far as it may without destroying the clarity of opinion, *from comment on the evidence when the case is sent back for a new trial*—a rule that cannot always be strictly observed when the question involved is a nonsuit upon demurrer. We believe, however, that the case under review calls for an observance of the rule. We have refrained from passing upon the objections to the evidence because the same situation may not recur, but *the want of specific discussion has no other significance.*

Id. at 312-13, 49 S.E.2d at 748 (emphasis added).

As to the third and final question, Fusaiotti's 10 September 2010 affidavit states that Penn National was prejudiced by McKinnon's failure to cooperate, because the company "has been unable to perform a meaningful investigation of the [a]ccident[.]" Further, in her deposition, Fusaiotti testified that Penn National was not able to learn "how [McKinnon and his passenger] were using the trailer, where they were going with the trailer, [or] who hooked up the trailer[.]" She also stated that Penn National had been unable to obtain this information from any other source.

Here, where the accident occurred as the result of the trailer becoming detached from the pick-up truck hauling it, I agree with Penn National that obtaining information about who attached the trailer to the truck, how it was attached, how the truck was being driven just prior to the detachment, and other related information was highly relevant—indeed, essential—to Penn National's ability to investigate, defend, and/or settle Plaintiff's claim. Thus, I would hold that Penn National has established prejudice by McKinnon's failure to cooperate. Accordingly, I would affirm the trial court's grant of summary judgment in favor of Penn National.

SAMUEL AND DORIS FORT, JULIE KATHERINE FAIRCLOTH, AND RAEFORD B. LOCKAMY, II, PETITIONERS v. COUNTY OF CUMBERLAND, NORTH CAROLINA, RESPONDENT, AND TIGERSWAN, INC. INTERVENOR RESPONDENT

No. COA11-758

(Filed 7 February 2012)

1. Zoning—standing to challenge proposed use—owner of adjoining land—use prohibited by ordinance—special damages alleged

Petitioners had standing to challenge the Cumberland County Board of Adjustment's approval of intervenor respondent's plan to build a firearms training facility. Petitioners were the owners of adjoining or nearby lands, the challenged land use was prohibited by a valid zoning ordinance, and petitioners alleged that they would sustain special damage from the proposed use through a reduction in the value of their property.

2. Zoning—agricultural district—firearms training facility—not permitted use

The trial court erred in a zoning case by affirming the Cumberland County Board of Adjustment's decision to uphold the Zoning Administrator's classification of petitioner intervenor's firearms training facility as a permitted use in the A1 Agricultural District. The zoning ordinance for the district in which the training facility was to be located expressly stated that it was to be used as an agricultural district with limited exceptions, including elementary or secondary schools. Respondent's facility failed to qualify under any permitted use.

Appeal by petitioners from order entered 22 February 2011 by Judge Robert F. Floyd, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 16 November 2011.

Currin & Currin, Attorneys at Law, by Robin T. Currin and George B. Currin, for petitioners-appellants.

Deputy County Attorney Harvey W. Raynor, III, for respondent-appellee County of Cumberland.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker and

Brenton W. McConkey, for intervenor-respondent-appellee

TigerSwan, Inc.

HUNTER, Robert C., Judge.

Petitioners-appellants, Samuel and Doris Fort, Julia Katherine Faircloth, and Raeford B. Lockamy, II (collectively "petitioners") appeal the trial court's order concluding, *inter alia*, that intervenor-respondent-appellee TigerSwan, Inc.'s ("TigerSwan") proposed training facility is a permitted land use under respondent County of Cumberland's zoning ordinance. After careful review, we affirm, in part, and reverse, in part.

Background

Petitioners began the underlying action by appealing to the Cumberland County Board of Adjustment (the "Board") the decision of the county's Zoning Administrator to approve a site plan for a training facility (the "Training Facility") in Cumberland County. The site plan for the Training Facility was proposed by TigerSwan, a North

Carolina corporation that has leased approximately 1,000 acres in rural Cumberland County as the site for its Training Facility.

TigerSwan's site plan classified the proposed Training Facility as a "firearms training facility" and the evidence presented in the subsequent appeals established that TigerSwan intends to provide instruction to military, law enforcement, and security personnel in topics such as weapons training, urban warfare, convoy security operations, and "[w]arrior [c]ombatives" in order to "teach, coach, and mentor tomorrow's soldiers." TigerSwan also intends to provide courses on topics such as first aid, firearm and hunting safety, and foreign languages for adults and children.

In addition to classroom facilities, the site plan for the Training Facility includes multiple firing ranges surrounded by berms, or earthen embankments, intended as a barrier to suppress noise from firing weapons and to prevent ammunition from leaving the firing range. Beyond the berms, the firing ranges are surrounded by Surface Danger Zones ("SDZs"), which TigerSwan's site plan describes as open areas of land where "ricochet hazards" that "may endanger non-participating personnel, or the general public" might land within TigerSwan's property.

The land leased by TigerSwan, as well as petitioners' property, is zoned as belonging to an A1 Agricultural District under Cumberland County's Zoning Ordinance (the "Zoning Ordinance" or "Ordinance"). The Zoning Ordinance limits the types of commercial uses permitted in an A1 Agricultural District and provides a list of permitted and conditional uses within the district. Included in the list of permitted uses are "SCHOOLS, public, private, elementary or secondary." The Cumberland County Zoning Administrator approved TigerSwan's site plan by classifying the business as a "private school."

Petitioners appealed the approval of the site plan to the Board providing affidavits and in-person testimony of their opposition to the Training Facility. Petitioner Faircloth resides on her property with her family. While petitioners Fort and Lockamy do not live on their properties, they use the properties to enjoy the quiet atmosphere of the rural setting for family cookouts, gardening, and other means of recreation. Petitioners expressed their concerns for the increased noise from the firing ranges and TigerSwan's potential use of helicopters. In addition to the potential noise, petitioners were concerned for their personal safety due to the potential for stray gunfire given that TigerSwan intends to provide weapons training on firearms that

require SDZs of two and a half miles. Due to the quantity of ammunition TigerSwan estimates it will fire in a year (15 million rounds), petitioners also raised concerns over lead contamination of the groundwater and surrounding soil. Because of these potential adverse effects, petitioners believe the approval of the TigerSwan Training Facility will result in a decrease in their property values.

The Board voted unanimously that petitioners had standing to challenge the approval of TigerSwan's site plan, and voted three-to-two in favor of reversing the decision of the Zoning Administrator. However, as a vote of four-fifths of the Board was required to reverse the decision of the Zoning Administrator, N.C. Gen. Stat. § 153A-345(e) (2009), the Zoning Administrator's approval of the site plan was affirmed as a matter of law. Petitioners appealed the Board's decision to the superior court by petition for writ of certiorari. The trial court concluded that petitioners had standing to maintain their appeal, but held that the Training Facility was a permitted use in an A1 Agricultural District under the Cumberland County's Zoning Ordinance. Petitioners appeal from this order.

Discussion

A. Standing

[1] TigerSwan first argues that petitioners do not have standing to maintain their challenge to the approval of TigerSwan's site plan. We disagree.

Whether a party has standing to maintain an action "implicates a court's subject matter jurisdiction and may be raised at any time, even on appeal." *Fish House, Inc. v. Clarke*, 204 N.C. App. 130, 136, 693 S.E.2d 208, 212, *disc. review denied*, 364 N.C. 324, 700 S.E.2d 750 (2010). In our determination of whether a party has standing, we utilize a *de novo* review and must "view the allegations as true and the supporting record in the light most favorable to the non-moving party." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008). Here, petitioners assert they have standing pursuant to N.C. Gen. Stat. § 160A-393(d)(2) (2009), which confers standing to challenge the Board's decision to "person[s] who will suffer *special damages* as the result of the decision being appealed." (Emphasis added.)

A property owner does not have standing to challenge another's *lawful* use of her land merely on the basis that such use will reduce the value of her property. *Jackson v. Guilford Co. Bd. of Adjustment*,

275 N.C. 155, 161, 166 S.E.2d 78, 82 (1969). However, where the challenged land use is "prohibited by a valid zoning ordinance, the owner of adjoining or nearby lands, who will sustain special damage from the proposed use through a reduction in the value of his own property, does have a standing" to maintain an action to prevent the use. *Id.*

Additionally, in *Magnum*, our Supreme Court held that the petitioners in that case had standing to maintain their suit where the petitioners: (1) challenged a land use that would be unlawful without a special use permit; (2) alleged they would suffer special damages if the use is permitted; and (3) provided evidence of " 'increased traffic, increased water runoff, parking, and safety concerns,' as well as the secondary adverse effects" that would result from the challenged use. 362 N.C. at 643-44, 669 S.E.2d at 282-83. Recently, this Court applied the standard set forth in *Magnum* and concluded that a petitioner challenging her neighbor's application for a use permit on the basis that the proposed use would reduce the value of the petitioner's property was sufficient to establish the petitioner had standing. *Sanchez v. Town of Beaufort*, ___ N.C. App. ___, ___, 710 S.E.2d 350, 353-54, *review denied and dismissed*, ___ N.C. ___, 717 S.E.2d 745, 718 S.E.2d 152, and 718 S.E.2d 153 (2011).

We discern no meaningful distinction between *Magnum*, *Sanchez*, and the present case. Here, petitioners testified to their concerns that the alleged unlawful approval of the Training Facility would increase noise levels, had the potential to result in groundwater and soil contamination, and threatened the safety of anyone on their property due to stray bullets. These problems, petitioners contend, would result in a decrease in their property values. We conclude this evidence was sufficient to establish standing to challenge TigerSwan's proposed land use.

TigerSwan contends that petitioners' evidence as to the potential impact on their property values is insufficient to support their claim. Specifically, TigerSwan cites N.C. Gen. Stat. § 160A-393, which provides that lay witnesses' opinions as to property values do not constitute competent evidence. However, reading section 160A-393 as a whole, it is apparent the definition of competent evidence provided in subsection (k)(3) of the statute is limited to that subsection, and the definition does not affect the Court's analysis of standing, which is governed by subsection (d). N.C. Gen. Stat. § 160A-393. TigerSwan's argument is overruled.

B. Permitted Use

[2] Next, petitioners contend that the trial court erred in affirming the Board's decision to uphold the Zoning Administrator's classification of the TigerSwan Training Facility as a permitted use in the A1 Agricultural District. We agree.

"In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 386, 628 S.E.2d 1, 2-3 (2006). "Questions involving the interpretation of ordinances are questions of law." *Ayers v. Bd. of Adjustment*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201, *disc. review denied*, 336 N.C. 71, 445 S.E.2d 28 (1994). In our review of the alleged errors of law made below, we may freely substitute our judgment for that of the superior court. *Id.* at 530-31, 439 S.E.2d at 201.

"In interpreting a municipal ordinance '[t]he basic rule is to ascertain and effectuate the intent of the legislative body.' " *Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjustment*, 334 N.C. 132, 138-39, 431 S.E.2d 183, 187-88 (1993) (citations omitted). In the present case, the Zoning Ordinance for the district in which the Training Facility is located expressly states the intent of the district, as follows:

> A1 Agricultural District. This district is designed to promote and protect agricultural lands, including woodland, within the County. *The general intent* of the district is to permit all agricultural uses to exist *free from most private urban development except for* large lot, single-family development. Some public and/or semi-public uses as well as *a limited list of convenient commercial uses are permitted to ensure essential services for the residents.*

Cumberland County Zoning Ordinance, art. III, § 303A (2010) (Emphasis added.) Although we feel this statement of intent is unambiguous, we also note the title of the zoning district—the A1 Agricultural District—provides additional indication of the spirit and goal of the ordinance. *Ayers*, 113 N.C. App. at 531, 439 S.E.2d at 201 (giving consideration to the title of the zoning district when discerning the intent of the zoning ordinance).

The Zoning Ordinance further provides a list of permitted, conditional, and special uses for the various districts in the County's Zoning Ordinance, including the A1 Agricultural District. Permitted land uses in the A1 Agricultural District include, among others,

"SCHOOLS, public, private, elementary or secondary." Petitioners and respondents disagree as to how to interpret these words.

Petitioners argue that by including "SCHOOLS, public, private, elementary or secondary" as permitted uses, the drafters of the ordinance intended the words "elementary or secondary" to qualify, and to limit, the types of public and private schools, permitting only: public elementary schools, private elementary schools, public secondary schools, and private secondary schools. This interpretation, TigerSwan argues, renders the words "public, private" redundant as all elementary or secondary schools must be either public or private.

Alternatively, TigerSwan proposes an interpretation that each word offset by commas holds their own meaning. Thus, "public" and "private" do not modify "elementary or secondary," and the following schools would be permitted uses: public schools, private schools, elementary schools, and secondary schools. TigerSwan contends the Training Facility qualifies as a "private school" and therefore is a permitted use in the A1 Agricultural District. Petitioners counter that this interpretation renders the words "elementary or secondary" redundant; because all elementary or secondary schools must be either public or private, the inclusion of "elementary or secondary" would be unnecessary unless the words were intended as a limitation.

We construe the Zoning Ordinance by adhering to well-founded principles of statutory construction. *See Cogdell v. Taylor*, 264 N.C. 424, 428, 142 S.E.2d 36, 39 (1965) (noting the rules governing statutory interpretation apply equally to interpretations of zoning ordinances). First, we presume that "no part of a statute is mere surplusage, but that each provision adds something not otherwise included therein." *Duke Power Co. v. City of High Point*, 69 N.C. App. 378, 387, 317 S.E.2d 701, 706, *disc. review denied*, 312 N.C. 82, 321 S.E.2d 895 (1984). Second, "words and phrases of a statute may not be interpreted out of context, but must be interpreted as a composite whole so as to harmonize with other statutory provisions and effectuate legislative intent," *id.*, while avoiding absurd or illogical interpretations, *Ayers*, 113 N.C. App. at 531, 439 S.E.2d at 201. Additionally, we find instructive this Court's use of the long-standing rule of statutory construction: "*expressio unius est exclusio alterius*," meaning the expression of one thing is the exclusion of another. *Mangum*, 196 N.C. App. at 255, 674 S.E.2d at 747 (citing *Baker v. Martin*, 330 N.C. 331, 337, 410 S.E.2d 887, 890–91 (1991) and *Bd. of Drainage Comm'rs v. Credle*, 182 N.C. 442, 445, 109 S.E. 88, 90 (1921)).

Applying these rules of construction to the ordinance at issue, we conclude the inclusion of "elementary or secondary" in the description of permissible schools was intended to exclude other types of "SCHOOLS," whether they be private or public. It would be illogical for the drafters to provide that all public and all private schools are permitted *in addition to* elementary and secondary schools. Rather, in light of the drafters' express intent for the A1 Agricultural District to limit commercial uses to those providing "essential services," we regard the inclusion of "public" and "private" as an affirmation that *private* elementary or secondary schools are permitted as commercial uses providing "essential services" to residents.

This interpretation is reinforced by the drafters' express prohibition of "SCHOOL[S], business and commercial for nurses or other medically oriented professions, trade, vocational & fine arts." Petitioners argue that the Training Facility should be prohibited based upon this language, while TigerSwan attempts to distinguish the Training Facility from trade or vocational schools by arguing they will teach *skills*, not occupations. Without deciding whether the Training Facility qualifies as either a trade or vocational school, we conclude that the Training Facility is not a permitted use as it is not a public or private, elementary or secondary school.

TigerSwan places great emphasis on the testimony of the Cumberland County Planning Director as to the original intent of the list of prohibited schools and his contention that schools such as the one proposed by TigerSwan were not intended to be prohibited. However, as our Supreme Court has clearly stated, the intent of the drafters of a statute cannot be established in this manner: "Testimony, even by members of the Legislature which adopted the statute, as to its purpose and the construction intended to be given by the Legislature to its terms, is not competent evidence upon which the court can make its determination as to the meaning of the statutory provision." *State v. Nat'l Food Stores, Inc.*, 270 N.C. 323, 332-33, 154 S.E.2d 548, 555 (1967) (rejecting the affidavit of the North Carolina Commissioner of Agriculture as to the intent of a statute regulating the sale of milk). As the rules governing statutory interpretation apply equally to interpretations of zoning ordinances, *Cogdell*, 264 N.C. at 428, 142 S.E.2d at 39, the Cumberland County Planning Director's testimony as to the intent of the Ordinance is irrelevant to our analysis.

Lastly, TigerSwan argues petitioners distort the nature of the activities that will occur at the Training Facility by focusing on the more extreme activities highlighted in their advertising materials—such as training law enforcement and military personnel in urban warfare. TigerSwan does not dispute such skills will be taught at its facility. Rather, TigerSwan stresses that it will also instruct adults and children in leadership, first aid, and foreign languages—skills commonly taught in elementary and secondary schools. However, the Zoning Ordinance expressly states in the introduction to the section on permitted and conditional uses that "no land, building or structure shall be used . . . *in whole or in part* for any use other than the uses permitted" by the district in question. (Emphasis added.) Thus, while TigerSwan may offer some instruction that would be permitted in an elementary or secondary school, the inclusion of permitted uses cannot offset the uses prohibited by the Ordinance. TigerSwan's argument is overruled.

Conclusion

In sum, the trial court did not err in concluding petitioners had standing to maintain their appeal of the decision of the Board of Adjustment. However, the trial court erred in concluding the TigerSwan Training Facility is a permitted use within the A1 Agricultural District under the Cumberland County Zoning Ordinance. The trial court's order is therefore affirmed, in part, and reversed, in part.

Affirmed, in part, and reversed, in part.

Judges McGEE and HUNTER, Jr., Robert N., concur.

BLUE RIDGE SAVINGS BANK, INC., PLAINTIFF v. GUY MITCHELL, AMY MITCHELL, AND ELOISE MITCHELL, DEFENDANTS

No. COA11-289

(Filed 7 February 2012)

Real Property—foreclosure—insufficient evidence bid substantially less than true value

The trial court did not err in a foreclosure case by entering summary judgment in favor of plaintiff. Although there may have been a genuine issue of material fact as to the property's true value, the highest of those possible values was not sufficient to show that plaintiff bid "substantially less" than the property's true value, in violation of N.C.G.S. § 45-21.36.

Appeal by defendants from judgment entered 16 November 2010 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 13 September 2011.

Dungan Law Firm, P.A., by James W. Kilbourne, Jr., for plaintiff.

Frank G. Queen, PLLC, by Frank G. Queen, for defendants.

ELMORE, Judge.

Guy Mitchell, Amy Mitchell, and Eloise Mitchell (defendants) appeal from an order of summary judgment in favor of Blue Ridge Savings Bank, Inc. (plaintiff), decreeing that plaintiff is entitled to recover $32,746.96 plus interest and reasonable attorney's fees from defendants. We affirm.

On 19 February 2002, defendants executed a promissory note in the principal amount of $130,000.00 with an interest rate of nine percent per year. Plaintiff was the lender, and the debt was secured by a deed of trust in favor of plaintiff dated 19 February 2002. The deed of trust secured a four-acre property in Haywood County. According to the complaint, the parties modified the original promissory note on 24 March 2009, changing the interest rate to 11.5 percent per year.

Defendants failed to make payments under the promissory note, and plaintiff foreclosed on the property. On 21 May 2010, plaintiff held a public foreclosure auction but was itself the only and highest bidder with a bid of $100,000.00. On 24 May 2010, plaintiff sent a demand letter to defendants to collect $32,746.96, the balance remaining on their loan after the net proceeds of the foreclosure sale

were applied. Defendants did not pay the balance, and plaintiff sued them on 1 June 2010.

In their answer, defendants moved to dismiss for failure to state a claim. Plaintiff moved for judgment on the pleadings, or, in the alternative, summary judgment. The trial court heard plaintiff's motion on 16 November 2010, and it determined that no genuine issues of material fact existed and that plaintiff was entitled to judgment as a matter of law. Although the parties did not submit a transcript of the hearing, they agree that the following evidence was presented to the trial court: (1) the affidavit of Scott Nesbitt, Vice President of Blue Ridge Savings Bank, Inc.; (2) an appraisal report of the property, performed at plaintiff's request by James E. Hackney on 28 June 2010; and (3) the affidavit of Ann Eavenson, a co-owner of Main Street Realty in Waynesville.

According to Nesbitt's affidavit, plaintiff listed the property in May 2010 and sold it five months later on 26 October 2010 for $110,000.00 in an arms-length transaction to an unrelated third party. In the appraisal, Hackney estimated the market value of the property to be $109,000.00. He also stated that plaintiff listed the property for $129,900.00 after buying it at the auction. According to Eavenson's affidavit, the property was listed for sale on 30 October 2009 for $319,900.00, it was listed again in January 2010 for $299,000.00, and "during the foreclosure period, an oral offer was made by another real estate agent on behalf of an investor in the amount of $150,000.00," though that "offer was never formally reduced to a written offer to purchase."

On appeal, defendants argue that plaintiff violated N.C. Gen. Stat. § 45-21.36 by bidding "substantially less" than the property was worth. They argue that there is a genuine issue of material fact as to the property's true value, given the range of values presented in the two affidavits and appraisal. Although we agree that there may be a genuine issue of material fact as to the property's true value, the highest of those possible values is not sufficient to show that plaintiff bid "substantially less" than the property's true value, and, thus, defendants' argument fails as a matter of law.

Section 45-21.36 "applies well-settled principles of equity to provide protection for debtors whose property has been sold and purchased by their creditors for a sum less than its fair value." *NCNB Nat'l Bank v. O'Neill*, 102 N.C. App. 313, 316, 401 S.E.2d 858, 859 (1991) (citation omitted). The statute limits the "possibility of abuse leading to a windfall" for the creditor. *Id.* It states, in relevant part:

> When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset . . . that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part[.]

N.C. Gen. Stat. § 45-21.36 (2009). Here, defendants argue that the amount bid ($100,000.00) was substantially less than the property's true value, which they assert could have been as little as $109,000.00 or as much as $150,000.00.

As a preliminary matter, we note that only the values of $100,000.00, $109,000.00, and $110,000.00 were competent evidence of the property's true value. Neither the list price of $129,000.00 nor the unaccepted oral offer of $150,000.00 is competent evidence of market value:

> It is not the offering of property at a given price that furnishes evidence of market value; it is the actual sale by a seller willing but not obliged to sell, to a buyer willing but not obligated to buy. An owner may and frequently does place a higher price on his property than it will bring in the market. It is not until a voluntary buyer is willing to take the property at the stated price that the transaction becomes an indication of market value. A mere offer to buy or sell property is incompetent to prove its market value. The figure named is only the opinion of one who is not bound by his statement and it is too unreliable to be accepted as a correct test of value.

North Carolina State Highway Com. v. Helderman, 285 N.C. 645, 654-55, 207 S.E.2d 720, 727 (1974) (quotations and citations omitted); *see also Canton v. Harris*, 177 N.C. 10, 13, 97 S.E. 748, 749 (1919) (quoting *Sharp v. United States*, 191 U.S. 341, 349, 48 L. Ed. 211, 213

(1903)) (" 'Oral and not binding offers are so easily made and refused in a mere passing conversation and under circumstances involving no responsibility on either side as to cast no light upon the question of value. It is frequently very difficult to show precisely the situation under which these offers were made. In our judgment, they do not tend to show value, and they are unsatisfactory, easy of fabrication, and even dangerous in their character as evidence upon this subject.' "). Neither party disputes that the $100,000.00 auction price and the $109,000.00 appraisal are evidence of the property's market value, though plaintiff does argue that the $110,000.00 sale price is not competent evidence of market value. However, our Supreme Court has explained that

> [s]uch subsequent sale would simply be a circumstance indicating the fair value of the property at the time of the foreclosure, the weight to be given it depending upon other circumstances such as the lapse of time between the foreclosure and the subsequent sale and the known probability, at the time of the foreclosure sale, that such subsequent sale could be made.

Wachovia Realty Inv. v. Housing, Inc., 292 N.C. 93, 113 232 S.E.2d 667, 679 (1977). Accordingly, the range of values supported by competent evidence is $100,000.00 to $110,000.00. Nevertheless, plaintiff's $100,000.00 bid at the foreclosure sale is not substantially less than the top value of $110,000.00.

Our appellate courts have not set out particular guidelines as to what "substantially less" than the property's true value means. However, this Court has affirmed a judgment that a bid that was twenty percent less than the appraised value of the property was "substantially less" than the property's true value. *First Citizens Bank & Trust Co. v. Cannon*, 138 N.C. App. 153, 154-56, 530 S.E.2d 581, 582-83 (2000). In that case, the debtors were entitled to the defense set out in § 45-21.36 *Id.* at 155-56, 530 S.E.2d at 583. Here, the percentage difference between the appraised value of the property and plaintiff's bid is nine percent, and if we take the sale price of $110,000.00, the percentage difference is ten percent. These values do not approach the twenty percent difference, which we characterized as "substantially less" in *Cannon*.

Though the twenty percent mark is not a bright line rule or cut-off by any interpretation, defendants offer no authority (including any reference to *Cannon*) supporting their assertion that the bid was substantially less than the true value or fair market value of the property;

indeed, the argument is based merely on the fact that both the appraised value and the subsequent sale price were more than the bid. Because the statute requires that the bid be "substantially less" than true value, not just "less" than true value, and because defendants have offered no authority or cogent argument supporting their claim that plaintiff's bid was substantially less than the property's true value, we affirm the order of the trial court.

Affirmed.

Judge MCGEE concurs.

Judge HUNTER, JR., Robert N., dissents by separate opinion.

HUNTER, JR., Robert N., Judge, dissenting.

I believe the majority errs in its reading of *First Citizens v. Cannon*, 138 N.C. App. 153, 530 S.E.2d 581 (2000), when it holds that a nine or ten percent difference between the amount bid and the property's true value in the case *sub judice* is not "substantially less" under N.C. Gen. Stat. § 45-21.36 because that difference is less than the twenty percent difference in *Cannon*. In *Cannon*, this Court never specifically characterized the bid amount to be "substantially less" than the property's true value; this was only done by the trial court. *Cannon*, 138 N.C. App. at 156, 530 S.E.2d at 583. Instead, this Court addressed the appellant's argument that the trial court relied on incompetent evidence in determining the true value of the property in question. *Id.* This Court disagreed with the appellant's argument and affirmed the trial court's decision. *Id.* The appellant made no argument regarding whether the amount bid was in fact "substantially less" than the value of the true property, and, as such, this Court did not address the issue. Therefore, to refer to the amount bid and property value difference of twenty percent in *Cannon* as a percentage this Court upheld as "substantially less" is not supported in my reading of *Cannon*.

I am further concerned with the majority's analysis of whether plaintiff's bid was "substantially less" than the true value of the property in question. "A deficiency judgment is an 'imposition of personal liability on [the] mortgagor for [the] unpaid balance of mortgage debt after foreclosure has failed to yield [the] full amount of due debt.' " *Hyde v. Taylor*, 70 N.C. App. 523, 526, 320 S.E.2d 904, 906 (1984) (citation omitted).

> G.S. 45-21.36 allows a debtor to claim a setoff against a deficiency judgment to the extent that the bid at the foreclosure is *substantially less than the true value of the realty*, where (1) the creditor forecloses pursuant to a power of sale clause, (2) there is a deficiency, and (3) the creditor who forecloses is the party seeking a deficiency judgment.

Id. at 526, 320 S.E.2d at 906-07 (emphasis added). Defendants here seek such a deficiency judgment, yet the majority faults defendants for failing to "offer [] authority (including any reference to *Cannon*) supporting their assertion that the bid was substantially less than the true value or fair market value of the property." However, thorough research of the case law of this state reveals that neither this Court nor our Supreme Court has provided guidance on how to show a bid amount is "substantially less" than the true value of the property. I agree with the majority when it states, "Our appellate courts have not set out particular guidelines as to what 'substantially less' than the property's true value means," nevertheless the majority faults defendants for failing to offer "authority or cogent argument" to support their position. With no guidance provided by our appellate courts, I do not see how defendants can be penalized for failing to adequately show plaintiff's bid was "substantially less" than the true value of the property.

In my opinion, determining the issue of whether the amount bid is "substantially less" than the true value of the property is a mixed question of law and fact, similar to that of determining what a "reasonable time" means. The North Carolina Supreme Court has held

> what is [a] "reasonable time" is generally a mixed question of law and fact, not only where the evidence is conflicting, but even in some cases where the facts are not disputed; and the matter should be decided by the jury upon proper instructions on *the particular circumstances of each case.*
>
> The time, however, may be so short or so long that the court will declare it to be reasonable or unreasonable as [a] matter of law. . . .
>
> If, from the admitted facts, the court can draw the conclusion as to whether the time is reasonable or unreasonable by applying to them a legal principle or a rule of law, then the question is one of law. But if different inferences may be drawn, or the circumstances are numerous and complicated and such that a definite legal rule can not be applied to them, then the matter

> should be submitted to the jury. It is only when the facts are undisputed and different inferences can not be reasonably drawn from them that the question ever becomes one of law.

Claus v. Lee, 140 N.C. 552, 554–55, 53 S.E. 433, 434–35 (1906) (citations omitted) (emphasis added). Similarly, what is "substantially less" is also a uniquely individualized and subjective issue: where a ninety cent bid on a property worth one dollar (a ten percent less bid) may not be "substantially less" than the property's true value, a $900,000 bid on a property worth $1,000,000 (also a ten percent less bid) may be. Moreover, a bid that is ten percent less than the property value may or may not be "substantially less" than the true value of the property depending on varying market conditions. Because determining whether the amount bid is "substantially less" than the true value of the property is such a unique inquiry resulting in varied results even for similar percentage differences, I believe such a determination cannot be made without looking to the particular circumstances of each case, as is done when determining "reasonable time." Only if such facts and particular circumstances are presented to the trial court do I believe the court may decide the issue on summary judgment. Otherwise, the case must proceed to trial. In fact, in *Cannon*, the trial court actually held a nonjury trial on the merits of the case before it found that the amount bid by the mortgagor was substantially less than the property's true value. *Cannon*, 138 N.C. App. at 156, 530 S.E.2d at 583.

Here, the only evidence the court had to determine if the amount bid was "substantially less" than the value of the property is the value bid on the property by plaintiff and the two values regarding the true value of the property, one provided by an appraiser ($109,000) and one being the sale price ($110,000). Without more evidence regarding the circumstances of the case, I believe it was improper for the trial court to decide on summary judgment that the amount bid was not "substantially less" than the value of the true property and to thereby preclude defendants from a deficiency judgment. Like in *Cannon*, the trial court should have held a trial to enable it to determine whether plaintiff's bid was substantially less than the property's true value. This is a material question of fact in this instance, and therefore, I would reverse the trial court's order granting summary judgment in favor of plaintiff.

WENDY L. FIELDS v. CYNTHIA McMAHAN

No. COA11-1043

(Filed 7 February 2012)

Appeal and Error—preservation of issues—constitutional issue—not raised at trial—dismissed

Plaintiff's argument that the trial court erred in allowing defendant's motion to compel discovery was dismissed where plaintiff raised a constitutional argument on appeal which had not been presented and ruled upon by the trial court.

Appeal by plaintiff from order entered 1 June 2011 by Judge William R. Pittman in Chatham County Superior Court. Heard in the Court of Appeals 11 January 2012.

Maxwell, Freeman & Bowman, P.A., by John A. Bowman, for plaintiff-appellant.

Essex Richards, P.A., by Edward G. Connette, for defendant-appellee.

BRYANT, Judge.

Because plaintiff raises on appeal a constitutional argument which has not been presented and ruled upon by the trial court, we dismiss the appeal.

On 28 September 2010, plaintiff Wendy Fields, filed a complaint against defendant Cynthia McMahan in Chatham County Superior Court alleging breach of contract, breach of partnership, actual fraudulent inducement to contract, constructive fraudulent inducement to contract, tortious interference with existing contract, tortious interference with prospective economic advantage, libel, slander of title, unfair and deceptive trade practices, and punitive damages. On 10 November 2010, defendant answered plaintiff's complaint and counterclaimed for breach of contract, breach of fiduciary duty, and statutory conspiracy. Defendant voluntarily dismissed the counterclaim for statutory conspiracy on 3 February 2011.

The subject of the action is a show dog, a German Shepard named Bill von der Fürstenau (hereinafter "Bill"). Bill was bred and resides in Germany. His pedigree—his title document which contains his formal lineage—was issued under the authority of the *Verein fur Deutsche Schaferhunde (SV) E.V.* (hereinafter "SV"). Prior to this

action, Bill was owned in part by German national Lothar Vörg. In her complaint, plaintiff asserted that under SV rules, a German Shepard owned in whole or in part by a German national could not breed through artificial insemination; however, if Bill was owned by American citizens, plaintiff asserted, he could be registered with the American Kennel Club (AKC) and utilize artificial insemination.

Plaintiff asserted that Bill had been world ranked since 2009 and, after having earned the "Sieger" title "VA1" at the 2009 North American Sieger Show—a national conformation show of the Working Dog Association of the German Shepard Dog Club of America, Bill held the ranking of #1 adult male German Shepard Dog in the United States.

In September 2009, plaintiff purchased a one-half interest in Bill for $41,500.00. Plaintiff co-owned Bill with Vörg who maintained physical custody of Bill. Within a week of plaintiff's purchase, Vörg sold his one-half interest in Bill to defendant. Pursuant to the purchase agreements entered into by both plaintiff and defendant, Vörg surrendered physical custody of Bill to Jochen Janz, "a German national and internationally recognized breeder, trainer and handler . . . ."

Plaintiff asserted that after defendant's acquisition of interest, defendant refused to pay for any of Bill's expenses leaving plaintiff to pay for all of Bill's non-custodial costs, including, international air travel expenses, show entry fees, sperm supplement, and semen collection fees. Moreover, plaintiff asserts "Defendant had the affirmative obligation to convey her title and interest in Bill to Jochen Janz" in the spring of 2010 but failed to do so.

On 24 May 2011, defendant filed Defendant's Motion to Compel Discovery specifically requesting that plaintiff produce all correspondence to and from Janz beginning 1 January 2009 through 24 May 2011, as well as, all cell phone records and credit card receipts for the month of June 2010.

On 1 June 2011, an order was entered in Chatham County Superior Court allowing "Defendant's Motion to Compel Discovery as it relates to Request for Production numbers 3 and 10[.]" From entry of this order, plaintiff appeals.

On appeal, plaintiff questions whether the trial court erred in allowing defendant's motion to compel discovery. Plaintiff argues that the trial court's order compelling compliance with defendant's discovery requests infringes upon her privilege against self-incrimination

protected by the Fifth Amendment to the United States Constitution and affects a substantial right, making the order appealable. We hold the argument plaintiff raises is not properly before us.

"[O]rdinarily, discovery orders are interlocutory and are not subject to immediate appeal. Orders that are interlocutory are subject to immediate appeal when they affect a substantial right of a party." *Lowd v. Reynolds*, ___ N.C. App. ___, ___, 695 S.E.2d 479, 482 (2010) (citation omitted).

> [T]he right against self-incrimination is a very substantial right, indeed, protected by both the United States and North Carolina Constitutions, and if some of the interrogatories are incriminating, as [plaintiff] contends, and [she] is nevertheless compelled to answer them now [her] constitutional right could be lost beyond recall and [her] appeal at the end of the trial would be of no value.

Shaw v. Williamson, 75 N.C. App. 604, 606-07, 331 S.E.2d 203, 204 (1985) (citation omitted). However, "[a] constitutional issue not raised at trial will generally not be considered for the first time on appeal." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam) (citations omitted).

On 24 May 2011, defendant filed a motion to compel discovery seeking a court order compelling plaintiff to respond to interrogatories and requests for production of documents. Defendant stated that she served her First Set of Interrogatories and Requests for Production of Documents upon plaintiff on 29 December 2010, and, on 10 March 2011, plaintiff provided "deficient" responses.

In defendant's motion to compel discovery, defendant identified requests No. 3 and No. 10 as receiving deficient responses.

> 3. Identify and produce any and all correspondence, including all email communications, to or from Jochen Janz, for the period beginning January 1, 2009, and continuing to the present. This requests specifically includes e-mail to or from [plaintiff's] email account . . . .
>
> . . .
>
> 10. Please provide all cell phone records and credit card receipts for the month of June 2010.

In support of her motion, defendant made the following arguments:

> These Requests [sic] are relevant and would likely lead to admissible evidence for several reasons:
>
> a. Plaintiff has alleged breach of contract by Defendant, but Jochez Janz is a central party to the contract and has a financial interest in the lawsuit. Janz is the individual who induced both Plaintiff and Defendant to enter the contract, so Plaintiff's communications with Janz would be very relevant in this action.
>
> b. It also appears from discovery that Jochen Janz fraudulently induced Ms. McMahan into purchasing her half interest in Bill without disclosing to her the personal relationship he had with the Plaintiff.
>
> c. In addition, the email and cell phone records may reveal improper motive on Plaintiff's part in pursuing her claims against defendant. Specifically, Jochen Janz, a German citizen, fled the country after warrants were issued in Chatham County for charges arising out of his physical assault on Defendant. With the warrants outstanding, Janz cannot return to the United States. It appears that Plaintiff has a personal relationship with Janz, and that one of her motives in pursuing this action is to coerce Defendant into seeking a dismissal of the criminal charges.
>
> d. Jochen Janz fled the country to avoid arrest and prosecution in June 2010. Plaintiff's cell phone records and credit card receipts for that month are relevant to determine whether she assisted, either directly or indirectly, in his leaving the country.
>
> e. The emails, cell phone records, and credit card records would likely contain information related to impeachment and admissions.

In response to defendant's motion to compel discovery, plaintiff filed a memorandum of law in opposition to defendant's motion. In addition to contesting the grounds for objection defendant set forth in paragraphs (a) through (e), plaintiff also forecasts the assertion of her Fifth Amendment privilege against self-incrimination in the event the trial court allowed defendant's motion.

> In this action, there is no motive personal to the Plaintiff other than to rectify the cloud on her title to Bill. Plaintiff has a legitimate, stand-alone civil action against Defendant concerning the ownership of Bill which pre-dates the criminal charges against Janz. Criminal charges are separate from the allegations and arguments herein. . . .
>
> Frankly, it is Plaintiff's view that Defendant seeks information concerning these phone records and credit card records from June, 2010 solely for the purpose of turning such information over to the authorities in hopes of subjecting Plaintiff to criminal exposure. . . .
>
> . . .
>
> The only purpose for Defendant's Requests Nos. 3 and 10 is to re-direct focus of this contract matter with inflammatory information and to annoy and embarrass the Plaintiff. Further, Defendant wants to carry out her threat of securing phone records and credit card statements so as to possibly subject Plaintiff to criminal exposure in aiding or assisting Mr. Janz's return to Germany. *To be clear, if necessary, the Defendant reserves her right to invoke her Fifth Amendment privilege against self-incrimination.*
>
> . . .
>
> The requested documents have absolutely nothing to do with, and will not lead to the discovery of admissible evidence concerning ownership of the dog, Bill. *Should Defendant's Motion to Compel on these two Requests be granted, the Plaintiff reserves the right to assert her Fifth Amendment privilege.*
>
> . . .
>
> Defendant's Motion to Compel should be denied in its entirety.
>
> In the alternative, should the [trial court] grant the Motion to Compel, with regard to Requests for Production of Nos. 3 and 10, *the Plaintiff wants to be clear that Plaintiff's Fifth Amendment privilege will be invoked.*

(Emphasis added).

On 1 June 2011, the trial court entered an order stating that "Defendant's Motion to Compel Discovery as it relates to Request for Production numbers 3 and 10 is allowed . . . ." The record does not

otherwise reflect that plaintiff invoked her Fifth Amendment right against self-incrimination and obtained a ruling from the trial court after assertion of the right. Therefore, the trial court had no opportunity to rule on the constitutional issue. *See Sugg v. Field*, 139 N.C. App. 160, 164, 532 S.E.2d 843, 846 (2000) ("[T]his Court has made it clear that where the privileged information sought from a plaintiff in discovery is material and essential to the defendant's defense, plaintiff must decide whether to come forward with the privileged information or whether to assert the privilege and forego the claim in which such information is necessary. Dismissal is not automatic; before dismissing a claim based upon plaintiff's refusal to testify in reliance upon the privilege against self-incrimination, the court must employ the balancing test recognized in [*Qurneh v. Colie*, 122 N.C. App. 553, 558, 471 S.E.2d 433, 436 (1996), and *Cantwell v. Cantwell*, 109 N.C. App. 395, 427 S.E.2d 129 (1993)]. This test involves weighing a party's privilege against self-incrimination against the other party's rights to due process and a fair trial. *See Cantwell* at 397, 427 S.E.2d at 130 . . . ."). As such, plaintiff, on appeal, asserts a constitutional privilege that has not been presented and ruled upon by the trial court. *See Anderson*, 356 N.C. at 416, 572 S.E.2d at 102 ("[a] constitutional issue not raised at trial will generally not be considered for the first time on appeal." (citations omitted)). Accordingly, we dismiss this appeal.

Dismissed.

Judges ELMORE and ERVIN concur.

STATE OF NORTH CAROLINA v. TERRY LEE HOLDER

No. COA11-919

(Filed 7 February 2012)

Constitutional Law—effective assistance of counsel—concession of guilt to lesser-included offense—defendant's consent

Defendant was not deprived of his Sixth Amendment right to effective assistance of counsel in a felony fleeing to elude arrest case. The trial court's inquiry of defendant was sufficient evidence that defendant was aware his counsel would concede

defendant's guilt of the lesser-included offense of misdemeanor fleeing to elude arrest, that he was informed of the potential consequences of that decision, and that he knowingly consented to an admission of guilt to the lesser-included offense. Aside from defense counsel's concession of defendant's guilt to the lesser-included offense, defendant did not allege any other deficiencies in his counsel's representation at trial or that he was therefore deprived of a fair trial.

Appeal by defendant from judgments entered 25 January 2011, by Judge Ola M. Lewis in Johnston County Superior Court. Heard in the Court of Appeals 10 January 2012.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for the State.

W. Michael Spivey for defendant appellant.

McCULLOUGH, Judge.

On 25 January 2011, a jury found Terry Lee Holder ("defendant") guilty of driving while impaired and felony fleeing to elude arrest. Defendant then pled guilty to attaining habitual felon status. On appeal, defendant argues he was deprived of his Sixth Amendment right to effective assistance of counsel at trial. We find no error.

I. Background

On the night of 20 October 2009, Deputy Randy Ackley of the Johnston County Sheriff's Office ("Deputy Ackley") encountered defendant on a two-lane road in Johnston County, North Carolina. Deputy Ackley observed that defendant was travelling approximately 80 miles per hour. Deputy Ackley activated his emergency lights and pursued defendant. During the pursuit, defendant operated his vehicle in excess of 100 miles per hour, drove at times without headlights, and ran stop signs. Defendant also passed a gasoline tanker truck and "cut off" the tanker by making a sharp turn just in front of the tanker. Defendant was finally stopped when he ran over "stop sticks" deployed in front of his vehicle by another officer. The stop sticks punctured defendant's tires, causing his vehicle to slow down and run into a ditch. Defendant was subsequently tested for alcohol use and found to have a blood alcohol level of .11. Defendant told the arresting officers that he ran from Deputy Ackley because he had been drinking and had had a bad night.

Based on these events, defendant was charged with and indicted for driving while impaired and felony fleeing to elude arrest. Defendant was also indicted for being an habitual felon. Defendant was tried by jury on 24 January 2011, and on 25 January 2011, the jury returned unanimous verdicts finding defendant guilty of both offenses. Defendant then pled guilty to attaining habitual felon status. Defendant was sentenced to a term of 120 days' imprisonment for the impaired driving conviction and to a minimum of 80 months' and a maximum of 105 months' imprisonment for the felony eluding arrest conviction and attaining habitual felon status. Defendant gave oral notice of appeal in open court at the close of the proceedings.

II. Ineffective assistance of counsel

In his only issue on appeal, defendant argues he was deprived of his Sixth Amendment right to effective assistance of counsel where his trial counsel conceded his guilt without his voluntary consent. Defendant's argument is without merit.

Ordinarily, to prevail on a claim of ineffective assistance of counsel, the defendant bears the burden of meeting a two-part test: "a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286. "Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (internal quotation marks and citations omitted).

However, our Supreme Court has determined that a defendant receives ineffective assistance of counsel *per se* when the defendant's counsel concedes the defendant's guilt to either the offense charged or a lesser-included offense without the defendant's consent. *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507–08 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986); *see also State v. Alvarez*, 168 N.C. App. 487, 501, 608 S.E.2d 371, 380 (2005). Nonetheless, our Supreme Court has noted that "[n]either *Harbison* nor any subsequent case specifies a particular procedure that the trial court must invariably follow when confronted with a defendant's concession[.]" *State v. Berry*, 356 N.C. 490, 514, 573 S.E.2d 132, 148 (2002). Indeed, our Supreme Court has specifically "declined to set out what constitutes an acceptable consent by a defendant in this

context." *State v. McDowell*, 329 N.C. 363, 387, 407 S.E.2d 200, 213 (1991). In *State v. Matthews*, 358 N.C. 102, 591 S.E.2d 535 (2004), our Supreme Court stated that "[f]or us to conclude that a defendant permitted his counsel to concede his guilt to a lesser-included crime, the facts must show, at a minimum, that defendant *knew* his counsel [was] going to make such a concession." *Id.* at 109, 591 S.E.2d at 540. And recently, this Court noted that our Supreme Court's holdings in "*Harbison* and *Matthews* clearly indicate that the trial court must be satisfied that, prior to any admissions of guilt at trial by a defendant's counsel, the defendant must have given knowing and informed consent, and the defendant must be aware of the potential consequences of his decision." *State v. Maready*, ___ N.C. App. ___, ___, 695 S.E.2d 771, 776, *disc. review denied*, 364 N.C. 329, 701 S.E.2d 247 (2010).

Prior to trial in the present case, defense counsel informed the trial court that at some point during the trial, he may concede defendant's guilt to "something other" than felony fleeing to elude arrest, and the following colloquy occurred:

> [DEFENSE COUNSEL]: And there may be a time during this trial, I probably need to address this now—and I don't know at what point it may occur. It may occur sometime during opening, *it certainly may occur during closing—where I concede guilt for Mr. Holder something other than felony fleeing to speed—speeding to elude arrest.* And I just—you know, *that's with his consent.*
>
> . . . .
>
> [DEFENSE COUNSEL]: We talked about that, and that that is something we would need to get out. And I don't—you know, I don't know at this point what the instructions will be, where we'll be at that point. I don't know that it will come up right away, but I just wanted to put you on notice as to that.
>
> THE COURT: Okay. Mr. Holder, sir, your attorney—and we will certainly address it for the record again when necessary—but he has indicated to this Court, that there may be times when he will concede guilt as to some portion of the offenses charge[d]. Have you discussed that with your attorney?
>
> THE DEFENDANT: Yes.
>
> THE COURT: I need you to answer loudly and clearly for the record, please.

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. And, sir, is that, indeed, part of the trial strategy that you have discussed with your attorney?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right, and, sir, do you understand that once there is that concession, it's out there for the jury, though the State still has the burden of proof. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: And that a juror may infer from that concession that you are guilty of all of these charges; do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right, sir. We will note that for the record. And is there anything you wish to bring to the Court's attention about that particular trial strategy before we get started? Because once the attorney makes an opening argument and says that, it's out there, can't bring it back. Have any objection to him doing that, or is that, indeed, something you want him to do?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right, I'll note that for the record. Anything else on behalf of your client, sir?

[DEFENSE COUNSEL]: Not that I'm aware of, your Honor.

THE COURT: All right. And, Mr. Holder, sir, noting, too, for the record that this will not be an issue that, should you be convicted, will be something that you can appeal at trial—appeal based on the trial, stating that you didn't [know] your lawyer was going to do it or it wasn't part of your trial strategy. Understood?

THE DEFENDANT: Yes, ma'am.

(Emphasis added.)

Subsequently, during his closing argument, defense counsel argued the State could not meet its burden of proving defendant committed

the offense of felony fleeing to elude arrest, but conceded that defendant was guilty of misdemeanor fleeing to elude arrest, stating:

> On the felony fleeing to elude arrest charge, you're going to have a choice, guilty of felony fleeing to elude arrest. In order to find that, you've got to find all of this. I respectfully submit to you, the State can't show that. *And that's enough to kick it back to the misdemeanor fleeing to elude arrest. And that's what he's guilty of. I don't dispute a bit that he's guilty of that.*

(Emphasis added.) Although defendant acknowledges in his brief that "[t]his was undoubtedly sound trial strategy in the face of compelling evidence of defendant's guilt," defendant argues the decision to admit guilt rests solely with him and that his attorney's concession during the closing argument to the jury constitutes a *per se* constitutional violation under *Harbison*. Defendant contends the colloquy between the trial court and defendant was not adequate to determine what offense defendant authorized his attorney to admit, nor to determine that his admission was knowing and voluntary. As a result, defendant argues he should be awarded a new trial on his conviction for felony fleeing to elude arrest, or in the alternative, defendant requests we remand to the trial court for a hearing to determine whether defendant gave his informed consent to his attorney's admitting his guilt of the offense of misdemeanor fleeing to elude arrest.

Contrary to defendant's contentions, the colloquy between the trial court, defense counsel, and defendant shows that defense counsel explained to the trial court in defendant's presence that defendant had consented to permitting his counsel to concede to the jury that he was guilty of "something other than felony fleeing to speed—speeding to elude arrest." The trial court judge spoke directly with defendant to ensure that he understood the consequences of conceding guilt and that he did in fact consent to an admission of guilt to "some portion of the offenses charged," specifically a lesser-included offense of felonious fleeing to elude arrest, as specified by defense counsel at the beginning of the colloquy. Thus, the trial court's inquiry of defendant is sufficient evidence that defendant was aware his counsel would make such a concession, that he was informed of the potential consequences of that decision, and that he knowingly consented to an admission of guilt to the lesser-included offense. We also note that defendant has made no factual assertion in his brief that he did not actually consent to his attorney's concession.

When there is a knowing consent, as demonstrated by this case, we examine the issue concerning ineffective assistance of counsel pursuant to the normal ineffectiveness standard set forth previously. *State v. Goode*, 197 N.C. App. 543, 547-48, 677 S.E.2d 507, 511 (2009). Here, aside from defense counsel's concession of defendant's guilt to the lesser-included offense of misdemeanor fleeing to elude arrest, defendant has not alleged any other deficiencies in his counsel's representation at trial or that he was therefore deprived of a fair trial. Having already determined that defendant gave knowing and voluntary consent to his counsel to concede guilt to the lesser offense, we hold defendant received a fair trial free from error.

No error.

Judges HUNTER (Robert C.) and THIGPEN concur.

STATE OF NORTH CAROLINA v. GREGORY R. CHAPMAN

No. COA11-229

(Filed 7 February 2012)

Jurisdiction—over appeal—failure to challenge order granting relief—writ of habeas corpus

The Court of Appeals lacked jurisdiction to hear the State's appeal from an order dismissing two counts of capital first-degree murder against defendant and the appeal was dismissed. The State failed to also challenge the order granting relief pursuant to a writ of *habeas corpus*, which concluded that the murder indictments did not properly charge any offense.

Appeal by the State from dismissal order entered 23 December 2010 by Judge Russell J. Lanier, Jr., in Duplin County Superior Court. Heard in the Court of Appeals 13 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel Shatz, for defendant.

ELMORE, Judge.

The State appeals from an order dismissing two counts of capital first-degree murder against Gregory R. Chapman (defendant). Because the State failed to also challenge the order granting relief pursuant to a writ of habeas corpus, which concluded that the murder indictments did not properly charge any offense, we lack jurisdiction to hear this appeal, and we dismiss it without considering the merits.

On 26 May 2008, defendant shot Lisa Wallace once in her left upper abdomen. Wallace was nineteen weeks and four or five days pregnant with twins. The bullet did not enter Wallace's uterus. Wallace was taken to Pitt County Memorial Hospital, where she had emergency surgery; following the surgery, Wallace underwent a spontaneous abortion of both twins. Wallace survived. Following the spontaneous abortion, both twins had heartbeats, and they were each assigned an Apgar score of one; neither twin scored on the other four factors that comprise an Apgar score—respiration, color, movement, and irritability. The first twin was delivered at 4:42 p.m., weighed 336 grams, and was pronounced dead at 5:10 p.m. when his heartbeat stopped. The second twin was delivered at 4:49 p.m., weighed 323 grams, and was pronounced dead at 5:20 p.m. when her heartbeat stopped.

Certificates of live birth were issued for each twin. Death certificates were also issued, and both the death certificates and the medical examiner's report listed the immediate cause of death for each twin as "previable prematurity." The medical experts who testified at the habeas corpus hearing all agreed that a previable newborn cannot maintain life outside of the mother's womb, regardless of medical intervention. No medical expert opined that the twins were viable at their gestational age or weight.

Defendant was charged capitally with two counts of first-degree murder for the death of the twins, who were named as the victims on the indictment. He was also charged with possession of a firearm by a felon, assault with a deadly weapon with the intent to kill inflicting serious injury, and discharging a weapon into occupied property. Under the pretrial release order for the two first-degree murder charges, defendant's release was not authorized. However, under the pretrial release orders for the other three charges, bond was set at $2.5 million. On 23 November 2009, defendant applied for a writ of habeas corpus, seeking "to remove the restraint of his liberty with respect to his being held unlawfully without bond since July 2, 2008 on two charges of first degree murder." In essence, he argued that "the only criminal offense for which a defendant may be held without

bond is capital murder, and because [he] ha[d] not been properly and lawfully charged with the murder of any living person, his restraint without bond [was] illegal and unlawful." Defendant sought discharge pursuant to N.C. Gen. Stat. § 17-33 with respect to the release order for the murder charges against him and remand pursuant to N.C. Gen. Stat. § 17-35 with respect to the assault charge.

Judge Gary E. Trawick issued a writ of habeas corpus on 1 December 2009 and ordered an evidentiary hearing to resolve the issues raised by defendant in his application.

On 8 November 2010, Judge Russell L. Lanier, Jr., held the evidentiary hearing pursuant to the writ of habeas corpus. He heard testimony from a number of experts, including the obstetrician who was present and attending when the twins were delivered, the surgical pathologist who conducted the post-mortem examination of the twins, a professor of pathology who was the medical examiner in this case, the labor and delivery nurse who prepared the twins' delivery report, an expert in obstetrics and gynecology who reviewed the medical records and reports for the defense, and an expert in preventative medicine and obstetrics and gynecology. Judge Lanier found all of the witnesses to be highly credible and noted that there was no material conflict in their testimony. In addition, the State asserted that it would have called the same witnesses, with the exception of the obstetrics and gynecology expert who reviewed the medical records and reports for the defense.

At the end of the hearing, Judge Lanier concluded that the twins were never alive, under the law, and thus they could not have been murdered. Following that ruling, defendant moved to dismiss the murder charges under N.C. Gen. Stat. § 15A-954. Judge Lanier allowed the motion, and the State gave oral notice of appeal.[1]

On 28 December 2010, the trial court entered the relief order, which included twenty-five findings of fact and five conclusions of law. It concluded that the named victims in the murder indictments "did not meet any of the three requirements under the common law

1. At the conclusion of the hearing, both parties and Judge Lanier agreed that the case would continue on to the Court of Appeals. The prosecutor noted that the "State would be reviewing of the Court's decision either by way of a Writ of Certiorari or interlocutory appeal." Judge Lanier also made a comment about whether the motion to dismiss should be stayed until the Court of Appeals decided the issues stemming from the relief order. Based on these comments and also comments made by the Assistant Attorney General during oral argument, it appears clear that the State's decision not to challenge the relief order by filing a petition for certiorari was a deliberate one.

born-alive rule. They were not viable. They were not born alive as defined under the common-law rule. They did not die as a result of injuries inflicted upon them *in utero* prior to birth." Because the named victims in the murder indictments were not alive, they could not lawfully be the victims of any homicide offense. "As a result, the murder indictments in this case do not properly charge any offense, and they confer no jurisdiction on any court to establish conditions of pretrial release." Thus, the court concluded, defendant's "current detention without bond based on pretrial release orders denying the availability of bond on the basis that [defendant] is charged with capital offenses is unlawful under N.C. Gen. Stat. § 17-1 and [defendant] is entitled to immediate relief from this unlawful restraint." Finally, the court concluded that the appropriate remedy was "to have the no-bond pretrial release orders in the murder cases vacated, and for [defendant] to be remanded to the custody of the Sheriff of Duplin [C]ounty under the authority of the pretrial release orders in his non-capital cases, which are unaffected by this order and remain valid."

On 28 December 2010, the trial court also entered its order dismissing the murder charges. The trial court incorporated the relief order by reference and stated that its ruling in the habeas proceeding

> constitutes an adjudication in the defendant's favor of factual and legal issues that are essential to a successful prosecution in this case. In sum, this Court's ruling that the named victims do not qualify as potential homicide victims under the born-alive rule makes a successful prosecution in this case impossible.

Sua sponte, the trial court also "note[d] that a further implication of its ruling in the habeas proceeding is that the indictment in this case fails to charge an offense and that N.C. Gen. Stat. § 15A-954(a)(10) also applies and requires dismissal of the murder charges in this case."

The State appeals only the order dismissing the murder charges against defendant; the State did not file a petition for certiorari for this Court to review the relief order. Without question, the State has the right to appeal an order dismissing the charges against defendant under N.C. Gen. Stat. § 15A-1445(a)(1), and, also without question, the State must petition for certiorari if it wants this Court to review the relief order, *Surratt v. State*, 276 N.C. 725, 726, 174 S.E.2d 524, 525 (1970). At oral argument, the State was adamant that we need not review the relief order and it has no interest in our review of the relief order. It asserts that we can grant the relief it seeks without disturbing the relief order. At issue, then, is whether we can review the dis-

missal without also reviewing the relief order. We conclude that we cannot and that the State should have petitioned for certiorari in addition to directly appealing the dismissal order. Because we cannot review the dismissal without also reviewing the relief order, we dismiss the State's appeal. We do not address the merits.

If we were to review the dismissal and find error, this would allow the State to proceed on the murder charges against defendant. However, because the writ was never challenged and would still be in place when the State returned to its initial prosecution, imprisoning defendant on the charge of murder would be unlawful. *See* N.C. Gen. Stat. § 17-33 (2011) ("If no legal cause is shown for such imprisonment or restraint, or for the continuance thereof, the court or judge shall discharge the party from the custody or restraint under which he is held."); N.C. Gen. Stat. § 17-25 (2011) ("If any person shall knowingly again imprison or detain one who has been set at large upon any writ of habeas corpus, for the same cause, other than by the legal process or order of the court wherein he is bound by recognizance to appear, or of any other court having jurisdiction in the case, he shall be guilty of a Class 1 misdemeanor."); *see also In re Williams*, 149 N.C. 436, 437, 63 S.E. 108, 109 (1908) ("The prisoner having been discharged, no practical purpose is to be subserved in prosecuting this appeal, even if the State had such right which, it is plainly intimated in *S. v. Miller*, 97 N.C. 451[, 1 S.E. 776,] is not given the State. Proceedings in *habeas corpus*, the object of which is to release a person from illegal restraint, must necessarily be summary to be useful, and if action could be arrested by an appeal upon the part of the State, the great writ of liberty would be deprived of its most beneficial results."). These, obviously, are incompatible outcomes.

Moreover, although at common law res judicata does not attach to the *denial* of habeas relief, *Schlup v. Delo*, 513 U.S. 298, 317, 130 L. Ed. 2d 808, 829 (1995),

> in *habeas corpus* proceedings, the general rule in most jurisdictions is that an order or judgment *discharging* a person in such proceedings is conclusive in his favor that he is illegally held in custody and is *res judicata* of all issues of law and fact necessarily involved in that result, and he cannot again be arrested for the same cause; that is, *upon the same warrant, indictment, or information which was therein held illegal.*

State v. Lewis, 274 N.C. 438, 443, 164 S.E.2d 177, 180 (1968) (quoting *State ex rel. Cacciatore v. Drumbright*, 156 So. 721, 723 (Fla. 1934)

(alterations removed)). This rule prevents the incompatible result that stems from allowing the State to proceed on an indictment that has been held to be illegal by order of discharge upon a writ of habeas corpus without also vacating the discharge order. We must therefore dismiss the State's appeal for lack of jurisdiction.

Dismissed.

Judge MCGEE concurs.

Judge HUNTER, JR., Robert N., concurs in result only.

STATE OF NORTH CAROLINA v. WILLIAM LATHAM REYNOLDS

No. COA11-536

(Filed 7 February 2012)

Sentencing—guilty plea—failure to properly inform defendant of maximum sentence—guilty plea not voluntary

The trial court's failure to properly inform defendant of the maximum sentence he faced called into question the voluntariness of his guilty plea. Because defendant's plea arrangement contemplated his being sentenced to 135 months in prison, instead of the 138 months he was actually sentenced to, in exchange for pleading guilty to felony larceny, felony breaking and entering, and having attained habitual felon status, the trial court's error tainted all of defendant's guilty pleas.

Appeal by Defendant from judgment entered 23 February 2010 by Judge Zoro J. Guice, Jr. in Superior Court, Lincoln County. Heard in the Court of Appeals 25 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.

John T. Hall for Defendant.

McGEE, Judge.

Pursuant to a plea agreement with the State, Defendant pleaded guilty to felony breaking and entering and felony larceny on 23

February 2010. Defendant agreed to plead guilty provided that the State dismiss several additional charges against him. Defendant's plea arrangement stated that "Defendant will be sentenced to 135 months in the DOC." The trial court accepted Defendant's guilty plea and sentenced Defendant, as an habitual felon, to 135 to 171 months in prison. The trial court also ordered Defendant to pay $3,015.00 in restitution. Defendant filed a *pro se* motion for appropriate relief (MAR) on 2 August 2010, which the trial court denied in an order dated the same day. Defendant petitioned this Court for a writ of certiorari, which was granted 27 September 2010, "for the purpose of reviewing the judgment dated 23 February 2010[.]"

I. Issues on Appeal

Defendant raises the following issues on appeal: (1) the trial court erred by entering an order for restitution in the amount of $3,015.00; (2) the trial court erred by accepting Defendant's guilty plea because Defendant had not been informed of the maximum possible sentence that could be imposed; and (3) the trial court abused its discretion in denying Defendant's MAR.

II. Guilty Plea

Because we find it dispositive of Defendant's appeal, we first address Defendant's argument concerning his guilty plea. Defendant argues that the trial court erred in accepting his guilty plea because he could not have entered the guilty plea knowingly, voluntarily, or understandingly because he had not been informed of the correct maximum sentence. Defendant argues that he was misinformed, in that the trial court told him the maximum possible sentence would be 168 months' imprisonment when, in fact, the maximum sentence was 171 months. The State and Defendant agree that the appropriate maximum possible sentence corresponding to a minimum sentence of 135 months was, in fact, 171 months. *See* N.C. Gen. Stat. § 15A-1340.17 (2009).

N.C. Gen. Stat. § 15A-1022(a)(6) (2011) provides in pertinent part:

> (a) . . . a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and: . . . .
>
> (6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge[.]

The State contends that Defendant has failed to file a complete record upon which our Court can conduct an analysis. The record in this case contains two identical copies of a plea transcript regarding Defendant's guilty pleas to felony larceny and felony breaking and entering. There is no copy of the plea transcript with respect to Defendant's having attained the status of an habitual felon. However, the transcript of the hearing at which the trial court accepted Defendant's guilty plea contains an exchange between Defendant and the trial court during Defendant's plea colloquy. Because the trial court was statutorily obligated to "personally address" Defendant and to inform Defendant of the consequences of his plea, and because the error that Defendant assigns to the trial court occurred during Defendant's plea colloquy, we find the record sufficient to review Defendant's argument.

The State also argues that Defendant has failed to show that there was prejudicial error to Defendant because "any variance in the maximum sentence the court stated . . . [D]efendant would receive did not affect his decision to plead guilty[.]" The State argues that Defendant "did not object during sentencing or contend that he was not informed or aware that the maximum sentence was 171 months." However, we find that the State's argument relies on an incorrect standard of review, as well as a misapprehension of the timing of the acceptance of Defendant's guilty plea.

In *State v. McNeill*, 158 N.C. App. 96, 580 S.E.2d 27 (2003), which the State cites in its argument, this Court noted the following:

> Our Courts have rejected a ritualistic or strict approach in applying these standards and determining remedies associated with violations of G.S. § 15A-1022. Even when a violation occurs, there must be prejudice before a plea will be set aside. Moreover, in examining prejudicial error, courts must "look to the totality of the circumstances and determine whether noncompliance with the statute either affected defendant's decision to plead or undermine the plea's validity."
>
> Because of the additional term of imprisonment associated with habitual offender status, this constitutes a direct consequence of one's plea to the same. As a result, the State must prove the error was harmless beyond a reasonable doubt.

McNeill, 158 N.C. App. at 103-04, 580 S.E.2d at 31 (citations omitted).

We are not persuaded that the State has shown that the trial court's informing Defendant of an incorrect maximum sentence was harmless error. During Defendant's plea hearing, the following exchange occurred:

> The Court: Have you agreed to plead guilty as a result of a plea arrangement?
>
> [Defendant]: Yes, sir.
>
> The Court: Are these the terms and conditions that you're pleading guilty to: One count of breaking and entering and larceny and pleading guilty to being an habitual felon and that all matters are to be consolidated in one count of habitual felony and that you will receive a minimum sentence of 135 months, and I don't have that sheet before me, maximum 135—minimum 135, maximum 168; is that right?
>
> [The State]: Yes.
>
> The Court: It's the chart as of 12/1/95 I believe. 135 minimum, 168 maximum. Do you understand that; sir?
>
> [Defendant]: Yes, sir.
>
> The Court: Do you now personally accept this arrangement?
>
> [Defendant]: Yes, sir.
>
> . . . .
>
> The Court: As to the habitual felony charge, upon consideration of the record proper, the evidence, a factual presentation offered, the answers of . . . [D]efendant, statements of the lawyer for . . . [D]efendant and the [State], the [c]ourt finds that there is a factual basis for the entry of the plea, that . . . [D]efendant is satisfied with his lawyer's legal services, that . . . [D]efendant is competent to stand trial, that the State has provided . . . [D]efendant with appropriate notice of any aggravating factors and/or sentencing points and . . . [D]defendant has waived such notice, that the plea is the informed choice of . . . [D]efendant and is made freely, voluntarily, and understandingly. . . . [D]efendant's plea is hereby accepted by the [c]ourt and is ordered recorded.

Anything for the State before sentencing?

[The State]: No, sir.

The Court: For . . . [D]efendant?

[Defendant]: No, sir.

Thus, when the trial court accepted Defendant's guilty plea, Defendant had been misinformed as to the maximum sentence he would receive as a result of his guilty plea. While the difference between the maximum sentence described by the trial court and the correct maximum sentence is only three months, we cannot say that an additional three months of possible imprisonment is not prejudicial. Further, on these facts we are reluctant to establish precedent for a trial court's providing incorrect information to a defendant prior to accepting a guilty plea.

We find the facts of the present case to be similar to those in *State v. McTaggart*, 171 N.C. App. 516, 615 S.E.2d 737, 2005 WL 1669217 (2005). Though unpublished, we find the reasoning in *McTaggart* to be sound. In *McTaggart*, this Court found that a defendant had not knowingly, voluntarily, and understandingly entered a guilty plea when the trial court informed him that the minimum sentence was 70 months, but "[c]learly . . . did not inform defendant of 'the maximum possible sentence' as required by N.C. Gen. Stat. § 15A-1022." *Id.* at *2.

> We also note that not only did the court fail to inform defendant of the maximum sentence, but an incorrect maximum was listed on the sentencing worksheet attached to the transcript of plea. The maximum sentence listed on that worksheet is "59 mos (sub. to stat. minimums)." Neither defendant's counsel nor the trial judge realized the error. The trial court and defense counsel incorrectly assessed the maximum sentence to which defendant was exposed. There is no evidence in the instant case that anyone accurately explained the maximum sentence to defendant prior to entry of his plea. Because the maximum sentence determines the projected prison release date, defendant faced an additional fourteen months of imprisonment. The increase in defendant's period of confinement calls into question the voluntariness of his guilty plea. Under the facts of this case, the trial court's failure to inform defendant of the consequences of his plea undermines the validity of defendant's plea.

Id. at *3.

In the present case, as in *McTaggart*, we find that the trial court's failure to properly inform Defendant of the maximum sentence he faced "calls into question the voluntariness of his guilty plea." *Id.* Because Defendant's plea arrangement contemplated his being sentenced to 135 months in prison in exchange for pleading guilty to felony larceny, felony breaking and entering, and having attained habitual felon status, we find that the trial court's error tainted all of Defendant's guilty pleas. Therefore, we must vacate Defendant's convictions and remand for a new trial. In light of our holding, we need not address Defendant's arguments concerning restitution and his MAR.

Vacated and remanded for a new trial.

Judges HUNTER, Robert C. and CALABRIA concur.

JOHNSTON COUNTY, ON BEHALF OF DIANE BUGGE, PLAINTIFF V. CHRISTOPHER M. BUGGE, DEFENDANT

No. COA11-869

(Filed 7 February 2012)

1. Appeal and Error—incomplete transcript—appellate review not precluded

Plaintiff's motion to dismiss defendant's appeal in a child support case was denied. The incomplete transcript did not preclude appellate review of the appeal.

2. Child Custody and Support—motion to modify—presumption of substantial change of circumstance—rebutted by evidence

The trial court did not abuse its discretion in a child support case by failing to make sufficient findings of fact concerning substantial change of circumstances. Although defendant was entitled to the presumption of a substantial change in circumstances, the presumption was rebutted by evidence that defendant intentionally left his job, thereby voluntarily depressing his income. Further, defendant's contention that his income was inapplicable when the basis for the modification was a three year review was

rejected and his argument that the trial court improperly deviated from the child support guidelines was overruled.

Appeal by Defendant from order entered 7 February 2011 by Judge Charles Bullock in Johnston County District Court. Heard in the Court of Appeals 1 December 2011.

Holland & O'Connor, PLLC, by Jennifer S. O'Connor, for Plaintiff-Appellee.

Law Office of Elaine B. Wilson, by Elaine B. Wilson, for Defendant-Appellant.

BEASLEY, Judge.

Christopher Bugge (Defendant) appeals the trial court's denial of his motion to decrease his child support payments. For the following reasons, we affirm.

Defendant and Diane Bugge (Plaintiff) were married on 16 December 1995 and later separated on 5 January 2007. There were two children born of the marriage. On 15 February 2007, the parties entered into a consent order for child support. The consent order provided that Defendant would pay $1,800 per month in child support. On 29 October 2007, the parties entered into another consent agreement which lowered Defendant's child support payments to $830 per month.

Plaintiff requested intervention from the Johnston County Child Support Enforcement Agency (the Agency) and on 15 June 2009, the Agency filed a motion to intervene on behalf of Plaintiff. The court permitted intervention and an order was entered on 21 July 2009 that required Defendant to continue to pay $830 per month plus arrears.

On 15 October 2010, Defendant moved to modify the child support order and the trial court denied this motion concluding that there had been no change in circumstances. On 3 December 2010, Defendant filed another motion to modify the child support order. Defendant's motion to decrease his child support payment was denied. On 4 February 2011, Defendant again moved to decrease his child support and the trial court denied his motion on 7 February 2011. On 9 March 2011, Defendant filed timely notice of appeal.

[1] We first address Plaintiff's motion to dismiss. Plaintiff argues that the incomplete transcript precludes appellate review of this appeal. We disagree.

A review of the transcript reveals that there are small portions of the hearing where the court's rulings are inaudible. Plaintiff argues that the inaudible portions of the court's reasoning for denying modification of the child support order renders this Court unable to review the merits of this appeal. "[A]lthough the transcript in the case *sub judice* cannot be described as a model of reporting service, it is not so inaccurate as to prevent this Court from reviewing it for errors. . . ." *State v. Hammond*, 141 N.C. App. 152, 168, 541 S.E.2d 166, 177-78 (2010) (citations omitted). Moreover,

> it is not necessary to dismiss [the] appeal in light of the other documents in the record and defendant's assignments of error. Appellate Rule 9(a)(1)(v) states that the record shall contain "so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned. . . ."

Napowsa v. Langston, 95 N.C. App. 14, 19, 381 S.E.2d 882, 885 (1989). In this case, the trial court's order included written findings of fact and conclusions of law. Additionally, Defendant does not argue that the trial court's findings are not supported by competent evidence, but instead argues that the trial court applied an incorrect legal standard. Under these circumstances, we will not dismiss Defendant's appeal and will now address the appeal on the merits.

[2] Defendant argues that the trial court abused its discretion because it did not make sufficient findings of fact concerning substantial change of circumstances. We disagree.

"In reviewing child support orders, our review is limited to a determination [of] whether the trial court abused its discretion." *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005). "Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* "The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Id.*

Pursuant to N.C. Gen. Stat. § 50-13.7 (a) (2011), a trial court is authorized to modify a child support order at any time upon a motion in the cause by an interested party and a showing of changed circumstances. "Modification of an order requires a two-step process. First, a court must determine whether there has been a substantial

change in circumstances since the date the existing child support order was entered." *Head v. Mosier*, 197 N.C. App. 328, 333, 677 S.E.2d 191, 195 (2009) (citations omitted). The trial court only moves to the second step if the court finds there has been a substantial change in circumstances. *Id.* at 334, 677 S.E.2d at 196.

The 2009 Child Support Guidelines provide:

> In a proceeding to modify the amount of child support payable under a child support order that was entered at least three years before the pending motion to modify was filed, a difference of 15% or more between the amount of child support payable under the existing order and the amount of child support resulting from application of the guidelines based on the parents' current incomes and circumstances shall be presumed to constitute a substantial change of circumstances warranting modification of the existing child support order.

N.C. Child Support Guidelines 2011 Ann. R. N.C. 41, 46. "When the moving party has presented evidence that satisfies the requirements of the fifteen percent presumption, they [sic] do not need to show a change of circumstances by other means." *Head*, 197 N.C. App. at 333-34, 677 S.E.2d at 196. (citations omitted).

However, "[t]he fact that a husband's salary or income has been reduced substantially does not automatically entitle him to a reduction." *Wolf v. Wolf*, 151 N.C. App. 523, 526, 566 S.E.2d 516, 518 (2002).

> The trial court may refuse to modify support and/or alimony on the basis of an individual's earning capacity instead of his actual income when the evidence presented to the trial court shows that a husband has disregarded his marital and parental obligations by: (1) failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family's financial responsibilities, (3) acting in deliberate disregard for his support obligations, (4) refusing to seek or to accept gainful employment, (5) wilfully refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, or (8) ***intentionally leaving his employment to go into another business.***

Id. at 526-27, 566 S.E.2d at 518-19. (citations omitted) (emphasis added). "When the evidence shows that a party has acted in 'bad faith', the trial court may refuse to modify the support awards." *Id.*

Defendant contends that he was not afforded the presumption of a substantial change of circumstances provided by the N.C. Child Support Guidelines. Defendant is correct in his assertion that there is a presumption that a substantial change of circumstances has occurred in this case. However, "the guidelines apply as a rebuttable presumption in all legal proceedings involving the child support obligation of a parent. . . ." N.C. Child Support Guidelines, 2009 Ann. R. N.C. 41.

In the case *sub judice*, the trial court found that

> DEFENDANT VOLUNTARILY LEFT HIS JOB IN NORTH CAROLINA TO RELOCATE TO FLORIDA TO PURSUE A CAREER IN COMPUTERS AND IS CURRENTLY PURSUING A CAREER AS A MEDICAL THERAPU[T]IC MASSAGE THERAPIST WITHOUT ANY CONCERN [FOR] THE WELFARE OF [HIS] MINOR CHILDREN.

The trial court may deny modification upon a finding that Defendant intentionally left his employment. *See Wolf*, 151 N.C. App. at 527, 566 S.E.2d at 519. Although Defendant was entitled to the presumption of a substantial change in circumstances, the presumption was rebutted by evidence that Defendant intentionally left his job, thereby voluntarily depressing his income.

Further, Defendant argues that the trial court did not have the authority to determine that Defendant depressed his income because the ground for modification was not his change in income, but the modification was based on a three year review of the initial child support order. Defendant erroneously argues that the lower court had no authority to use Defendant's income as a factor in determining whether to grant or deny modification and; therefore, the trial court erred by relying on Defendant's income in determining whether there had been a substantial change in circumstances that warranted a modification of the child support order. Defendant provides no case support for this argument. Moreover, a plain reading of N.C. Gen. Stat. § 50-13.7(a) (2011) clearly shows that Defendant's income is also determinative when requesting modification based on a three year review. We therefore reject Defendant's contention that the income of a party seeking modification is inapplicable when the basis for the modification is a three year review.

Defendant further argues that the trial court improperly deviated from the child support guidelines. This argument is based on Defendant's erroneous contention that the trial court lacked authority to use Defendant's income as a factor for denying the modification. Accordingly, Defendant's remaining argument is also overruled.

Affirmed.

Judges ERVIN and THIGPEN concur.

IN THE MATTER OF ROBERT DALE HUTCHINSON

No. COA11-757

(Filed 7 February 2012)

Appeal and Error—preservation of issues—argument not raised in trial court—not subject matter jurisdiction issue

The State failed to properly preserve for appeal its sole argument regarding its consent to the termination of respondent's sex offender registration and its appeal was dismissed. The State failed to make its argument before the trial court and its appeal did not present an issue of subject matter jurisdiction.

Appeal by Respondent from order entered 12 January 2011 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 14 November 2011.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for Petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for Respondent.

STEPHENS, Judge.

After being charged with failing to update his address in compliance with the North Carolina sex offender registration statutes, Petitioner Robert Dale Hutchinson filed in Brunswick County Superior Court a petition to terminate his sex offender registration requirement. At the hearing on Hutchinson's petition, the State con-

sented to termination of Hutchinson's registration requirement,[1] and Judge Ola M. Lewis granted the petition in an order entered 12 January 2011. Thereafter, the order was received by the State Bureau of Investigation (the "SBI"), which, after forwarding the order to and receiving it back from the SBI's legal counsel, removed Hutchinson from the North Carolina sex offender registry. The SBI notified the Brunswick County Sheriff's Office of Hutchinson's removal on 4 February 2011.

On 9 February 2011, however, the State filed a notice of appeal of Judge Lewis' order, along with a motion to stay enforcement of that order. The State's motion was heard on 31 May 2011 by Superior Court Judge Jay D. Hockenbury. Despite consenting to termination of Hutchinson's registration and expressing willingness to expedite that process at the January hearing before Judge Lewis, the State argued at the May hearing before Judge Hockenbury that Hutchinson's registration should not be terminated, that enforcement of the termination order—with which the State had already voluntarily complied—should be stayed, and that Hutchinson should be reinstated on the sex offender registry. Over Hutchinson's objections, the State's motion to stay was granted by Judge Hockenbury.

Thereafter, Hutchinson filed with this Court a motion seeking a temporary stay of Judge Hockenbury's order and requesting this Court to issue its writ of *certiorari* and/or its writ of *supersedeas* "to review the 28 July 2011 decision of [Judge Hockenbury]." On 29 July 2011, this Court allowed Hutchinson's motion for temporary stay. On 10 August 2011, this Court granted Hutchinson's petition for writ of

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1. From the hearing on Hutchinson's petition:

> [ADA]: Your Honor, [this] is the petition that [counsel for petitioner] and I spoke with you about to terminate sex offender registration . . . . I'm not objecting at this point to that registration requirement being terminated. It's my understanding that [] Hutchinson is going to be moving out of State to the State of Alabama. Is that correct?
>
> [Counsel for petitioner]: That's correct.
>
> . . . .
>
> [ADA]: He has a job lined up for him there and we're not wanting to hold him up by these additional requirements.
>
> . . . .
>
> [ADA]: And, your Honor, if you do grant the petition, as we've discussed, . . . the State will be taking a dismissal on [Hutchinson's charge for failure to comply with the registration requirements] and we will get that to Madame clerk by the end of the day. We will fax the jail so that that won't hold him up.

supersedeas, referred his petition for writ of *certiorari* to the panel assigned to hear the appeal, and stayed Judge Hockenbury's order and "[a]ll further proceedings in this matter" "pending the outcome of the appeal taken to this Court." It was further ordered that "Hutchinson shall not be reinstated to the sexual offender registry at this time."

On 15 August 2011, Hutchinson filed a motion to dismiss the State's appeal of Judge Lewis' order. In that motion, Hutchinson argued that the State had not properly preserved any issues for appeal and, thus, the State's appeal of Judge Lewis' order terminating Hutchinson's registration should be dismissed. For the following reasons, we agree.

As noted *supra*, the State consented to termination of Hutchinson's registration requirement at the hearing before Judge Lewis. However, on appeal, the State now contends that the registration requirement should not have been terminated because Hutchinson had not been registered in North Carolina for 10 years.[2] It is a well-established rule in our appellate courts that a contention not raised and argued in the trial court may not be raised and argued for the first time on appeal. *E.g.*, *Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003). Since the State did not argue to the trial court that Hutchinson's registration requirement could not be terminated because Hutchinson had not been registered for the requisite 10 years, the State cannot raise that argument on appeal. *See id.; see also* N.C. R. App. P. 10(a)(1).

Nevertheless, the State contends that it is not barred by the general rule stated above because the State's appeal presents a question of subject matter jurisdiction and because such a question may be raised at any time. We are unpersuaded. The question the State raises on appeal is whether a trial court may grant a petition to terminate a sex offender's registration requirement where the petitioner has been registered in North Carolina for fewer than 10 years. This Court recently answered that question in *In re Borden*, ___ N.C. App. ___, ___ S.E.2d ___ (2011), where we reversed a trial court's termination of the petitioner's registration requirement on the ground that the petitioner had not been registered in North Carolina for at least 10 years. This Court in *Borden* did not hold that the trial court lacked

2. Section 14-208.12A(a) provides that "[t]en years from the date of initial county registration, a person required to register . . . may petition the superior court to terminate the [] registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article." N.C. Gen. Stat. § 14-208.12A(a) (2011).

jurisdiction to rule on the petition in the first place because the petitioner had not been registered in North Carolina for 10 years. On the contrary, in *Borden* we held that "the trial court *erred* when it terminated [the petitioner's] sex offender registration requirement," and we "reverse[d] the trial court's order." *Id.* at ___, ___ S.E.2d at ___ (emphasis added). The obvious implication from *reversing* a trial court's ruling on a petition filed by a petitioner who has been registered in North Carolina for fewer than 10 years—and thereby instructing the trial court to enter an order denying the petition—is that the trial court has subject matter jurisdiction to rule on petitions for termination of registration filed by petitioners who have been registered in North Carolina for fewer than 10 years. We are bound by that decision. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Accordingly, the State's argument that Hutchinson's petition could not be granted because he had not been registered in North Carolina for 10 years does not raise a question of subject matter jurisdiction and, therefore, was waived when the State failed to advance that argument before the trial court.

Because the State failed to properly preserve its sole argument on appeal, the appeal must be dismissed. *Estates, Inc. v. Town of Chapel Hill*, 130 N.C. App. 664, 666, 504 S.E.2d 296, 298 (1998). Further, this Court's writ of *supersedeas* and temporary stay are dissolved. As for Hutchinson's petition for writ of *certiorari* to review Judge Hockenbury's order staying Judge Lewis' order terminating Hutchinson's registration requirement, we grant *certiorari* and hold that because the State's appeal from Judge Lewis' order is dismissed, Judge Hockenbury's stay of enforcement of Judge Lewis' order must be dissolved.

Appeal DISMISSED; writ of *supersedeas* and temporary stay DISSOLVED; writ of *certiorari* GRANTED; trial court's stay DISSOLVED.

Chief Judge MARTIN and Judge ELMORE concur.

SEAL POLYMER INDUSTRIES-BHD, PLAINTIFF v. MED-EXPRESS, INC., USA, DEFENDANT

No. COA11-1101

(Filed 7 February 2012)

Judgments—foreign—full faith and credit—presumption not rebutted

The trial court did not err by denying defendant's motion for relief from a foreign judgment and enforcing a judgment from an Illinois court. Defendant failed to rebut the presumption that the Illinois judgment was entitled to full faith and credit.

Appeal by defendant from order entered 21 June 2011 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 23 January 2012.

Robert J. Deutsch, P.A., by Tikkun A.S. Gottschalk, for plaintiff-appellee.

Stephen Barnwell, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Med-Express, Inc., USA appeals from an order denying its motion for relief from a foreign judgment and enforcing a 14 March 2011 judgment from an Illinois court. For the following reasons, we affirm the order of the trial court.

On 11 December 2009, plaintiff, Seal Polymer Industries-BHD, filed a complaint in the Circuit Court of Cook County, Illinois, to collect a debt in the amount of $104,000.00, plus interest and costs, from defendant related to the sale of two freight containers of latex gloves. Defendant informed plaintiff that, rather than filing an answer, it would not make an appearance based on its belief that it had no contacts with Illinois and would attack the judgment based on personal jurisdiction in the event that plaintiff thereafter tried to enforce the judgment in North Carolina. Defendant also sent a letter to this effect to the Clerk of Cook County, Illinois, and to the trial court judge, the Honorable Judge Ronald Bartkowicz. Judge Bartkowicz ultimately entered an order, which contained no written findings of fact, awarding $104,040.00 to plaintiff on 14 March 2011.

Plaintiff filed a Notice of Filing Foreign Judgment and a copy of the Illinois judgment in Buncombe County Superior Court on 3 May

2011 pursuant to N.C.G.S. § 1C-1704, along with an affidavit from its attorney affirming that the judgment is final and unsatisfied. Defendant filed a Motion for Relief from Foreign Judgment and Notice of Defense. After a hearing, the superior court denied defendant's motion for relief and ruled that the Illinois judgment is enforceable under N.C.G.S. §§ 1C-1701 through 1C-1705. Defendant appeals.

The sole issue on appeal is whether the trial court erred in denying defendant's Motion for Relief from Foreign Judgment and Notice of Defense and concluding that the Illinois judgment is enforceable in North Carolina.

Defendant first contends its Motion for Relief contained evidence which rebutted the presumption that the foreign judgment was enforceable, and consequently, the trial court erred in enforcing the foreign judgment. We disagree.

Under N.C.G.S. § 1C-1705(a), a "judgment debtor may file a motion for relief from, or notice of defense to, [a] foreign judgment . . . on [any ground] for which relief from a judgment of this State would be allowed." N.C. Gen. Stat. § 1C-1705(a) (2011). The judgment creditor has the burden of proving that the foreign judgment is entitled to full faith and credit in North Carolina. N.C. Gen. Stat. § 1C-1705(b) (2011). In a proceeding for enforcement of a foreign judgment, the introduction into evidence of an authenticated copy of the judgment establishes a presumption that it is entitled to full faith and credit. *Lust v. Fountain of Life, Inc.*, 110 N.C. App. 298, 301, 429 S.E.2d 435, 437 (1993). The judgment debtor may rebut this presumption "upon a showing that the rendering court did not have . . . jurisdiction over the parties." *Id.* The judgment creditor, however, is not required to bring forth any evidence to show that no defenses available to the debtor are valid. *Id.* at 302, 429 S.E.2d at 437. "[W]hen a judgment of a court of another state is challenged on the grounds of jurisdiction . . . there is a presumption the court had jurisdiction until the contrary is shown." *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969).

In the instant case, plaintiff had the burden of proving that the foreign judgment is entitled to full faith and credit. Plaintiff met this burden by attaching an authenticated copy of the Illinois judgment to its Notice of Filing Foreign Judgment. Thus, defendant needed to present evidence to rebut the presumption that the judgment is enforceable by asserting a defense under N.C.G.S. § 1C-1705(a). In its Motion for Relief from Foreign Judgment and Notice of Defense,

defendant failed to present any evidence or assert any factual allegations which would support a finding that the Illinois court lacked personal jurisdiction. Rather, defendant merely stated that it was incorporated under North Carolina law, had its principal place of business in North Carolina, and that it had "no minimum contacts with the State of Illinois." This conclusory statement alone is insufficient to establish the affirmative defense of lack of personal jurisdiction. *See Ft. Recovery Indus., Inc. v. Perry*, 57 N.C. App. 354, 356-57, 291 S.E.2d 329, 331 (1982). Therefore, defendant has failed to rebut the presumption that the Illinois judgment is entitled to full faith and credit.

Defendant next contends the foreign judgment is not enforceable because neither the Illinois order, nor the North Carolina order enforcing it, include findings of fact. We disagree.

Illinois judgments are valid if they state the name of the defendant and amount of the judgment; they do not need to contain findings of fact to be enforceable. *See Bell Discount Corp. v. Pete Weck's Auto Serv., Inc.*, 124 N.E.2d 674, 675 (Ill. App. Ct. 1st Dist. 1954). In North Carolina, "[e]ither party may request that the trial court make findings regarding personal jurisdiction, but in the absence of such request, findings are not required." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217, *appeal dismissed and disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000). "Where no [written] findings are made, proper findings are presumed," and therefore, "our role on appeal is to review the record for competent evidence to support these presumed findings." *Id.* at 615, 532 S.E.2d at 217-18. The admission of an authenticated copy of the Illinois judgment established a presumption that there was no defect in personal jurisdiction, which defendant was then required to rebut. As discussed above, defendant failed to introduce factual evidence that the Illinois trial court lacked personal jurisdiction over it because it merely recited that it was a North Carolina corporation that did not have "minimum contacts" with Illinois. Therefore, because defendant has not rebutted the presumption that there was personal jurisdiction in the instant case, we hold that the trial court did not err in enforcing the Illinois judgment.

Affirmed.

Judges McGEE and CALABRIA concur.

STATE OF NORTH CAROLINA v. MARSHA LYNN WILLIAMS [INTERNATIONAL FIDELITY INS. CO., BEASLEY BAIL BONDING COMPANY, INC.]

No. COA11-721

(Filed 7 February 2012)

1. Sureties—bond forfeiture—motion to set aside—untimely filed

The trial court did not err in a bond forfeiture case when it denied the bond surety's motion to set aside a bond forfeiture order. As deadlines for filing documents with the court are subject to the hours when the court is open for business, surety filed the motion to set aside forfeiture outside the 150 days required under N.C.G.S. § 15A-544.5 (d).

2. Sureties—bond forfeiture—partially remitted—abuse of discretion—no legal authority cited

The trial court did not abuse its discretion in a bond forfeiture case by failing to fully remit the forfeited amount to the bond surety pursuant to N.C.G.S. § 15A-544.8(b)(2). Surety cited no authority for its argument that because the trial court found extraordinary circumstances warranting partial remission, remission should be in full unless the trial court makes specific findings supporting partial remission.

3. Appeal and Error—preservation of issues—argument not alternate basis to support order—failure to cross-appeal

Appellee failed to preserve for appeal its argument in a bond forfeiture case that the trial court abused its discretion by granting a partial remission. Appellee's argument did not provide an alternate basis for supporting the trial court's order and appellee did not raise the issue on cross-appeal.

Appeal by Surety from order entered 14 February 2011 by Judge Cheryl Spencer in Craven County District Court. Heard in the Court of Appeals 1 December 2011.

White & Allen, P.A., by Brian J. Gatchel, for Appellee Craven County Board of Education.

Greene & Wilson, P.A., by Kelly L. Greene and Thomas Reston Wilson for Appellant Surety.

BEASLEY, Judge.

International Fidelity Ins., Co., Beasley Bail Bonding Company, Inc. (Surety) appeals the trial court's final judgment granting it partial relief. For the following reasons, we affirm.

On 4 September 2009, Marsha Lynn Williams (Defendant) was charged with operating a motor vehicle while subject to an impairing substance, and operating a vehicle with an open container of alcoholic beverages after drinking. Surety executed a $1,500.00 appearance bond on behalf of Defendant. On 10 March 2010, Defendant failed to appear, Defendant's bond was forfeited, and a warrant was issued for her arrest. On 22 March 2010, a bond forfeiture notice was issued. The forfeiture became a final judgment on 19 August 2010.

Surety paid the total forfeiture before the close of business on 19 August 2010, but continued to search for Defendant. Surety located and surrendered Defendant to the Sheriff of Craven County on 19 August 2010 at 9:40 p.m. On 20 August 2010, Surety filed a Motion to Set Aside Forfeiture and Petition for Remission. In an order filed 14 February 2011, the trial court ordered partial remission of the bond pursuant to N.C. Gen. Stat. §15A-544.8(b)(2). On 25 February 2011, Surety filed timely notice of appeal.

[1] Surety argues that the trial court erred when it denied its motion to set aside the bond forfeiture order. We disagree.

" 'Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court. In conducting this review, we are guided by the following principles of statutory construction.' " *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009) (quoting I*n Re Proposed Assessments v. Jefferson-Pilot*, 161 N.C. App. 558, 559-60, 589 S.E.2d 179, 180-81 (2003)). "Where the language of a statute is clear and unambiguous there is no room for judicial construction and the courts must give it its plain and definite meaning, and the courts are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Id.* (internal quotation marks and citations omitted).

"The exclusive avenue for relief from forfeiture of an appearance bond (where the forfeiture has not yet become a final judgment) is provided in G.S. § 15A-544.5." *State v. Robertson*, 166 N.C. App. 669, 670-71, 603 S.E.2d 400, 401 (2004). Pursuant to N.C. Gen. Stat. § 15A-544.5 (b)(3) (2011), a forfeiture may be set aside when "[t]he defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the sheriff's receipt[.]" If a

reason to set aside forfeiture exists, then the party seeking to set aside the forfeiture must "[a]t any time before the expiration of 150 days after the date on which notice was given . . . make a written motion that the forfeiture be set aside[.]" N.C. Gen. Stat. § 15A-544.5 (d)(1) (2011).

There is no dispute about the facts of this case. Surety surrendered Defendant on 19 August 2010 to the Craven County Sheriff at 9:40 p.m. and because the court was closed, Surety filed the Motion to Set Aside forfeiture on 20 August 2010 which was outside the 150 days required under N.C. Gen. Stat. § 15A-544.5 (d). Surety argues that the 150 day period should not expire when the courthouse closes, but should be extended until 11:59 p.m.

When calculating a period of time prescribed or allowed by statute "[t]he last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday when the courthouse is closed for transactions[.]" N.C. Gen. Stat. § 1A–1, Rule 6(a) (2011). Rule 6 shows that only weekends and legal holidays are recognized as days which the statutory time limit can be automatically extended. The legislature was aware of times that the court would be closed on regular weekdays, but made no provision for how to treat weekdays after business hours. Contrary to Surety's assertion, we must assume that deadlines for filing documents with the court are subject to the hours when the court is open for business. Because the statute is clear and unambiguous, we are without authority to interpret N.C. Gen. Stat. § 15A-544.5 (d) to extend the time limits proscribed therein in the manner contended for by Surety. Therefore, Surety's argument is without merit.

[2] Next, Surety asserts that the trial court abused its discretion in failing to fully remit the forfeited amount pursuant to N.C. Gen. Stat. § 15A-544.8(b)(2) (2011).

Surety argues that because the trial court found extraordinary circumstances warranting partial remission, remission should be in full unless the trial court makes specific findings supporting partial remission. Surety cites no authority in support of this proposition. "Without [appellant] presenting a legal basis for awarding such relief, we cannot reverse the trial court. As our Supreme Court has stressed, '[i]t is not the role of the appellate courts . . . to create an appeal for an appellant.' " *Citizens Addressing Reassignment & Educ., Inc. v. Wake Cty. Bd. of Educ.*, 182 N.C. App. 241, 247, 641 S.E.2d 824, 828

(2007) (quoting *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005)).

[3] Finally, Craven County Board of Education (the Board) argues that the trial court abused its discretion by granting a partial remission where the trial court's only basis for finding extraordinary circumstances was the fact that Surety surrendered Defendant to the Craven County Sheriff. Although the Board has submitted an issue for review, this issue is not properly before us.

The North Carolina Rules of Appellate Procedure provides that an appellee "[w]ithout taking an appeal, . . . appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C.R. App. 28(c). Here, the Board did not give notice of appeal and did not raise an alternative basis in law. In *CDC Pineville, LLC v. UDRT of N.C., LLC*, 174 N.C. App. 644, 657, 622 S.E.2d 512, 521 (2005), this Court held that

> Plaintiff's cross-assignment of error regarding the damages award is not an alternative basis, but rather constitutes an attack on the judgment itself. Plaintiff's arguments concerning the damages award attempt to show how the trial court erred in its findings of fact and conclusions of law, and do not provide an "alternate basis" for supporting the court's award of damages. The correct method for plaintiff to have raised this question on appeal was to have raised the issue on cross-appeal.

Similarly, the Board attacks the trial court's grant of partial remission by arguing that the trial court's findings of fact did not support its conclusion of law. This is not an alternative basis. Therefore, we are without authority to consider the Board's argument because it failed to properly preserve the issue for appellate review.

Affirmed.

Judges ERVIN and THIGPEN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 FEBRUARY 2012)

ALLRAN v. WELLS FARGO No. 11-967	Lincoln (11CVS208)	Affirmed
BAKER v. BAKER No. 11-1010	Guilford (11CVD5329)	Affirmed
BEATTY v. JONES No. 11-414	Wake (08CVS21917)	Affirmed
BOWERS v. TEMPLE No. 11-566	Carteret (10CVS943)	Affirmed
BRAMBLETT v. BRAMBLETT No. 11-970	Forsyth (09CVD8611)	Affirmed
CAGLE v. MARRIOTT No. 11-816	Ind. Comm. (W07827)	Affirmed
CALLANAN v. WALSH No. 11-911	Transylvania (01CVD129)	Affirmed
CAPTRAN NEVADA CORP. v. THE KIRKLIN LAW FIRM No. 11-474	Moore (10CVS650)	Affirmed
CARAVANTES v. DOWLESS No. 11-577	Bladen (09CVD229)	Vacated and Remanded
DAVIS v. GROFF No. 11-948	Durham (10CVS3420)	Affirmed
DAVIS v. GROFF No. 11-1024	Durham (10CVS3420)	Dismissed
DELLINGER v. BARNES No. 11-792	McDowell (08CVS1006)	Dismissed
FORMYDUVAL v. YEDDO No. 11-584	Brunswick (09CVS2763)	Affirmed
GASPER v. THE BD. OF TRUSTEES OF HALIFAX CMTY. COLL. No. 11-675	Wake (08CVS15288)	Affirmed
IN RE A.S.Y. No. 11-952	Orange (08JT101)	Affirmed
IN RE K.D.C.T.J. & K.M.W.J. No. 11-1200 A ffirmed	Greene (09JT46-47)	Affirmed

IN RE K.K. No. 11-1180	Forsyth (09JT166)	Affirmed
IN RE R.K No. 11-900	Buncombe (09JB95)	Dismissed
IN RE S.C.U. No. 11-550	Buncombe (09JB338)	Affirmed
IN RE S.P. No. 11-1052	Nash (11JA9)	Affirmed
IN RE T.J. No. 11-1071	Wayne (09JT110)	Reversed
IN RE V.M.F. No. 11-1166	Transylvania (09JA16)	Affirmed in part reversed and part
IN RE W.L.M. No. 11-723	Mecklenburg (07JB281)	Affirmed in Part; Vacated and Remanded in Part
IN RE Z.D.N.T. No. 11-1146	Craven (10JA14)	Affirmed
JACKSON v. ES&J ENTERPRISES, INC. No. 11-225	Columbus (09CVS1005)	Affirmed
LANE v. LANE No. 11-608	Bertie (06CVD179)	Affirmed in Part; Reversed and Part
LINGERFELT v. ADVANCE TRANSP., INC No. 11-983	Ind. Comm. (120154) (PH2200)	Affirmed
MAINLINE SUPPLY CO. v. HILLCREST CONSTR., INC. No. 11-734	Union (09CVS493)	Affirmed
McCracken &AMICK, INC. v. PERDUE No. 11-199	Wake (10CVS3520)	Affirmed
PANOS v. TIMCO ENGINE CTR., INC. No. 11-803	Guilford (06CVS5771)	Affirmed
REMI v. TYRONE No. 11-877	Mecklenburg (10CVD22726)	Affirmed in Part and Reversed in Part
SCOTCHIE v. SCOTCHIE ENTERS., INC. No. 11-828	Ind. Comm. (889041)	Affirmed

SEC. CREDIT CORP. v. MID/EAST ACCEPTANCE CORP. No. 11-775	Johnston (10CVS3936)	Affirmed
SIMPSON v. ROBERTSON, No. 11-858	Mecklenburg (10CVS13429)	Affirmed
SPANISH MOSS, LLC v. WACHOVIA No. 11-510	Mecklenburg (10CVS7952)	Reversed and Remanded
STATE v. BELL No. 11-1006	Wayne (10CRS52610) (0CRS6001)	Appeal dismissed; Petition for Writ of *Certiorari* denied
STATE v. BOYD No. 11-562	Halifax (07CRS53267)	Dismissed
STATE v. BROWN No. 11-528	Moore (09CRS52522)	Affirmed
STATE v. COX No. 11-742	Sampson (10CRS51955)	No Error
STATE v. DAVIS No. 11-960	Gaston (08CRS14067-70) (08CRS61770-72)	Affirmed
STATE v. DAVIS No. 11-694	Guilford (09CRS79347) (09CRS80159-60) (09CRS80162) (09CRS80164) (09CRS80165-66)	No Error
STATE v. FEW No. 11-902	Transylvania (08CRS52222) (08CRS52224) (09CRS168)	No Error
STATE v. FULLWOOD No. 11-1054	Buncombe (09CRS56018-20) (09CRS56022)	No Error
STATE v. GAMBLE No. 11-842	Edgecombe (10CRS50734-35)	No Prejudicial Error
STATE v. GRIER No. 11-1015	Cleveland (09CRS54858)	No Prejudicial Error
STATE v. HAQQ No. 11-993	Burke (10CRS51132)	No Error
STATE v. HARRIS No. 11-987	Harnett (09CRS51973) (10CRS525)	Affirmed

STATE v. HUDSON No. 11-444	Mecklenburg (09CRS201239) (09CRS35624)	No Error
STATE v. HUNTER No. 11-478	Durham (10CRS51613)	Affirmed
STATE v. JOHNSON No. 11-898	Mecklenburg (10CRS204377-78) (10CRS20518)	No Error
STATE v. KAHLEY No. 11-394	Craven (05CRS53027)	No Error
STATE v. KELLY No. 11-887	Buncombe (10CRS700243)	Vacated in Part and Remanded for Resentencing.
STATE v. MILLER No. 11-1161	Buncombe (08CRS55739)	Affirmed
STATE v. MILLS No. 11-442	Mecklenburg (09CRS218250) (09CRS218252)	No Error
STATE v. NEEDHAM No. 11-892	Lincoln (09CRS52250) (09CRS52252-54)	No error in part; vacate in part
STATE v. NETTLES No. 11-638	New Hanover (10CRS10172) (10CRS57913) (10CRS58745)	No Error
STATE v. OAKS No. 11-463	Mecklenburg (08CRS255465-67) (08CRS255469-70)	No Error
STATE v. ORE No. 11-1033	Pitt (10CRS5340) (10CRS54713) (10CRS54893)	No prejudicial error.
STATE v. PARKER No. 11-939	Duplin (10CRS51330)	Reversed and Remanded
STATE v. ROGERS No. 11-907	Lenoir (09CRS52095) (11CRS204)	Affirmed
STATE v. SPEARMAN No. 11-991	New Hanover (10CRS57271)	Affirmed
STATE v. SPRUILL No. 11-430	Martin (99CRS2182)	No prejudicial error

STATE v. STEWART No. 11-985	Union (07CRS53732) (08CRS6448)	No Error
STATE v. SWARTZ No. 11-872	Surry (07CRS53598-99) (07CRS53600-601)	No Error
STATE v. SWINSON No. 11-557	Pitt (10CRS53476-77)	No Error
STATE v. TYSON No. 11-855	Beaufort (09CRS754-755)	No prejudicial error
STATE v. WEBSTER No. 11-862	Onslow (10CRS51270) (10CRS51543)	No Error
THORNTON v. STUCKEY No. 11-508	Johnston (09CVS1636)	No Error
TOWN OF LELAND v. HWW, LLC No. 11-210	Brunswick (07CVS2440)	Affirmed

STATE OF NORTH CAROLINA v. ANTWON T. PRIVETTE AND DEANGELO DARNE SMITH

No. COA11-139

(Filed 7 February 2012)

1. Pretrial Proceedings—criminal prosecution—joinder—proper

The trial court did not err in a felonious possession of stolen goods, extortion, and conspiracy to commit extortion case by allowing the State's joinder motion. The trial court's joinder decision did not deprive defendant of a fair trial.

2. Evidence—gang-related—felonious possession of stolen goods—no prejudice

The trial court did not err or commit plain error in a felonious possession of stolen goods case by failing to exclude certain gang-related evidence offered by the State. Assuming that the trial court erred by permitting the introduction of the evidence, there was no reasonable possibility that the jury would have acquitted defendant of possessing stolen property had that error not been committed.

3. Criminal Law—closing arguments—comments ill-advised—not fundamentally unfair

The trial court did not commit reversible error in a felonious possession of stolen goods case by failing to intervene *ex mero motu* during the State's closing argument. While the prosecutor would have been better advised to have refrained from making some of the comments to which defendant directed the Court of Appeals' attention, any impropriety in the challenged portions of the prosecutor's closing argument did not render defendant's trial fundamentally unfair.

4. Possession of Stolen Property—felonious possession of stolen goods—sufficient evidence

The trial court erred in a felonious possession of stolen goods case by denying defendant's motion to dismiss. There was insufficient evidence of "other incriminating circumstances" indicating that defendant constructively possessed the stolen rings.

5. Criminal law—jury instructions—extortion—proper interpretation of statute

The trial court's jury instruction on extortion did not materially misrepresent the law. The relevant statutory language required proof that defendant intentionally utilized unjust or unlawful means in attempting to obtain property or other acquittance, advantage, or immunity that he sought and the instruction was fully consistent with a proper interpretation of N.C.G.S. § 14-118.4.

6. Crimes, Other—extortion—conspiracy to commit extortion—sufficient evidence

The trial court did not err in an extortion and conspiracy to commit extortion case by denying defendant's motion to dismiss the charges. The State presented sufficient evidence that defendant wrongfully threatened the victim with death or serious injury in order to gain his release from imprisonment and the dismissal of criminal charges.

7. Evidence—officer's testimony—history and activities of gangs—irrelevant—erroneous

The trial court erred in an extortion and conspiracy to commit extortion case by admitting a police officer's testimony concerning the history of the Bloods and the activities of various Bloods subsets. The evidence had no bearing on the issue of defendant's guilt of the crimes with which he had been charged as the evidence did not tend to make the existence of any fact that was of consequence to the determination of the action more probable or less probable than it would have been without the evidence.

8. Evidence—officer's testimony—hierarchy of gang structure—relevant to extortion-related charges

The trial court did not err in an extortion and conspiracy to commit extortion case by admitting a police officer's testimony concerning the hierarchy of gang structure in the Bloods. The evidence was relevant to the charges as it shed light on the relationship between defendant and other parties involved.

9. Evidence—photographs of tattoos—testimony regarding relationship between tattoos and gangs—relevant—not prejudicial

The trial court did not err in an extortion and conspiracy to commit extortion case by admitting photographs of defendant's

tattoos and related testimony describing the relationship between certain of these particular tattoos and Bloods symbology. The photographic evidence depicting defendant's rank within the Bloods was relevant to the extortion-related charges as it shed light on some of defendant's statements and on the subsequent behavior of other involved parties. Moreover, the prejudicial effect of this photograph and related testimony was not so great as to compel its exclusion pursuant to N.C.G.S. § 8C-1, Rule 403.

10. Evidence—telephone conversation—defendant and wife—not relevant

The trial court erred in an extortion and conspiracy to commit extortion case by admitting evidence concerning a telephone conversation between defendant and his wife. The conversation had no tendency to make the existence of defendant's authority, or lack thereof, over his wife more probable or less probable than would have been the case had the challenged evidence not been admitted.

Appeal by defendants from judgments entered 13 May 2010 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 31 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Steven Armstrong for the State in response to Defendant Antwon T. Privette.

Attorney General Roy Cooper, by Assistant Attorney General Jason T. Campbell, for the State in response to Defendant DeAngelo D. Smith.

Michele Goldman, for defendant-appellant Antwon T. Privette.

Duncan B. McCormick, for defendant-appellant DeAngelo D. Smith.

ERVIN, Judge.

Defendants Antwon T. Privette and DeAngelo D. Smith appeal from judgments imposed by the trial court sentencing Defendant Smith to 90 to 117 months imprisonment based upon his convictions for felonious possession of stolen goods and having attained habitual felon status and sentencing Defendant Privette to 133 to 169 months imprisonment based upon his convictions for extortion, conspiracy to commit extortion, felonious possession of stolen goods, and having

attained habitual felon status. After careful consideration of Defendants' challenges to the trial court's judgments in light of the record and the applicable law, we find no error in the trial court's judgments with respect to Defendant Smith, reverse Defendant Privette's conviction for possession of stolen goods, and award Defendant Privette a new trial in his extortion-related cases.

I. Factual Background

A. Substantive Facts

1. Robbery of Perry Brothers Jewelers

On 14 May 2009, Gary Lynn and Frank Marsh robbed Perry Brothers Jewelers. At that time, Mr. Marsh and Mr. Lynn, who were armed, took approximately twenty-two rings. After exiting the store, Mr. Lynn and Mr. Marsh entered a Nissan Murano driven by a third person. Subsequently, investigating officers determined that Deidre Archie, one of Privette's girlfriends, had rented the Murano on 11 May 2009.

2. Placing of "Grill" Order at A-Town Jewelz

On 15 May 2009, Smith telephoned A-Town Jewelz and asked Erica Wilkins, the clerk, if the store purchased scrap gold. Later that day, Defendants came to A-Town Jewelz. Smith gave four gold rings to Ms. Wilkins for use in making a custom mouthpiece known as a "grill," signed a receipt evidencing this transaction, and wrote a telephone number belonging to Privette on that document. Later that day, Privette telephoned Ms. Wilkins for the purpose of asking her out. During that conversation, Privette mentioned that he had "more scrap gold." The rings that Smith gave to Ms. Wilkins had been taken in the Perry Brothers robbery. Two of the recovered rings were valued at approximately $3,235.00.

3. Investigation

On 15 May 2009, an officer of the Raleigh Police Department spotted Smith driving the Murano used in the Perry Brothers robbery, followed him into an apartment complex, and unsuccessfully attempted to speak with him. A subsequent search of the Murano resulted in the seizure of the A-Town Jewelz receipt signed by Smith and a vehicle rental receipt signed by Ms. Archie. The fingerprints of Privette, Mr. Lynn, Mr. Marsh, Smith's girlfriend, Doneisha Sanders, and Privette's wife, Shuntraya Cabbagestalk-Privette, were detected on the inside and outside of the vehicle.

4. Privette's Statement

After his arrest, Privette told investigating officers that he and a friend had gone to Perry Brothers during the week of the robbery in order to find a gift for Ms. Cabbagestalk-Privette. Privette stated that he could not have been involved in the Perry Brothers robbery because he was at home and subject to electronic monitoring at the time the robbery occurred.[1] Privette admitted that he had been with Ms. Archie when she rented the Murano and with Smith during his visit to A-Town Jewelz.

5. Smith's Statement

Smith admitted to investigating officers that he was a gang member and that he had borrowed the Murano from Ms. Archie on the date of the Perry Brothers robbery. On that date, Smith had been "driving around" in the Murano with two fellow gang members known as "G" and "Chop," a pair of individuals later identified as Mr. Lynn and Mr. Marsh. According to Smith, "G" and "Chop" dropped him off at the home of another girlfriend, Katrina Smith, and drove off in the Murano.[2] Approximately one hour later, "G" and "Chop" picked Smith up and gave him four or five rings for allowing them to use the Murano. Smith admitted that he thought that the rings might be the proceeds of a "lick," which is another word for a robbery. Smith took the rings to A-Town Jewelz the following day.

6. Recorded Jailhouse Telephone Conversations

While in police custody, Defendants made numerous telephone calls,[3] many of which related to efforts by Privette and Ms. Cabbagestalk-Privette to have Mr. Lynn and Mr. Marsh confess to the Perry Brothers robbery. For example, Ms. Cabbagestalk-Privette informed Privette in a 27 May 2009 conversation that she had told Mr. Lynn that Privette was "locked up for [a robbery] he [ain't] even done" and that, "if [Mr. Lynn] did the [robbery,] [he] need[ed] to man up and own up to [his] charge." Subsequently, Privette told Ms. Cabbagestalk-Privette to "call [Mr. Lynn] and tell him I said if he don't come down here and tell these people that I ain't . . . know nothing

1. A subsequent check of Privette's electronic monitoring records verified this contention.

2. According to Ms. Smith's school attendance records, she was in school at the time of this alleged visit

3. Officer Lisa Mendez of the Raleigh Police Department testified at trial for the purpose of interpreting the terminology used in these conversations.

about it, and I ain't have nothing to do with that . . . he fitting to get rolled."[4] In addition, Privette told Ms. Cabbagestalk-Privette to:

> [t]ell . . . [Mr. Marsh], or whatever, robbed the jewelry store with mace and a gun. I don't care what . . . they robbed it with, but the thing is [they] need to clear me. [They] need to clear me you. I am down here, they already know I ain't do nothing, I ain't have nothing to do with nothing, you know what I am saying? . . . If [they] turn themselves in [they] don't get nothing but like 10 to 12 months.

Similarly, Privette told Ms. Cabbagestalk-Privette to tell Mr. Lynn that he had "[three] days to get down here . . . or he rolled." During a 1 June 2009 conversation, Ms. Cabbagestalk-Privette told Privette that Mr. Lynn had asked her whether he was "on a plate;"[5] in response, Privette noted that he had previously told Mr. Lynn that "he [was] food," which meant that he was in violation of gang code and susceptible to attack. On 17 June 2009, Smith told Mr. Lynn to listen to the Defendants and that he had a deadline by which he needed to turn himself in. Mr. Lynn and Mr. Marsh subsequently turned themselves in to authorities, confessed to the Perry Brothers robbery, and pled guilty to robbery-related charges arising from the robbery. Mr. Lynn was not a suspect in the Perry Brothers robbery at that time.

B. Procedural History

On 8 February 2010 and 9 February 2010, the Wake County grand jury returned bills of indictment charging Smith with felonious possession of stolen goods and having attained habitual felon status. On 18 November 2008, 8 February 2010, and 9 March 2010, the Wake County grand jury returned bills of indictment charging Privette with having attained habitual felon status; felonious possession of stolen goods; extortion; and conspiracy to commit extortion.[6]

The cases against Defendants came on for trial before the trial court and a jury at the 3 May 2010 criminal session of the Wake

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4. According to Officer Mendez, the word "rolled," in gang terminology, meant "murder[ing] someone."

5. According to Officer Mendez, the fact that someone was "on the plate" meant that he or she had violated gang code

6. Although additional charges were lodged against Defendants, the textual discussion focuses on those charges that are relevant to the issues Defendants have raised on appeal given that a majority of these other charges were dismissed by the trial court or resulted in acquittals

County Superior Court. Prior to trial, the trial court granted the State's motion to join the cases against Defendants for trial.[7] At the conclusion of the evidence, the trial court dismissed a number of the charges that had been lodged against Defendants. On 12 May 2010, the jury returned verdicts convicting Smith of possessing stolen property and convicting Privette of possessing stolen property, extortion, and conspiracy to commit extortion.[8]

After the return of the jury's verdict, both Defendants pled guilty to having attained habitual felon status. As a result, the trial court sentenced Smith to 90 to 117 months imprisonment and sentenced Privette to a consolidated term of 133 to 169 months imprisonment. Defendants noted appeals to this Court from the trial court's judgments.

II. Legal Analysis

A. Appeal of Defendant Smith

1. Joinder

[1] In his first challenge to the trial court's judgment, Smith contends that the trial court erred by allowing the State's joinder motion. In seeking to persuade us of the validity of this contention, Smith points to the admission of evidence concerning Privette's threats against Mr. Lynn and to the admission of a letter from Privette to Smith's mother insinuating that Smith "participated in the robbery as the driver," arguing that the admission of this evidence "made it impossible for Smith to receive a fair determination with respect to his guilt or innocence." Defendant's argument lacks merit.

North Carolina "has a 'strong policy favoring consolidated trials of defendants accused of collective criminal behavior.' " *State v. Roope*, 130 N.C. App. 356, 364, 503 S.E.2d 118, 124, *disc. review denied*, 349 N.C. 374, 525 S.E.2d 189 (1998). "A trial court's ruling on . . . questions of joinder or severance . . . is discretionary and will not be disturbed absent a showing of abuse of discretion." *State v. Carson*, 320 N.C. 328, 335, 357 S.E.2d 662, 666-67 (1987). " 'The test is whether the conflict in defendants' respective positions at trial is of

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7. Both Defendants objected to the joinder of their cases for trial by way of either a formal objection or a severance motion. In addition, Smith unsuccessfully renewed his motion to sever on a number of occasions

8. The jury could not reach a verdict concerning the issue of Smith's guilt of conspiracy to commit robbery with a dangerous weapon, resulting in the declaration of a mistrial with respect to that charge.

such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial.' " *State v. Lowery*, 318 N.C. 54, 59, 347 S.E.2d 729, 734 (1986) (quoting *State v. Nelson*, 298 N.C. 573, 587, 260 S.E.2d 629, 640 (1979), *cert. denied sub nom. Jolly v. North Carolina*, 446 U.S. 929, 100 S. Ct. 1867, 64 L. Ed. 2d 282 (1980)).

After carefully reviewing the record, we are unable to conclude that the trial court's joinder decision deprived Smith of a fair trial. As the record clearly reflects, the only issues that the trial court submitted for the jury's consideration with respect to Smith involved his guilt or innocence of possessing stolen property and conspiracy to commit robbery with a dangerous weapon. As a result of the jury's inability to reach a unanimous verdict with respect to the conspiracy charge, it is clear that the admission of evidence insinuating that Smith drove the Murano at the time of the Perry Brothers robbery did not harm Smith in this case.[9] Similarly, aside from the fact that the threats that Privette made against Mr. Lynn were not relevant to the possession of stolen property charge for which Smith was convicted, we conclude that the evidence against Smith relating to that charge was so strong that there is no reasonable possibility that the jury would have reached a different result had the trial court refrained from joining Defendants' cases for trial. More particularly, the fact that Smith brought rings that had been stolen during the Perry Brothers robbery to A-Town Jewelz and acknowledged that these rings might have been acquired in a "lick" provides almost conclusive evidence of his guilt of felonious possession of stolen property. As a result, we conclude that the trial court did not abuse its discretion by allowing the State's joinder motion.

2. Admission of Gang-Related Evidence

[2] Secondly, Smith contends that the trial court erred and committed plain error by failing to exclude certain gang-related evidence offered by the State, including testimony concerning the history, organization, practices and symbology of the United Blood Nation gang; testimony concerning Smith's membership in that organization; and photographs of Defendants' tattoos. Once again, we conclude that Smith's argument lacks merit.

Prior to trial, both the State and Privette filed motions seeking a pretrial determination of the admissibility of gang-related evidence.

9. We express no opinion concerning the propriety of joining any future trial conducted for the purpose of determining Smith's guilt of conspiracy with charges lodged against Privette or anyone else.

At the conclusion of the hearing held with respect to these motions, the trial court decided to allow the admission of testimony concerning "general things . . . with respect to ranks" and Smith's admission of gang membership and rank. However, the trial court excluded testimony concerning attaining gang rank through violence or the accumulation of a criminal record.

At trial, the State presented evidence establishing that both Defendants were affiliated with the Bloods. In addition, the State, over objection, elicited evidence that Smith had admitted to being a ranking member of the Bloods. Furthermore, Officer Mendez was allowed to testify concerning the history and organization of the Bloods, including the Bloods subsets that operated in Raleigh. Over objection, Officer Mendez was permitted to describe the Bloods' "books of knowledge," which contained the specific history of a given gang subset, the codes used for internal gang communications, the gang hierarchy, the prayers that gang members are required to memorize, the identity of the gang's leaders, and gang symbology. Finally, the State was allowed, over objection, to introduce photographs of Defendants' tattoos and to offer testimony describing Defendants' tattoos and their relationship to gang symbology.

In order to successfully challenge the admission of this evidence on appeal, Smith must demonstrate both that the trial court erred in admitting the challenged evidence and that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached." N.C. Gen. Stat. § 15A–1443(a). "Where there exists overwhelming evidence of defendant's guilt[,] defendant cannot make such a showing; this Court has so held in cases where the trial court improperly admitted evidence relating to defendant's membership in a gang." *State v. Gayton*, 185 N.C. App. 122, 125, 648 S.E.2d 275, 278 (2007) (internal quotation marks omitted) (holding that admission of evidence of gang activity was harmless error).

Assuming that the trial court erred by permitting the introduction of gang-related evidence against Smith, we do not believe that there is a reasonable possibility that the jury would have acquitted Smith of possessing stolen property had that error not been committed. *State v. Hope*, 189 N.C. App. 309, 316-17, 657 S.E.2d 909, 913-14 (holding that the erroneous admission of gang-related evidence did not prejudice the defendant given the overwhelming evidence of his guilt), *disc. review denied*, 362 N.C. 367, 664 S.E.2d 315 (2008); *State v. Hightower*, 168 N.C. App. 661, 667, 609 S.E.2d 235, 239 (declining to

determine whether evidence of defendant's gang membership was admitted in error given the overwhelming evidence of the defendant's guilt), *disc. review denied*, 359 N.C. 639, 614 S.E.2d 533 (2005). As we have previously discussed, the record demonstrates that Smith brought rings stolen in the Perry Brothers robbery to A-Town Jewelz and that he admitted that these rings might have been obtained in a "lick." Simply put, "[i]gnoring all evidence related to gangs and gang activity, the unchallenged evidence presented by the State at trial showed that [Smith committed the crime charged.]" *Gayton*, 185 N.C. App. at 126, 648 S.E.2d at 279. As a result, Smith is not entitled to appellate relief based on the admission of gang-related evidence.

3. State's Closing Argument

[3] Finally, Smith contends that the trial court committed reversible error by failing to intervene *ex mero motu* during the State's closing argument. Once again, we conclude that Smith's argument lacks merit.

During closing argument, the State argued, in pertinent part, that:

> But why should you care? . . . [Y]ou live in different areas within Wake County. Maybe one or two of you live near this area, but you may live in Morrisville or Wake Forest or Cary or wherever. And maybe you don't know a lot of people like Antwon Privette or DeAngelo Smith, and it's not your neighborhood. But because you're jurors in this county, it's your community. And, you know, you're responsible for what goes on in this community and what we allow to go on in this community. You may not think they're your neighbors, but Cynthia Perry is your neighbor. And Gary Lynn could be your neighbor, and he could have been somebody if he didn't fall under the influence and control of people that are charged with these crimes in this courtroom.
>
> Now, police have spent thousands of hours and resources investigating these crimes. These are your police. These are your courts. And if you don't do what the law requires here and follow the law as the Judge is about to give it to you and find the truth in the matter—and I would tell you that the truth only lies in this case with the evidence the state has put in front of you because I've detailed dozens of—or multiple lies coming from the other table. If you don't send a clear message that they're guilty and this is not okay—whether it's in southeast Raleigh, whether it's in your backyard, in your community—

there are going to be more guns in the faces of people like Cynthia Perry who's your neighbor. And there are going to be more young men like Gary Lynn who could have been somebody.

[Def. Privette]: Your Honor, I'd object to this.

The Court: Sustained as to . . . what Gary Lynn might have been.

[The State]: But people are afraid . . . and they'll do whatever they say even if it means committing felonies and coming in and trying to hide it from them. So unless you do what we're asking you to do—and I'm imploring you and really begging you to find them guilty of these charges—then, you know, that's the message that's being sent around this community.

If you do the right thing and you honestly consult your conscience and consult the facts and consult the law as the Judge gives it to you, I believe all 12 of you will be able to go back [] there and agree that both of these defendants are guilty of the crimes charged. And we're glad you did, and the community will thank you as I thank you.

In his brief, Smith contends that the prosecutor's contentions that (1) the jury was responsible for what went on in the community, (2) the community would thank the jury for convicting Defendants and (3), in the event that the jury failed to convict Defendants, there would "be more guns in the faces of people like [the jewelry store clerk,] who's your neighbor," exceeded the limits on proper prosecutorial jury arguments. As a result of the fact that Smith failed to object to the portion of the State's closing argument that he seeks to challenge on appeal, our task is to determine "whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted). However, "only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 117 S. Ct. 228, 136 L. Ed. 2d 160 (1996). As a result, "[s]uch remarks constitute reversible error only when they render the proceeding fundamentally unfair." *State v. Phillips*, 365 N.C. 103, 144, 711 S.E.2d 122, 150 (2011) (citation omitted).

A careful review of the record demonstrates that, while the prosecutor would have been better advised to have refrained from making some of the comments to which Smith has directed our attention, *State v. Golphin*, 352 N.C. 364, 471, 533 S.E.2d 168, 237 (2000) (noting that "[t]he State cannot encourage the jury to lend an ear to the community"), *cert. denied*, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305 (2001); *State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143 (1994) (stating that, "[w]hile the prosecution may not argue the effect of defendant's conviction on others, i.e., general deterrence, the prosecution may argue specific deterrence, that is, the effect of conviction on defendant himself"), any impropriety in the challenged portions of the prosecutor's closing argument did not render Smith's trial fundamentally unfair. *State v. Boyd*, 311 N.C. 408, 418, 319 S.E.2d 189, 197 (1984) (holding that the prosecutor's comments during closing argument did not merit *ex mero motu* intervention and, alternatively, that any alleged impropriety was not prejudicial given that the record provided ample support for the jury's verdict), *cert. denied*, 471 U.S. 1030, 105 S. Ct. 2052, 85 L. Ed. 2d 324 (1985); *State v. Rush*, 196 N.C. App. 307, 311, 674 S.E.2d 764, 768 (holding that, even if "the prosecutor's argument was grossly improper, given the amount of evidence against defendant, it could not have been prejudicial"), *disc. review denied*, 363 N.C. 587, 683 S.E.2d 706 (2009). In light of the fact that Smith brought rings stolen from Perry Brothers to A-Town Jewelz and admitted that these rings might have been obtained as the result of a "lick," the record contains "ample support for [Smith's] conviction [for possession of stolen property] despite [any] improper remarks [that may have been made during the State's closing argument]." *Boyd*, 311 N.C. at 418, 319 S.E. 2d at 197. As a result, we conclude that Smith's final challenge to the trial court's judgment lacks merit.

B. Appeal of Defendant Privette

1. Sufficiency of the Evidence of Possession of Stolen Property

[4] In his first challenge to the trial court's judgment, Privette contends that the trial court erred by denying his motion to dismiss the felonious possession of stolen goods charge that had been lodged against him on the grounds that the record evidence did not support a finding that he actually or constructively possessed the stolen rings. Privette's argument has merit.

In order to justify the denial of a motion to dismiss for insufficient evidence, the State must present substantial evidence of "(1) each essential element of the [charged offense] and (2) defendant's

being the perpetrator of such offense." *State v. Johnson*, ____ N.C. App. ___, ___, 693 S.E.2d 145, 148 (2010) (citation omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). On appeal, we view "the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004), *cert. denied*, 546 U.S. 830, 126 S. Ct. 47, 163 L. Ed. 2d 79 (2005). We review a trial court's decision to deny a motion to dismiss for insufficient evidence *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

The essential elements of felonious possession of stolen property are: "(1) . . . possession of personal property[;] (2) valued at greater than [$1,000.00;] (3) which has been stolen[;] (4) with the possessor knowing or having reasonable grounds to believe the property was stolen[;] and (5) with the possessor acting with dishonesty.' " *State v. Parker*, 146 N.C. App. 715, 717, 555 S.E.2d 609, 610 (2001) (quoting *State v. Brantley*, 129 N.C. App. 725, 729, 501 S.E.2d 676, 679 (1998)). "[P]ossession . . . may be either actual or constructive. Constructive possession exists when the defendant, while not having actual possession [of the goods] . . . has the intent and capability to maintain control and dominion over the[m]." *State v. Phillips*, 172 N.C. App. 143, 146, 615 S.E.2d 880, 882-83 (2005) (internal quotation marks and quotations omitted). "Where . . . the defendant's possession . . . is nonexclusive, constructive possession may not be inferred in the absence of other incriminating circumstances." *State v. Alston*, 91 N.C. App. 707, 710, 373 S.E.2d 306, 309 (1988) (citation omitted).

As the State acknowledges, the record contains no evidence tending to show that Privette actually possessed the stolen rings. On the other hand, the State does contend that the evidence presented at trial shows the existence of the "other incriminating circumstances" necessary to establish constructive possession, including (1) the fact that Privette, Smith, Mr. Marsh, and Mr. Lynn all belonged to the Bloods; (2) the fact that Privette had a high rank within that organization; (3) the fact that Smith allowed Mr. Marsh and Mr. Lynn to borrow the Murano; (4) the fact that Mr. Lynn and Mr. Marsh gave Smith rings which Smith assumed to be the proceeds of a robbery; (5) the fact that Privette accompanied Smith to A-Town Jewelz; (6) the fact that Privette told Ms. Wilkins that he had "more scrap gold;" and (7) the fact that Privette became upset with Ms. Cabbagestalk-Privette when she indicated that she planned to tell an unidentified

woman to "give me the rings." We do not find the State's argument persuasive.

As the Supreme Court has clearly stated, a defendant's presence at premises at which contraband is located does not establish that the defendant constructively possessed the items in question unless he or she was in such "close juxtaposition to the [contraband] as to raise a reasonable inference [of control]." *State v. Minor*, 290 N.C. 68, 74, 224 S.E.2d 180, 185 (1976). In *Minor*, the Supreme Court held that evidence tending to show that (1) the defendant had visited an abandoned house leased or controlled by a co-defendant; (2) a marijuana field was located in a wooded area near the house; (3) the field could be accessed by three routes; and (4) the defendant was arrested while sitting in the front passenger seat of the co-defendant's vehicle did not support a finding of constructive possession. *Id*. at 74-75, 224 S.E.2d at 185. As a result of the fact that "the most the State ha[d] shown [was] that the defendant [was] in an area where he could have committed the crimes charged," the Supreme Court concluded that a determination that the evidence tended to show constructive possession would involve "sail[ing] in[to] a sea of conjecture and surmise." *Id*. at 75, 224 S.E.2d at 185.

After carefully reviewing the record, we hold that the necessary "other incriminating circumstances" cannot be inferred from the fact that (1) Privette was a high-ranking member of a gang to which the other individuals involved in the underlying robbery and subsequent transfer of the stolen goods belonged; (2) Privette accompanied a person in actual possession of stolen property to an enterprise at which an apparently legitimate transaction occurred; and (3) Privette and Ms. Cabbagestalk-Privette made ambiguous references to "more scrap gold" and "rings" unaccompanied by any indication that tended to indicate that these items were stolen.[10] At most, the State has established that Privette "had been in an area where he could have committed the crimes charged." *Minor*, 290 N.C. at 75, 224 S.E.2d at 185. The record contains no indication that Privette had any involvement in the A-Town Jewelz transaction aside from accompanying Smith while he engaged in an apparently legitimate transaction at that location. Beyond that we must rely on conjecture and surmise to

10. The trial court denied Privette's dismissal motion based on "his comment to his wife on the telephone call." We do not believe that this conversation, in which Privette reacted adversely to Ms. Cabbagestalk-Privette's reference to the "rings," supports a reasonable inference that Privette possessed stolen rings. At most, the evidence tends to indicate that the subject of "rings" had some sensitivity for Privette, not that he possessed any of the rings taken from Perry Brothers.

establish constructive possession, an approach that we rejected in *Minor*. As a result, we conclude that the record does not contain sufficient evidence to show that Privette had the "intent and capability to maintain control and dominion" over the stolen rings, so that the trial court erred by denying Privette's motion to dismiss the felonious possession of stolen property charge.[11] *Phillips*, 172 N.C. App. at 146, 615 S.E.2d at 883.

2. Jury Instructions Concerning Extortion-Related Charges

[5] At the conclusion of all of the evidence, the trial court instructed the jury, consistently with N.C.P.I.-Crim. 14-118.4, that the jury should convict Privette of extortion in the event that it found beyond a reasonable doubt that:

> First, that the defendant communicated a threat to the victim. Threatening physical violence is a threat; Second, that the defendant did this with the intent to obtain an avoidance of criminal prosecution. This avoidance of criminal prosecution is an advantage; And third, that the defendant intended to obtain avoidance of a criminal prosecution wrongfully—that is, knowing that he was not entitled to obtain it in this manner. If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant threatened the victim by threatening physical violence with the intent to obtain an advantage wrongfully, it would be your duty to return a verdict of guilty.

According to Privette, the trial court's instruction materially misstated the applicable law. We do not find this argument persuasive.

In his brief, Privette acknowledges that he did not object to the challenged instruction at trial. Ordinarily, the absence of such an objection would limit our review to determining whether "plain error" had occurred. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). However, Privette contends that his claim is not subject to "plain error" review because "the North Carolina Supreme Court has recognized an exception for [claims] that a defendant's constitutional right to a unanimous jury verdict has been violated." *State v. Haddock*, 191 N.C. App. 474, 478-79, 664 S.E.2d 339, 343 (2008) (citation omitted). Although we question whether Privette's challenge to the trial court's extortion-related instruction does, in fact, involve an

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11. In light of our holding with respect to the "possession" issue, we need not address Privette's other challenges to his conviction for felonious possession of stolen property.

alleged violation of Article I, Section 24 of the North Carolina Constitution, we need not resolve that issue since Privette is not entitled to relief based on this claim under a "*de novo*" standard of review.

N.C. Gen. Stat. § 14-118.4 provides, in pertinent part, that a person is guilty of extortion if that person "threatens or communicates a threat or threats to another with the intention thereby wrongfully to obtain anything of value or any acquittance, advantage, or immunity . . . ." "Extortion may be defined as wrongfully obtaining anything of value from another by threat, duress, or coercion." *Harris v. NCNB Nat. Bank of North Carolina*, 85 N.C. App. 669, 675, 355 S.E.2d 838, 843 (1987) (citing *Black's Law Dictionary* 696 (rev. 4th ed. 1968)). According to Privette, the plain language of N.C. Gen. Stat. § 14-118.4 establishes that the term "wrongfully" modifies "to obtain anything of value or any acquittance, advantage or immunity," so that an individual accused of extortion is not guilty if he believes that he is entitled to the "value" or "acquittance, advantage, or immunity" that he seeks to obtain. In Privette's view, the trial court's instructions impermissibly changed the focus from the wrongfulness of the end which he allegedly sought to achieve to the wrongfulness of the manner in which he allegedly sought to obtain it.

As we stated in *State v. Greenspan*, 92 N.C. App. 563, 568, 374 S.E.2d 884, 887 (1989), "[t]he wrongful intent required by the [extortion] statute refers to the obtaining of the property and not to the threat itself." The defendant in *Greenspan* was convicted of extortion based on evidence that he had informed the victim that he would not press charges against the victim for placing harassing phone calls if the victim gave him money. *Id.* at 564-65, 374 S.E.2d at 885-86. On appeal, the defendant challenged the sufficiency of the evidence to support his conviction on the grounds that the record failed to establish the necessary intent given that the victim had, in fact, made harassing phone calls, thereby entitling him to the money which he sought. *Id.* at 568, 374 S.E.2d at 887. This Court, however, rejected the defendant's argument on the grounds that the wrongful intent required by the statute referred to the obtaining of property rather than to the threat itself. *Id.* In the course of our analysis, we recognized that there was a split of authority with respect to the "claim of right" issue and noted that, in the absence of a statutory provision authorizing the assertion of such a defense, most jurisdictions had declined to recognize it. *Id.* at 568-69, 374 S.E.2d at 887-88. We did not, however, decide whether the defendant's belief that he was entitled to the "value" that he sought was a defense to extortion, since we

upheld the defendant's conviction on the grounds that he had no established right to obtain the amount of money he demanded. *Id*. at 569, 374 S.E.2d at 888. As a result of the fact that we did not explicitly resolve the "claim of right" issue in *Greenspan*, we must now decide whether, by using the phrase "with the intention thereby wrongfully to obtain," the General Assembly intended that a person could be convicted of extortion for threatening or communicating a threat based on a belief that he was entitled to the value, acquittance, advantage, or immunity that he sought to obtain.

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox*, *Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citation omitted). "The best indicia of that intent are the language of the statute[,] . . . the spirit of the act and what the act seeks to accomplish." *Concrete Co. v. Board Of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation omitted).

> When construing an ambiguous criminal statute, we must apply the rule of lenity, which requires us to strictly construe the statute in favor of the defendant. "However, this [rule] does not require that words be given their narrowest or most strained possible meaning. A criminal statute is still construed utilizing 'common sense' and legislative intent."

State v. Conway, 194 N.C. App. 73, 79, 669 S.E.2d 40, 44 (2008) (internal citation omitted and quoting *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005)), *disc. review denied*, 363 N.C. 132, 673 S.E.2d 665 (2009). "Where possible, statutes should be given a construction which, when practically applied, will tend to suppress the evil which the Legislature intended to prevent." *In re Hardy*, 294 N.C. 90, 96, 240 S.E.2d 367, 372 (1978).

The key words in N.C. Gen. Stat. § 14-118.4 are "wrongfully" and "obtain." "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) (citations omitted). "In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute." *Perkins v. Arkansas Trucking Servs.*, *Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000). "Wrongful"

has been defined as "1. [c]haracterized by unfairness or injustice . . . [or] 2. [c]ontrary to law; unlawful . . . ." *Black's Law Dictionary* 1606 (7th ed. 1999). Put another way, "wrongful" means "wrong or unjust . . . [or] having no legal sanction[.]" *Webster's Ninth New Collegiate Dictionary* 1363 (9th ed. 1991). Similarly, "obtain" has been defined as "to hold on to, possess, [or] obtain . . . [or] to gain or attain [usually] by planned action or effort[.]" *Webster's Ninth New Collegiate Dictionary* 816 (9th ed. 1991). As a result, if the "wrongful intent required by the [extortion] statute refers to the obtaining of [the] property . . . ," *Greenspan*, 92 N.C. App. at 568, 374 S.E.2d at 887, then, in order for a defendant to wrongfully obtain property, we believe that a conviction for violating N.C. Gen. Stat. § 14-118.4 must necessarily involve an effort by an individual to attain property or some other acquittance, advantage, or immunity in an unlawful and unjust manner.

Such a construction of N.C. Gen. Stat. § 14-118.4, which rests upon the literal language utilized by the General Assembly, is consistent with the basic purpose sought to be achieved by the enactment of the relevant statutory provision. The word "extort" has been defined as "obtain[ing] from a person by force, intimidation, or undue or illegal power[.]" *Webster's Ninth New Collegiate Dictionary* 440 (9th ed. 1991). Similarly, *Black's Law Dictionary* 605 (7th ed. 1999) defines extortion as "the act or practice of obtaining something or compelling some action by illegal means, as by force or coercion." Based upon our reading of these definitions, we believe that the evil sought to be suppressed by the enactment of N.C. Gen. Stat. § 14-118.4 is the obtaining of property by unlawful or unjust means, so that an individual may commit extortion when he is seeking to obtain something to which he may be entitled in an unlawful or unjust manner as well as when he seeks something that he is not entitled to obtain.

Finally, we do not believe that the General Assembly intended that those with a reasonable claim of entitlement to the property which they seek to obtain would be exempt from the strictures of N.C. Gen. Stat. § 14-118.4. In the event that we were to adopt the construction of the relevant statutory language espoused by Privette, then an individual with a reasonable belief of entitlement to property would be free to threaten to engage in any type of violent conduct, including murder, in order to obtain that property without any risk of being convicted of extortion. Adopting such an interpretation of the relevant statutory language, under which the same conduct might or might not be sufficient to support a guilty verdict depending solely on the legitimacy of the ends sought to be achieved, would be inconsis-

tent with the result that we believe the General Assembly sought to achieve by enacting N.C. Gen. Stat. § 14-118.4. A decision to reach a contrary result would effectively authorize an unlimited right of self-help dispute resolution in which the legitimacy of the ends justified the means as long as the means in question did not constitute a separate criminal offense.

As a result, we conclude that North Carolina does not recognize a "claim of right" defense in extortion-related cases. Instead, we construe the relevant statutory language to require proof that the defendant intentionally utilized unjust or unlawful means in attempting to obtain the property or other acquittance, advantage, or immunity that he seeks instead of requiring proof that the defendant sought to achieve an end to which he had no entitlement. After careful review, we further conclude that the trial court's extortion-related jury instructions, which required the jury to find that Privette "intended to obtain avoidance of a criminal prosecution wrongfully—that is, knowing that he was not entitled to obtain it in this manner," are fully consistent with a proper interpretation of N.C. Gen. Stat. § 14-118.4.

In seeking to persuade us to reach a different result, Privette appears to contend that the State should have charged him with communicating threats instead of extortion. *See State v. Cunningham*, 344 N.C. 341, 360-61, 474 S.E.2d 772, 781 (1996) (stating that the elements of the crime of communicating threats are "[(1)] the defendant threatened a person; [(2)] the defendant communicated a threat to that person; [(3)] the defendant made the threat in such a manner and under such circumstances that a reasonable person would believe the threat was likely to be carried out; and [(4)] the person threatened believed that the threat was likely to be carried out"). We do not find this argument persuasive. As we see it, there is an important difference between the crime of extortion and the crime of communicating threats, with the former focused on threats made for the purpose of wrongfully obtaining something of value or an acquittance, advantage, or immunity and the latter focused more on threats of a general nature. As a result of the fact that Privette allegedly acted for the purpose of obtaining an acquittance, advantage or immunity, he was appropriately charged with violating N.C. Gen. Stat. § 14-118.4. Thus, Privette is not entitled to relief from the trial court's judgment based on his challenge to the trial court's extortion-based instruction.

3. Sufficiency of the Evidence of Extortion-Related Crimes

[6] Thirdly, Privette contends that the trial court erred by denying his motion to dismiss the extortion and conspiracy to commit extortion charges. In essence, Privette contends that the evidence received at trial did not suffice to support a finding that he knew that he was not entitled to seek to avoid criminal prosecution by threatening Mr. Lynn. We do not find this argument persuasive.

As we have already noted, N.C. Gen. Stat. § 14-118.4 provides, in pertinent part, that a person is guilty of extortion if he "threatens or communicates a threat or threats to another with the intention thereby wrongfully to obtain anything of value or any acquittance, advantage, or immunity[.]" "A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Bindyke*, 288 N.C. 608, 615, 220 S.E.2d 521, 526 (1975) (citation omitted). "To hold a defendant liable for the substantive crime of conspiracy, the State must prove an agreement to perform every element of the crime." *State v. Suggs*, 117 N.C. App. 654, 661, 453 S.E.2d 211, 215 (1995).

The evidence presented at trial tended to show that Privette sent messages to Mr. Lynn through Ms. Cabbagestalk-Privette to the effect that Mr. Lynn would be killed or assaulted if he did not turn himself in to authorities for committing the Perry Brothers robbery. Ms. Cabbagestalk-Privette indicated that she had given these messages to Mr. Lynn and had relayed Mr. Lynn's responses to Privette. Mr. Lynn subsequently turned himself in to authorities and confessed to having committed the Perry Brothers robbery even though he was not suspected of having participated in that crime. When this evidence is considered in the light most favorable to the State, it permits a reasonable juror to determine that Privette wrongfully threatened Mr. Lynn with death or serious injury in order to gain his release from imprisonment and the dismissal of criminal charges. As a result, the trial court correctly denied Privette's dismissal motion.

4. Admission of Gang-Related Testimony

Fourth, Privette contends that the trial court erred by admitting evidence concerning his alleged gang involvement, tattoos, and an 11 June 2009 telephone conversation with his wife. Privette's arguments have merit, at least in part.

At trial, the State contended that Privette was a "102," "original gangster," or "OG," which meant that he held high rank in the Bloods,

and that he utilized his gang-related status to "g[i]ve orders" to Smith, Mr. Lynn, and Mr. Marsh relating to the underlying crimes. Prior to trial, the trial court decided to allow testimony concerning "general things . . . with respect to ranks" and to exclude any testimony about the attainment of gang rank through violence or the development of a criminal record. At trial, over Privette's objection, Officer Mendez was allowed to testify about the history and organization of the Bloods, which was formed in a New York detention facility, and identifying the Bloods subsets located in Raleigh. In addition, Officer Mendez testified, over objection, that one Bloods subset is "more violent" and that another is about "sex, making money and committing murders." Moreover, Officer Mendez testified that a gang member identified as a "102," an "original gangster," or "OG" is a higher-ranking gang member and that a "higher-ranking gang member tells a lower-ranking gang member what to do." Officer Mendez described, without objection, gang-related symbols employed by the Bloods, including the fact that "the Bloods use a five[-pointed] star [representing] [the] . . . [f]ive principles within the nation" and that "[a]nother common symbol is a dog paw, and it's three circular burn marks, usually on the right side of the body." The trial court admitted, over objection, nine photographs of Privette's tattoos, only one of which was published to the jury, and allowed Officer Mendez to describe certain tattoos and their relation to Bloods symbology. According to Officer Mendez, a photograph of Privette's back showed that:

> There is a five-pointed star right here (indicating) with some wings on it. That would represent the five principles of Blood. There's also a five-pointed crown here . . . with the three circular marks which would be consistent with the dog paw. Obviously, right here, there's a big number five which would represent the five principles of Blood. There's east side right here. And then down here is kind of difficult to see, but there's [an] O, G right here, and then right here says status. The only other [tattoo] of significan[ce] would be this C73, which like I said before, that was the specific block within Rikers Island that United Blood Nation was created.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. Generally, all relevant evidence is admissible, N.C. Gen. Stat. § 8C-1, Rule 402, but evidence that has

"not been connected to the crime charged and which [has] no logical tendency to prove any fact in issue [is] irrelevant and inadmissible." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228-29 (1991), *appeal dismissed and disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992). N.C. Gen. Stat. § 8C-1, Rule 404(b), which is a specialized relevance rule, provides, in pertinent part, that "[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." However, such "other crimes" evidence may be admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b). According to well-established North Carolina law, N.C. Gen. Stat. § 8C-1, Rule 404(b) is a "rule of *inclusion* . . . subject to but *one exception* requiring exclusion [of evidence] if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C. Gen. Stat. § 8C-1, Rule 403. "[T]he appropriate standard of review for a trial court's ruling on [relevancy-related issues] is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (internal quotation marks and citation omitted).

a. Evidence of Gang History and Gang Behavior

[7] First, Privette contends that the trial court erred by admitting Officer Mendez's testimony concerning the history of the Bloods and the activities of various Bloods subsets. We believe that this argument has merit.

Evidence of gang membership is generally inadmissible unless it is relevant to the issue of guilt. *State v. Freeman*, 313 N.C. 539, 547-48, 330 S.E.2d 465, 472-73 (1985). After carefully reviewing the record, we are unable to determine how the evidence concerning the history of the Bloods and the proclivities of various Bloods subsets has any bearing on the issue of Privette's guilt of the crimes with which he had been charged since this evidence "does not tend 'to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without

the evidence.' " *Gayton*, 185 N.C. App. at 125, 648 S.E.2d at 278 (quoting N.C. Gen. Stat. § 8C–1, Rule 401). The only effect of the trial court's decision to allow the admission of this evidence was to depict a "violent" gang subculture of which Privette was a part and to impermissibly portray Privette as having acted in accordance with gang-related proclivities. *See Gayton*, 185 N.C. App. at 125, 648 S.E.2d at 278 (holding that the trial court erred by admitting gang-related evidence where "the only probative value the information had . . . was to portray defendant as a gang member"); *see also United States v. Roark*, 924 F.2d 1426, 1434 (8th Cir. 1991) (holding that the trial court erred by allowing testimony regarding the gang's "institutional criminality" and involvement in drug manufacturing and distribution, even though the defendant was involved in such activities, because that evidence was "inherently and unfairly prejudicial" and tended to "deflect [] the jury's attention from the immediate charges and cause [] it to prejudge a person with a disreputable past . . ."). As a result, the trial court erred by admitting testimony concerning the history of the Bloods and the activities in which various Bloods subsets tended to engage.

b. "Hierarchy and Rank" Evidence

[8] Secondly, Privette challenges the trial court's decision to admit Officer Mendez's testimony concerning "the hierarchy of [] gang structure." We believe, however, that evidence tending to show Privette's position in the local Bloods hierarchy was relevant to the extortion-related charges that had been lodged against him by shedding light on the relationship between Privette and Mr. Lynn.[12] *See Freeman*, 313 N.C. at 547-48, 330 S.E.2d at 472-73. Simply put, evidence as to Privette's higher rank within the Bloods hierarchy helped explain Privette's reason for believing that he could induce Mr. Lynn to confess to the Perry Brothers robbery, placed into context his statements that Mr. Lynn was "food" and would be "rolled" if he did not turn himself in, and helped explain Mr. Lynn's decision to turn himself in and confess his involvement in the Perry Brothers robbery when he was not suspected of having any involvement in the commission of that crime. *See State v. Arnold*, 284 N.C. 41, 47, 199 S.E.2d 423, 427 (1973) (stating that "evidence is . . . relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably

12. We need not address the extent to which this "hierarchy and rank" evidence was relevant to the possession of stolen property charge given our decision to reverse Privette's conviction for committing that offense.

allows the jury to draw an inference as to a disputed fact"). In addition, we cannot conclude that the trial court erred by admitting the "hierarchy and rank" testimony given its obvious relevance to the extortion-related crimes that Privette was charged with committing. As a result, the trial court did not err by admitting Officer Mendez's testimony concerning Privette's place in the Bloods hierarchy.

c. Defendant Privette's Tattoos[13]

[9] Thirdly, Privette contends that the trial court erred by admitting photographs of his tattoos and related testimony describing the relationship between certain of these particular tattoos and Bloods symbology. This argument lacks merit.

In describing a photograph of Privette's back, Officer Mendez indicated that Privette had the letters "O" and "G" tattooed on his lower back, with the word "status" appearing directly below those two letters. Although evidence concerning a defendant's gang tattoos or other similar "body art" is irrelevant in the absence of evidence tending to show a connection between gang activity and the crime with which a defendant has been charged, *Hope*, 189 N.C. App. at 316-17, 657 S.E.2d at 913-14 (holding that testimony concerning a defendant's gang tattoos and "burn marks" was irrelevant given the absence of any evidence that the underlying crime was gang-related), we have already determined that the "hierarchy and rank" evidence presented by Officer Mendez was relevant to the issue of Privette's guilt of committing extortion-related offenses and conclude that photographic evidence depicting Privette's rank within the Bloods was relevant as well. Simply put, evidence tending to show that Privette was an "OG" cast light on Privette's comments that Mr. Lynn was "food" and would be "rolled" if he did not turn himself in and on Mr. Lynn's decision to do as Privette ordered. *See Arnold*, 284 N.C. at 47-48, 199 S.E.2d at 427-28. Moreover, for the reasons set forth with respect to the "hierarchy and rank" evidence, we conclude that the prejudicial effect of this photograph and related testimony was not so great as to compel its exclusion pursuant to N.C. Gen. Stat. § 8C-1,

13. As we have already noted, the only photograph of Privette's tattoos that appears to have been exhibited to the jury depicted Privette's back. In his brief, Privette advances arguments concerning a number of photographs, including a photograph of Privette's arm depicting a skull with "living, human eyes" surrounded by the "smoking barrel of a semi-automatic handgun," about which no testimony was offered and which were never published to the jury. As a result of the fact that these other photographs were never described in oral testimony or published to the jury, we are unable to see how any ruling that the trial court might have made with respect to these photographs could have prejudiced Privette.

Rule 403. As a result, the trial court did not err by allowing the challenged photograph to be admitted into evidence and published to the jury.

d. 11 June 2009 Telephone Conversation

[10] Finally, Privette contends that the trial court erred by admitting evidence concerning an 11 June 2009 telephone conversation between Privette and his wife. We find Privette's contention persuasive.

In the course of the 11 June 2009 telephone conversation, Ms. Cabbagestalk-Privette told Privette that, if she were a man, she would "give [Privette] a run for [his] money." In response, Privette described the violent acts he would commit on Ms. Cabbagestalk-Privette if she were a man and disrespected him, which included "knock[ing] [her] teeth down [her] throat," "stab[ing] [her] in [the] chest [three] times," and "pistol[] whipp[ing] [her] [for] [a]bout 45 [to] 50 minutes." Privette also told Ms. Cabbagestalk-Privette during this conversation that he "would've killed [her]." Finally, Privette stated that he had the respect of others because he had a reputation as someone that doesn't "play" and as having a "low tolerance when it come[s] to dealin[g] [with] men and their bulls---." Although the trial court initially determined that evidence of this conversation was irrelevant, it reversed its ruling after Privette's counsel inquired on cross-examination about whether Ms. Cabbagestalk-Privette was a member of the Bloods and whether Privette would have any authority over her on the grounds that Privette had "opened the door" to the admission of the telephone conversation and "all the threats . . . and acts of physical violence" discussed in it.

Admittedly, "[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981) (citations omitted). Although Privette did open the door to the admission of evidence concerning the extent of his authority over Ms. Cabbagestalk-Privette, the description of the violent acts that Privette would commit against Ms. Cabbagestalk-Privette if she "were" a man who disrespected him did not have any bearing on the "authority" issue. On the contrary, Privette clearly indicated that he would engage in similar acts of violence against men who disrespected him regardless of whether those men had any gang affilia-

tion. In addition, Ms. Cabbagestalk-Privette did not belong to the class of people to whom Privette was directing these threats. Simply put, this conversation had no tendency to make the existence of Privette's authority, or lack thereof, over his wife more probable or less probable than would have been the case had the challenged evidence not been admitted. Instead, this evidence had little purpose other than to show Privette's violent propensities. "[A] defendant's threat against a third person has no probative value and serves no other purpose than to arouse prejudice and hostility on the part of the jury against the defendant." *State v. Franklin*, 327 N.C. 162, 177, 393 S.E.2d 781, 790 (1990) (holding that testimony to the effect that defendant threatened to kill a third party who had stolen from him was inadmissible because it served no purpose other than showing defendant's propensity for violence). Thus, the trial court erred by admitting evidence concerning the 11 June 2009 telephone conversation.

5. Prejudice

After careful consideration of the nature and scope of the trial court's evidentiary errors, we further conclude that Privette is entitled to a new trial on the extortion-related charges. At trial, Privette argued, in effect, that the jury should not convict him of extortion and conspiracy to commit extortion on the grounds that he was angry about having been falsely arrested and incarcerated for involvement in a robbery which he had no role in committing, that the language in which these statements were couched simply reflected the environment in which he lived and should not be understood as having any greater significance, and that the statements upon which the State relied did not reflect a genuine intent to harm anyone. Although the State certainly presented evidence from which a different inference could be drawn, we believe that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached" at trial. N.C. Gen. Stat. § 15A-1443(a). As a result, we conclude that Privette is entitled to a new trial in the extortion-related cases.[14]

III. Conclusion

Thus, for the reasons set forth above, we find no error in the trial court's judgment relating to Smith. In addition, we conclude that Privette's conviction for possession of stolen property should be reversed and that Privette should receive a new trial in the extortion-

14. Having concluded that Privette is entitled to a new trial in the extortion-related cases, we need not address his challenge to the prosecutor's jury argument.

related cases. As a result, the trial court's judgment as to Smith should, and hereby does, remain undisturbed and the trial court's judgment against Privette in the felonious possession of stolen property case should be reversed, and Privette should receive a new trial in the extortion-related cases.

NO ERROR IN PART, REVERSED IN PART, REMANDED AND NEW TRIAL IN PART.

Judges STEPHENS and BEASLEY concur.

IN THE MATTER OF: APPEAL OF: JOSHUA McLAMB FROM THE ORDER OF THE SAMPSON COUNTY BOARD OF COMMISSIONERS ADOPTING THE SCHEDULE OF VALUES, STANDARDS AND RULES FOR THE 2011 GENERAL REAPPRAISAL

No. COA11-1007

(Filed 7 February 2012)

1. Taxation—real property—present-use schedule of values—quality of soil

The Property Tax Commission sitting as the State Board of Equalization and Review did not err in confirming Sampson County's present-use schedule of values (SOV) for the 2011 general reappraisal of real property. Petitioner's arguments that the County's present-use SOV was illegal because it disregarded N.C.G.S. § 105-317(a)'s mandate that the County consider the "quality of soil" in making its assessment was overruled.

2. Taxation—real property—present-use schedule of values—Use-Value Manual

The Property Tax Commission sitting as the State Board of Equalization and Review did not err in confirming Sampson County's present-use schedule of values (SOV) for the 2011 general reappraisal of real property. Contrary to petitioner's argument, the County was not required to adopt the values as set forth in the Use-Value Manual in its present-use SOV.

3. Taxation—real property—present-use schedule of values—proportional share of tax burden

The Property Tax Commission sitting as the State Board of Equalization and Review did not err in confirming Sampson

County's present-use schedule of values (SOV) for the 2011 general reappraisal of real property. The County's present-use SOV did not fail to value individual property within the county so that each parcel bore its proportional share of the tax burden.

4. Taxation—real property—present-use schedule of values—not illegal based on statute

The Property Tax Commission sitting as the State Board of Equalization and Review did not err in confirming Sampson County's present-use schedule of values (SOV) for the 2011 general reappraisal of real property. Petitioner's argument failed to show that the present-use SOV was illegal based on N.C.G.S § 105-283 and his argument was overruled.

5. Taxation—real property—present-use schedule of values—procedure for adoption of values not arbitrary

The Property Tax Commission sitting as the State Board of Equalization and Review did not err in confirming Sampson County's present-use schedule of values (SOV) for the 2011 general reappraisal of real property. Contrary to petitioner's argument, the substantial evidence before the Court of Appeals did not demonstrate an arbitrary procedure in the adoption of the County's present-use SOV.

6. Taxation—real property—present-use schedule of values—corrective procedure—not arbitrary or capricious

The Property Tax Commission sitting as the State Board of Equalization and Review did not err in confirming Sampson County's present-use schedule of values (SOV) for the 2011 general reappraisal of real property. Petitioner failed to carry his burden to show that the County's present-use SOV "corrective procedure" was arbitrary or capricious.

7. Evidence—exclusion of witness—exclusion of maps—taxes on real property—not prejudicial

The Property Tax Commission sitting as the State Board of Equalization and Review did not err in confirming Sampson County's present-use schedule of values for the 2011 general reappraisal of real property. Petitioner failed to show how the trial court's exclusion of one of his witnesses and some maps was prejudicial to his case.

IN RE APPEAL OF McLAMB

[218 N.C. App. 485 (2012)]

Appeal by petitioner Joshua McLamb from final decision entered 25 February 2011 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 14 December 2011.

Everett Gaskins & Hancock, LLP, by E.D. Gaskins, Jr. and The Wooten Law Firm, by Louis E. Wooten, III, for petitioner-appellant Joshua McLamb.

Daughtry, Woodard, Lawrence & Starling, LLP by Annette C. Chancy and William Joel Starling, Jr., for respondent-appellee Sampson County.

STROUD, Judge.

Joshua McLamb ("petitioner") appeals from the decision of the Property Tax Commission sitting as the State Board of Equalization and Review confirming Sampson County's ("respondent") present-use schedule of values for the 2011 general reappraisal. For the following reasons, we affirm the Commission's decision.

I. Background

On 15 November 2010, the Sampson County Board of Commissioners adopted the 2011 Sampson County Schedule of Values for qualified present-use agricultural and forestry land (referred to herein as the "present-use SOV"). The present-use SOV set the agricultural land values for major land resource areas 133A and 153A at $657.00 and $630.00 per acre, respectively; for forestry land, the County's present-use SOV set a value of $382.00 per acre for both major land resource areas 133A and 153A. Petitioner filed a notice of appeal with the North Carolina Property Tax Commission ("the Commission") pursuant to N.C. Gen. Stat. § 105-290(c) on 13 December 2010. The Tax Commission heard petitioner's appeal on 27 January 2011. The Tax Commission issued its final decision on 25 February 2011, confirming the County's present-use SOV. Petitioner timely appealed to this Court pursuant to N.C. Gen. Stat. § 105-345.

On appeal, petitioner contends that the Commission erred in its decision, as the 2011 Sampson County present-use SOV (1) did not consider soil quality of each parcel in determining the present-use value of agricultural and forestry property, in violation of N.C. Gen. Stat. §§ 105-317(a) and 105-277.7; (2) is arbitrary and capricious because it is not supported by evidence in the record; (3) does not achieve fairness with the "corrective procedure[;]" and (4) does not "value present use land as far as practical[,]" in violation of N.C. Gen.

Stat. § 105-283. Petitioner also contends that the Commission's decision to exclude his expert witness and the USDA soil maps was an abuse of discretion and resulted in substantial prejudice to his case.

II. Standard of Review

In reviewing an appeal from the North Carolina Property Tax Commission, this Court

> may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or
>
> (4) Affected by other errors of law; or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b) (2009). "Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test." *In re Murray*, 179 N.C. App. 780, 783, 635 S.E.2d 477, 479 (2006) (citation and quotation marks omitted). Further,

> [i]n evaluating whether the record supports the Commission's decision, "this Court must evaluate whether the decision is supported by substantial evidence, and if it is, the decision cannot be overturned." *In re Appeal of Interstate Income Fund I*, 126 N.C. App. 162, 165, 484 S.E.2d 450, 452 (1997) (citing *In re Appeal of Perry-Griffin Found.*, 108 N.C. App. 383, 394, 424 S.E.2d 212, 218 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977).

Id. Additionally, "[i]t is the responsibility of the Commission to determine the weight and credibility of the evidence presented." *In re Appeal of Owens*, 144 N.C. App. 349, 352, 547 S.E.2d 827, 829 (emphasis in original), *appeal dismissed and disc. rev. denied*, 354 N.C. 361, 556 S.E.2d 575 (2001). Additionally, in appeals from a Tax Commission's decision regarding the validity of a county's present-use value schedule, "the good faith of tax assessors and the validity of their actions are presumed[.]" *In re McElwee*, 304 N.C. 68, 75, 283 S.E.2d 115, 120 (1981) (citing *In re Appeal of Amp, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761-62 (1975)); *In re Appeal of Parker*, 191 N.C. App. 313, 316, 664 S.E.2d 1, 3 (2008).

> [I]n order for the taxpayer to rebut the presumption he must produce "competent, material and substantial" evidence that tends to show that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property.

AMP, 287 N.C. at 563, 215 S.E.2d at 762 (emphasis in original). As petitioner's first and fourth arguments present questions of law, we apply a *de novo* review of those issues. *See Murray*, 179 N.C. App. at 783, 635 S.E.2d at 479. We have noted that "[i]n determining whether the Commission's decision is supported by competent, material and substantial evidence or arbitrary or capricious, we review the whole record." *In re Blue Ridge Mall LLC*, ____ N.C. App. ____, ____, 713 S.E.2d 779, 787 (2011). Therefore, we will apply the whole record test to petitioner's second and third arguments. We first address petitioner's first and fourth arguments.

III. Consideration of soil quality

Petitioner argues that Sampson County's present-use SOV "is illegal because it disregards the statutorily mandated critical factor: soil quality of each parcel is different and must be considered." Specifically, petitioner argues that the present-use SOV is illegal because it does not follow statutory mandates in N.C. Gen. Stat. § 105-317(a) and 105-277.7 and does not permit each parcel to carry its proportional share of the tax burden. Respondent counters that "there is no statutory obligation for the Commissioners to use soil quality to determine present-use value of land in its [present-use values.]"

N.C. Gen. Stat. § 105-283 (2009) mandates that "[a]ll property, real and personal, shall as far as practicable be appraised or valued at its true value in money[,]" and defines "true value" as the

> market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of *all the uses* to which the property is adapted and for which it is capable of being used. . . .

(Emphasis added.) However, N.C. Gen. Stat. § 105-277.4(a) (2009) permits qualifying agricultural or forestland to be taxed "on the basis of the value of the property in its present use[.]"[1] N.C. Gen. Stat. § 105-277.2(5) (2009) defines "[p]resent-use value" as "[t]he value of land in its current use as agricultural land, horticultural land, or forestland, based solely on its ability to produce income and assuming an average level of management. . . ."[2]

A. N.C. Gen. Stat. § 105-317(a) requirements

[1] Specifically, petitioner argues that the County's present-use SOV is illegal because it disregards N.C. Gen. Stat. § 105-317(a)'s mandate that the County must consider the "quality of soil" in making its assessment. Respondent argues that the County's present-use value meets the appraisal standards established by N.C. Gen. Stat. §§ 105-277.2(5) and 105-317(b), as it was based in part on the "2009 Cash Rent Study" contained in the "2011 Use-Value Manual for Agricultural, Horticultural and Forest Land" ("the manual") and in part on comments from the public regarding the economic climate. N.C. Gen. Stat. § 105-317(a) lists factors to consider in valuing land including "quality of soil[.]"[3] Yet the factors listed in N.C. Gen. Stat. § 105-317(a) do not address "present-use value[,]" but address only determinations as to "true value of land[.]" As noted above, present-

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1. N.C. Gen. Stat. §§ 105-277.2, 105-277.3 and 105-277.4 set forth the qualifications and application process for present-use assessments.

2. The Sampson County present-use SOV makes no mention of "horticultural" land, but apparently treats any land that would be classified as "horticultural land[,]" as defined by N.C. Gen. Stat. §§ 105-277.2(3) and 105-277.3(a)(2), as "agricultural" land for purposes of the present-use SOV. Petitioner raises no argument regarding this substituted designation.

3. N.C. Gen. Stat. § 105-317(a)(1) states that "[i]n determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; waterpower; water privileges; dedication as a nature preserve; conservation or preservation agreements; mineral, quarry, or other valuable deposits; fertility; adaptability for agricultural, timber-producing, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value except growing crops of a seasonal or annual nature."

use valuation operates as an exception to the requirement that real property "shall as far as practicable be appraised or valued at its true value in money." *See* N.C. Gen. Stat. § 105-283. In fact, "[t]he statutory scheme for taxation of property qualifying for present use value treatment as defined in G.S. 105-277.2 and 277.3 is a tax deferment." *In re Appeal of Parker*, 76 N.C. App. 447, 450, 333 S.E.2d 749, 752 (1985). *See* N.C. Gen. Stat. § 105-277.4(c) (stating that the "difference between the taxes due on the present-use basis and the taxes that would have been payable in the absence of this classification, . . . are a lien on the real property of the taxpayer as provided in G.S. 105-355(a)" and "must be carried forward in the records of the taxing unit or units as deferred taxes."). "Present use value" is often less than the "true value" of real property. *See In re Appeal of Parker*, 191 N.C. App. 313, 317, 664 S.E.2d 1, 4 (2008) (noting in its analysis that "real property may be taxed at its present-use value, an amount typically lower than its true value, if a taxpayer is able to show that the property qualifies for present-use valuation. N.C. Gen. Stat. § 105-277.4(a) (2005); [*In re Appeal of Whiteside Estates, Inc.*, 136 N.C. App. 360, 364, 525 S.E.2d 196, 198, *cert. denied*, 351 N.C. 473, 543 S.E.2d 511 (2000)]"). Our Supreme Court has further stated that

> the clear legislative intent is that property be valued on the basis of its ability to produce income in the manner of its present use. All other uses for which the property might be employed and the many factors enunciated in G.S. 105-317(a) are irrelevant and immaterial. The focus of the appraisal is a narrow one: If the use of the property subject to present use valuation continues as at present what income will the property produce?

McElwee, 304 N.C. at 89, 283 S.E.2d at 128. As respondent argues, the only statutory requirements for an assessment of present-use value are that it (1) be "based solely on its ability to produce income and assuming an average level of management[,]" *see* N.C. Gen. Stat. § 105-277.2(5), and (2) is "prepared and [is] sufficiently detailed to enable those making appraisals to adhere to them in appraising real property." N.C. Gen. Stat. § 105-317(b)(1) (emphasis added).[4] As noted above, the County's present-use SOV is presumed to be correct. *See*

4. N.C. Gen. Stat. § 105-317(b)(1) in pertinent part, states "[i]n preparation for each revaluation of real property required by G.S. 105-286, it shall be the duty of the assessor to see that: (1) Uniform schedules of values, standards, and rules to be used in appraising real property at its true value and at its *present-use value* are prepared and are sufficiently detailed to enable those making appraisals to adhere to them in appraising real property."

McElwee, 304 N.C. at 75, 283 S.E.2d at 120. Petitioner does not claim that the County's present-use SOV was not based on income or was not "sufficiently detailed to enable those making appraisals to adhere to them in appraising real property." *See* N.C. Gen. Stat. § 105-277.2(5); N.C. Gen. Stat. § 105-317(b)(1). As petitioner's argument fails to rebut the presumption by showing that the County's present-use SOV was illegal because it did not follow the factors in N.C. Gen. Stat. § 105-317(a), his argument is overruled. *See AMP, Inc.*, 287 N.C. at 563, 215 S.E.2d at 762.

B. N.C. Gen. Stat. § 105-277.7 requirements

[2] Petitioner next contends that the County's present-use SOV is illegal because the "General Assembly specifically directs the Advisory Board to use soil quality in categorizing property for purposes of the [Present-use value] Manual" and since the County did not follow all of the manual's valuations based on the soil quality of each individual parcel, its present-use SOV is illegal. Respondent counters that the County did use values from "the 2011 Use Value Manual, which assess cash rental rates for various classes of soil[,]" in making its present-use SOV. Contrary to petitioner's argument, the County is not required to adopt the values as set forth in the manual in its present-use SOV. To assist the County in creating and approving a present-use valuation assessment, N.C. Gen. Stat. § 105-277.7 directs the creation of the North Carolina Use-Value Advisory Board ("the UVA Board"), stating that "[t]he Board must annually submit to the Department of Revenue a *recommended* use-value manual" which must include "estimated cash rental rates for agricultural lands and horticultural lands for the various classes of soils found in the State[;]" "*recommended* net income ranges for forestland furnished to the Board by the Forestry Section of the North Carolina Cooperative Extension Service[;]" capitalization rates of 9% for forestland and between 6 and 7% for agricultural land; "value per acre adopted by the Board for the best agricultural land[;]" and "[*r*]*ecommendations* concerning any changes to the capitalization rate for agricultural land and horticultural land and to the maximum value per acre for the best agricultural land and horticultural land based on a calculation to be determined by the Board[.]" N.C. Gen. Stat. § 105-277.7(a) & (c) (2009) (emphasis added). Pursuant to N.C. Gen. Stat. § 105-277.7 the UVA Board produced the "2011 Use-Value Manual for Agricultural, Horticultural and Forest Land" ("the manual"). As petitioner contends, the manual includes valuation determinations for agricultural and forestry land based on soil type, but it also states that the manual

is published yearly "to communicate the UVAB *recommended* present-use value rates and to explain the methodology used in establishing the *recommended* rates." (emphasis added). Petitioner's argument implies that since our General Statutes require the UVA Board to create the manual, and the manual bases its schedule on soil quality of individual parcels, then the County must follow the manual and base its present-use assessment on soil quality of individual parcels. However, as the above statutes and the portions of the manual clearly note, the manual merely gives "recommendations" to counties regarding their present-use valuation. Nothing in the manual and no statute requires the County to follow the manual in its evaluation. Indeed, if the manual's values were mandatory, there would be no need for the individual counties to adopt their own schedules of value, as the manual would establish the present-use value requirements for the whole State. Accordingly, petitioner's argument is overruled.

C. Proportional share of tax burden

[3] Finally, petitioner citing *In re Appeal of Whittington*, 129 N.C. App. 259, 260-61, 498 S.E.2d 194, 196 (1998) and *In re King*, 281 N.C. 533, 539, 189 S.E.2d 158, 161 (1972), also argues that the County's present-use SOV is illegal because it fails to "value individual property within the county so that each parcel bears its proportional share of the tax burden." Yet *Whittington* is inapplicable as that case did not address a determination regarding "present-use" values but dealt with the consideration of whether tobacco allotments were to be considered a factor in determining the "true value" of real property pursuant to N.C. Gen. Stat. § 105-317(a). *See Whittington*, 129 N.C. App. at 260-61, 498 S.E.2d at 195-96. We also find *King* inapplicable as it addressed a determination as to the "true value" of real property and its ruling was based on a County tax assessment that occurred prior to 1973, when the current "present-use" valuation system was enacted. *See King*, 281 N.C. at 539-42, 189 S.E.2d at 161-63; N.C. Session Laws 1973-709, s. 1. As petitioner's argument fails to rebut the County's presumption by showing that the County's present-use SOV was illegal because it did not follow the factors in N.C. Gen. Stat. § 105-317(a) or follow the recommendations of the manual, his arguments are overruled. *See AMP*, 287 N.C. at 563, 215 S.E.2d at 762.

IV. Fair valuation

[4] Petitioner next contends that respondent failed to "fulfill its statutory duty to endeavor to value present use land, as far as practical" in violation of N.C. Gen. Stat. § 105-283. Petitioner argues that the

USDA has "made it relatively easy for counties to take soil quality into account through the publication of the color coded and digitized [present-use value] Maps[;]" the County was aware of these maps and computer programs which could utilize these maps to determine present-use values for each individual parcel based on soil type; the adoption of a soil type valuation was "clearly feasible as other neighboring counties [such as Harnett and Pender Counties] have done so[;]" and the County's only excuse for not implementing a computer-based assessment and fulfilling its statutory duty was a lack of funds to implement the computer program. Respondent counters that "[t]here is no statutory obligation for Sampson County to employ all 'practicable' resources when determining present-use value" and evidence presented showed that present-use values based on digitized maps were not practicable as the technology costs to implement such a system would be over $100,000. As noted above, N.C. Gen. Stat. § 105-283 states, in pertinent part, that "[a]ll property, real and personal, shall as far as practicable be appraised or valued at its true value in money[,]" and goes on to define "*true value*[.]" (emphasis added). Therefore, any statutory requirements contained in N.C. Gen. Stat. § 105-283 would relate to a County's "true value" assessment. Here, as noted above, petitioner is appealing from an exception to true value assessment, the County's "present-use" assessment values, which are not based on a property's *true value* but on the income which it produces. *See* N.C. Gen. Stat. § 105-277.2(5). Therefore, N.C. Gen. Stat. § 105-283 would not be applicable. As petitioner's argument fails to rebut the County's presumption by showing that the present-use SOV was illegal based on N.C. Gen. Stat § 105-283, his argument is overruled. *See AMP*, 287 N.C. at 563, 215 S.E.2d at 762. We next turn to addressing petitioner's second and third arguments using the whole record test.

V. Arbitrary and Capricious

[5] Petitioner next contends that the County used an arbitrary and capricious method in adopting its present-use SOV. Specifically, petitioner citing *Appeal of Land & Mineral Co.*, 49 N.C. App. 608, 614, 272 S.E.2d 878, 882 (1980), *disc. review denied*, 302 N.C. 397, 279 S.E.2d 351 (1981), argues that the County's present-use SOV is arbitrary and capricious because the rental rates used to create the county tax assessor's recommended present-use agricultural SOV and the County's adopted present-use agricultural SOV were less than the rental rates reported to Commissioners by the county manager; the County failed to gather data or conduct any independent studies "to

support the assumed rental and income rates it used" in making its present-use agricultural SOV; and the agricultural present-use SOV was reduced from the tax assessor's recommendation but the forestry present-use SOV was increased from the assessor's recommendation. Respondent contends that its agricultural present-use SOV is not arbitrary or capricious as it was based on "cash rental rates recognized [that] productivity level [based on] . . . geographic area (i.e., MLRA 133A and 153A)" from the manual, which was adjusted based on public comments regarding the economic conditions and the adopted present-use SOV "specifically provides that the value assessed can be adjusted pursuant to the UVAB guidelines upon presentation by the taxpayer of a soil study." Evidence in the record shows that in adopting the present-use SOV the Commissioners considered information in the 2011 Use-Value Manual, the tax assessor's recommendations, and input from residents and staff at County Board of Commissioners' meetings.

A. The manual

As noted above, the North Carolina Use-Value Advisory Board, pursuant to N.C. Gen. Stat. § 105-277.7, published the "2011 Use-Value Manual for Agricultural, Horticultural and Forest Land" ("the manual") in April 2010. The manual's foreword states that the General Assembly passed legislation in 1973 creating the present-use value program to keep "the family farm in the hands of the farming family" as economic development had caused an increase in the demand for land in the State and that demand lead to increased prices and assessed values for farmland, to the point that farmers "could not afford the increase in property values[.]" The manual also notes that the United States Department of Agriculture divided the State into six Major Land Resource Areas ("MLRA"), with a majority of Sampson County located in MLRA 133A, and a small portion at the southern end of the county located in MLRA 153A. *See* N.C. Gen. Stat. § 105-277.7(c)(2). The manual included recommended present-use schedules for agricultural and forestry land.

1. Recommended agricultural schedule

The manual includes data on agricultural rental rates and schedules of values [5] for each MLRA, including 133A and 153A, based on

5. The manual states that "Rents were divided by a capitalization rate of 6.5% to produce the Agricultural Schedule." *See* N.C. Gen. Stat. § 105-277.7(c)(3) (stating that "[t]he capitalization rate for agricultural land . . . must be no less than six percent (6%) and no more than seven percent (7%)."

three classifications of soil types: Class I, Best Soils; Class II, Average Soils; and Class III, Fair Soils.[6] These agricultural rental rates were based on a "2009 Cash Rent Study" of the whole state, conducted by the North Carolina Department of Agriculture, which specifically showed that the rental rates for the MLRA 133A section of Sampson County agricultural land were: $81.60 for High Productive soil; $58.40 for medium productive soil; and $41.80 for low productive soil.[7] As the small section of MLRA 153A located in Sampson County had fewer than 10 survey responses or reports, specific rental values for that area were included in the aggregate totals for MLRA 153A showing that average rents for MLRA 153A were: $70.10 for high productive soil; $51.00 for medium productive soil; and $38.40 for low productive soil.[8]

2. Recommended forestry schedule

The manual also listed data regarding net incomes and schedules of values[9] for forestry land for each MLRA, including 133A and 153A, but in contrast there were five soil type classifications for each MLRA: "Class I" through "Class V[.]" Information regarding these net incomes was provided to the Board by the North Carolina Cooperative Extension Service Forestry Section.[10] The manual also includes a section listing the type of soil in each MLRA in the State and the soil quality classification for each type of soil based on its use as agricultural or forestry land.

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6. There was a class IV for "Non-Productive Soils" which was to be "appraised at $40.00 per acre" statewide.

7. N.C. Gen. Stat. § 105-277.7(c)(1) requires the Board to use estimated cash rental rates for valuing agricultural land based on either "individual county studies or from contracts with federal or State agencies[.]"

8. The section of the manual describing the "2009 Cash Rent Study" states that "[t]o ensure respondent confidentiality and provide more statistical reliability, counties and districts with fewer than 10 reports are not published individually, but are included in aggregate totals."

9. The manual states that "Net Present Values were divided by a capitalization rate of 9.00% to produce the Forestland Schedule." *See* N.C. Gen. Stat. § 105-277.7(c)(3) (requiring that "[t]he capitalization rate for forestland shall be nine percent (9%).").

10. N.C. Gen. Stat. § 105-277.7(c)(2) requires the Board to obtain "recommended net income ranges for forestland . . . [from] the Forestry Section of the North Carolina Cooperative Extension Service." The manual states that the Forestry Section in its procedure for making a forestry schedule and forestry income considered individual factors such as soil productivity, "indicatory tree species (or stand type)[,]" average stand establishment, annual management costs, average rotation length, timber yield, and "average timber stumpage prices." *See* N.C. Gen. Stat. § 105-277.7(c)(2).

B. Tax assessor's recommendations

The County administrative and tax assessor's offices, created their own "2011 Use-Value Manual" extracting from the UVA Board's manual pertinent information for Sampson County to assist the Commissioners in understanding and adopting present-use values for 2011. Prior to the adoption of the County's present-use SOV, the tax assessor made a recommended present-use SOV to Commissioners which stated that for all agricultural lands in Sampson County, including both MLRA 133A and 153A, the County's agriculture schedule should follow the manual's schedule of values for only one quality classification of soil, "Class II[,]" which was based on rent figures from the "2009 Cash Rent Study" for "medium" productive soils.[11] Specifically, the assessor recommended to the Commissioners a present-use value of $815.00 per acre for all Sampson County agricultural land located in MLRA 133A and a value of $785.00 per acre for all present-use agricultural land located in MLRA 153A, based on the manual's rental rates of $53.00 and $51.00, respectively, for "average soil[.]" The assessor's recommendation excluded the manual's other schedule values for classes I (best) or III (fair) quality soils, explaining that "[a]t this time the County does not have the capability to use digitized soil information to apply to each parcel, for this reason one price is chosen to value land under present-use value classification." Likewise for forestry land, the tax assessor administrator recommended for both MLRA 133A and 153A that the present-use forestry schedule follow the manual's values for one quality class of soil, "Class II" because of the same limitation. Specifically, the assessor recommended a present-use forestry value of $305.00 per acre for both MLRA 133A and 153A and excluded the other four soil quality categories.

C. Public hearings

Prior to the adoption of the Sampson County present-use SOV, the Commissioners held public hearings to obtain input from residents regarding the proposed present-use SOV. According to minutes from the 18 October 2010 Board of Commissioners' meeting, several county residents voiced concerns about the proposed schedule of values based on how the bad economic conditions were negatively affecting the farming industry in the County. Additionally, minutes from the 8 November 2010 Board of Commissioners meeting show

11. The 2009 Rents Study included MLRA rent averages for soils classified as "high productivity[,]" "medium productivity[,]" and "low productivity[.]"

that the County information director told Commissioners that it would cost more than $100,000.00 to implement a computer-based system to assign multiple values based on soil quality for each parcel of real property in the County.

D. Adoption of present-use SOV

On 15 November 2010, the Commissioners adopted the following present-use valuation schedules:

- Agricultural Schedule MLRA 133A $657.00
- Agricultural Schedule MLRA 153A $630.00
- Forest Land (133A and 153A) $382.00[.]

The following notes were also included with the above values:

- The information shown on this page comes from the 2011 Use-Value Manual for Agriculture, Horticulture and Forest Land (published by the North Carolina Department of Revenue). At this time the County does not have the capacity to use digitized soil information to apply to each parcel, for this reason one price is chosen to value land under present-use value classification.
- All land in Present Use Valuation will be considered by using the information shown above unless the property owner supplies the Tax Assessor with a detailed soil analysis of their property. This information will then be taken into consideration, and the land classes will be adjusted according to the 2011-Use Value Manual for Agriculture, Horticulture and Forest Land.

County Manager Ed Causey testified that the Commissioners in adopting the present-use SOV considered (1) the cost to the County to implement a system to make present-use values based on soil quality; (2) the input from residents at the Board of Commissioners' meetings and the Commissioners' individual discussions with several farmers in the County about how the proposed present-use SOV would impact the local economy; (3) the significant economic impact of agriculture in Sampson County; (4) that the figures in the manual were based on rental rates; and (5) the current hard economic conditions, unemployment in the county, and hardships in certain segments of the agricultural businesses, such as poultry. Mr. Causey stated that the Commissioners used the manual's figures from the rent study as a

baseline and because of concerns that farmers were not paying higher rents, lowered the assessor's proposed present-use schedule figures for agriculture to ensure that most people were not overburdened, given the economic situation.

E. Analysis

The "substantial evidence" before us, *see Murray*, 179 N.C. App. at 783, 635 S.E.2d at 479, contrary to petitioner's argument, does not demonstrate an arbitrary procedure by the Commissioners in its adoption of the County's present-use SOV. Because of technology costs, the Commissioners chose to base their present-use SOV on the manual's values for MLRAs 133A and 153A "Class II" or "Average Soil" schedules, as recommended by the assessor, rather than basing it on individual parcel soil quality. Utilizing the manual's "Class II" agricultural schedules was not arbitrary or capricious, as those figures were based on present-use income, specifically "average" rents for medium productive soil for each MLRA from the 2009 Cash Rent Study. *See* N.C. Gen. Stat. § 105-277.2(5). Since the Commissioners utilized the manual's agricultural schedules based on income figures from the rent study, it did not need to conduct an independent county study of rental incomes. After noting that these figures were based on average rental rates from 2009 and hearing from residents about the hard economic conditions and economic outlook of the County in 2010, the Commissioners reduced the present-use agriculture schedules for each MLRA. Because present-use assessments operate as a tax deferral, *see Parker*, 76 N.C. App. at 450, 333 S.E.2d at 752, and were initially passed to help farmers keep their farmland by lowering tax rates, this downward adjustment would be far from arbitrary or capricious, as that change would operate to further that purpose by reducing tax rates in response to the down-turn in the economy and to help farmers keep their land. As further evidence that those figures were not arbitrary, we note that the Commissioner's agricultural schedules for MLRA 133A and 153A fall between the manual's recommended schedule values for "Class II" (based on average soil rents) and "Class III" (based on fair soil rents). Therefore, petitioner failed to carry his burden to show that the County's agricultural present-use SOV was arbitrary or capricious. *See AMP*, 287 N.C. at 563, 215 S.E.2d at 762.

As noted above, petitioner argues that the present-use SOV was arbitrary and capricious because the agricultural present-use SOV was reduced from the assessor's recommendation based on the downturn in the economy but the forestry present-use SOV was increased

from the assessor's recommendation. We note that evidence in the record shows that the Commissioners received input from residents regarding how the economy had negatively affected the agricultural industry in Sampson County, but there were few comments at the meeting regarding the economic impact on forestry. According to minutes from the 18 October 2010 board meeting, ten residents voiced their opinions regarding the proposed present-use SOV and only one mentioned "woodland," but most voiced concerns regarding how the assessment would affect the agricultural industry in the county. There is no explanation in the record for the increase from the tax assessor's recommended forestry present-use SOV. As noted above, the manual's figures for the forestry net incomes for the forestry schedule are provided by the Forestry Section of the North Carolina Cooperative Extension Service, and unlike the recommended agricultural schedule which is based on rental income from the rent study, forestry income is based on the Forestry Section's understanding and consideration of multiple factors such as soil productivity, "indicatory tree species or stand type[,]" average stand establishment, annual management costs, average rotation length, timber yield, and "average timber stumpage prices." *See* N.C. Gen. Stat. § 105-277.7(c)(2). The County's forestry schedule did not stray far from these recommendations, as the Commissioners chose $382.00 for both MLRA 133A and 153A, which was between the manual's recommended forestry schedule for "Class I" and "Class II" quality soils in those MLRAs. Therefore, as the forestry present-use SOV was within the range of the figures listed in the manual, we cannot say that petitioner carried his burden of showing that the County's forestry schedule was arbitrary or capricious. *See AMP*, 287 N.C. at 563, 215 S.E.2d at 762.[12]

We further note that even though the County was not required to base its present-use SOV on soil quality data, the SOV specifically states that any owner who believes that his agricultural or forestry land is overvalued may challenge his valuation by supplying "the Tax Assessor with a detailed soil analysis of their property" and that "information [would] then be taken into consideration, and the land

12. We find *Appeal of Land & Mineral Co.*, 49 N.C. App. 608, 614-15, 272 S.E.2d 878, 882-83 (1980), cited by petitioner, inapplicable as the Court held that the County's "blanket valuation" of a parcel of property was arbitrary and capacious because the County in making its "true value" assessment failed to consider the factors in N.C. Gen. Stat. § 105-317(a). Here, as noted above, the factors in N.C. Gen. Stat. § 105-317(a) are "irrelevant and immaterial" in a present-use valuation. *See McElwee*, 304 N.C. at 89, 283 S.E.2d at 128.

classes will be adjusted according to the 2011-Use Value Manual for Agriculture, Horticulture and Forest Land." However, petitioner challenges this provision of the present-use SOV in his next argument.

VI. Corrective Procedure

[6] Petitioner argues next that the provision in the present-use SOV allowing a landowner to submit a soil analysis for determination as to whether the values of his land should be reduced based on the manual "does not achieve fairness." Petitioner argues that since the Commissioners chose a median figure for its present-use SOV, some properties are overvalued while other properties are undervalued. Petitioner argues that because of the reduction in taxes from those properties that are undervalued, Commissioners will have to increase the tax rates to make up for those losses. Petitioner further argues that owners of overvalued property would be "paying a disproportionately larger share of the tax burden while the owners of the undervalued property are paying a disproportionally smaller share of the tax burden." Respondent argues that "[t]here is no evidence that Sampson County would have to increase the tax rate for non-agricultural properties as a result of reducing the tax rate for agricultural properties in order to generate the revenue necessary to operate Sampson County" and as the present-use assessment operates the County takes "a loss" on taxes not collected based on true value "to achieve the General Assembly's overall goal of 'keeping the family farm in the hands of the farming family.' " Contrary to petitioner's argument, the purpose of the present-use value assessment is not to gain as much tax revenue as possible from owners of every type of land, as it operates as a tax deferment. *See Parker*, 76 N.C. App. at 450, 333 S.E.2d at 752. As respondent notes, the purpose of present-use valuation is to *reduce* tax rates for landowners involved in agriculture or forestry, and, in doing so, the County would possibly not receive as much tax revenue as it would if the land were assessed at its true value but farmers and landowners would be better able to keep their properties with the lower present-use tax rate. The present-use SOV is not at all arbitrary, as it furthers the goal of the present-use assessment legislation. In addition, the SOV permits a landowner who believes that his property is overvalued based on the "median" rates listed in the SOV to obtain a soil analysis and submit this information to the tax assessor in requesting a reduction in present-use value of his land. Petitioner is correct that it is highly unlikely that any landowner will ever challenge the assessment of his property as being too low, so that he is not paying as much in taxes

as he possibly could, but how the County Commissioners choose to administer the County's tax resources available to them is not an issue in this case. Accordingly, petitioner has failed to carry his burden to show that the County's present-use SOV "corrective procedure" is arbitrary or capricious. *See AMP*, 287 N.C. at 563, 215 S.E.2d at 762.

VII. Exclusion of Witness and Maps

[7] Finally, petitioner argues that the Tax Commission's decision to exclude the testimony of Dr. Kleiss, a Professor and Extension Specialist in the Department of Soil Science at North Carolina State University, and the exclusion of USDA Sampson County Present-use Value Maps resulted in substantial prejudice to his case. Petitioner argues that "Dr. Kleiss would have provided further evidence to refute Sampson County's unsupported contention that it was impractical for it to use a soil based [present-use] evaluation system, and would have supported that testimony with the soil maps." Respondent states that petitioner was not prejudiced by the exclusion of Dr. Kleiss or the maps as "[w]hether or not it would have been practicable for Sampson County to use a more detailed soil-based [present-use] valuation system than it did is irrelevant." (footnote omitted). Like respondent, we fail to see how the exclusion of this witness and the maps was prejudicial as the County was not required to adopt a present-use SOV based on the soil quality of individual parcels, as the manual recommends, or to implement a computer-based system to effect this recommendation. Therefore, petitioner's argument is overruled.

For the foregoing reasons, we affirm the Tax Commission's decision.

AFFIRMED.

Judges BRYANT and CALABRIA concur.

42 EAST, LLC, PLAINTIFF v. D.R. HORTON, INC., DEFENDANT

No. COA10-1570

(Filed 7 February 2012)

1. Contracts—home construction—closing date—extension of time—time of the essence

The trial court erred in a breach of contract case arising out of a home building contract by concluding that defendant breached the contract. The findings and conclusions were inadequate to determine if the required closing date had been extended or if the "time is of the essence" clause was breached or waived.

2. Contracts—home construction—termination of agreement

The trial court erred in a breach of contract case arising out of a home building contract by concluding that defendant did not properly terminate the contract. The trial court was required to determine whether defendant properly terminated the contract under sections 40 and 5 of the agreement, but did not address whether defendant properly terminated the agreement under section 40. Furthermore, the trial court did not address whether defendant acted in good faith and in the exercise of honest judgment under section 40.

3. Contracts—home construction—findings of fact—misapprehension of law

The trial court erred in a breach of contract case arising out of a home building contract by concluding that defendant breached the contract. Because the trial court made its findings of fact under a misapprehension of law, the order was vacated and remanded to the trial court.

Appeal by defendant from judgment entered 10 May 2010 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 17 August 2011.

Manning, Fulton & Skinner, P.A., by Robert S. Shields, Jr. and Katherine M. Bulfer, for plaintiff-appellee.

Smith Moore Leatherwood LLP, by Sidney S. Eagles, Jr., Stephen W. Petersen, and Elizabeth Brooks Scherer, for defendant-appellant.

GEER, Judge.

Defendant D.R. Horton, Inc. ("Horton") appeals from the Order and Rule 52(a) Judgment entered against Horton and in favor of plaintiff 42 East, LLC ("42 East") after a bench trial. Because (1) the order did not resolve all the issues necessary to determine Horton's liability, (2) the findings of fact were made under a misapprehension of the law, and (3) some of the findings are not supported by the evidence, we vacate and remand for further findings of fact and conclusions of law.

Facts

Horton is the nation's largest homebuilder. This case arises out of a Lot Purchase Agreement ("the Agreement") entered into by 42 East and Horton on 19 May 2006 that anticipated Horton would purchase 273 fully developed residential lots owned by 42 East for a total price of $10,828,300.00. The initial Agreement provided for five successive closings with Horton purchasing at each closing an approximately equal number of lots.

Within five business days of the effective date of the Agreement, the parties executed an escrow agreement pursuant to which Horton deposited, as earnest money, a letter of credit with the escrow agent in the amount of $400,000.00 naming 42 East as the beneficiary. The Agreement provided that in the event Horton defaulted in the performance of any of its obligations under the Agreement, then 42 East's "sole and exclusive remedy" would be to receive payment of the letter of credit as liquidated damages.

Horton's obligation to close on the purchase of the lots was contingent on certain specified conditions, including the following contained in Section 5(b) of the Agreement:

> 5. Contingencies.
>
> . . . .
>
> b. Conditions to Buyer's Obligation to Close. Buyer's obligation to close on the purchase of Lots under this Agreement is contingent upon satisfaction of all of the following conditions (collectively, the "Conditions to Closing")[:] . . . (6) Seller shall deliver good and marketable title to the Property to Buyer and the Title Company shall be unconditionally prepared to issue a standard ALTA owner's form title insurance policy insuring good and marketable fee simple title to the Property with a lia-

> bility limit in the amount of the Purchase Price at standard premium rates . . . .

"Good and marketable title" was defined by Section 8 of the Agreement as "title that is insurable by the title insurance company designated by [Horton] . . . under a standard ALTA owner's form at standard rates, free and clear of all liens, encumbrances and other exceptions to title and rights of others . . . . " Section 8 of the Agreement further provided that 42 East would have until closing to cure all title objections, at their sole cost.

Section 9 of the Agreement allowed for a 60-day inspection period during which Horton's agents, consultants, and contractors could enter upon and inspect the property and conduct any tests and studies that Horton deemed necessary or appropriate. Section 9 further specified that "[t]he results of all inspections, tests, examinations and studies of the Property performed during the Inspection Period and the Covenants, Site Plan, Subdivision Plans, Grading Plan, Drainage Plan, and the plans and design for the Private Sewer System must be suitable to [Horton], in its sole discretion." If, on or before the end of the 60-day period, Horton did not deliver a written "Notice of Suitability," then the Agreement would "automatically terminate on that date."

Originally, the Agreement provided that the first closing would occur between 1 November 2006 and 31 December 2006. The parties, however, entered into a First Amendment to the Agreement on 25 August 2006 delaying the initial closing date due to water and sewer issues unrelated to the current dispute.

In addition, by mutual agreement, the parties extended the inspection period to 9 October 2006. On 2 October 2006, Chris Crowson, the attorney doing the title work on the property for Horton, notified 42 East of Horton's objections regarding the title of the property. Mr. Crowson had particular concern about certain issues because he perceived that they would be difficult to resolve. Those issues included an easement identified as the "18' Cart Path Easement"; a pathway called the "Needham Path" crossing over a 186.14 acre tract that makes up a portion of the property; and assignments of leases and rents to Four Oaks Bank & Trust Co. that were never cancelled.

Horton sought title insurance for the property from Investors Title Insurance Company. Investors Title prepared a commitment letter to Horton in September 2006 advising defendant of the terms of

the title insurance policy, including the exceptions it would make to its coverage—in other words, items for which Investors Title would not be obligated to provide coverage if any claim were made on those exceptions.

Although Horton's normal practice was to deal with significant title issues during the inspection period, Horton, on the advice of Mr. Crowson, decided to propose a Second Amendment to the Agreement rather than just further extending the inspection period. The Second Amendment, executed 6 October 2006, not only moved the inspection period expiration date to 23 October 2006, but also added a section 40 to the Agreement that Horton believed would be its "best remedy" and would give the company the "protection" it needed regarding the title issues.

Section 40 provided:

> 40. **Additional Contingency**. Buyer's obligation to close on the purchase of Lots under this Agreement is contingent upon Buyer's receipt from Seller of evidence in a form acceptable to Buyer that all of the objections to title to the Property listed in **Exhibit H** attached hereto and incorporated herein have been cured or removed ("the Additional Contingency"). Should this Additional Contingency not be satisfied or waived in writing by Buyer prior to each Closing, then Buyer, at its option, may terminate this Agreement by giving written Notice to Seller, in which event, all of the Earnest Money on deposit with Escrow Agent shall be immediately refunded to Buyer.

In turn, Exhibit H listed in substantially similar form the objections set forth in Mr. Crowson's 2 October 2006 letter. On 12 October 2006, Horton issued a "Notice of Suitability" for the property in which it stated that the property was suitable for purchase.

In addition to the title issues, various other factors unrelated to Horton's activities at the site—such as the sewer system, roadway design, and grading—were causing delays on the project. On 23 May 2007, Horton's on-site manager at the time, Scott Morrison, sent an email to Mr. Crowson discussing a new "take down" schedule for purchase of the lots on the project. The parties amended the Agreement for a third time on 18 September 2007. That amendment doubled the number of closings from five to ten and substantially reduced the number of lots to be closed at each closing, reducing Horton's purchase price at the initial closing by $1,000,000.00. The Third Amendment also set a new initial closing date of 28 November 2007.

Shortly after the execution of the Third Amendment, the parties began discussing a fourth amendment to the Agreement in light of the deteriorating real estate market. In fact, Horton ultimately lost $700,000,000.00 for fiscal year ending 31 December 2007.

On 5 December 2007, Mr. Morrison sent the terms of a proposed Fourth Amendment to Mr. Crowson and requested that he prepare that amendment. On 18 December 2007, Mr. Crowson emailed Mr. Morrison a proposed draft that set a new initial closing date of 20 January 2008, extended the takedown schedule for the project from 2 March 2010 to 20 October 2012, and provided that Horton would purchase 5 rather than 10 lots per month. Although Horton challenges the finding of fact, the trial court found that "[a]s of December 18, 2007, Gary Lynch, on behalf of the Plaintiff, and Scott Morrison and John Nance, Vice President of Land Acquisition and Development for Defendant, and Kurt Burger, Regional Vice President of Defendant, had agreed to the terms of the Fourth Amendment."

On 21 December 2007, however, Horton instructed Mr. Crowson to put 42 East in default on the project. Section 27 of the Agreement provided that 42 East had 45 days—or until 7 February 2008—in which to cure any alleged default.

On 4 January 2008, Larry Kristoff, attorney for 42 East, wrote Mr. Crowson responding to each of Mr. Crowson's objections to title. Between the execution of the Second Amendment and Mr. Kristoff's letter, there had been no discussions regarding the objections to title. After receiving Mr. Kristoff's letter, Mr. Crowson discussed with Investors Title what would need to be done to resolve the remaining objections to title to Investors Title's satisfaction, especially what was required to remove the Needham Path exception from the title insurance policy.

Mr. Crowson then discussed his conversation with Investors Title with Horton and asked Horton how it would like to handle the title issues. Horton told Mr. Crowson that it had decided to terminate the Agreement. On 28 January 2008, Horton sent a letter terminating the Agreement pursuant to section 5(b) and section 40 of the Agreement.

On 25 August 2008, 42 East filed suit against Horton alleging that the company had breached the Agreement. The case was tried in a bench trial before Judge Robert H. Hobgood. At trial, 42 East did not argue that Horton violated any specific term of the Agreement, but rather contended that Horton had violated its duty of good faith and fair dealing.

Based on the above facts and additional contested findings that Mr. Crowson did not provide Investors Title with certain information, that Horton did not provide Mr. Crowson with pertinent information, that Horton could have obtained title insurance from another carrier without the Needham Path exception, and that Horton did not give 42 East an opportunity to obtain quitclaim deeds that would have removed the Needham Path exception, the trial court concluded that Horton "did not act in good faith and make a reasonable effort to obtain insurable title to the property as defined by the Lot Purchase Agreement. That constitutes a breach of the contract and places [Horton] in default of a condition or covenant of the contract." The trial court, therefore, awarded 42 East the $400,000.00 liquidated damages provided for in the Agreement, as well as interest since the filing of the complaint, for a total of $450,666.00. Horton timely appealed to this Court.

Discussion

"The standard of review on appeal from a non-jury trial is 'whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.' " *East Mkt. St. Square, Inc. v. Tycorp Pizza IV, Inc.*, 175 N.C. App. 628, 632, 625 S.E.2d 191, 196 (2006) (quoting *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). We review the trial court's conclusions of law *de novo. Id.*

I

[1] We first address Horton's contention that because the Agreement contained a "time is of the essence" clause, the parties were required to close by the deadline specified in the Agreement's Third Amendment. The Third Amendment had extended the "required closing date" for the first closing until 28 November 2007. According to Horton, when 42 East did not close by that date, the contract terminated, and the trial court should have entered judgment in favor of Horton on that basis.

42 East, in response, first asserts that Horton did not raise this issue at trial and, therefore, did not preserve it for appellate review. Based on our review of the record, it is apparent that Horton did argue at the trial level that the "time is of the essence" clause required judgment in Horton's favor. This issue is, therefore, properly before the Court.

When a "contract contain[s] a '[t]ime is of the essence' provision and plaintiff [does] not close within the required time frame, plaintiff's claim for breach of contract must fail." *S.N.R. Mgmt. Corp. v. Danube Partners* 141, *LLC*, 189 N.C. App. 601, 620, 659 S.E.2d 442, 455 (2008). A "time is of the essence" clause "clearly and unambiguously indicates that a definitive time to close [is] a vital and essential term to the contract." *Fairview Developers*, *Inc. v. Miller*, 187 N.C. App. 168, 173, 652 S.E.2d 365, 369 (2007).

A "time is of the essence" clause can, however, be waived. *Phoenix Ltd. P'ship of Raleigh v. Simpson*, 201 N.C. App. 493, 501, 688 S.E.2d 717, 723 (2009) (holding that "undisputed facts demonstrating that defendants not only never insisted on closing on the specified closing date, but made statements and took actions manifesting an intent that closing should occur at some unspecified later date establish that defendants waived the 'time is of the essence' clause"). As this Court has explained, " '[w]aiver is always based upon an express or implied agreement. There must always be an intention to relinquish a right, advantage or benefit. The intention to waive may be expressed or implied from acts or conduct that naturally leads the other party to believe that the right has been intentionally given up.' " *Fairview Developers*, 187 N.C. App. at 172, 652 S.E.2d at 368 (quoting *Patterson v. Patterson*, 137 N.C. App. 653, 667, 529 S.E.2d 484, 492 (2000)).

The trial court's order does not resolve the issues relating to Horton's "time is of the essence" argument, including whether any waiver occurred. The court had no need to address Horton's argument because it found that the parties had, in fact, agreed to a Fourth Amendment extending the initial closing date to 20 January 2008:

> 28. On December 18, 2007, Chris Crowson e-mailed Scott Morrison a proposed draft for the Fourth Amendment to the Lot Purchase Agreement. This proposed Amendment set a new closing date for January 20, 2008. Further, it extended the takedown schedule out an additional two years from March 2, 2010 to October 20, 2012. It further changed the takedown schedule for the Defendant by providing that it would purchase five lots per month rather than ten lots per month. These new projections were based on market studies done by the Defendant.
>
> 29. As of December 18, 2007, Gary Lynch, on behalf of the Plaintiff, and Scott Morrison and John Nance, Vice President of Land Acquisition and Development for Defendant, and Kurt

> Burger, Regional Vice President of Defendant, had agreed to the terms of the Fourth Amendment.

On appeal, Horton argues that the trial court's finding of fact 29 is in error given section 34 of the Agreement. Section 34 provides that "[n]otwithstanding any other provision herein, neither this agreement nor any amendment hereto shall be a valid, binding and enforceable obligation of [Horton] unless and until such document is ratified in writing by" certain specified "corporate officer[s] of [Horton]." (Original in all capitals.) The individuals identified in the trial court's finding of fact as having agreed to the Fourth Amendment were not, however, included among those specified in section 34 as having authority to ratify an amendment. In any event, as Horton notes, the trial court's finding of fact does not establish that the agreement to the amendment was in writing.

Because the trial court's order does not address section 34, we cannot determine the basis under which the trial court concluded that the parties had agreed to the Fourth Amendment's terms. Moreover, 42 East does not provide this Court with any basis for upholding the trial court's finding of a valid agreement. Instead, it acknowledges that the Fourth Amendment was never executed and then argues that its proposal is nonetheless evidence of waiver of the "time is of the essence" clause. We must, therefore, remand to the trial court for additional findings of fact and conclusions of law regarding the issue whether the parties entered into a Fourth Amendment to the Agreement.

In the event that the trial court determines that no Fourth Amendment extension ever became effective, the trial court must then address whether Horton waived the "time is of the essence" clause. While Horton acknowledges that, as a general matter, a "time is of the essence" clause may be waived, it argues that section 30(k) of the Agreement and section 34 (discussed above) preclude any finding of an implied waiver. Section 30(k) of the Agreement provides

> k. Any failure or delay of [Horton] or [42 East] to enforce any term of this Agreement shall not constitute a waiver of such term, it being explicitly agreed that such a waiver must be specifically stated in a writing delivered to the other party in compliance with Section 16 above. Any such waiver by [Horton] or [42 East] shall not be deemed to be a waiver of any other breach or of a subsequent breach of the same or any other term.

It has, however, long been the law in North Carolina that

> [t]he provisions of a written contract may be modified *or waived* by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived. This principle has been sustained even where the instrument provides for any modification of the contract to be in writing. . . . It has likewise been sustained where a contract contained a provision to the effect that "No salesman or agent of the company shall have the right to change or modify this contract."

Whitehurst v. FCX Fruit & Vegetable Serv., Inc., 224 N.C. 628, 636, 32 S.E.2d 34, 39 (1944) (emphasis added) (quoting *H. M. Wade Mfg. Co. v. Lefkowitz*, 204 N.C. 449, 451, 168 S.E.2d 517, 517 (1933)). *See also Inland Constr. Co. v. Cameron Park II, Ltd.*, 181 N.C. App. 573, 577, 640 S.E.2d 415, 418 (2007) (accord). Our Supreme Court has specifically applied this reasoning with respect to a contract providing both that "time is of the essence" and that substantial modifications of the contract must be in writing. *See Childress v. C. W. Myers Trading Post, Inc.*, 247 N.C. 150, 156, 100 S.E.2d 391, 395 (1957) ("If the parties verbally assented to extend the time for the completion of the building to October, the parties would be bound thereby notwithstanding Section 3 of the contract which required 'substantial variations from the terms' to be in writing.").

We see no reason that these holdings by our Supreme Court and this Court should not apply with equal force to "no waiver" provisions such as the no waiver provision in the Agreement, especially given the Supreme Court's express reference to "waiver" in *Whitehurst*. As courts from other jurisdictions have observed:

> "The general view is that a party to a written contract can waive a provision of that contract by conduct expressly or surrounding performance, despite the existence of a so-called anti-waiver or failure to enforce clause in the contract." 13 *Williston on Contracts* § 39:36 (4th ed.2000). This is "based on the view that the nonwaiver clause itself, like any other term of the contract is subject to waiver by agreement or conduct during performance." *Id.*

ASC Utah, Inc. v. Wolf Mountain Resorts, L.C., 2010 UT 65, 245 P.3d 184, 196 n.8 (2010). *See also Retail Developers of Ala., LLC v. E. Gadsden Golf Club, Inc.*, 985 So. 2d 924, 930 n.3 (Ala. 2007) ("This Court has consistently held that nonwaiver clauses and clauses that

require modifications to be in writing can be found to have been waived upon proper proof."); *Hovnanian Land Inv. Grp., LLC v. Annapolis Towne Ctr. at Parole, LLC*, 421 Md. 94, 121-22, 25 A.3d 967, 983 (2011) ("[T]he freedom to contract includes the freedom to alter that contract. [Plaintiff] was free, after signing the initial contract, to waive a condition for which it had bargained. *See, e.g.*, 8-40 Corbin on Contracts § 40.13 (2011) ('Parties to a contract cannot, even by an express provision in that contract, deprive themselves of the power to alter or vary or discharge it by subsequent agreement.'). Provisions in a contract which purport to limit this ability of parties to modify their contract, implicitly or explicitly, are disfavored. Accordingly, we agree with the Court of Special Appeals that a party may waive, by its actions or statements, a condition precedent in a contract, even when that contract has a non-waiver clause.").

We, therefore, hold that the non-waiver clause in the Agreement does not preclude a determination that Horton waived the "time is of the essence" clause. Whether or not Horton's conduct amounted to waiver is, however, a question of fact to be decided by the trial court. *See id.* at 122, 25 A.3d at 983 ("Yet, whether subsequent conduct of the parties amounts to a modification or waiver of their contract is generally a question of fact to be decided by the trier of fact." (internal quotation marks omitted)). Accordingly, if the trial court determines that the parties did not by amendment further extend the initial closing date, then the trial court must make findings of fact and conclusions of law addressing whether Horton waived the Agreement's "time is of the essence" clause.

II

[2] Horton further contends that although it terminated the Agreement pursuant to both section 5 and section 40 of the Agreement, the trial court, in concluding that Horton "did not properly terminate the contract as allowed by the written contract documents," only addressed section 5. We agree.

Horton's letter purporting to terminate the Agreement asserted that the termination was because 42 East had "failed to cure the objections to title pursuant to Section 40 of the Agreement and Horton is unable to obtain insurable title to the Property pursuant to Section 5(b) of the Agreement." Horton, therefore, did act under both sections 5 and 40.

Section 5 imposed upon 42 East a duty to deliver to Horton "good and marketable fee simple title to the Property with a liability limit in

the amount of the Purchase Price at standard premium rates." On the other hand, section 40 of the contract required that 42 East deliver "evidence in a form acceptable to [Horton] that all of the objections to title to the Property listed in **Exhibit H** attached hereto and incorporated herein have been cured or removed."

"When the parties use clear and unambiguous terms, the contract should be given its plain meaning, and the court can determine the parties' intent as a matter of law." *Alaimo Family Chiropractic v. Allstate Ins. Co.*, 155 N.C. App. 194, 197, 574 S.E.2d 496, 498 (2002). " 'Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety. The problem is not what the separate parts mean, but what the contract means when considered as a whole.' " *Jones v. Casstevens*, 222 N.C. 411, 413-14, 23 S.E.2d 303, 305 (1942) (quoting *Paige on Contracts* § 1112). It is a basic principle of contract law that " '[a]ll parts of the contract will be given effect if possible.' " *Dysart v. Cummings*, 181 N.C. App. 641, 647, 640 S.E.2d 832, 836 (quoting *Int'l Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 316, 385 S.E.2d 553, 556 (1989)), *aff'd per curium*, 361 N.C. 580, 650 S.E.2d 593 (2007).

In its order in this case, the trial court made several findings of fact regarding both sections 5 and 40, including quoting their terms and explaining how section 40 came to be added to the Agreement by an amendment. The trial court's conclusions of law also discussed section 40 extensively, concluding that it was a condition precedent; that "[t]he language of paragraph 40 of the Second Amendment did not give the Defendant unbounded discretion in the manner in which it addressed the title issues for the property"; and that "this discretion must be exercised in a reasonable manner based upon good faith and fair play."

However, the conclusions of law specifically addressing Horton's liability for breach of contract state only:

> 6. [Horton] did not act in good faith and make a reasonable effort to obtain insurable title to the property as defined by the Lot Purchase Agreement. That constitutes a breach of the contract and places the Defendant in default of a condition or covenant of the contract.
>
> 7. [Horton] did not properly terminate the contract as allowed by the written contract documents.

Conclusion of law 6 addresses only the contractual duty imposed by section 5 of the Agreement regarding the delivery of "good and marketable title," which is defined as "title that is insurable by the title insurance company designated by [Horton]."

Section 40 does not reference "good and marketable title" or "insurable title." Nowhere in the order does the trial court address whether, as required by section 40, 42 East provided to Horton "evidence in a form acceptable to [Horton] that all of the objections to title to the Property listed in **Exhibit H**" had been cured or removed or whether Horton waived this condition precedent. Further, although 42 East tried the case based on a theory that Horton breached the implied covenant of good faith and fair dealing, the order does not specifically address whether that implied covenant was violated in connection with section 40, as well as section 5. Although 42 East claims that "[i]nherent in this conclusion [of law 6] is that Horton failed to act in good faith with respect to Paragraph 40," we cannot agree given the specific language of conclusion of law 6 and the differing requirements of the two sections of the Agreement.

We note further that the trial court's finding of fact 5 states, after quoting section 5(b)(6), that "[Horton] was obligated to close under the Agreement if Plaintiff delivered insurable title as defined by the Agreement." Although this statement is included as part of a finding of fact, it is in fact a conclusion of law. *See In re Everette*, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999) ("A 'conclusion of law' is a statement of the law arising on the specific facts of a case which determines the issues between the parties."). A conclusion of law mischaracterized as a finding of fact, will, on appeal, be treated as a conclusion of law and reviewed accordingly. *In re R.A.H.*, 182 N.C. App. 52, 60, 641 S.E.2d 404, 409 (2007).

The trial court's apparent belief, reflected in finding of fact 5, that delivery of insurable title was all that was required for closing explains the court's failure to address the specific terms of section 40. Because, however, all sections of the Agreement must be given effect, and nothing in the Agreement suggests that compliance with section 5 negates the requirements of section 40, the trial court was required to determine whether Horton properly terminated the contract under section 40 as well as section 5.

On appeal, 42 East makes various arguments regarding why Horton could not properly terminate the Agreement under section 40. Those arguments must, however, be considered by the trial court in

the first instance. As the trial court did not address whether Horton properly terminated the Agreement under section 40, we must remand the case to the trial court for further findings of fact and conclusions of law on that issue.

Horton further challenges the trial court's conclusions of law seemingly setting out the standard for determining whether Horton acted properly under section 40, even though it did not include any conclusion of law specifically addressing compliance with the duties under section 40. Conclusions of law 4 and 5 state:

> 4. The language of paragraph 40 of the Second Amendment did not give the Defendant unbounded discretion in the manner in which it addressed the title issues for the property.
>
> 5. Our Courts have repeatedly imposed a "reasonableness" standard in such situations in which the existence of rights and obligations is within the discretion of one of the parties. *MCI [Constructors,] Inc. v. Hazen & Sawyer P.C.*, 401 [F. Supp. 2d] 504 ([M.D.N.C.]2005). Where a contract confers on one party a discretionary power affecting the rights of the other, this discretion must be exercised in a reasonable manner based upon good faith and fair play. *See [Mezzanotte] v. Freeland*, supra at 414.

Horton argues that to the extent the trial court concluded that the question was whether Horton acted reasonably in terminating the Agreement under section 40, that conclusion is contrary to North Carolina law.

In *Fulcher v. Nelson*, 273 N.C. 221, 224, 159 S.E.2d 519, 522 (1968), the Supreme Court addressed a contract that allowed the plaintiff to " 'trade back' " a car to the defendant if he was not satisfied with the car. After first noting that the plaintiff's "dissatisfaction *with the Cadillac*, as distinguished from general dissatisfaction with the terms of the trade, is the ground on which he asserts a contractual right to 'trade back[,]' " the Court held that "the contract conferred this right to 'trade back' if plaintiff's election was made in good faith on account of his dissatisfaction with the condition in which he found the Cadillac." *Id.*

Fulcher thus appears to hold that in deciding whether a party properly terminated a contract pursuant to a satisfaction clause, the question is whether the party acted in good faith. "Good faith"

depends on whether the party actually was dissatisfied regarding the condition falling within the party's discretion or whether the termination of the contract was due to some other reason, such as general dissatisfaction with the terms of the contract.

Midulla v. Howard A. Cain Co., 133 N.C. App. 306, 515 S.E.2d 244 (1999), supports this interpretation of *Fulcher*. In *Midulla*, a contract for purchase of land provided that the plaintiffs' offer "was contingent on a '[r]eview of covenants and restrictions, the body of which are satisfactory to Buyer.' " *Id.* at 309, 515 S.E.2d at 246. This Court explained that, pursuant to this provision, the "plaintiffs had the discretion to cancel the Contract if they were not satisfied with the covenants and restrictions governing the area where the property was located. However, plaintiffs also had a duty to act in good faith." *Id*. The Court held that plaintiffs' evidence that they "believed that 'the covenants and restrictions exposed them to the risk of becoming obligated for payments in which they had an inadequate voice in approving' " was, under the terms of the contract, "an adequate reason to cancel the Contract." *Id.* at 310, 515 S.E.2d at 247. The Court held that in the absence of evidence supporting defendant's claim that plaintiffs cancelled the contract simply to avoid their contractual obligations, the plaintiffs were entitled to summary judgment. *Id*.

Fulcher and *Midulla*, therefore, focus on whether the party exercising discretion acted in good faith and not whether the party acted reasonably. The cases relied upon by the trial court in its conclusion of law are not to the contrary. The decision by the United States District Court for the Middle District of North Carolina in *MCI Constructors* is not controlling authority, and to the extent that it suggests that a reasonableness standard applies in reviewing a party's exercise of discretion, it misapprehends controlling North Carolina law.

Mezzanotte v. Freeland, 20 N.C. App. 11, 200 S.E.2d 410 (1973), upon which *MCI Constructors* is largely based and which the trial court also cited, does not—and could not—overrule *Fulcher* and is not contrary to *Midula*. It involved a contract for the purchase and sale of land that was conditioned on the plaintiff's obtaining financing satisfactory to itself. The defendants argued that this agreement, hinging on the plaintiff's finding the financing satisfactory, was illusory. In rejecting this argument, this Court held:

> The contract implies that plaintiffs would in good faith seek proper financing from NCNB and that such financing in keeping with reasonable business standards could not be rejected

> at the personal whim of plaintiffs but only for a satisfactory cause. Where a contract confers on one party a discretionary power affecting the rights of the other, this discretion must be exercised in a reasonable manner based upon good faith and fair play. . . . A promise conditioned upon an event within the promisor's control is not illusory if the promisor also 'impliedly promises to make reasonable effort to bring the event about or to use good faith and honest judgment in determining whether or not it has in fact occurred.' 1 Corbin on Contracts, § 149, at 659.

Id. at 17, 200 S.E.2d at 414-15.

In other words, *Mezzanotte* involves two prongs. First, the plaintiff was required to make reasonable efforts to obtain financing. Second, any rejection of that financing had to be for "satisfactory cause" after " 'us[ing] good faith and honest judgment.' " *Id.* (quoting 1 *Corbin on Contracts*, § 149, at 659) *See also Dysart*, 181 N.C. App. at 648-49, 640 S.E.2d at 837 (applying *Mezzanote* and holding that when plaintiffs had discretionary power to terminate contract for purchase of land if estimated costs of repair exceeded $10,000.00, plaintiffs acted "in a reasonable manner and in good faith and fair play" when they promptly arranged for home inspection within time frame specified in contract).

Mezzanotte and Dysart (as affirmed by the Supreme Court), therefore, require a determination whether Horton acted in a reasonable manner with respect to receipt of 42 East's "evidence . . . that all of the objections to title to the Property listed in **Exhibit H** . . . have been cured or removed"—that is the event referred to in *Mezzanotte.* In considering Horton's determination that it was dissatisfied with this evidence, the trial court must determine whether Horton acted in good faith and in the exercise of honest judgment, as set out in *Fulcher*, *Midulla*, and *Mezzanotte. See also Ledbetter Bros., Inc. v. N.C. Dep't of Transp.*, 68 N.C. App. 97, 104, 314 S.E.2d 761, 766 (1984) ("Under our law such 'satisfaction' provisions clearly invest the inspecting party with discretionary power to reject, subject only to restrictions of good faith.").

III

[3] Finally, Horton contends that certain of the trial court's findings of fact are unsupported by the evidence. We note first that 42 East has, as to these findings of fact, argued—consistent with the standard of review—that "the existence of contrary evidence does not mean

that the findings at issue are not properly supported . . . ." However, 42 East has not specifically pointed to any evidence that supports the portions of the findings that Horton challenges. It is not adequate for a party to assert that a finding is supported by evidence without including citations to the record and that evidence.

Nonetheless, it is well established that " '[f]acts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light.' " *Concerned Citizens of Brunswick Cnty. Taxpayers Ass'n v. State ex rel. Rhodes*, 329 N.C. 37, 46, 404 S.E.2d 677, 683 (1991) (quoting *Helms v. Rea*, 282 N.C. 610, 620, 194 S.E.2d 1, 8 (1973)). Since the trial court made its findings of fact under a misapprehension of law—that the issue was only whether Horton failed to act in good faith and make a reasonable effort to obtain insurable title to the property—we must vacate the order and remand so that the trial court can consider the evidence in light of both section 5 and section 40.

We note that as to many of the challenged findings of fact, Horton seems to be contending primarily that they are incomplete in that they fail to take into account certain uncontested evidence or, because of the omission of certain facts, they are misleading. On the other hand, whether other findings challenged by Horton are unsupported depends upon how the order is interpreted. For example, Horton contends that the trial court's finding that Horton did not give 42 East "the opportunity to obtain the necessary quitclaim deeds" is inconsistent with the fact that 14 months elapsed between the date that Horton first notified 42 East of the objections to title and when Horton terminated the Agreement. The order can, however, be read as finding that Horton should have given 42 East an opportunity to cure the title objections after sending the letter of default. We believe that all of these issues regarding the findings of fact can better be addressed by the trial court on remand.

Because, however, the scope of the remand could be affected by Horton's challenges to the trial court's findings relating to a title insurance policy 42 East obtained from Old Republic Title Insurance Company, we address the sufficiency of the evidence supporting those findings. Finding of fact 47 provided in pertinent part that "[o]n August 6, 2006, the Plaintiff provided the Defendant with a copy of a 17.4 million dollar title insurance policy from Old Republic Title Insurance Company that contained the following 'temporary exception' with respect to the Needham Path . . . ." Finding of Fact 48 fur-

ther found that "[t]he Old Republic Title Insurance Company policy exception for the Needham Path provided that it would be deleted upon completion of the roads for the project which were completed on January 16, 2008." The trial court then found that Horton did not provide its attorney, Mr. Crowson, with a copy of the Old Republic policy (finding of fact 49) and that Horton "could have obtained title insurance for the property from Old Republic National Title Insurance Company without the Needham Path exception but the Defendant did not provide a copy of the Old Republic policy to its attorney Chris Crowson and he was not aware of the fact that Old Republic had previously issued a policy for the property."

The record does not support the trial court's finding that 42 East provided Horton with a copy of the Old Republic policy. Significantly, 42 East has pointed to no evidence supporting that portion of the finding. Instead, testimony presented at trial, along with the documentary exhibits in this case, show that 42 East only provided the Old Republic commitment to Horton and not the insurance policy itself. That commitment evidenced title exceptions for the Needham Pathway and that 18' Cart Path that were at issue in clearing the title for closing. As Horton did not have a copy of the Old Republic policy, it could not have provided the policy to its closing attorney, Chris Crowson, contrary to findings of fact 49 and 50.

In addition, the trial court's findings of fact indicating that the temporary exception for Needham Path would be deleted upon completion of the roads is not wholly correct. The Old Republic policy also included a permanent exception for "[b]uilding restriction lines, easements and any other facts shown on plat(s) recorded in Book of Maps 63, Page 232; Book 64, Page 294; Book 67, Page 16 & 256; and Book 52, Page 407, Johnston County Registry." The plats to which the exception refers contain the Needham Pathway and 18' Cart Path, and testimony established that because of the permanent exception, the Needham Path exception would survive even after completion of the roads. Therefore, to the extent that the trial court found that Horton could have obtained title insurance from Old Republic without the Needham Path exception, that finding is not supported by the evidence.

These findings of fact are material to the trial court's conclusion that Horton "did not act in good faith and make a reasonable effort to obtain insurable title to the property as defined by the Lot Purchase Agreement." While the record contains evidence that could support the trial court's conclusion that Horton did not properly terminate the contract under section 5, we cannot assume that the trial court would

have reached the same decision in the absence of its findings regarding the Old Republic title insurance policy. On remand, the trial court must, therefore, also revisit its conclusion of law regarding section 5.

Conclusion

We, therefore, vacate the order below and remand for further findings of fact and conclusions of law. The trial court is free to revisit those findings, although it is not required to do so, with the exception of the portions of the findings related to the Old Republic title insurance policy discussed above. *See Friend-Novorska v. Novorska*, 143 N.C. App. 387, 393-94, 545 S.E.2d 788, 793 (holding that when appellate court vacates trial court judgment and order, that judgment and order is "void and of no effect:" on remand; trial court is "free to reconsider the evidence before it and to enter new and/or additional findings of fact based on the evidence, with the exception that the trial court [i]s bound on remand by any portions of the . . . order affirmed by this Court"), *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001). We stress, however, that nothing in this opinion is intended to express any view on what conclusion the trial court should reach.

Vacated and Remanded.

Chief Judge MARTIN and Judge BEASLEY concur.

KEVIN ROYSTER, PLAINTIFF THOMAS D. MCNAMARA, DEFENDANT

No. COA11-714

(Filed 7 February 2012)

1. Attorneys—legal malpractice—not barred by collateral estoppel—not barred by the law of the case—sufficient forecast of evidence—summary judgment improper

The trial court erred by granting summary judgment in favor of defendant attorney in a legal malpractice case. Plaintiff's claim was not barred by the doctrine of collateral estoppel or the law of the case doctrine as the issue decided in the earlier case was not the same issue raised by plaintiff in this case and the issue in the present case and was never litigated or decided at an earlier time. Further, plaintiff forecast sufficient evidence to survive defendant's summary judgment motion.

2. Attorneys—legal malpractice—damages—emotional injury —improperly dismissed

The trial court erred in a legal malpractice case by dismissing plaintiff's request for damages for emotional injury. Plaintiff's allegation that he sustained emotional injury was nothing more than a description of the damage that he claimed to have suffered as the result of defendant's professional negligence and did not constitute the addition of an enforceable claim or cause of action that the statute of limitations had run against.

Appeal by plaintiff from order entered 8 December 2010 by Judge Benjamin G. Alford in Onslow County Superior Court. Heard in the Court of Appeals 17 November 2011.

Jeffrey S. Miller, for Plaintiff-Appellant.

Yates, McLamb & Weyher, L.L.P., by Dan J. McLamb and Kathrine E. Fisher, for Defendant-Appellee.

ERVIN, Judge.

Plaintiff Kevin Royster appeals from an order granting summary judgment in favor of Defendant Thomas McNamara and dismissing his allegation that he is entitled to damages for "emotional" injury. After careful consideration of Plaintiff's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court erred by granting summary judgment in favor of Defendant and dismissing Plaintiff's request for damages for "emotional" injury and that this case should be remanded to the Onslow County Superior Court for further proceedings not inconsistent with this opinion.

I. Factual Background

Plaintiff; his father, Warren Royster; his grandmother, Barbara Jackson; and his mother, Brenda J. McClain, were involved in the operation of East Coast Imports, a sole proprietorship which purchased wrecked and salvaged automobiles for the purpose of rebuilding and reselling them or using them as a source of second-hand parts. Although East Coast Imports was owned by Ms. Jackson, Warren Royster served as its General Manager, Ms. McClain functioned as its secretary and bookkeeper, and Plaintiff worked as a salesman. An investigation by the License and Theft Division of the North Carolina Division of Motor Vehicles revealed that an individual named Stacey

Greene had purchased a Saturn automobile from East Coast Imports. Although East Coast Imports represented that the vehicle was a 1993 Saturn that had been driven approximately 77,000 miles, the vehicle in question was, in fact, a 1992 Saturn that had been driven for 226,945 miles and had been sold to East Coast Imports as a "parts only" vehicle, which meant that it could not be appropriately registered or licensed for operation on North Carolina roads. The dashboard vehicle identification plate, the vehicle identification decal on the driver's side door, and the odometer had been removed from an unrepairable 1993 Saturn and installed on the 1992 Saturn sold to Ms. Greene in such a manner as to appear original.

On 4 May 2004, Ms. Greene filed a complaint against Warren Royster, Ms. Jackson, Ms. McClain, and Plaintiff, doing business as East Coast Imports, in which she sought to recover damages for fraud and unfair and deceptive trade practices. Plaintiff, Warren Royster, Ms. Jackson, and Ms. McClain retained Defendant to represent them in this proceeding. The action filed by Ms. Greene came on for trial before the trial court and a jury at the 10 October 2005 civil session of Onslow County Superior Court. On 13 October 2005, the jury returned a verdict finding in favor of Ms. Greene on the fraud claim and awarding her $1,911.00 in compensatory damages and $500,000.00 in punitive damages (which was reduced to $250,000.00 in accordance with N.C. Gen. Stat. § 1D-25). On the same date, the trial court entered judgment in accordance with the jury's verdict, as modified.

On 24 October 2005, Plaintiff, Warren Royster, Ms. Jackson, and Ms. McClain filed a motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. On 23 March 2006, the trial court entered an order denying this new trial motion. Plaintiff, Warren Royster, Ms. Jackson, and Ms. McClain noted an appeal to this Court from the trial court's judgment. On 6 November 2007, this Court filed an opinion affirming the trial court's judgment and upholding the denial of the motion for a new trial as to Plaintiff. *Greene v. Royster*, 187 N.C. App. 71, 81-82, 652 S.E.2d 277, 284 (2007).

On 29 October 2008, Plaintiff filed a complaint against Defendant seeking to recover damages for professional negligence. In his complaint, Plaintiff alleged that he had never had any "dealings whatsoever with [Ms.] Greene" or any involvement with "East Coast Imports that in any way impacted [Ms.] Greene" and that, except for Defendant's negligent failure to move for a directed verdict in his favor at trial, Plaintiff would not have had "judgment entered against him in the amount of $251,911.00." In his answer, Defendant asserted

that the trial court's order denying Plaintiff's motion for a new trial and our decision to affirm the trial court's ruling established that "more than a scintilla of evidence" supported Ms. Greene's claims against Plaintiff so that the trial court would have denied a directed verdict motion had one been made on Defendant's behalf. In addition, Defendant asserted that Plaintiff's claims were barred on collateral estoppel and *res judicata* grounds. On 9 July 2009, Plaintiff voluntarily dismissed his complaint against Defendant without prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a).

Plaintiff refiled his complaint against Defendant on 2 July 2010. Although the complaint that Plaintiff filed on 2 July 2010 was essentially identical to the one that he had voluntarily dismissed without prejudice on 9 July 2009, Plaintiff did allege for the first time in his refiled complaint that, as a result of Defendant's negligence, "[Plaintiff] [had] been prevented from enjoying a normal life, [was] forced to undergo humiliation and emotional damage, and [had] suffered other damages . . . ." In his answer, Defendant reiterated the defenses that he had asserted in his initial answer and alleged that Plaintiff's claims for "emotional damages and any other emotional distress" should be disregarded because they had not been asserted in Plaintiff's original complaint. On 25 August 2010, Defendant filed a motion seeking summary judgment in his favor on the grounds that (1) the record in the underlying case established as a matter of law that, had a motion for directed verdict in Plaintiff's favor been made at the original trial, it would have been denied; (2) Plaintiff's claim was barred by the doctrines of collateral estoppel and *res judicata*; and (3) Plaintiff's emotional distress claim had not been asserted in his original complaint. On 8 December 2010, the trial court entered an order allowing Defendant's motion. Plaintiff noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Appropriateness of Summary Judgment

[1] On appeal, Plaintiff contends that the trial court erred by granting summary judgment in favor of Defendant by "giving the Defendant[] the benefits of the doctrine of *res judicata*." Although the trial court appears to have relied on the doctrine of collateral estoppel rather than the doctrine of *res judicata* in deciding to dismiss Plaintiff's complaint, we believe that Plaintiff's challenge to the trial court's decision has merit.

In seeking summary judgment, Defendant contended that there was no genuine issue of material fact concerning whether the injuries that Plaintiff claims to have sustained were proximately caused by Defendant's negligence. More specifically, Defendant argued that Plaintiff's complaint was subject to dismissal because the issue of whether Plaintiff was liable to Ms. Greene on the basis of fraud had been fully and fairly litigated in the underlying case. As a result, Defendant contended that Plaintiff was collaterally estopped from arguing that he had not defrauded Ms. Greene and that Plaintiff could not establish that his alleged injuries were proximately caused by Defendant's negligence because the record developed in *Greene*, "including the Judgment, the jury's verdict, the Order denying [Plaintiff's] Motion for [a] New Trial, all findings of fact and conclusions of law in that Order, and other pleadings and filings[,]" established that a motion for directed verdict, had one been asserted, would and should have been denied.

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). "A defendant may show [that] he is entitled to summary judgment 'by (1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim.' " *Young v. Gum*, 185 N.C. App. 642, 645, 649 S.E.2d 469, 472 (2007) (quoting *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, disc. review denied, 340 N.C. 359, 458 S.E.2d 187 (1995)), *disc. review denied*, 362 N.C. 374, 662 S.E.2d 552 (2008). We review an order granting summary judgment *de novo*, *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004), viewing the record evidence in the light most favorable to the nonmoving party. *ABL Plumbing & Heating Corp. v. Bladen Cty. Bd. of Educ.*, 175 N.C. App. 164, 167-68, 623 S.E.2d 57, 59 (2005), *disc. review denied*, 360 N.C. 362, 629 S.E.2d 846 (2006).

In a legal malpractice action, "the plaintiff has the burden of proving by the greater weight of the evidence: (1) that the attorney breached the duties owed to his client, as set forth by *Hodges* [*v. Carter*,] 239 N.C. 517, [519-20,] 80 S.E.2d 144,[145-46, (1954),] and that [the attorney's] negligence (2) *proximately caused* (3) damage to

the plaintiff." *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 365-66 (1985) (emphasis added). In order to establish the necessary proximate cause, "a plaintiff is required to prove that he would not have suffered the harm alleged absent the negligence of his attorney." *Hummer v. Pulley, Watson, King & Lischer, P.A.*, 157 N.C. App. 60, 66, 577 S.E.2d 918, 923 (citation omitted), *disc. review denied*, 357 N.C. 459, 585 S.E.2d 758 (2003). "A plaintiff alleging a legal malpractice action must prove a 'case within a case,' meaning a showing of the viability and likelihood of success of the underlying action." *Formyduval v. Britt*, 177 N.C. App. 654, 658, 630 S.E.2d 192, 194 (2006) (citation omitted), *aff'd by an equally divided court*, 361 N.C. 215, 639 S.E.2d 443 (2007). As a result, in order to avoid an award of summary judgment in favor of Defendant, Plaintiff was required to forecast evidence tending to show that the trial court would have ruled in his favor had Defendant sought a directed verdict at the original trial.

The first issue that we must address in order to resolve the issues raised by Plaintiff's challenge to the trial court's order is whether Plaintiff's professional negligence claim against Defendant is barred by the doctrine of collateral estoppel.[1] The doctrine of collateral estoppel " 'precludes relitigation of an issue decided previously in judicial or administrative 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.' " *Lancaster v. N.C. Dep't of Env't & Natural Res.*, 187 N.C. App. 105, 111, 652 S.E.2d 359, 363 (2007) (quoting *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 166, 557 S.E.2d 610, 613 (2001), *aff'd*, 355 N.C. 485, 562 S.E.2d 422 (2002)), *disc. review denied*, 362 N.C. 236, 659 S.E.2d 734 (2008). As a result, the doctrine of collateral estoppel prevents "the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim." Whitacre, 358 N.C. at 15, 591 S.E.2d at 880 (citation omitted). "The elements of collateral estoppel . . . are as follows: (1) a prior suit resulting in a

1. Although Plaintiff contends that the trial court erroneously ruled in Defendant's favor on *res judicata* grounds, the proper resolution of this case involves application of collateral estoppel rather than *res judicata* principles. *Res judicata* precludes litigants from asserting the same "claim" in a second suit based on the same cause of action between the same parties or their privies. *Whitacre P'Ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). As a result of the fact that the claim that Plaintiff asserted against Defendant in this case is not identical to the claim that Ms. Greene asserted against him in the underlying case and the fact that the two cases involved different sets of parties, the doctrine of *res judicata* does not apply in this case.

final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." *McDonald v. Skeen*, 152 N.C. App. 228, 230, 567 S.E.2d 209, 211 (citing *Thomas M. McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986)), *disc. review denied*, 356 N.C. 437, 571 S.E.2d 222 (2002).

After thoroughly reviewing the record, we do not believe that the trial court's judgments and orders in the underlying case or our affirmance of the trial court's decision to deny Plaintiff's motion for a new trial are entitled to collateral estoppel effect in this case given that the "issue" decided in the earlier case and the "issue" raised by Plaintiff in this case are not identical and given that the issue raised by Plaintiff in the present case was never actually litigated or decided at an earlier time.

In *Greene*, this Court addressed the issue of whether the trial court properly denied Plaintiff's motion for a new trial, which was predicated upon a contention that the evidence presented at the trial of the underlying case was insufficient to justify finding Plaintiff liable to Ms. Greene. 187 N.C. App. at 81, 652 S.E.2d at 284. As a result of the fact that Plaintiff's motion "[was made] pursuant to . . . [N.C. Gen. Stat. § 1A-1,] Rule 59(a) [](7)", we recognized that " 'it [was] plain that [the] trial judge's *discretionary* order pursuant to . . . Rule 59 for or against a new trial . . . [could] be reversed on appeal only in those exceptional cases where an *abuse of discretion [was] clearly shown.' " *Id. at* 78, 652 S.E.2d at 282 (emphasis added) (quoting *Worthington v. Bynum*, 305 N.C. 478, 484, 290 S.E.2d 599, 603 (1982)); *see also Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000) (stating that "a motion for new trial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed absent a manifest abuse of that discretion"). After acknowledging that the trial court's instructions concerning the liability issue made reference to Plaintiff, Warren Royster, Ms. Jackson, and Ms. McClain as a group rather than requiring the jury to make individual findings concerning the extent to which each of the named participants in the alleged fraud were liable to Ms. Greene individually and noting that Plaintiff "did not object to the [instructions] when given opportunity by the trial court" or "request that a separate issue be submitted regarding his actions only," *Id.* at 81, 652 S.E.2d at 284, we determined that the jury's verdict was amply supported by evidence, stating that:

> (1) defendants intentionally changed the VIN on a 1992 Saturn in a deliberate effort to contravene the law and to conceal the fact that the vehicle was unfit for operation; (2) [Ms. Greene] purchased the vehicle in reliance on defendants' representation that it was a road-worthy 1993 Saturn; and (3) the State of North Carolina impounded the vehicle, leaving [Ms. Greene] without the use of her automobile for more than three years.

Id. As a result, we held that the trial court did not abuse its discretion in denying Plaintiff's motion for a new trial. *Id.* at 82, 652 S.E.2d at 284. Simply put, our ultimate holding in *Greene* was that the trial court did not abuse its discretion in denying the motion for a new trial lodged by Plaintiff on the grounds that the record contained sufficient evidence to support a jury verdict against the "defendants."

In this case, however, Plaintiff alleges that Defendant negligently failed to move for a directed verdict at the original trial on the grounds that the record, when viewed in the light most favorable to Ms. Greene, did not contain sufficient evidence tending to show that Plaintiff, individually, was liable to Ms. Greene for fraud.

> 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.

Herring v. Food Lion, LLC, 175 N.C. App. 22, 26, 623 S.E.2d 281, 284 (2005) (internal citations omitted), *aff'd per curiam*, 360 N.C. 472, 628 S.E.2d 761 (2006). As a result, the issue raised by Plaintiff's claim against Defendant in this case is whether the record developed at the underlying trial, when considered in the light most favorable to Ms. Greene, would have supported a finding that Plaintiff was liable to Ms. Greene for fraud. A determination that the record contained sufficient evidence to support the jury's verdict against the "defendants" is simply not a determination that the record contained sufficient evidence to support a finding that Plaintiff defrauded Ms. Greene. Thus, the issue decided in *Greene* and the issue raised by Plaintiff's claim in this case are not identical. Moreover, the issue of whether the record contained sufficient evidence to support a finding of liability against Plaintiff was not actually litigated or determined in the underlying case given that Defendant failed to make a directed verdict motion on Plaintiff's behalf. As a result, Plaintiff is not collaterally estopped

from asserting a professional negligence claim against Defendant predicated on his failure to seek a directed verdict in Plaintiff's favor at the trial of the underlying case.

In seeking to persuade us to reach a different result, Defendant relies upon our decision in *Whiteheart v. Waller*, 199 N.C. App. 281, 281-83, 681 S.E.2d 419, 420-21 (2009), which arose from the defendant's representation of the plaintiff in connection with a billboard leasing dispute. After the plaintiff failed to pay the rent associated with a billboard located on a particular tract of property, one of the plaintiff's competitors offered to lease the billboard location from the property owner and requested the removal of the plaintiff's billboard in accordance with instructions received from the property owner. *Id.* at 281-82, 681 S.E.2d at 420. In response to this request, the plaintiff sent the property owner a check for past due rent and a proposed new lease, both of which the property owner rejected and returned to the plaintiff. *Id.* at 282, 681 S.E.2d at 420. Even so, the plaintiff failed to comply with the property owner's requests for the removal of the plaintiff's billboard. *Id.* Subsequently, the plaintiff sent a letter informing the recipients that the new occupant of the billboard location was a "lease jumper" and had engaged in "unprofessional, unethical, and despicable" business practices. *Id.* Although the plaintiff's attorney reviewed the letter before it was sent, he failed to advise the plaintiff that sending this letter might result in liability for damages. *Id.* As a result, the competitor and the property owner obtained a damage award against the plaintiff. *Id.* at 283, 681 S.E.2d at 421. After the plaintiff filed an action against his attorney in which he alleged that the attorney had negligently failed to advise him of the fact that he might be held liable in the event that he sent the letter disparaging the competitor, the trial court dismissed the plaintiff's complaint. *Id.* On appeal, we held that the trial court correctly "applied collateral estoppel in determining that the jury verdicts . . . finding the plaintiff liable for malicious prosecution, abuse of process, libel *per se*, unfair and deceptive trade practices, slander of title, unjust enrichment, and *quantum meruit*, established as a matter of law plaintiff's intentional wrongdoing[,]" thus precluding the plaintiff from asserting a legal malpractice claim against his attorney on the basis of *in pari delicto* considerations. *Id.* at 285, 681 S.E.2d at 422.

Whiteheart is distinguishable from this case in at least two significant respects. First, our holding in *Whiteheart* was premised upon a determination that "[t]he issue regarding whether [the] plaintiff engaged in intentional acts giving rise to legal liability was litigated

and was necessary for the jury's verdicts and the superior court's judgments against [the] plaintiff." 199 N.C. App. at 284, 681 S.E.2d at 422. In the present case, Defendant correctly contends that, in *Greene*, we held that the jury's verdict was amply supported by the evidence. However, the trial court's judgment and our holding in *Greene* only establish that sufficient evidence existed to support the jury's verdict that "[Ms. Greene] [was] damaged by the fraud of the Defendants," rather than by Plaintiff individually. Secondly, our decision in *Whiteheart* was predicated upon the fact that the plaintiff's claim was barred on the basis of *in pari delicto* concerns given that the record clearly established that the plaintiff was "well aware" that his actions were unethical. 199 N.C. App. at 286, 681 S.E.2d at 422-23. Simply put, "[r]egardless of the nature of the advice from [the] defendant, [the] plaintiff knew that the information [he was presenting] was incorrect." *Id*. at 286, 681 S.E.2d at 423. The present record does not support barring Plaintiff's professional negligence claim in this case on *in pari delicto* grounds,[2] given that the entire issue raised by Plaintiff's professional negligence claim is the extent to which the evidence received at the underlying trial supported a finding of liability. Thus, for both of these reasons, we conclude that *Whiteheart* does not control the disposition of the present case.

We do not find Defendant's reliance upon the discussion of the "law of the case" doctrine set out in *Young*, 185 N.C. App. at 645-46, 649 S.E.2d at 472 (affirming a trial court's decision to grant summary judgment in favor of the defendant in a legal malpractice action stemming from the defendant's alleged failure to advise the plaintiff that a prior consent order could be set aside given that the court had already decided that the consent order should remain in full force and effect) persuasive either. According to well-established North Carolina law, "once a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case."

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2. The *in pari delicto doctrine* "generally forbids redress to one for an injury done him by another, if he himself first be in the wrong about the same matter whereof he complains." *Byers v. Byers*, 223 N.C. 85, 90, 25 S.E.2d 466, 469-70 (1943). As the record in *Whiteheart* clearly established, the plaintiff knew that his actions were improper despite the fact that his attorney failed to attempt to dissuade him from sending the letter on which his liability was, at least in part, predicated. The gravamen of Plaintiff's claim in this case, by contrast, rests on the assertion that, despite the fact that the record did not support a finding of liability, judgment was entered against him because Defendant failed to challenge the sufficiency of the evidence to support a finding that he was liable to Ms. Greene. As a result, there is no basis for finding that the claim that Plaintiff has asserted against Defendant in this case should be barred on *in pari delicto* grounds.

N.C.N.B. v. Virginia Carolina Builders, 307 N.C. 563, 567, 299 S.E.2d 629, 631 (1983). As a result, the "law of the case" doctrine prevents parties from relitigating issues that have already been resolved. *Epps v. Duke University*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849, *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996). As we have already established, the issue of whether sufficient evidence existed to support the submission to the jury of Ms. Greene's fraud claim against Plaintiff individually has not been previously addressed or decided. Thus, Plaintiff's complaint is not barred by the "law of the case" doctrine.

Finally, we conclude that Plaintiff has forecast sufficient evidence to survive Defendant's summary judgment motion. As we have already noted, Plaintiff was required to forecast evidence tending to show that "(1) [Defendant] breached the duties owed to his client, as set forth by *Hodges*, 239 N.C. [at 519-20,] 80 S.E.2d [at 145-46] and that [Defendant's] negligence (2) proximately caused (3) damage to [P]laintiff." *Rorrer*, 313 N.C. at 355, 329 S.E.2d at 366. At the hearing on Defendant's summary judgment motion, Plaintiff submitted the transcript of the underlying trial for the trial court's consideration. A careful reading of the transcript indicates that Defendant failed to move for a directed verdict on Plaintiff's behalf. In addition, the investigating officer testified that he had not had "any dealings" with Plaintiff, that he did not "know of anything" that Plaintiff had done in connection with the sale or purchase of Ms. Greene's vehicle, that Plaintiff's name did not appear on any of the documentation concerning Ms. Greene's vehicle, that Plaintiff had nothing to do with the sale of Ms. Greene's vehicle, and that he did not have any information suggesting that Plaintiff had any personal involvement in the sale of two other vehicles which were also under investigation. As a result, we hold that the record reveals the presence of a genuine issue of material fact concerning the extent to which Plaintiff is entitled to recover damages from Defendant based upon his failure to seek a directed verdict concerning the fraud claim that Ms. Greene had asserted against Plaintiff, so that the trial court erred by granting summary judgment in Defendant's favor.

B. "Emotional" Damages Allegation

[2] Secondly, Plaintiff contends that the trial court erred by dismissing his claim for compensation for "emotional" damages on the grounds that his effort to obtain such damages did not constitute a " 'claim' within the meaning of the [North Carolina] Rules of Civil Procedure." Once again, we conclude that Plaintiff's argument has merit.

"A motion to dismiss under [N.C. Gen. Stat. § 1A-1,] Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting 'the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some [recognized] legal theory.' " *Forsyth Memorial Hospital. v. Armstrong World Industries*, 336 N.C. 438, 442, 444 S.E.2d 423, 425-26 (1994) (quoting *Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991)) (alteration in original). "A statute of limitation or repose may be the basis of a 12(b)(6) dismissal if on its face the complaint reveals the claim is barred by the statute." *Cage v. Colonial Building Co.*, 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994) (citations omitted). N.C. Gen. Stat. § 1–15(c), which governs the limitations period for professional negligence claims, "provides for a minimum three-year period from occurrence of the last act [of malpractice]; [and] an additional one-year-from-discovery period for injuries 'not readily apparent' subject to a four-year period of repose commencing with defendant's last act giving rise to the cause of action . . . ." *Black v. Littlejohn*, 312 N.C. 626, 634, 325 S.E.2d 469, 475 (1985) (footnote omitted).

According to N.C. Gen. Stat. § 1A-1, Rule 41(a)(1), "a plaintiff may re-file within one year a lawsuit that was previously voluntarily dismissed, and the re-filed case will relate back to the original filing for purposes of tolling the statute of limitations." *Losing v. Food Lion, L.L.C.*, 185 N.C. App. 278, 283-84, 648 S.E.2d 261, 264-65 (2007) (citations omitted), *disc. review denied*, 362 N.C. 236, 659 S.E.2d 735 (2008). "[T]he Rule 41(a) tolling of the applicable statute of limitations applies only to the claims in the original complaint, and not to other causes of action that may arise out of the same set of operative facts." *Id.* at 284, 648 S.E.2d at 265. In other words, "Rule 41(a)(1) extends the time within which a party may refile suit after taking a voluntary dismissal when the refiled suit involves the same parties, rights and cause of action as in the first action." *Holley v. Hercules, Inc.*, 86 N.C. App. 624, 628, 359 S.E.2d 47, 50 (1987) (citations omitted).

Plaintiff filed his original complaint against Defendant within the three-year period set out in N.C. Gen. Stat. § 1-15(c). After taking a voluntary dismissal without prejudice, Plaintiff refiled his complaint in a timely manner. In his refiled complaint, Plaintiff alleged for the first time that, as a result of Defendant's negligence, "[P]laintiff [had] been prevented from enjoying a normal life, [was] forced to undergo humiliation and emotional damage, and [had] suffered other damages . . . ." Defendant argues, in reliance upon our decisions in *Losing*

and *Stanford v. Owens*, 76 N.C. App. 284, 289, 332 S.E.2d 730, 733, *disc. review denied*, 314 N.C. 670, 336 S.E.2d 402 (1985), that this "emotional" injury component of Plaintiff's damage claim is time-barred given that Plaintiff first sought to recover such damages more than four years after the entry of judgment in the underlying case and the denial of Plaintiff's motion for a new trial.

In *Losing*, we held that a plaintiff's claim for invasion of privacy, which had been asserted for the first time in a complaint that had been refiled following a voluntary dismissal with prejudice, was time-barred because the plaintiff had not asserted such a claim in his original complaint. 185 N.C. App. at 283-84, 648 S.E.2d at 264-65. In *Stanford*, we held that the plaintiff's fraud claim was time-barred in a case in which the plaintiff originally filed a complaint alleging negligent misrepresentation, took a voluntary dismissal, and refiled a complaint alleging both negligent misrepresentation and fraud some seven years after the cause of action had accrued. 76 N.C. App. at 288-89, 332 S.E.2d at 733. The present case is not governed by *Losing* and *Stanford*, given that the "new" claims asserted in those cases involved separate causes of action that required proof of separate elements while, in this case, "only one cause of action is asserted, and it is the same cause of action that was asserted in the first [complaint]. . . ." *Holley*, 86 N.C. App. at 627, 359 S.E.2d at 49 (holding that a plaintiff's request for an award of punitive damages that was asserted for the first time in a refiled complaint did not add "an enforceable claim or cause of action that the statute of limitations had run against"). Although North Carolina law recognizes a separate cause of action for intentional or negligent infliction of "severe emotional distress," emotional injury may, in appropriate cases, be awarded as a regular component of compensatory damages in a tort action. *See Iadanza v. Harper*, 169 N.C. App. 776, 778-81, 611 S.E.2d 217, 220-22 (distinguishing between the "severe emotional distress" required to establish a claim for intentional or negligent infliction of emotional distress and the emotional suffering that may be included in a damage recovery in a tort action), *disc. review denied*, 360 N.C. 63, 621 S.E.2d 624 (2005). Plaintiff's allegation that he sustained "emotional" injury is nothing more than a description of the damage that he claims to have suffered as the result of Defendant's professional negligence and "did not [constitute the addition of] an enforceable claim or cause of action that the statute of limitations had run against." *Holley*, 86 N.C. App. at 628, 358 S.E.2d at 50. As a result, the trial court

erred by dismissing Plaintiff's request for compensation for emotional injuries stemming from Defendant's alleged legal malpractice.[3]

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by granting summary judgment in favor of Defendant with respect to the liability issue and dismissing Plaintiff's request for "emotional" damages. As a result, the trial court's order should be, and hereby is, reversed and this case should be, and hereby is, remanded to the Onslow County Superior Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges BEASLEY and THIGPEN concur.

MARQUES COLE JONES v. NIAH DRAKE WHIMPER

No. COA11-689

(Filed 7 February 2012)

Child Custody and Support—venue—contemporaneous lawsuits—New Jersey home state

The trial court did not err in a child custody and support action by declining to exercise jurisdiction over plaintiff's motion for emergency custody and his complaint for custody of his minor child. At the time the child custody proceeding was instituted by plaintiff in New Jersey, New Jersey was the child's home state. The trial court was required to dismiss plaintiff's action pursuant to N.C.G.S. § 50A-206(b).

Appeal by plaintiff from order entered 21 February 2011 by Judge P. Gwynett Hilburn in Pitt County District Court. Heard in the Court of Appeals 15 November 2011.

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3. Defendant has not contended on appeal that "emotional" injuries of the type at issue here are not compensable in a legal malpractice action stemming from alleged deficient representation in connection with underlying fraud-based litigation, and we express no opinion on that issue at this time.

Bishop & Smith, PLLC, by Keith A. Bishop, for plaintiff appellant.

W. Gregory Duke for defendant appellee.

McCULLOUGH, Judge.

Marques Cole Jones ("plaintiff") appeals from the trial court's order declining to exercise jurisdiction over plaintiff's motion for emergency custody and his complaint for custody of his minor child. We affirm.

I. Background

Plaintiff is the biological father of the minor child Z.J. Niah Drake Whimper ("defendant") is the biological mother of Z.J. Z.J. was born in Greenville, Pitt County, North Carolina, on 23 December 2004. From the record, it appears the minor child resided with defendant in both Greenville and Havelock, North Carolina, following the child's birth. On 29 September 2006, defendant married Guy Whimper, Jr. ("Whimper").

On 22 December 2006, defendant filed a child custody complaint in Pitt County District Court seeking primary physical custody of Z.J. Plaintiff and defendant participated in court-ordered mediation but were unable to reach a mediated parenting agreement. Thereafter, in July 2007, defendant filed a voluntary dismissal of her pending North Carolina child custody action. Defendant then relocated to the State of New Jersey with the minor child and Whimper in August 2007.

On 4 May 2009, Whimper filed a verified complaint for adoption of Z.J. in the Superior Court of New Jersey. On 1 September 2009, defendant filed her consent to the adoption of Z.J. by Whimper. On 12 November 2009, Judge Margaret M. Foti ("Judge Foti"), presiding judge over the matter in New Jersey, entered an order preserving the custodial *status quo* until the matter could be heard.

On 8 December 2009, plaintiff filed a civil action complaint in the Superior Court of New Jersey seeking child custody and support and reasonable parenting time. On 13 January 2010, Judge Foti entered a civil action order in the Superior Court of New Jersey consolidating Whimper's adoption action and plaintiff's custody action and setting a hearing date for 20 September 2010. The record shows that defendant and Whimper moved back to North Carolina with the minor child, this time to Charlotte, in August 2010.

On 9 November 2010, plaintiff filed notice to dismiss the proceedings in the Superior Court of New Jersey on *forum non conveniens* grounds. On 15 November 2010, Judge Foti ordered that the Superior Court of New Jersey would retain jurisdiction over the matter and denied plaintiff's motion to dismiss. On the same day, plaintiff filed the present child custody action in Pitt County, North Carolina. In his complaint, plaintiff alleged that defendant's residence with the minor child in the State of New Jersey was temporary in nature and that the home state of both defendant and the minor child remained North Carolina. However, plaintiff's complaint acknowledged that he was a party to Whimper's adoption action, which was still pending in New Jersey at the time defendant filed the present complaint. On 23 November 2010, Judge Foti sent written notification of the pending proceedings in New Jersey Superior Court to Judge Hilburn, the presiding judge in plaintiff's current action in Pitt County District Court. In her letter, Judge Foti indicated that she had denied plaintiff's motion to dismiss the pending child custody matters in New Jersey, which had asserted *forum non conveniens* grounds. Judge Foti also indicated in her letter to Judge Hilburn that plaintiff had filed a child custody action in New Jersey on 8 December 2009 which had been consolidated for trial in New Jersey and that "[t]he subject minor lived with his mother and step-father in New Jersey at the time these actions were filed."

On 1 December 2010, Judge Hilburn ordered that jurisdiction over all matters concerning Z.J. shall be in the State of New Jersey. However, on 10 December 2010, Judge Hilburn set aside the previous order and ordered a hearing on the jurisdiction issue. In the 10 December 2010 order, Judge Hilburn indicated that counsel for plaintiff and Judge Foti would participate by telephone regarding the jurisdiction issue. On 2 February 2011, Judge Hilburn notified Judge Foti by email of the possibility of a telephone conference between the two judges and counsel for both parties regarding the jurisdiction issue, stating that Judge Hilburn had asked "the attorneys to contact [the family court coordinator] if they feel that a telephone conference should take place between all of us regarding the jurisdiction issue. Otherwise, the issue of jurisdiction will be decided by the two [judges]." The record discloses no other communications between the two judges, nor whether any conference between the two judges and the parties took place.

On 21 February 2011, Judge Hilburn entered an order declining to exercise jurisdiction over the matters of custody and child support relating to Z.J. Plaintiff timely filed written notice of appeal from the trial court's order on 14 March 2011.

II. Subject-matter jurisdiction: simultaneous child custody proceedings

On appeal, plaintiff argues the trial court's order declining to exercise jurisdiction in the present child custody action must be reversed for two reasons: (1) the trial court held an *ex parte* communication with the New Jersey trial judge and violated the mandatory provisions of N.C. Gen. Stat. § 50A-110 (2009); and (2) the trial court failed to provide plaintiff an opportunity to present facts and legal arguments before making its custody determination. Although plaintiff presents these arguments separately in his brief, they essentially address the same issue: What is required of a North Carolina trial court in determining jurisdiction in child custody actions when simultaneous proceedings are pending in another state?

In reviewing a question of subject matter jurisdiction, our standard of review is *de novo*. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). To determine jurisdiction of child custody issues, the trial court must follow the mandates of the federal Parental Kidnapping Prevention Act ("PKPA") and the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") as enacted in North Carolina. *Williams v. Williams*, 110 N.C. App. 406, 409, 430 S.E.2d 277, 280 (1993). When there are simultaneous proceedings in other states, the UCCJEA provides, with regard to jurisdiction:

> Except as otherwise provided . . . a court of this State may not exercise its jurisdiction under this Part if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state *having jurisdiction substantially in conformity with this Article*, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this State is a more convenient forum . . . .

N.C. Gen. Stat. § 50A-206(a) (2009) (emphasis added). Similarly, the PKPA provides in part:

> A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State *is exercising jurisdiction consistently with the provisions of this section* to make a custody or visitation determination.

28 U.S.C. § 1738A(g) (2006) (emphasis added). Thus, when there is an action already pending in another state, the trial court in North Carolina must address first the threshold question of whether the other state is exercising jurisdiction in substantial conformity with jurisdictional statutes controlling in this state. *See Davis v. Davis*, 53 N.C. App. 531, 539-40, 281 S.E.2d 411, 416 (1981).

Both the PKPA and the UCCJEA " 'provide[] substantially the same jurisdictional prerequisites.' " *Potter v. Potter*, 131 N.C. App. 1, 4, 505 S.E.2d 147, 149 (1998) (alteration in original) (quoting *Beck v. Beck*, 123 N.C. App. 629, 632, 473 S.E.2d 789, 790 (1996)). Significantly, "both permit the state wherein a custody claim is filed to assume jurisdiction if that state is the home state of the affected child." *Id.*; *see* N.C. Gen. Stat. § 50A-201(a)(1) (2009) (allowing a North Carolina court to exercise jurisdiction over an initial child custody determination when "[t]his State is the home state of the child on the date of the commencement of the proceeding"); 28 U.S.C. § 1738A(c)(2) (allowing a state to exercise jurisdiction over a child custody visitation determination when "such State . . . is the home state of the child on the date of the commencement of the proceeding"). Under both statutes, a child's "home state" is the state in which a child has lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of the child custody proceeding. N.C. Gen. Stat. § 50A-102(7) (2009); 28 U.S.C. § 1738A(b)(4). Notably, priority is given to the state with home state jurisdiction. *See Chick v. Chick*, 164 N.C. App. 444, 448, 596 S.E.2d 303, 307 (2004); N.C. Gen. Stat. § 50A-206 (Official Comment) (2009) ("The problem of simultaneous proceedings is no longer a significant issue. Most of the problems have been resolved by the prioritization of home state jurisdiction under Section 201[.]").

In the present case, Judge Hilburn found as a fact that "[t]he child who is the subject of the New Jersey action and this North Carolina action resided in New Jersey, and specifically for six months immediately preceding the commencement of the New Jersey actions." This finding of fact is supported by competent evidence in the record, including plaintiff's own complaint for child custody and his sworn affidavits as to the status of the minor child. The record shows defendant relocated to New Jersey in August 2007 with the minor child, where the two resided until August 2010. While plaintiff correctly contends that the jurisdictional provisions of the UCCJEA do not apply to adoption proceedings, plaintiff filed a child custody action in the Superior Court of New Jersey on 8 December 2009. Thus, at the

time the child custody proceeding was instituted by plaintiff in New Jersey, New Jersey was the child's home state for jurisdiction purposes under both the UCCJEA and the PKPA, and therefore, Judge Hilburn properly concluded that North Carolina cannot exercise jurisdiction over the matter.

Nonetheless, plaintiff argues Judge Hilburn should have complied with the mandatory provisions of N.C. Gen. Stat. § 50A-110 before ruling on the jurisdiction issue. Under this statute, when determining the existence of subject matter jurisdiction in a child custody proceeding, a court in North Carolina "*may* communicate with a court in another state." N.C. Gen. Stat. § 50A-110(a) (2009) (emphasis added). When such discretionary communication occurs between the two courts pursuant to this statute, "[t]he court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made." *Id.* § 50A-110(b). Furthermore, a record must be made of the communication, unless the communication concerns schedules, calendars, court records, or similar matters. *Id.* § 50A-110(d).

In addition to such discretionary communication under section 50A-110, a North Carolina court is sometimes statutorily required to communicate with a foreign court concerning child custody proceedings. Relevant to this case is section 50A-206 of the UCCJEA, which provides, "If the court determines that a child-custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this Article, *the court of this State shall stay its proceeding and communicate with the court of the other state.*" N.C. Gen. Stat. § 50A-206(b) (emphasis added). "If the court of the state having jurisdiction substantially in accordance with [the UCCJEA] does not determine that the court of this State is a more appropriate forum, *the court of this State shall dismiss the proceeding.*" *Id.* (emphasis added).

Here, upon filing his motion to dismiss the pending New Jersey action on 9 November 2010, plaintiff presented extensive *forum non conveniens* arguments to Judge Foti. On 15 November 2010, Judge Foti denied plaintiff's motion to dismiss, stating in her order that she would contact the presiding judge in North Carolina "as to the jurisdiction issues." That same day, plaintiff filed the present action in North Carolina, including his same *forum non conveniens* arguments. At the request of counsel for both plaintiff and defendant,

Judge Foti informed Judge Hilburn, by way of letter dated 23 November 2010, that she had determined New Jersey was the proper state to exercise jurisdiction in the child custody matters, citing New Jersey's UCCJEA statutory provisions. Accordingly, upon making the factual determination that New Jersey was properly exercising home state jurisdiction at the time the New Jersey actions were commenced, Judge Hilburn's obligation to communicate with the New Jersey court under the mandatory provisions of N.C. Gen. Stat. § 50A-206(b) had already been fulfilled, as Judge Foti had already informed Judge Hilburn of her decision that North Carolina was not the more convenient forum. Accordingly, pursuant to N.C. Gen. Stat. § 50A-206(b), Judge Hilburn was required to dismiss plaintiff's action. Judge Hilburn's 21 February 2011 order details these events in the findings of fact, and thereafter properly concludes that North Carolina cannot exercise jurisdiction in this matter.

We emphasize that because the communication between the North Carolina and New Jersey courts at issue in the present case concerned simultaneous child custody proceedings, the provisions of N.C. Gen. Stat. § 50A-206 control. Because the record reveals no discretionary communication between the two courts actually occurred, the provisions of N.C. Gen. Stat. § 50A-110 are not implicated. Plaintiff argues that because Judge Hilburn's 21 February 2011 order indicates that the decision to decline jurisdiction in North Carolina was made "[a]fter reviewing the file, hearing arguments of counsel and reviewing correspondence from and *having telephone conferences* with the Honorable Margaret M. Foti, Superior Court of New Jersey," the record necessarily implies that Judge Hilburn held discretionary *ex parte* communications with Judge Foti without complying with section 50A-110. (Emphasis added.) However, even if Judge Hilburn did, in fact, have telephone conferences with Judge Foti regarding the jurisdiction issue, we fail to see how any such communication affected the outcome in the present case, as Judge Hilburn's findings of fact both disclose and rely on the same facts that are presented in plaintiff's present child custody complaint, Judge Foti's order denying plaintiff's motion to dismiss, and Judge Foti's letter to Judge Hilburn, which was fully produced to the parties. Further, although plaintiff argues he was given no opportunity to present facts and arguments regarding the jurisdiction issue to Judge Hilburn, plaintiff submitted to Judge Hilburn a copy of his extensive *forum non conveniens* arguments as an exhibit to his present action for child custody.

Thus, the statutory prerequisites for determining child custody jurisdiction were substantially complied with in the present case. In the 21 February 2011 order, Judge Hilburn made the requisite findings of fact and conclusions of law that New Jersey had proper home state jurisdiction at the time the New Jersey child custody action was commenced, that the New Jersey court had communicated with the North Carolina court regarding the jurisdictional issue, that New Jersey declined to find this State the more appropriate forum for the parties' custody dispute, and that North Carolina must therefore dismiss the action under the UCCJEA and the PKPA. Given these circumstances, and our *de novo* conclusion that North Carolina may not exercise jurisdiction over plaintiff's child custody matter, the trial court's order declining to exercise jurisdiction in the present case must be affirmed.

Affirmed.

Judge STEELMAN concurs.

Judge McGEE dissents with separate opinion.

McGEE, Judge, dissenting.

Because I believe the trial court failed to fully comply with N.C. Gen. Stat. §§ 50A-110 and 50A-206, I would remand.

First, I disagree with the assumption that, if the trial court's contact with the New Jersey court was mandatory as opposed to discretionary, the trial court was not required to comply with any provisions of N.C.G.S. § 50A-110, which states:

> Communication between courts.
>
> (a) A court of this State may communicate with a court in another state concerning a proceeding arising under this Article.
>
> (b) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.
>
> (c) Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.

> (d) Except as otherwise provided in subsection (c), a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.
>
> (e) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

N.C.G.S. § 50A-110. Though not determinative, it is instructive that N.C.G.S. § 50A-110 falls under the section of the UCCJEA entitled "General Provisions" and N.C.G.S. § 50A-110 itself is entitled "Communication between courts[,]" not "Discretionary communication between courts." *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 812, 517 S.E.2d 874, 879 (1999) ("[T]his Court has stated that the title of an act should be considered in ascertaining the intent of the legislature."). N.C.G.S. § 50A-110 is an enabling statute. As the "Official Comment" states:

> This section emphasizes the role of judicial communications. It authorizes a court to communicate concerning any proceeding arising under this Act. This includes communication with foreign tribunals and tribal courts. Communication can occur in many different ways such as by telephonic conference and by on-line or other electronic communication. The Act does not preclude any method of communication and recognizes that there will be increasing use of modern communication techniques.
>
> Communication between courts is required under Sections 204, 206, and 306 and strongly suggested in applying Section 207. Apart from those sections, there may be less need under this Act for courts to communicate concerning jurisdiction due to the prioritization of home state jurisdiction. Communication is authorized, however, whenever the court finds it would be helpful. The court may authorize the parties to participate in the communication. However, the Act does not mandate participation. Communication between courts is often difficult to schedule and participation by the parties may be impractical. Phone calls often have to be made after-hours or whenever the schedules of judges allow.
>
> This section does require that a record be made of the conversation and that the parties have access to that record in order to be informed of the content of the conversation. The

> only exception to this requirement is when the communication involves relatively inconsequential matters such as scheduling, calendars, and court records. Included within this latter type of communication would be matters of cooperation between courts under Section 112. A record includes notes or transcripts of a court reporter who listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum or an electronic record of the communication between the courts, or a memorandum or an electronic record made by a court after the communication.
>
> The second sentence of subsection (b) protects the parties against unauthorized ex parte communications. The parties' participation in the communication may amount to a hearing if there is an opportunity to present facts and jurisdictional arguments. However, absent such an opportunity, the participation of the parties should not . . . be considered a substitute for a hearing and the parties must be given an opportunity to fairly and fully present facts and arguments on the jurisdictional issue before a determination is made. This may be done through a hearing or, if appropriate, by affidavit or memorandum. The court is expected to set forth the basis for its jurisdictional decision, including any court-to-court communication which may have been a factor in the decision.

My reading of N.C. Gen. Stat. § 50A-110 and its Official Comment is that § 50A-110 applies to the entire UCCJEA. Section (a) *enables* the trial court to contact a court in another state whenever the trial court determines contact would be helpful, even if not specifically mandated by another part of the UCCJEA. I believe sections (b) through (e) apply whenever the trial court contacts a court in another state concerning matters of jurisdiction.

I do not believe the protections against unauthorized *ex parte* communications and the notice provisions of § 50A-110 apply to discretionary *ex parte* communications but do not apply when contact is mandated by statute. N.C.G.S. § 50A-110, in my opinion, clearly expresses that the intent of the General Assembly is that *ex parte* communications between courts of this State and courts of other states shall be recorded if the content of those communications is substantive. The only exception to the requirements of recordation is if the communication is not substantive. N.C.G.S. § 50A-110(c). I believe the same is true for the other provisions of N.C.G.S.

§ 50A-110, such as the requirement of notice and an opportunity to be heard, after disclosure of the content of *ex parte* communications to the parties, and before any final ruling on jurisdiction is made.

The Official Comment directly references N.C.G.S. § 50A-206, and there is nothing in the Official Comment suggesting that the safeguards included in N.C.G.S. § 50A-110 would not apply to N.C.G.S. §§ 204, 206, and 306. N.C.G.S. § 50A-206 does not conflict with N.C.G.S. § 50A-110; nor does it indicate that the "General Provisions" of the UCCJEA (N.C.G.S. §§ 101 to 112) do not apply to the provisions of the UCCJEA falling under the "Jurisdiction" heading (N.C.G.S. §§ 201 to 210).

Second, N.C.G.S. § 50A-206(b) states:

> Except as otherwise provided in G.S. 50A-204, a court of this State, before hearing a child-custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to G.S. 50A-209. *If the court determines that a child-custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this Article, the court of this State shall stay its proceeding and communicate with the court of the other state.* If the court of the state having jurisdiction substantially in accordance with this Article does not determine that the court of this State is a more appropriate forum, the court of this State shall dismiss the proceeding.

N.C.G.S. § 50A-206(b) (emphasis added). Even assuming N.C.G.S. § 50A-110 does not apply to all communications between courts of this State and those of other states, I believe the facts of this case require remand. Our Court addressed a similar factual situation in *Harris v. Harris*, 202 N.C. App. 584, 691 S.E.2d 133, 2010 WL 520906 (2010) (unpublished opinion). Though *Harris* is unpublished, I find the following reasoning persuasive[1]:

> Notably, communication is only required under G.S. § 50A-206(b) *after* the North Carolina court has made a determination of substantial compliance with the UCCJEA. Thus, either (1) the North Carolina court was communicating with the [other state] court after making a determination that the [other state] court

1. I note that the wording of the *Harris* opinion also suggests that the requirements of N.C.G.S. § 50A-110 might not apply to mandatory communications pursuant to N.C.G.S. § 50A-206. I do not agree with this distinction.

> had proper subject-matter jurisdiction via substantial compliance with the UCCJEA, or (2) the communication was discretionary, in which case a record of the communication was plainly statutorily required [pursuant to N.C.G.S. § 50A-110].

Harris, 2010 WL 520906 at *2 (citation omitted). In the present case, the majority reasons:

> Because the record reveals no discretionary communication between the two courts actually occurred, the provisions of N.C. Gen. Stat. § 50A-110 are not implicated. Plaintiff argues that because Judge Hilburn's 21 February 2011 order indicates that the decision to decline jurisdiction in North Carolina was made "[a]fter reviewing the file, hearing arguments of counsel and reviewing correspondence from and *having telephone conferences* with the Honorable Margaret M. Foti, Superior Court of New Jersey," the record necessarily implies that Judge Hilburn held discretionary ex parte communications with Judge Foti without complying with section 50A-110. (Emphasis added.)

I disagree that "the record reveals no discretionary communication between the two courts actually occurred[.]" Judge Hilburn entered an order on 1 December 2010 in which she included the statement: "it appearing to the Court after having a conference with the presiding Judge in New Jersey that New Jersey should have jurisdiction in this matter." Judge Hilburn then set aside the 1 December 2010 order by order entered 10 December 2010, in which she stated that "a hearing shall take place on the jurisdiction issue on January 7, 2011 at 9:30 a.m. at which time counsel for the Plaintiff and the presiding New Jersey Judge shall be allowed to participate by telephone regarding the jurisdiction issue." Judge Hilburn entered the final order in this matter on 21 February 2011, which stated in part: "After reviewing the file, hearing arguments of counsel and reviewing correspondence from and having telephone conferences with the Honorable Margaret M. Foti, Superior Court of New Jersey, Hudson County, the Court declines to exercise jurisdiction in this cause[.]"

The record does not indicate when the trial court determined "that a child-custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with [the UCCJEA]." N.C.G.S. § 50A-206(b). It can be inferred that the trial court made this determination by the time it signed the 21 February 2011 order, but any inference beyond that is speculation. The 1

December 2010 order that was set aside indicates only that Judge Hilburn had communicated with the judge in New Jersey and that New Jersey should have jurisdiction. As in *Harris*,

> nothing in the record on appeal indicates that the North Carolina court made a determination of substantial compliance with the jurisdictional requirements of the UCCJEA. Indeed, there is no indication that the trial court considered anything other than its *ex parte* conversation prior to issuing the order. . . . It would undermine the express purpose of the UCCJEA, which seeks to ensure that "a custody decree is rendered in that State which can best decide the case in the interest of the child," if the court in this matter were permitted to decline jurisdiction without any explanation of its actions. *See* N.C. Gen. Stat. § 50A-101 (Official Comment) (2009). . . .
>
> Since there is no indication that the trial court made the factual determination necessary to trigger required communication [pursuant to N.C.G.S. § 50A-206], we view the communication between the courts as discretionary. As such, G.S. 50A-110(c) (2009) controls. Consequently, a record of the communication was required to be made and provided to the parties so that they may be "given an opportunity to fairly and fully present facts and arguments on the jurisdictional issue before a determination is made." N.C. Gen. Stat. § 50A-110 (Official Comment) (2009).

Harris, 2010 WL 520906 at *3. The record before us provides no guidance on the issue of whether the trial court's communications with the New Jersey court were discretionary pursuant to N.C.G.S. § 50A-110, mandatory pursuant to N.C.G.S. § 50A-206 (or some other statute), or both. The UCCJEA determines whether North Carolina has jurisdiction in matters such as the one before this Court. I do not assume the existence of jurisdictional facts and do not apply a prejudice analysis to an issue of jurisdiction. A court of this State cannot exercise jurisdiction over a child custody matter unless authorized by the UCCJEA. *See* N.C. Gen. Stat. § 50A-201 (2011) ("a court of this State has jurisdiction to make an initial child-custody determination only if" certain criteria are met; this section provides "the exclusive jurisdictional basis for making a child-custody determination by a court of this State"); *see also* N.C.G.S. § 50A-206(a) ("a court of this State may not exercise its jurisdiction under this Part if, at the time of the commencement of the proceeding, a proceeding concerning

the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this Article" unless that proceeding has been terminated or the other state determines North Carolina is a more convenient forum).

Lastly, the majority contends "substantial compliance" with the dictates of the UCCJEA is all that is required to confer jurisdiction. I disagree.

A North Carolina court either has jurisdiction under the UCCJEA or it is without jurisdiction. N.C.G.S. § 50A-206 states: "If the court determines that a child-custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with [the UCCJEA], the court of this State shall stay its proceeding and communicate with the court of the other state." It appears it is from this language that the majority holds that only "substantial compliance" with the UCCJEA is required in order for a court of this State to exercise jurisdiction, but this language does not support the position of the majority. I find nothing in the UCCJEA supporting the position of the majority. North Carolina courts must fully comply with the provisions of the UCCJEA when making determinations concerning jurisdiction, and I would remand to the trial court for further action in accordance with the dictates of the UCCJEA.

STATE OF NORTH CAROLINA v. LAVORACE ROMOODEE HARRISON

No. COA11-425

(Filed 7 February 2012)

1. Evidence—prior statement—recollection refreshed—no prejudicial error

The trial court did not err in a larceny of a dog case by allowing a witness to reread her prior statement to the jury. The trial court properly allowed the witness to use her statement to refresh her recollection, and when the witness read the statement into evidence, it was not as a past recollection recorded subject to the stricter foundational requirements. Even assuming *arguendo* that allowing the witness to read the statement into evidence was error, defendant could not show that it rose to the level required under the plain error standard of review.

2. Evidence—written statement—erroneously sent to jury as exhibit—no prejudicial error

The trial court erred in a larceny of a dog case by admitting a witness's written statement as a "court's exhibit" and giving the exhibit to the jury to review in the jury room rather than conducting the jury back to the courtroom. However, defendant failed to meet his burden of showing prejudice as a result of the trial court's failure to follow the requirements of N.C.G.S. § 15A-1233(a).

3. Appeal and Error—Preservation of issues—raised for first time on appeal—dismissed

Defendant's constitutional argument that the cumulative effect of the trial court's errors deprived him of a fair trial in violation of his constitutional rights was dismissed as defense counsel raised no objections at trial based on constitutional challenges.

4. Larceny—sufficient evidence—motion to dismiss—properly denied

The trial court did not err in a larceny of a dog case by denying defendant's motion to dismiss for insufficient evidence. The State presented sufficient evidence of each essential element of the offense charged and that defendant was the perpetrator.

5. Evidence—pre- and post-arrest silence—erroneously admitted—no prejudicial error

The trial court committed error in a larceny of a dog case by allowing the State to use defendant's pre- and post-arrest silence as substantive evidence of his guilt. However, the errors did not rise to the level of plain error because defendant could not show that the errors probably resulted in the jury reaching a different verdict than it otherwise would have reached.

Appeal by defendant from judgment entered 16 December 2010 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 12 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General Tammy A. Bouchelle, for the State.

Daniel M. Blau for defendant.

ELMORE, Judge.

Lavorace Romoodee Harrison (defendant) was convicted by a jury of larceny of a dog and now appeals. We hold that defendant received a trial free from prejudicial error and plain error.

I. Background

On 27 January 2009, Judy Marshburn's one-year-old pit bull was stolen from her yard in Spring Hope. The dog was white with a brown patch over his eye, and Marshburn kept him in a dog pen in the back yard, with a brick in front of the gate to keep the dog from escaping. Marshburn never saw the dog again.

An investigator from the Nash County Sheriff's Department, Deputy Bryant, interviewed defendant after receiving an anonymous tip that defendant was transporting dogs. Defendant denied any knowledge of the larceny of Marshburn's dog. However, defendant was arrested for the larceny after the investigator spoke with Kristyn Stanco, who had called the Sheriff's Department with information about the larceny. Stanco and defendant were friends and had known each other for a long time; Stanco regularly braided defendant's hair for him. Stanco provided the following statement:

> On 02-04-09, Lavorace Harrison came to my house and was talking to me[,] Charleston, and Travis. Lavorace said that the police came and talked to him about stolen dogs and speakers. Lavorace then said that the police asked him about a blue pitt [*sic*] bull and Judy's white pitt [*sic*] bull with a brown patch. Lavorace then said that they will never find those dogs because I had pictures of them on my phone but I erased them and I also took them to Rocky Mount where they will never look. Lavorace then said that Buck Wheless helped them get Judy's dog the night it was stolen. Lavorace then stated that Buck then went back and broke into Judy's property after he helped them get the white pitt [*sic*] bull. I saw the pictures of the dogs in Lavorace's phone. He had four pictures of the blue pitt [*sic*] bull and 2 pictures of Judy's white pitt [*sic*] bull with the brown patch on his left eye.

Stanco testified that defendant had come to her house to have his hair braided, and as he was going through his cell phone, she saw several photos of pit bulls. One dog was gray or blue and the other was white with a brown patch over its eye.

At trial, during the State's direct examination of Stanco, the prosecutor showed Stanco her statement after he asked her what she told

Deputy Bryant when he came to her house and she provided the following response:

> When they asked me did I have a stolen dog, I just told them no, Lavorace had gave me that dog because the little puppies have died and—well, almost have died and I tried to help him help that dog out and he said he couldn't take care of it anymore, so I—I said I could take the dog and I can try and bring him back to life or save him or—I have the food and stuff. So, I tried to keep the dog, but the dog ended up dying any way.

At the prosecutor's direction, Stanco re-read the statement. She confirmed that it was a "true and accurate statement" and that she had nothing to add to it. The following colloquy then ensued:

> Q. And does that help recollect—help refresh your recollection of the statement that you gave to Officer Bryant that night or day?
>
> A. Yes, sir.
>
> Q. And my question goes back then after looking at that statement, did he say where he got that dog from or who he got the dog from?
>
> A. He didn't say exactly who it was from. He just said he dropped it off in Rocky Mount.
>
> Q. Okay. Whose name—
>
> A. Because I didn't—he said Judy—Judy's name, but I didn't know they were taking about that Judy. I thought it was another Judy.
>
> Q. I understand that, but they—but he clearly states that he got Judy's dog in that statement, is that correct?
>
> A. Yes, yes.
>
> Q. Okay. In fact, if you would, read your statement to the ladies and gentlemen of the jury if you would, please.

Stanco then read her statement to the jury, without objection by defendant. Stanco also testified that she saw defendant erase the photos of the dogs from his phone.

After the jury had deliberated for several hours, it sent a note out to the judge stating, "We are deadlocked 7 to 5. We do not seem to be

able to come to a decisive verdict. Could we see the written statement by Miss Stanko [*sic*]." Both the State and defense counsel stated that they had "no objection." The judge then asked, "All right, do you want me to bring them out? Do you want to see them back out?" Defense counsel replied, "No." The judge asked, "Are you sure?" And defense counsel replied, "Yes, Your honor." After the prosecutor agreed to send the statement in to the jury room, the judge said, "All right, Mr. Kearney pass that in and by agreement between the Defendant and the State I will not bring the jury back out. I will mark this Court's Exhibit 1 or A."

Within the hour, the jury returned with a verdict, finding defendant guilty. Defendant, who had a prior record level of I, was sentenced to four to five months' imprisonment. The sentence was suspended, and defendant was placed on twenty-four months' supervised probation and ordered to provide a DNA sample pursuant to N.C. Gen. Stat. § 15A-266.4.

II. Arguments

A. Stanco's Written Statement

[1] Defendant first argues that the trial court committed plain error by allowing Ms. Stanco to read her prior statement to the jury. He argues that the trial court improperly admitted Ms. Stanco's statement as a past recollection recorded. The State, on the other hand, argues that the trial court properly admitted Ms. Stanco's statement as a present recollection refreshed. Our Supreme Court has explained the distinction as follows:

> It is generally accepted that two types of aid are available for a witness: past recollection recorded and present recollection refreshed. Under present recollection refreshed[,] the witness' memory is refreshed or jogged through the employment of a writing, diagram, smell or even touch, and he testifies from his memory so refreshed. The evidence presented at trial comes from the witness' memory, not from the aid upon which the witness relies; thus, there is no need to engage in the foundational inquiry required under the doctrine of past recollection recorded. It is only where the testimony of the witness purports to be from refreshed memory but is clearly a mere recitation of the refreshing memorandum[] [that] such testimony is not admissible as present recollection refreshed and should be excluded by the trial judge.

State v. Ysut Mlo, 335 N.C. 353, 367, 440 S.E.2d 98, 104-05 (1994) (quotations and citations omitted).

Present recollection refreshed is addressed by Rule 612 of our Rules of Evidence, which states, in relevant part that "[i]f, while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying." N.C. Gen. Stat. § 8C-1, Rule 612(a) (2011). Past recollection recorded, on the other hand, is an exception to the hearsay rule and is governed by Rule 803(5):

> Recorded Recollection.—A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

N.C. Gen. Stat. § 8C-1, Rule 803(5) (2011). As noted in the official commentary, a past recollection recorded cannot "be received as an exhibit unless offered by an adverse party" in order "[t]o prevent a jury from giving too much weight to a written statement that cannot be effectively cross-examined[.]" N.C. Gen. Stat. § 8C-1, Rule 803(5) cmt. (2011). Because a true present recollection refreshed does not involve hearsay, "the rules governing [a witness's] testimony are those generally involved in the direct and cross-examination of witnesses." 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 224, at 881 (7th ed. 2011). Thus, a writing used to refresh recollection is not admissible because it was used to refresh the witness's recollection, but it may be admissible for independent reasons. 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 172, at 639 (7th ed. 2011); *see also State v. Spinks*, 136 N.C. App. 153, 160, 523 S.E.2d 129, 134 (1999) ("Here, the State's attempt to refresh the witness' recollection was unsuccessful, and no foundation was laid to suggest that the recorded statement was independently admissible.") (citing N.C. Gen. Stat. § 8C–1, Rule 901(a)).

Distinguishing between a writing that is offered as a past recollection recorded and one that is used to refresh a witness's recollection is critical because of the difference in admissibility requirements. Before a past recollection recorded can be read into evidence, certain

foundational requirements must be met. To establish a foundation for the introduction into evidence of a past recollection recorded, the witness, "by hypothesis, [must have] *no present recollection* of the matter contained in the writing." *State v. Gibson*, 333 N.C. 29, 50, 424 S.E.2d 95, 107 (1992) (quoting *United States v. Riccardi*, 174 F.2d 883, 887 (3d Cir. 1949) (emphasis added)), *overruled on other grounds by State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993), and *State v. Bell*, 338 N.C. 363, 450 S.E.2d 710 (1994). In contrast,

> [u]nder present recollection refreshed the witness' memory is refreshed or jogged through the employment of a writing, diagram, smell or even touch, and he testifies from his memory so refreshed. Because of the independent origin of the testimony actually elicited, the stimulation of an actual present recollection is not strictly bounded by fixed rules but, rather, is approached on a case-by-case basis looking to the peculiar facts and circumstances present.

Gibson, 333 N.C. at 50, 424 S.E.2d at 107. Because "the evidence is the testimony of the witness at trial, whereas with a past recollection recorded the evidence is the writing itself," "the foundational questions raised by past recollection recorded are never reached." *Id.* The relevant test, then, "is whether the witness has an independent recollection of the event and is merely using the memorandum to refresh details or whether the witness is using the memorandum as a testimonial crutch for something beyond his recall." *State v. York*, 347 N.C. 79, 89, 489 S.E.2d 380, 386 (1997).

Here, Stanco had an independent recollection of her conversation with defendant as well as of making her statement to the investigator. When asked, she affirmed that her recollection had been refreshed. She then testified from memory, and that testimony included some details that were not contained in the statement, such as braiding defendant's hair and seeing defendant erase the photos of the dogs from his phone. Her testimony shows that she was not using her prior statement as a testimonial crutch for something beyond her recall. Accordingly, the trial court properly allowed Stanco to use her statement to refresh her recollection, and when Stanco read the statement into evidence, it was not as a past recollection recorded subject to the stricter foundational requirements.

Turning next to whether the trial court committed plain error by allowing Stanco to read the statement into evidence, we look to see if allowing Stanco to read the statement into evidence was error and, if

so, whether the error was " '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 (2007) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987)); *see also* N.C.R. App. P. 10(a)(4) (2011). Even if we assume *arguendo* that allowing Stanco to read the statement into evidence was error, defendant cannot show that it rose to the level required under our plain error standard of review. Stanco testified independently about the contents of the statement, and the jury heard nothing from her reading of the statement that it did not hear from her. Her testimony and her prior statement were consistent. In addition, defendant had the opportunity both to cross-examine Stanco about the statement and to testify himself when he took the stand. Accordingly, we conclude that it was not plain error for the trial court to permit Stanco to read her statement into evidence.

B. Jury Request for Stanco's Statement

[2] Defendant next argues that the trial court erred by admitting Stanco's written statement as a "court's exhibit" and giving the exhibit to the jury to review in the jury room rather than conducting the jury back to the courtroom.

Section 15A-1233(a) states that, "[i]f the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom." N.C. Gen. Stat. § 15A-1233(a) (2011). Bringing the jury back to the courtroom is mandated by the statute and is not within the trial judge's discretion. *State v. Nobles*, 350 N.C. 483, 506, 515 S.E.2d 885, 900 (1999). However, "to be entitled to a new trial, defendant must demonstrate that there is a reasonable possibility that a different result would have been reached had the trial court's error not occurred." *Id.* (citing *State v. McLaughlin*, 320 N.C. 564, 570, 359 S.E.2d 768, 772 (1987)). Here, defendant cannot meet that burden. As in *Nobles*,

> [n]ot only did defendant's counsel agree with the trial court when it erroneously thought that it had discretion whether to bring the jury to the courtroom, but there was unanimous agreement among the State, the defendant, and the trial judge concerning the items requested by the jury; and the prosecution and defendant consented to permitting the jury to have those items.

Id. Accordingly, we reach the same conclusion as our Supreme Court did in *Nobles*, that "defendant has not met his burden of showing prejudice as a result of the trial court's failure to follow the requirements of N.C.G.S. § 15A-1233(a)." *Id.; see also State v. Helms*, 93 N.C. App. 394, 401, 378 S.E.2d 237, 241 (1989) (holding that the defendant "waived his right to assert, on appeal, the judge's failure to bring the jury to the courtroom" when his attorney consented to the judge's communication procedure).

Section 15A-1233(b) of our General Statutes states that, "[u]pon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence." N.C. Gen. Stat. § 15A-1233(b) (2011). Again, this section is a mandate, and the trial judge does not have discretion to give the jury exhibits or writings that have not been received in evidence. *State v. Combs*, 182 N.C. App. 365, 373, 642 S.E.2d 491, 498 (2007). However, as with a violation of § 15A-1233(a), it is not sufficient for the defendant to show that the trial court erred; he must also show that he was prejudiced. *Id.* at 374, 642 S.E.2d at 498. Again, defendant cannot meet this burden.

In *Combs*, the jury asked to see a statement made by the defendant. *Id.* at 372, 642 S.E.2d at 497. However, the written statement itself was never received in evidence; instead, a detective had read the statement into the record. *Id.* Although the trial judge considered bringing the jury back to the courtroom and allowing the detective to re-read the statement to them, the judge apparently dismissed that option for convenience reasons. *Id.*, 642 S.E.2d at 498. Over defense counsel's objection, the judge and the prosecutor decided that the prosecutor would redact the written statement and then submit the redacted statement to the jury. *Id.* at 373, 642 S.E.2d at 498. On appeal, this Court concluded that the defendant could not show prejudice because "[t]he trial court could have instructed the court reporter to that portion of [the detective's] testimony in which he reported defendant's statement to the jury under N.C. Gen. Stat. § 15A-1233(a)," and "the testimony would have been identical to the written document provided to the jury[.]" *Id.* at 374, 642 S.E.2d at 498. Thus, "there [wa]s no reasonable possibility that the jury would have reached a different verdict if [the detective's] redacted report had not been sent back to the jury room." *Id.*

We reach the same conclusion here, because, under § 15A-1233(a), the trial court could have instructed the court reporter to read back that part of Stanco's testimony in which she read her statement into

the record. The testimony would have been identical to the written document given to the jury, and there was no reasonable possibility that the jury would have reached a different verdict had her statement not been sent back to the jury room. Despite this outcome, we emphasize that it was error—just not prejudicial error—for the trial judge to submit the written statement to the jury when it had not first been admitted into evidence, and we expressly discourage the practice.

C. Constitutional Arguments

[3] For the first time, on appeal, defendant argues that "the cumulative effect of the trial court's errors" deprived him of a fair trial, in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 19 and 23, of the North Carolina Constitution. "A constitutional issue not raised at trial will generally not be considered for the first time on appeal." *State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) (quotations, citation, and alteration omitted). Here, defense counsel raised no objections at trial based on constitutional challenges. Indeed, defense counsel made no objections at all with respect to the arguments raised by defendant on appeal. Accordingly, we do not review defendant's constitutional argument.

D. Denial of Defendant's Motion to Dismiss

[4] Defendant next argues that the trial court erred by denying his motion to dismiss because the State did not present sufficient evidence that defendant took the victim's dog. We disagree.

"When a defendant moves for dismissal, the trial court must determine whether the State has presented substantial evidence of each essential element of the offense charged and substantial evidence that the defendant is the perpetrator." *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997) (citation omitted). "If substantial evidence of each element is presented, the motion for dismissal is properly denied." *Id.* at 717, 483 S.E.2d at 434. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). "In considering the motion, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence, and resolving any contradictions in favor of the State." *State v. Anderson*, 181 N.C. App. 655, 659, 640 S.E.2d 797, 801 (2007) (citation omitted).

> To convict a defendant of larceny, the State must prove the following elements: 1) taking personal property belonging to another; 2) carrying it away; 3) without the consent of the possessor; 4) with the intent to deprive the possessor of it permanently; 5) knowing that the taker is not entitled to it.

State v. Cave, 174 N.C. App. 580, 584, 621 S.E.2d 299, 302 (2005) (citing N.C. Gen. Stat. § 14-72); *see also* N.C. Gen. Stat. § 14-81 (2011) (larceny of a dog is a Class I felony).

Defendant asserts that the only evidence that he was the person who took the dog was Stanco's statement, which he argues "does not prove that [he] participated in the larceny." Instead, he contends, the statement only shows that Buck Wheless stole the dog, leaving defendant's role in the larceny ambiguous. We disagree. Both Stanco's statement and her other testimony can support a finding that defendant himself took the dog. Although defendant is correct that Stanco testified that defendant said that Wheless helped "them" get the dog, and it's possible to interpret "them" as excluding defendant, Stanco clarified that she meant that defendant took the dog when the prosecutor asked, "[H]e clearly states that he got Judy's dog in that statement, is that correct?" Moreover, the State, not defendant, is entitled to all reasonable inferences that may be drawn from the evidence, including whether "them" referred to defendant. Accordingly, we hold that the trial court properly denied defendant's motion to dismiss for insufficient evidence.

E. Defendant's Pre- and Post-Arrest Silence

[5] In his last argument, defendant contends that the trial court committed plain error by allowing the State to use his pre- and post-arrest silence as substantive evidence of his guilt. Specifically, defendant argues that testimony by Deputy Bryant violated his constitutional right to remain silent. First, when Deputy Bryant was explaining the circumstances of defendant's initial interview, he stated: "So, I continued to interview with him. He provided me—he denied any involvement, wished to give me no statement, written or verbal." Second, when Deputy Bryant was discussing his arrest of defendant, the State asked him if defendant made any statements after serving the arrest warrant on defendant, and Deputy Bryant responded, "After he was mirandized [*sic*], he waived his rights and provided no further verbal or written statements." Defendant did not object to either statement, so we review for plain error.

This Court recently set out the rules governing the use of a defendant's pre- and post-arrest silence at trial:

> Whether the State may use a defendant's silence at trial depends on the circumstances of the defendant's silence and the purpose for which the State intends to use such silence." *State v. Boston*, 191 N.C. App. 637, 648, 663 S.E.2d 886, 894, *appeal dismissed and disc. review denied*, 362 N.C. 683, 670 S.E.2d 566 (2008). In *Boston*, this Court explained that a defendant's pre- arrest silence and post-arrest, pre-*Miranda* warnings silence may not be used as substantive evidence of guilt, but may be used by the State to impeach the defendant by suggesting that the defendant's prior silence is inconsistent with his present statements at trial. *Id.* at 649 n.2, 663 S.E.2d at 894 n.2. A defendant's post-arrest, post-*Miranda* warnings silence, however, may not be used for any purpose. *Id.* at 648-49, 663 S.E.2d at 894. *See also Doyle*, 426 U.S. at 619, 49 L. Ed. 2d at 98, 96 S. Ct. at 2245 (holding that "use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment"). Because different law applies to the different circumstances surrounding the testimony challenged by defendant, we analyze each circumstance separately.

State v. Mendoza, ____ N.C. App. ____, ____, 698 S.E.2d 170, 173-74 (2010).

Here, as in *Mendoza*, defendant testified after Deputy Bryant, so the State could not use Deputy Bryant's statement to impeach defendant. *See id.* at ____, 698 S.E.2d at 175 (discounting the State's "proposition that the State may present impeachment evidence in advance of a defendant's actually testifying"). Also, as in *Mendoza*, Deputy Bryant's testimony regarding "defendant's silence was admitted as substantive evidence during the State's case in chief and not for the purpose of impeachment" by "pointing out to the jury that defendant chose to remain silent when in [the deputy's] presence rather than provide the explanation proffered at trial." *Id.* at ____, 698 S.E.2d at 176. Thus, it was error for the trial court to admit either statement by Deputy Bryant.

However, these errors do not rise to the level of plain error because defendant cannot show that the errors were "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." *Leyva*, 181 N.C. App. at 499, 640 S.E.2d at 399 (quotations and citation omitted).

III. Conclusion

We hold that defendant received a trial free from prejudicial or plain error.

No prejudicial error; no plain error.

Judges BRYANT and STEPHENS concur.

GEORGE M. MUTEFF, EXECUTOR OF THE ESTATE OF VIRGINIA C. MILLER, PLAINTIFF-APPELLANT v. INVACARE CORPORATION AND AMERICAN MOBILITY, LLC, DEFENDANTS-APPELLEES

No. COA11-495

(Filed 7 February 2012)

1. Negligence—insulating negligence—jury instruction—erroneous—not prejudicial

The trial court erred in a negligence case arising out of plaintiff decedent's death caused by burns sustained when her wheelchair caught on fire by instructing the jury on insulating negligence. However, the error did not prejudice plaintiff as it could not have tainted the jury's verdict on the warranty claims and the jury could not have found defendants liable for negligence after finding the wheelchair was not defective and the warnings accompanying the wheelchair were not inadequate.

2. Pretrial Proceedings—severance of claims—save time and expense—motion properly granted

The trial court did not abuse its discretion in a case arising out of plaintiff decedent's death caused by burns sustained when her wheelchair caught on fire by severing plaintiff's claim for unfair and deceptive trade practices (UDTP) from plaintiff's other claims. The trial court's grant of defendants' motion saved the parties and the trial court time and expense that would have been unnecessarily spent prosecuting and defending an UDTP claim that would have failed.

3. Evidence—judicial notice—Texas Supreme Court opinion—no error

The trial court did not err in a case arising out of plaintiff decedent's death caused by burns sustained when her wheelchair caught on fire by taking judicial notice of the Texas Supreme Court opinion *Whirlpool v. Camacho* and instructing the jury that it was conclusive. The trial court merely took judicial notice that the Texas Supreme Court had filed the opinion and plaintiff and defendants examined and cross-examined plaintiff's expert thoroughly concerning the opinion.

Appeal by Plaintiff from judgment entered 10 November 2010, order entered 17 December 2010, *nunc pro* tunc 27 September 2010, and order entered 11 January 2011, by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Court of Appeals 15 November 2011.

Troutman Sanders LLP, by Gary S. Parsons, Gavin B. Parsons, D. Martin Warf, John R. Gerstein, and Meredith Werner, for Plaintiff-Appellant.

Hall, Rodgers, Gaylord & Millikan, PLLC, by Jonathan E. Hall and Kathleen M. Millikan, for Defendants-Appellees.

McGEE, Judge.

Virginia C. Miller (Ms. Miller) died on 22 November 2006 from severe burns she sustained when her house caught fire. Ms. Miller suffered from multiple sclerosis that adversely impacted her mobility and independence. She was assisted during the day by in-home caregivers from 9:00 or 10:00 a.m. until 5:00 or 6:00 p.m., but was alone at night. In the spring of 2005, Ms. Miller purchased a Pronto M71 self-propelled wheelchair (the wheelchair) from American Mobility, LLC (American Mobility). The wheelchair was manufactured by Invacare Corporation (Invacare), together with American Mobility (Defendants).

At approximately 7:51 a.m. on the morning of the fire, Ms. Miller called 911 and informed the operator that her wheelchair was on fire and she was trapped in the room with the wheelchair. Firefighters arrived within minutes of the call and removed Ms. Miller from her burning home. Due to the severity of her burns, Ms. Miller survived less than a day after being admitted to the hospital.

George M. Muteff (Plaintiff), the executor of Ms. Miller's estate, filed this action against Defendants on 3 July 2008. In his complaint, Plaintiff alleged, *inter alia*, product liability claims for negligence and breach of the implied warranty of merchantability against Defendants. Plaintiff also alleged a claim for unfair and deceptive trade practices (UDTP) against Invacare. Plaintiff alleged that the wheelchair had a design defect in its wiring that caused the fire and death of Ms. Miller. Plaintiff also alleged that the materials used in the manufacture of the wheelchair were unreasonably flammable, and that Defendants should have warned Ms. Miller of the dangers posed by the alleged wiring defect and flammable materials. Defendants filed answers denying Plaintiff's claims. Defendants also asserted contributory negligence as an affirmative defense. Defendants argued that the fire started when Ms. Miller's metal necklace came into contact with exposed blades of the wheelchair's AC charger cord. Defendants' theory was that Ms. Miller secured the charger cord to the arm of the wheelchair with her necklace in order to allow her to more easily plug the charger cord into an extension cord at night for charging. Defendants argued that, due to Ms. Miller's waning hand strength, she did not fully engage the charger cord into the extension cord, thereby leaving a gap into which the necklace slid, touched the live blades of the plug, and caused a short that resulted in the fire. After the fire, the necklace was found fused to the plug.

The trial court heard various motions on 20 September 2010. The trial court granted Defendants' motion to bifurcate the trial by leaving the claim for UDTP until after the other issues had been decided. The trial court also granted Defendants' motion asking the trial court to take judicial notice of the authenticity of a Texas Supreme Court opinion in which the testimony of one of Plaintiff's expert witnesses had been held to be insufficiently supported by the evidence. A jury trial was held, and the jury found in favor of Defendants. Judgment was entered on 10 November 2010. Plaintiff appeals.

I. Jury Instruction

[1] In Plaintiff's first argument, he contends that the trial court committed prejudicial error by instructing the jury on insulating negligence. The question raised in this appeal, which apparently is one of first impression, is whether a defendant may be insulated from liability by an independent act of a plaintiff, who was also the injured party in the action. Defendants argued that negligence on the part of Ms. Miller could serve to insulate Defendants from liability in the present case, and the trial court agreed. In the present case, although we

determine that the trial court erred in giving the instruction on insulating negligence, we hold that Plaintiff was not prejudiced by this error.

Defendants raised the issue of insulating negligence for the first time at the charge conference. Plaintiff objected, arguing that Defendants were attempting "a third bite at contrib[.]" The trial court overruled Plaintiff's objection and instructed the jury on insulating negligence as follows:

> There may be more than one proximate cause of an injury and death. Therefore, Virginia Miller need not prove that the [D]efendant's negligence was the sole proximate cause of her injury and death. Virginia Miller must prove by the greater weight of the evidence only that the [D]efendant's negligence was a proximate cause.
>
> In defining proximate cause, I explain that there may be two or more proximate causes of an injury. This occurs when separate and independent acts or omissions of different people concur, that is combine, to produce an injury.
>
> Thus, if the negligent acts or omissions of two or more people concur to produce the injury complained of, the conduct of each person is a proximate cause, even though one person may have been more or less negligent than the other.
>
> A natural and continuous sequence of causation may be interrupted or broken by the negligence of a second person. This occurs when a second person's negligence was not reasonably foreseeable by the first person, and it causes its own natural and continuous sequence which interrupts, breaks, displaces or supersedes the consequences of the first person's negligence.
>
> Under such circumstances, the negligence of the second person not reasonably foreseeable by the first person insulates the negligence of the first person and would be the sole proximate cause of the injury.
>
> In this case, the [D]efendant Invacare and American Mobility contend that if they were negligent, which they deny, such negligence was not a proximate cause of the [P]laintiff's injury because it was insulated by the negligence of Virginia Miller.
>
> You will consider this matter only if you find that the [D]efendant was negligent. If you do so find, the [D]efendant's negligence would be insulated, and the [D]efendant would not be

> liable to the [P]laintiff if the negligence of Virginia Miller was such as to have broken the causal connection or sequence between the [D]efendant's negligence and the [P]laintiff's injury, thereby excluding the [D]efendant's negligence as a proximate cause.
>
> The negligence of Virginia Miller would thus become, as between the negligence of the [D]efendant and Virginia Miller, the sole proximate cause of the [P]laintiff's injury.
>
> On the other hand, if the causal connection between the negligence of the [D]efendant and the [P]laintiff's injury was not broken, and the [D]efendant's negligence continued to be a proximate cause of the [P]laintiff's injury up to the moment of the fire, then the [D]efendant would be liable to the [P]laintiff.
>
> If at the time of the [D]efendant's negligent act, the [D]efendant reasonably could have foreseen such negligent conduct was—which was likely to produce injury on the part of one in the position of Virginia Miller, the causal connection would not be broken, and the negligence of the [D]efendant would not be prevented from being a proximate cause of the [P]laintiff's injury.
>
> However, if the negligence of the [D]efendant would not have resulted in the [P]laintiff's injury, except for the negligence of Virginia Miller, and if negligence and resulting injury on the part of one in the position of Virginia Miller was not reasonably foreseeable to the [D]efendant, then the causal connection would be broken, and the negligence of the [D]efendant Invacare and American Mobility would not be a proximate cause of the [P]laintiff's injury.
>
> The burden is not on the [D]efendant to prove that his negligence, if any, was insulated by the negligence of Virginia Miller; rather, the burden is on the [P]laintiff to prove by the greater weight of the evidence that the negligence of the [D]efendant was a proximate cause of the [P]laintiff's injury.

Our Supreme Court has explained the law concerning insulating negligence as follows:

> In order to insulate the negligence of one party, the intervening negligence of another must be such as to break the sequence or causal connection between the negligence of the first party and the injury, so as to exclude the negligence of the first party

> as one of the proximate causes of the injury. An efficient intervening cause is a new proximate cause. It must be an independent force which entirely supersedes the original action and renders its effect in the chain of causation remote. The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury. Put another way, in order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it.

Adams v. Mills, 312 N.C. 181, 194-95, 322 S.E.2d 164, 172-73 (1984) (citations omitted). " 'An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote.' " *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 236, 311 S.E.2d 559, 566 (1984) (citation omitted).

Defendants argue in their brief: "The concept of insulating negligence has been applied historically to a plaintiff's negligence in the evolution of proximate cause analysis." Defendants cite a law review article stating that, in the past, it was common to refer to contributory negligence as a superseding or intervening cause. Defendants cite only one case from North Carolina in support of their contention that insulating negligence has been applied to insulate a defendant from liability due to the acts of the injured party plaintiff. That case is *Smith v. R.R.*, 145 N.C. 98, 58 S.E. 799 (1907), a case involving the collision of two riverboats in a fog. In *Smith*, our Supreme Court stated: "The rights and liabilities of the parties are to be ascertained by resorting to the principles which control in actions for alleged negligence wherein *contributory negligence* is set up as a defense." *Id.* at 101, 58 S.E. at 800 (citation omitted) (emphasis added). The *Smith* Court further stated:

> " 'At common law the general rule is, that if both vessels are culpable in respect of faults operating directly and immediately to produce the collision, neither can recover damages so caused. In order to maintain his action, the plaintiff was obliged to establish the negligence of the defendant, and that

> such negligence was the sole cause of the injury; or, in other words, he could not recover, though defendant was negligent, if it appeared that his own negligence directly contributed to the result complained of.' "

Id. (citation omitted). Thus, our Supreme Court has laid out the general rule for contributory negligence: it is an affirmative defense and, as a general proposition, any negligence on the part of a party that is a proximate cause of the injury will bar recovery for that party. It is true that the *Smith* Court discussed proximate cause and some concepts that are associated with insulating negligence[1], but we do not read *Smith* as having applied the modern rules of insulating negligence to the facts in *Smith*. We read *Smith* as holding that, because there was undisputed evidence of negligence on the part of the plaintiff as a proximate cause of plaintiff's injuries, plaintiff was barred from recovery as a matter of law.

In their brief, Defendants do not cite any other North Carolina case in support of their argument. However, at oral argument, counsel for Defendants incorrectly stated that Defendants had included *Adams v. Mills*, 312 N.C. 181, 322 S.E.2d 164 (1984), in their brief in support of this proposition; however, only Plaintiff cited *Adams*. In *Adams*, Our Supreme Court stated:

> It is the defendant's contention that the plaintiff was contributorily negligent in temporarily letting his dump truck stand with a portion of it extending into the main traveled portion of the highway and that this negligence was a proximate cause of the collision. The *sole issue* presented on this appeal is the sufficiency of the evidence to support the defendant's *affirmative defense of contributory negligence*.

Id. at 183, 322 S.E.2d at 166 (emphasis added). In its discussion in *Adams* concerning whether the trial court properly declined to instruct the jury on contributory negligence, our Supreme Court discussed insulating negligence within the context of a discussion on proximate cause. Relevantly, that discussion was in relation to the possibility of the *plaintiff's* being insulated from liability due to *defendant's* alleged negligence. *Id.* at 194-95, 322 S.E.2d at 172-73. In every case where our appellate courts have held that one party's liability has been insulated due to the intervening acts of another, the

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1. Notably absent from the relevant analysis in *Smith* was any mention of foreseeability, which is a crucial element in any insulating negligence analysis. *Barber v. Constien*, 130 N.C. App. 380, 502 S.E.2d 912 (1998).

intervening acts have been those of some third party—either a different defendant or a person not made party to the action.

Adams does *suggest* that a *defendant's* own negligence can be considered "insulating negligence" and therefore defeat that defendant's contributory negligence defense. We also agree "that intervening negligence, also referred to in our case law as superseding or insulating negligence, is an elaboration of a phase of proximate cause." *Barber v. Constien*, 130 N.C. App. 380, 383, 502 S.E.2d 912, 914 (1998) (citation omitted). Because insulating negligence is a factor to consider when making a determination of proximate cause, there is some logic to support Defendants' contention that it could apply to the alleged negligence of Ms. Miller. However, history and common sense dictate a different result. As we have stated, we have found no North Carolina case where insulating negligence has been applied to facts such as the ones before us. Additionally, our State is a contributory negligence state. If a defendant can prove negligence—absent a finding of gross negligence on the part of the defendant—and proximate cause on the part of a plaintiff, that plaintiff will be completely barred from recovery. *Yancey v. Lea*, 354 N.C. 48, 51, 550 S.E.2d 155, 157 (2001).

However, contributory negligence is an affirmative defense, and the burden of proof lies with the defendant asserting it. Were we to adopt Defendants' position, it would become a plaintiff's burden to prove that plaintiff was not negligent, or that any negligence on that plaintiff's part was not an intervening proximate cause of the alleged injury.

Though Defendants took a different approach at oral argument, in their brief they stated:

> As proximate cause analysis evolved, certain principles materialized, and it became apparent that the concept of intervening negligence, when applied to a plaintiff's conduct, was merely another analytical tool to describe contributory negligence. Admittedly, while the terminology of insulating negligence is not typically applied to plaintiff's alleged negligence in the most recent case law of our state, its earlier application in this very context illustrates that such usage, being the functional equivalent of contributory negligence, is consistent with established legal principles, and is merely a different method of analyzing and explaining proximate cause with respect to a plaintiff's alleged negligent conduct.

If insulating negligence, when applied to the conduct of Ms. Miller, is the equivalent of contributory negligence as Defendants

argue, then there was no need for an instruction on insulating negligence because an instruction on contributory negligence was also given. More importantly, if Defendants' argument is correct, we *must* find error in the instruction given, as that instruction explicitly stated that Defendants did not have the burden of proof on the issue of insulating negligence. If insulating and contributory negligence were interchangeable in the present case, it was error for the trial court to remove the burden of proof from Defendants and effectively shift that burden to Plaintiff.

We believe that contributory negligence was the sole method available in the present case to relieve Defendants from any liability due to negligence on their part that was a proximate cause of Ms. Miller's injury. The standard for proving contributory negligence is lower than that for establishing insulating negligence, as the degree or foreseeability of the plaintiff's acts are not a factor in proving contributory negligence. However, the burden does fall on the defendant to prove contributory negligence. We hold that the trial court erred in instructing the jury on insulating negligence in the present case.

However, on the facts before us, we do not find that the trial court's error prejudiced Plaintiff. The jury found that Invacare did not breach the implied warranty of merchantability with regard to Invacare's manufacture of the wheelchair. The trial court instructed the jury with respect to the implied warranty of merchantability as follows:

> The fourth issue reads: Did Invacare breach the implied warranty of merchantability made to Virginia Miller? On this issue, the burden of proof is on Virginia Miller. This means that Virginia Miller must prove by the greater weight of the evidence that Invacare breached the implied warranty of merchantability made to Virginia Miller. A breach of the implied warranty of merchantability occurs if the wheelchair is not fit for the ordinary purposes for which such merchandise is used. A products liability claim based upon a breach of warranty is not depend-ent upon a showing of negligence. A breach of the implied warranty of merchantability occurs if the M71 was defective . . . under normal use. A defect may be inferred from evidence from the product's malfunction if there is evidence the product had been put to its ordinary use.
>
> A breach of the implied warranty of merchantability may also occur if the M71 did not contain an adequate or proper warn-

> ing. Finally, as to this fourth issue on which Virginia Miller has the burden of proof, if you find by the greater weight of the evidence, that Invacare breached the implied warranty of merchantability made to Virginia Miller, then it would be your duty to answer the issue yes in favor of Virginia Miller. If, on the other hand, you fail to so find, then it would be your duty to answer this issue no in favor of Invacare.

The jury determined that Invacare did not breach the implied warranty of merchantability. Necessarily, the jury had to make a determination that the wheelchair was not defective, and that warnings provided with the wheelchair were not inadequate, in order to find that Invacare did not breach the implied warranty of merchantability. Plaintiff's theory of negligence for both Defendants was predicated on a defect in the design of the wheelchair. Absent a finding of any defect in the design of the wheelchair, Plaintiff could not prevail in his negligence claims against Defendants.

The erroneous instruction on insulating negligence only applied to the negligence claims, not the warranty claims. There was nothing in the jury instructions permitting the jury to consider insulating negligence in its deliberations on the warranty claims. Therefore, the erroneous insulating negligence instruction could not have tainted the jury's verdict on the warranty claims, and those verdicts must stand. Because, on the facts before us, the jury could not have found Defendants liable for negligence after finding the wheelchair was not defective and the warnings accompanying the wheelchair were not inadequate, Plaintiff was not prejudiced by the erroneous instruction on insulating negligence.

II. Severance Issue

[2] Plaintiff argues that the trial court abused its discretion in severing Plaintiff's claim for unfair and deceptive trade practices (UDTP) from Plaintiff's other claims. We disagree.

The trial court granted Defendants' motion to sever the UDTP claim and reserved that claim for consideration after the jury made its determination concerning Plaintiff's other claims. A trial court's decision on a motion to sever will not be overturned absent a showing that the trial court abused its discretion. *Insurance Co. v. Transfer, Inc.*, 14 N.C. App. 481, 484, 188 S.E.2d 612, 614 (1972). Plaintiff's claim for UDTP was based entirely upon Plaintiff's allegation that Invacare manufactured a defective product. Plaintiff alleged in his complaint:

> Defendant Invacare's offering of dangerous and defective self-propelled wheelchairs to the public—specifically to physically disabled consumers, who relied upon their wheelchairs in order to move, and would necessarily be helpless to escape a hazard caused by their means of transport—was an unfair and deceptive act or practice, in violation of G.S. § 75-1.1.

Therefore, absent a finding by the jury that the wheelchair contained a design defect, the jury could not have found that the wheelchair (or any M71 wheelchair in general) was offered to the public in a dangerous and defective state. The trial court's grant of Defendants' motion to sever the UDTP claim saved the parties and the trial court time and expense that would have been unnecessarily spent prosecuting and defending an UDTP claim that would have failed. We find no abuse of discretion. We also disagree with Plaintiff's argument that he was prejudiced for the same reason—having determined that the wheelchair was not defective, the jury could not have found any UDTP upon Plaintiff's theory in that claim.

III. Judicial Notice

[3] In Plaintiff's final argument, he contends the trial court "erred in taking judicial notice of a Texas Supreme Court opinion and instructing the jury that it was conclusive." We disagree.

First, a trial court's decision concerning judicial notice will not be overturned absent an abuse of discretion. *Smith v. Beaufort County Hosp. Ass'n*, 141 N.C. App. 203, 211, 540 S.E.2d 775, 781 (2000). "[G]enerally a judge or a court may take judicial notice of a fact which is either so notoriously true as not to be the subject of reasonable dispute or *is capable of demonstration by readily accessible sources of indisputable accuracy." West v. Reddick, Inc.*, 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981) (citations omitted). The trial court instructed the jury as follows:

> The [trial court] has taken judicial notice that the Texas Supreme Court issued an opinion in the case of Whirlpool versus Camacho. The law provides that the [trial court] may take judicial notice of certain facts that are so well-known or so well-documented that they are not subject to reasonable dispute.
>
> When the [trial court] takes judicial notice of the—of a fact, neither party is required to offer proof as to such fact. Therefore, you will accept as conclusive that the Texas Supreme Court issued an opinion in the case of Whirlpool versus Camacho.

> You are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all or any part or none of that testimony.

Plaintiff argues: "A jury can hardly be expected to weigh an expert's opinion fairly when the trial court has told it that the highest court of another state has found his opinion insufficiently reliable and that this is conclusive." As is clearly indicated by the trial court's instruction, it did not in any manner indicate that the opinion of Plaintiff's expert was conclusively unreliable. The trial court did not even take judicial notice of the fact that the Texas Supreme Court found Plaintiff's expert unreliable in the *Whirlpool* opinion. The trial court merely took judicial notice that the Texas Supreme Court had filed an opinion in the case of *Whirlpool v. Camacho*. Plaintiff and Defendants examined and cross-examined Plaintiff's expert thoroughly concerning the *Whirlpool* opinion, and the trial court instructed the jury: "You are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all or any part or none of that testimony." The fact that the Texas Supreme Court filed an opinion in *Whirlpool v. Camacho* was accepted by both parties, and was a fact "capable of demonstration by readily accessible sources of indisputable accuracy." *West*, 302 N.C. at 203, 274 S.E.2d at 223. We hold that the trial court did not abuse its discretion in taking judicial notice of the fact that the Supreme Court of Texas filed the *Whirlpool* opinion. *See Reddick*, 302 N.C. at 203-04, 274 S.E.2d at 223-24.

No prejudicial error.

Judges STEELMAN and ERVIN concur.

STATE OF NORTH CAROLINA v. DOUGLAS ELMER REEVES

No. COA11-480

(Filed 7 February 2012)

1. Motor Vehicles—driving while impaired—sufficient evidence

The trial court did not err in a driving while impaired case by denying defendant's motion to dismiss for insufficient evidence. The State presented sufficient evidence of each essential element of the offense, including that defendant was the driver of the vehicle.

2. Jurisdiction—subject matter—superior court—reckless driving to endanger—charge dismissed at district court

The superior court lacked jurisdiction to try defendant for the charge of reckless driving to endanger as the State had dismissed the charge in district court and did not indict defendant in superior court for that charge. Even though the superior court arrested judgment on the charge, defendant's argument was properly before the Court of Appeals as the arrested judgment did not vacate the underlying verdict.

3. Sentencing—aggravating factors—insufficient notice—vacated and remanded for resentencing

The State failed to provide defendant in a driving while impaired case with the statutorily required notice of its intention to use an aggravating factor under N.C.G.S. § 20-179(d). Defendant's sentence on the DWI charge was vacated and remanded to the trial court for resentencing.

Appeal by Defendant from judgment entered 16 December 2010 by Judge W. Erwin Spainhour in Superior Court, Union County. Heard in the Court of Appeals 11 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for the State.

Robert W. Ewing for Defendant.

McGEE, Judge.

Douglas Elmer Reeves (Defendant) was charged on 6 February 2010 with driving while impaired (DWI) and reckless driving to endanger. The record indicates that there was a district court trial at which the State took a voluntary dismissal of Defendant's reckless driving charge. Defendant appealed to superior court and, after a jury trial, was found guilty of DWI and reckless driving to endanger on 16 December 2010. The trial court arrested judgment as to the charge of reckless driving to endanger, stating that "this charge is used to enhance the DWI[.]" The trial court determined that Defendant's driving was "especially reckless" and that this "aggravating factor[] . . . substantially outweigh[ed] any mitigating factor[,]" and therefore imposed Level Three punishment.

The evidence at trial tended to show that, on 6 February 2010, Trooper Perry Smith (Trooper Smith) of the North Carolina Highway Patrol responded to a call concerning a collision. Upon arriving at the scene, Trooper Smith observed a 1995 GMC vehicle in a drainage ditch, positioned at a forty-five degree angle. There was no damage to the vehicle.

As Trooper Smith approached the vehicle, he saw Defendant sitting in the driver's side of the vehicle. Trooper Smith asked Defendant what happened and Defendant responded that the vehicle was out of gas. Trooper Smith noticed that Defendant was "confused," had "red glassy eyes," slurred speech, and smelled strongly of alcohol. Trooper Smith also noticed that Defendant was unsteady on his feet when he walked.

Trooper Smith performed an alcosensor test for impairment and asked Defendant to perform an ABC test, a number counting test, and a finger test. Defendant had a positive reading on the alcosensor test and was unable to complete the other tests. Trooper Smith arrested Defendant for DWI, took him to the county jail, and administered an intoxometer test. Defendant's blood alcohol level registered 0.15 on the intoxometer test. Trooper Smith administered other field sobriety tests while at the jail, none of which Defendant accomplished to Trooper Smith's satisfaction.

In addition to the tests Trooper Smith administered, he asked Defendant where he was coming from, and Defendant stated that he was going home from "Reds Gone Country" where he had consumed three beers and three shots. Defendant admitted to Trooper Smith that he had been driving the vehicle that had run out of gas.

At trial, Defendant's wife testified that Defendant had called her from "Reds" the evening of 6 February 2010 and requested that she pick him up and take him home because he was intoxicated. Defendant's wife further testified that she did pick Defendant up, but when the vehicle ran out of gas, she pulled it into the ditch, called a neighbor to pick her up, and went to get gas. Defendant's wife claimed that, upon returning with the gas, she saw Defendant being arrested and so she continued driving and did not stop. At trial, Defendant testified that he was never driving the vehicle. Defendant testified that, because of the way the vehicle was positioned, he "crawled" into the driver's seat while Defendant's wife and neighbor were getting the gas.

I. Issues on Appeal

Defendant raises the following issues on appeal: (1) the trial court erred by failing to dismiss the DWI charge based on the insufficiency of the evidence as to the required element that Defendant drove the vehicle; (2) the trial court lacked jurisdiction to try Defendant on the reckless driving to endanger charge when the charge had previously been dismissed by the district court; (3) the trial court erred in aggravating the DWI sentence when the State failed to give proper notice of its intent to seek an aggravated range sentence for the DWI conviction; and (4) the trial court erred by sentencing Defendant to an aggravated DWI sentence where the State did not prove an aggravating factor beyond a reasonable doubt.

II. Motion to Dismiss

A. Standard of Review

[1] When considering the denial of 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 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. " 'Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion.' " *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255 (2002) (citation omitted). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commis-

sion of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *Powell*, 299 N.C. at 98, 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.* at 99, 261 S.E.2d at 117. "The test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both." *Id.*

B. Discussion

Defendant argues there was insufficient evidence that he drove the vehicle and, therefore, his motion to dismiss the DWI charge should have been granted by the trial court. We disagree.

Defendant was charged with DWI and, pursuant to N.C. Gen. Stat. § 20-138.1(a) (2011),

> [a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more[.]

"The essential elements of DWI are: (1) Defendant was driving a vehicle; (2) upon any highway, any street, or any public vehicular area within this State; (3) while under the influence of an impairing substance." *State v. Mark*, 154 N.C. App. 341, 345, 571 S.E.2d 867, 870 (2002).

Defendant correctly asserts that the State presented no testimony from anyone who actually saw Defendant driving the vehicle while he was impaired, and states that the "damaging testimony" came from Trooper Smith who testified to Defendant's admission that he was driving the vehicle. Defendant argues that the only evidence presented as to whether Defendant was driving the vehicle is Defendant's own extrajudicial confession. As such, Defendant contends, this extrajudicial statement is not sufficient evidence to support the conviction.

While it is well-settled that "a naked, uncorroborated, extrajudicial confession is not sufficient to support a criminal conviction," *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 880 (1986), we disagree with Defendant's argument because there was, in fact, other circumstantial evidence to support Defendant's conviction. In addi-

tion to Defendant's admission that he was driving, the State presented circumstantial evidence that when Trooper Smith arrived at the scene, no one was in the vehicle other than Defendant and Defendant was sitting in the driver's seat.

Although Defendant offered an explanation of why he was the only person in the vehicle when Trooper Smith arrived, "[t]he 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[.]" *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. Viewing the evidence in the light most favorable to the State, we conclude that there was sufficient evidence to support a jury's conclusion that Defendant was driving the vehicle. We therefore affirm the trial court's denial of Defendant's motion to dismiss.

III. Lack of Jurisdiction

[2] Defendant next argues that the trial court lacked jurisdiction to try him for the charge of reckless driving to endanger because that charge had previously been dismissed in district court. We agree. The record in this case shows that the State dismissed the reckless driving to endanger charge in district court and did not indict Defendant in superior court for that charge. In *State v. Phillips*, 127 N.C. App. 391, 489 S.E.2d 890 (1997), this Court addressed a similar situation. We noted that, "because the State took a voluntary dismissal at the district court on [a] speeding charge, that offense was not properly before the superior court for final disposition." *Id.* at 392, 289 S.E.2d at 891. Because "[t]he record [did] not indicate that the State took the voluntary dismissal pursuant to any plea arrangement with [the] defendant[,] . . . . the superior court did not have jurisdiction over the speeding offense." *Id.* at 392-93, 489 S.E.2d at 891.

In the present case, the State dismissed the charge of reckless driving to endanger in district court. As in *Phillips*, the record does not indicate that the dismissal was entered pursuant to any plea arrangement with Defendant. Thus, the superior court did not have jurisdiction over the charge of reckless driving to endanger. *Id.* "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). We therefore vacate the judgment as to the charge of reckless driving to endanger.

We note that the State contends that Defendant's argument is not properly before this Court because the trial court arrested judgment on the reckless driving charge and, therefore, there has been no final judgment entered on Defendant's conviction for that charge. We disagree.

The State cites *State v. Escoto*, 162 N.C. App. 419, 590 S.E.2d 898 (2004) in support of its argument. However, we note that *Escoto* dealt with a prayer for judgment continued and not an arrested judgment. In *State v. Casey*, 195 N.C. App. 460, 673 S.E.2d 168, 2009 WL 367734 (2009) (unpublished opinion), an unpublished opinion, this Court has applied the reasoning of *Escoto* to an arrested judgment, and held that an arrest of judgment which has the effect of vacating the underlying verdict does not amount to a final judgment which this Court may review.

However, an arrest of judgment does not always have the effect of vacating an underlying verdict. In certain cases, "an arrest of judgment does . . . have the effect of vacating the verdict," but "in other situations an arrest of judgment serves only to withhold judgment on a valid verdict which remains intact." *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990). Whether a verdict has been vacated will determine whether the arrested judgment serves as a final judgment, thus making its appeal before this Court proper.

"When judgment is arrested because of a fatal flaw which appears on the face of the record, such as a substantive error on the indictment, the verdict itself is vacated and the state must seek a new indictment if it elects to proceed again against the defendant." *Id.* However,

> when judgment is arrested on predicate felonies in a felony murder case to avoid a double jeopardy problem, the guilty verdicts on the underlying felonies remain on the docket and judgment can be entered if the conviction for the murder is later reversed on appeal, and the convictions on the predicate felonies are not disturbed upon appeal.

Id. at 439-40, 390 S.E.2d at 132.

In the first type of arrested judgment—where a " 'motion in arrest of judgment is . . . made after verdict to prevent entry of judgment based on a defective indictment or some fatal defect on the face of the record proper' "—a "court is free to arrest judgment in a proper case on its own motion[.]" *Id.* at 439, 390 S.E.2d at 131 (citation omit-

ted). In *Casey*, our Court noted that "the effect of the trial court's arresting judgment [for these reasons] . . . was *vacatur* of defendant's conviction on that . . . charge." *Casey*, 2009 WL 367734 at *6. We held that this type of arrested judgment created "no final judgment to review on appeal" and appeal therefrom was not properly before this Court. *Id.* Neither the State, Defendant, nor our own research, has revealed a case in which our Court or our Supreme Court has stated that the second type of arrested judgment—where it is entered to avoid double jeopardy and therefore does not amount to *vacatur*—is a final judgment.

In the present case, as in *Pakulski*, because the additional conviction of reckless driving was arrested because it was "used to enhance the DWI," it therefore remains on the docket and could be revisited on remand. Because the arrested judgment in the present case did not vacate the underlying verdict, this issue is properly before us.

IV. Notice of Aggravating Factors

A. Standard of Review

[3] Defendant alleges a violation of a statutory mandate, and "[a]lleged statutory errors are questions of law." *State v. Mackey*, ___ N.C. App. ___, ___, 708 S.E.2d 719, 721 (2011). A question of law is reviewed *de novo*. *Id.* Under the *de novo* standard, the Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower" court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation omitted).

B. Discussion

Pursuant to N.C. Gen. Stat. § 20-179(a1)(1) (2011), if a defendant appeals a DWI conviction to superior court and the State intends to use one or more aggravating factors under N.C.G.S. § 20-179(c) or (d), then the State is required to "provide the defendant with notice of its intent . . . no later than 10 days prior to trial[.]" In the present case, the record reveals that the State failed to provide notice to Defendant of its intent to pursue any aggravating factors.

It is evident that the State failed to provide Defendant with the statutorily required notice of its intention to use an aggravating factor under N.C.G.S. § 20-179(d). We must therefore vacate Defendant's sentence as to the DWI charge and remand to the trial court for resentencing. *See Mackey*, ___ N.C. App. at ___, 708 S.E.2d at 722 ("Accordingly, we hold that the trial court erred by sentencing defend-

ant in the aggravated range based upon the State's failure to provide proper written notice to defendant. We therefore reverse the sentence of the trial court as to defendant's convictions . . . and remand to the trial court for resentencing.").

Affirmed in part, vacated in part and remanded for resentencing.

Judges HUNTER, Robert C. and CALABRIA concur.

IN THE MATTER OF APPEAL OF FAMILY TREE FARM, LLC FROM THE DECISION OF THE HALIFAX COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION OF CERTAIN PROPERTY FOR TAX YEAR 2007

No. COA11-540

(Filed 7 February 2012)

Taxation—real property—market value—present-use value—not arbitrary—no illegal method used

The North Carolina Property Tax Commission did not err in affirming the decision of the Halifax County Board of Equalization and Review assigning a market value of $471,390.00 and a present-use value of $158,064.00 to property owned by plaintiff taxpayer. Taxpayer failed to meet its burden of showing that the County used an arbitrary or illegal method of valuation or that the assessment substantially exceeded the true value in money of the property.

Appeal by taxpayer from final decision entered 21 October 2010 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 12 October 2011.

Family Tree Farm, LLC, pro se.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker and Katherine E. Ross, for Halifax County.

ELMORE, Judge.

Family Tree Farm, LLC (taxpayer), appeals from the final decision of the North Carolina Property Tax Commission (Commission) affirming the decision of the Halifax County Board of Equalization and Review (Board) assigning a market value of $471,390.00 and a

present-use value of $158,064.00 to property owned by taxpayer. Because taxpayer has not shown that the Commission's decision was unsupported by competent, material, and substantial evidence or that the Commission's decision was arbitrary or capricious, we affirm the Commission's final decision.

Taxpayer owns 538.75 acres in a rural area of Halifax County. The property is part of the present-use value program (program), which gives preferential tax treatment to property owners who use their property for particular purposes. *See generally* N.C. Gen. Stat. § 105-277.2-277.7 (2011). The subject property has been designated as forestland under the program, meaning that the land is "part of a forest unit that is actively engaged in the commercial growing of trees under a sound management program." N.C. Gen. Stat. § 105-277.2(2) (2011). There is no question here as to the property's designation as forestland or its membership in the program. The sole issue before us is one of valuation.

Under the program, properties are taxed "on the basis of the value of the property in its present use" (present-use value) rather than its "true value." N.C. Gen. Stat. §§ 105-277.4(a), 105-277.6(b) (2011); *see also* N.C. Gen. Stat. § 105-283 (2011) ("[T]he words 'true value' shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller[.]"). However, during revaluation years, counties reappraise subject properties at both the present-use value and the true value. N.C. Gen. Stat. § 105-277.6(b) (2011). "The difference between the taxes due on the present-use basis and the taxes that would have been payable" without the designation "are a lien on the real property" and are "carried forward in the records of the taxing unit or units as deferred taxes." N.C. Gen. Stat. § 105-277.4(c) (2011). When the property loses its program eligibility, "[t]he deferred taxes for the preceding three fiscal years are due and payable[.]" *Id*.

Here, taxpayer's property was appraised in 2007. The appraiser assessed the property's market value to be $471,390.00 and its present-use value to be $158,064.00. Taxpayer appealed the market value assessment, arguing that the County had used an unlawful valuation method to calculate the property's true market value, resulting in an inequitable and arbitrary allocation of the ad valorem property tax burden. Taxpayer asserted that the property's true market value was $188,500.00. Taxpayer based this calculation on a fifty percent

value adjustment based on the property's frequent flooding, legal restrictions, and topographical limitations. The Board heard taxpayer's appeal but decided that no change in value was justified. Taxpayer then appealed to the Commission, which affirmed the Board's decision.

On appeal to this Court, taxpayer argues that the Commission erred by affirming the Board's decision not to adjust the market value assessment. Taxpayer does not appeal the Board's present-use value assessment. We review Commission decisions pursuant to N.C. Gen. Stat. § 105-345.2, which provides, in relevant part, as follows:

> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> * * *
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(c) (2011). "Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test." *In re Appeal of Parker*, 191 N.C. App. 313, 316, 664 S.E.2d 1, 3 (2008) (quotations and citations omitted). "[T]he 'whole record' test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 674, 599 S.E.2d 888, 903-04 (2004) (quotations and citation omitted).

"[A]d valorem tax assessments are presumed correct," and "[t]his presumption places the burden upon the taxpayer to prove that the assessments are incorrect." *In re Appeal of Odom*, 56 N.C. App. 412, 413, 289 S.E.2d 83, 84-85 (1982) (citations omitted). On appeal, "the good faith of tax assessors and the validity of their actions are presumed[.]" *In re McElwee*, 304 N.C. 68, 75, 283 S.E.2d 115, 120 (1981).

> [I]n order for the taxpayer to rebut the presumption [of correctness] he must produce competent, material and substantial evidence that tends to show that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of evaluation; AND (3) the assessment *substantially* exceeded the true value in money of the property. Simply stated, it is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong, he must also show that the result arrived at is *substantially* greater than the true value in money of the property assessed, i.e., that the valuation was *unreasonably high*.

Id. at 75, 283 S.E.2d at 120 (quotations and citations omitted). Here, we note that taxpayer's appeal is, to some degree, hypothetical, because the assessment being challenged—the property's market value—would only be used to calculate deferred taxes should the property leave the program.

Taxpayer argues that the County tax assessor, Charles Graham, failed to account for certain restrictions that reduced the property's market value. Specifically, taxpayer argues that Graham should have considered (1) wetland restrictions imposed on the property by the federal Clean Water Act, the federal Food Security Act, and the North Carolina Sedimentation Pollution Act; (2) the property's frequent flooding; and (3) the property's topography and tract size. Taxpayer also argues that the valuation was based on false data and comparables as well as incorrect appraisal standards. Finally, taxpayer argues that the Use Value Advisory Board requires a value of $40.00 per acre of wasteland, rather than the value of $100.00 per acre of wasteland used by the County.

Our General Statutes set out guidelines for the proper appraisal of real property:

> (a) Whenever any real property is appraised it shall be the duty of the persons making appraisals:
>
> (1) In determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; waterpower; water privileges; dedication as a nature preserve; conservation or preservation agreements; mineral, quarry, or other valuable deposits; fertility; adaptability for agricultural, timber-producing, commercial, industrial, or other uses; past income; probable future income; and any other factors that

> may affect its value except growing crops of a seasonal or annual nature.

N.C. Gen. Stat. § 105-317(a)(1) (2011). "Restrictions on land use, including governmental restrictions, while not specifically included in N.C. Gen. Stat. § 105-317(a)(1), certainly fall within the catch-all category of 'any other factors that may affect its value except growing crops of a seasonal or annual nature[.]' " *Parker*, 191 N.C. App. at 320-21, 664 S.E.2d at 6 (quoting N.C. Gen. Stat. § 105-317(a)(1)).

The Commission made the following findings of fact with respect to the property's physical characteristics and government restrictions:

> 7. When determining the assessed value for the subject woodland, Halifax County considered a riparian area consisting of 16 acres and adjusted the property's value accordingly. Halifax County did not adjust the value of the property to reflect 90 acres of wasteland when Appellant's Forest Management Plan makes no such reference to 90 acres of wasteland, and there were no documents or maps to show delineation for wasteland.
>
> 8. . . . Halifax County did not consider governmental restrictions to determine the assessed value for the woodland when there were no documents or information showing that the property was subject to governmental restrictions, as of January 1, 2007.

Having reviewed the exhibits and transcripts, we must agree with the Commission. Taxpayer's Forest Management Plan makes no reference to either wasteland or government restrictions, with the exception of the Tar-Pamlico Buffer protection rules.

The plan includes a map showing the property's nine forest management blocks, and that map does not indicate any areas that are not part of a forest management block or that should otherwise be considered wasteland. The plan also makes no reference to lost productivity due to flooding. The plan, written in August 2006, indicates that any growth problems within forest management blocks resulted from overcrowding rather than flooding or ground saturation. The Halifax County 2007 Schedule of Values, which taxpayer unsuccessfully challenged and which this Court upheld, *see Parker*, 191 N.C. App. at 323, 664 S.E.2d at 7-8, states that parcels may be "subject to a loss of value due to the potential for periodic flooding when compared to similar lots in the area where this problem does not exist." However, the discounts apply only when flooding limits the property's development.

The discount recognizes "the degree of loss of value from none to rendering the parcel unbuildable for parcels in flood plain areas." However, here, there is no dispute that the subject property has been and will be used for forestry; the property has been maintained as an ongoing forestry operation since 1958. Taxpayer presented no evidence supporting its position that the Commission should have increased the amount of wasteland or discounted the value of the property because it is within the 100-year flood plain.

With respect to governmental restrictions, taxpayer has pointed to no restrictions that are actually in place besides the Tar-Pamlico Buffer protection rules. In its brief, taxpayer argues that the federal Clean Water Act and federal Food Security Act "severely restrict" its use of the subject property and thus the County should have accounted for those restrictions in its valuation. Even assuming that taxpayer is correct and these two federal acts do severely restrict the property's use, the restrictions do not appear to affect the land's use as forestland. By taxpayer's own descriptions of the acts, they would not affect the property's value as forestland. In addition, taxpayer cannot show that its property is differently situated with respect to these restrictions than any other property located in the same geographic region. Finally, taxpayer faces a similar obstacle with respect to the North Carolina Sedimentation Pollution Act, which specifically does not apply to land used for forestry. *See* N.C. Gen. Stat. § 113A-52.01 (2011).

With respect to the actual valuation, Graham, using his "knowledge of the land in that area" and his memory of sales in the area, decided that model number R132, with a woodland rate of $900.00 per acre, was appropriate. The models and their corresponding rates can be found in the Halifax County 2007 Schedule of Values. Graham also testified that he assigned seventeen acres[1] of the property as wastelands because he "could see standing water on that much of it." According to the Schedule of Values, the market value of wasteland in a woodland area with model number R132 is $100.00 per acre. Indeed, the market value of wasteland in any agricultural area is set at $100.00 per acre in the Schedule of Values. These values cannot now be challenged, and taxpayer has not shown either that the woodland rate of $900.00 per acre was inappropriate or that the number of acres characterized as wasteland was inappropriate.

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1. According to the appraisal report, Graham designated 16.86 acres of the property as wasteland, which accounts for the discrepancy between the sixteen acres noted by the Commission and the seventeen acres noted by Graham in his deposition.

Accordingly, we conclude that taxpayer has not met its burden of showing that the County used an arbitrary or illegal method of valuation or that the assessment substantially exceeded the true value in money of the property. We affirm the decision of the Property Tax Commission.

Affirmed.

Judges BRYANT and STEPHENS concur.

STATE OF NORTH CAROLINA v. RONALD PRINCEGERALD COX

No. COA11-609

(Filed 7 February 2012)

1. Firearms and Other Weapons—possession by felon—insufficient evidence

The trial court erred in a possession of a firearm by a felon case by denying defendant's motion to dismiss the charge for insufficient evidence. The only evidence that defendant possessed the gun was his extrajudicial confession, which alone was not sufficient to support the charge.

2. Evidence—police officer testimony—visual identification—substance marijuana

The trail court did not err in a possession of marijuana case by improperly allowing two police officers to testify that the green vegetable matter found in defendant's lap was marijuana. A police officer experienced in the identification of marijuana may testify to his visual identification of evidence as marijuana and although it would have been better for the State to have introduced admissible evidence of chemical analysis of the substance, failing to introduce such evidence was not fatal.

Appeal by defendant from judgment entered 15 September 2010 by Judge Charles H. Henry in Wayne County Superior Court. Heard in the Court of Appeals 9 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General LeAnn Martin, for the State.

Irving Joyner for defendant.

ELMORE, Judge.

Ronald Princegerald Cox (defendant) was found guilty by a jury of possession of a firearm by a felon and possession of marijuana (greater than 0.5 ounces to 1.5 ounces). He now appeals. We find error as to defendant's conviction for possession of a firearm by a felon and no error as to his conviction for possession of marijuana.

The Goldsboro Police Department conducted a DWI checkpoint from 11:00 p.m. on 30 October 2009 until 3:00 a.m. on 31 October 2009. The checkpoint was at the intersection of Central Heights and Highway 13 North; the validity of the checkpoint is not at issue in this case. At approximately 1:35 a.m. on 31 October 2009, Officer William VanLenten saw a white Chevrolet Impala traveling north on Highway 13; the car then slowed and pulled into the driveway of a residence. Officer VanLenten knew that the car did not belong to the residence's owner, so he followed the car into the driveway. As he approached the car, he saw the driver, a black male, jump out of the car and travel by foot towards the back of the residence. The driver left the car door open. Officer VanLenten saw three passengers sitting in the car. Two were in the back seat, and defendant was sitting in the front passenger seat. Officer VanLenten saw that defendant had a sheet of white paper in his lap, with a cigar wrapper and some green vegetable matter that Officer VanLenten later identified as marijuana. Officer VanLenten observed defendant rolling the green vegetable matter into the cigar wrapper to form "some type of cigar or cigarette." When a second officer, Officer McNeil, arrived on the scene, he also observed the green vegetable matter on defendant's lap.

When Officer VanLenten examined the "flight path" of the car's driver, Brian White, he found a clear plastic bag containing other clear plastic bags, which each contained green leafy vegetable matter, later identified by Officer VanLenten as marijuana. He also found a .45 Taurus revolver. The revolver was lying in the grass about ten or twelve feet from the open driver's side door. The bag of marijuana was about three feet away from the revolver. Officer VanLenten observed that the gun was dry and warm to the touch, while the grass was wet with condensation. The outside temperature was "cool" and "most people were wearing long sleeves." Officer VanLenten did not

observe defendant or the other three passengers throw anything out of the car windows.

Officer VanLenten found a second .45 Taurus revolver in the car at the feet of one of the passengers, James Darden; Darden claimed ownership of that revolver. However, nobody claimed ownership of either the baggies of marijuana or the other revolver. A national database search showed that the revolver that Officer VanLenten found in the grass did not belong to defendant or the other vehicle occupants; it had been stolen from Sumter, Georgia. Officer VanLenten took defendant, White, and the third passenger, Deangelo Cox, into custody for possession of a stolen firearm and possession of marijuana. Officer McNeil took Darden into custody. Officer VanLenten also seized the paper, cigar wrapper, and green vegetable matter that he found on defendant's lap.

After Officer VanLenten took defendant, White, and Deangelo Cox to the police station, he informed them that if nobody took ownership of the revolver and the baggies of marijuana, they would all be charged. According to Officer VanLenten, defendant and White asked whether Deangelo Cox (defendant's younger brother) would be charged if they took ownership of the revolver and the drugs. At that point, Officer VanLenten read them their *Miranda* warnings and had them sign a form showing that they had been given their *Miranda* warnings. Officer VanLenten testified that, at 3:07 a.m., White "stated that the weed belonged to him," and, at 3:08 a.m., defendant "stated that the revolver belonged to him." He asked both White and defendant to write and sign statements, but both refused. He testified, "They said that that was enough, that that was all they were going to say."

After running defendant's record and learning that he had a felony conviction, Officer VanLenten charged defendant with possession of a firearm by a felon. He testified that, while he was completing the paperwork, he overheard defendant say that "he continued to roll his weed up because he knew they were about to be going to jail."

Defendant was sentenced as a Level II offender to a term of twelve to fifteen months' imprisonment for the felony firearm charge and the misdemeanor drug charge. He now appeals.

[1] Defendant first argues that the trial court erred by denying his motion to dismiss the firearm charge for insufficient evidence. We agree.

When a defendant moves for dismissal based on insufficiency of the evidence, the trial court must determine

> whether the State has presented substantial evidence of each essential element of the offense charged and substantial evidence that the defendant is the perpetrator. If substantial evidence of each element is presented, the motion for dismissal is properly denied. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

State v. Cross, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997) (quotations and citations omitted). "In considering the motion, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence, and resolving any contradictions in favor of the State." *State v. Anderson*, 181 N.C. App. 655, 659, 640 S.E.2d 797, 801 (2007) (citation omitted).

Under N.C. Gen. Stat. § 14-415.1, "[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm[.]" N.C. Gen. Stat. § 14-415.1(a) (2011). Here, there is no question that defendant has been convicted of a felony. The only element at issue is whether defendant owned or possessed the revolver.

> Possession of any item may be actual or constructive. Actual possession requires that a party have physical or personal custody of the item. A person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition.

State v. Alston, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citations omitted). Here, because the gun was not found on defendant's person, the State was required to offer evidence that defendant constructively possessed the revolver.

"When, as here, the defendant did not have exclusive control of the location where contraband is found, 'constructive possession of the contraband materials may not be inferred without other incriminating circumstances.' " *State v. Clark*, 159 N.C. App. 520, 525, 583 S.E.2d 680, 683 (2003) (quoting *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984)). "[T]he mere fact that [a] defendant was in a car where a gun was found is insufficient standing alone to establish constructive possession." *Id.* (citing *Alston*, 131 N.C. App. at 519, 508 S.E.2d at 318). Thus, the mere fact that defendant was in a car next to where a gun was found is not enough to establish constructive possession.

Here, defendant allegedly confessed to Officer VanLenten that the gun belonged to him. However, defendant asserts that this confession was the only evidence that the State offered to establish possession or ownership, which was not sufficient because "the State may not rely solely on the extrajudicial confession of a defendant to prove his or her guilt; other corroborating evidence is needed to convict for a criminal offense." *State v. Smith*, 362 N.C. 583, 592, 669 S.E.2d 299, 305 (2008) (citation omitted). This is the "traditional" *corpus delicti* rule, and it is applicable in "cases in which there is some *evidence aliunde* the confession which, when considered with the confession, will tend to support a finding that the crime charged occurred." *State v. Trexler*, 316 N.C. 528, 532, 342 S.E.2d 878, 880 (1986).

> The rule does not require that the *evidence aliunde* the confession prove any element of the crime. The *corpus delicti* rule only requires *evidence aliunde* the confession which, when considered with the confession, supports the confes sion and permits a reasonable inference that the crime occurred. . . . The independent evidence must touch or be concerned with the *corpus delicti*.

Id. at 532, 342 S.E.2d at 880-81. In *Smith*, our Supreme Court explained the current bounds of the *corpus delicti* rule, particularly as it expanded the rule in *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985):

> In *Parker*, North Carolina joined the national trend expanding the *corpus delicti* rule to allow a defendant's extrajudicial confession to sustain a conviction when the trustworthiness of the confession is substantiated by *evidence aliunde*. 315 N.C. 222, 337 S.E.2d 487. *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." *Id.* at 236, 337 S.E.2d at 495. 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.*

Smith, 362 N.C. at 592, 669 S.E.2d at 306. "The expanded rule enunciated in *Parker* applies in cases in which such independent proof is lacking but where there is substantial independent evidence tending to furnish strong corroboration of essential facts contained in defend-

ant's confession so as to establish trustworthiness of the confession." *Trexler*, 316 N.C. at 532, 342 S.E.2d at 881 (citations omitted); *see*, *e.g.*, *Parker*, 315 N.C. at 237, 337 S.E.2d at 495-96 (finding substantial corroborating evidence of the defendant's extrajudicial confession to two murders when the victims' bodies were found in the same condition described by the defendant in his confession, the murder weapon and bloody clothing were as described by the defendant, and one victim's wallet was recovered from a neighbor of the defendant's girlfriend). "Applying the more traditional definition of *corpus delicti*, the requirement for corroborative evidence would be met if that evidence tended to establish the essential harm, and it would not be fatal to the State's case if some elements of the crime were proved solely by the defendant's confession." *Parker*, 315 N.C. at 232, 337 S.E.2d at 493.

Here, the alleged confession contained no details; the entirety of the confession, as conveyed by Officer VanLenten, was that defendant owned the gun. Thus, any corroborative evidence under either test would have to tend to establish that defendant owned or possessed the gun. The State did not present such evidence. The State's evidence did tend to show that the gun came from inside the car, but defendant was not the only person in the car; indeed, there were three other people inside the car. The gun was found on the driver's side of the car, not the passenger's side where defendant was sitting, and the gun was ten or twelve feet away from the car. Officer VanLenten did not see any of the passengers throw anything out of the windows following White's departure from the driver's seat. When Officer VanLenten approached the car, defendant was still sitting in his seat, rolling a marijuana cigarette; nothing about his demeanor or appearance suggested that he had just thrown a firearm through the body of the car and out the open car door and into the grass ten or twelve feet away. Thus, the only evidence that defendant possessed the gun was the extrajudicial confession, which alone is not sufficient to support the charge of possession of a firearm by a felon. Accordingly, the trial court erred by denying defendant's motion to dismiss.

[2] Defendant next argues that the trial court improperly allowed the State's witnesses to testify that the green vegetable matter found in defendant's lap was marijuana. We disagree.

Both Officer VanLenten and Officer McNeil testified that the green vegetable matter in defendant's lap was marijuana. Defendant argues that this was improper because neither officer was tendered as an expert witness and neither testified that he had conducted a

chemical analysis of the substance. Instead, they testified that the substance was marijuana based on observation, training, and experience.

"[T]his Court has previously held that a police officer experienced in the identification of marijuana may testify to his visual identification of evidence as marijuana[.]" *State v. Garnett*, ___ N.C. App. ___, ___, 706 S.E.2d 280, 286, *disc. review denied*, 365 N.C. 200, 710 S.E.2d 31 (2011). Although we have acknowledged that in such circumstances "it would have been better for the State to have introduced admissible evidence of chemical analysis of the substance," failing to introduce such evidence is not fatal. *Id.* (quoting *State v. Fletcher*, 92 N.C. App. 50, 57, 373 S.E.2d 681, 686 (1988)). Accordingly, we hold that the trial court did not err by allowing the two officers to identify the green vegetable matter as marijuana based on their observation, training, and experience.

In conclusion, we reverse defendant's conviction for possession of a firearm by a felon and find no error as to his conviction for possession of marijuana.

Reversed in part; no error in part.

Judges BRYANT and STEPHENS concur.

STATE OF NORTH CAROLINA v. NORMAN ADAMS

No. COA11-561

(Filed 7 February 2012)

1. Drugs—trafficking in cocaine—jury instruction—entrapment—insufficient evidence

The trial court did not err in a trafficking in cocaine by possession, trafficking in cocaine by transportation, and conspiracy to traffic in cocaine by transportation case by denying defendant's request for an entrapment instruction. Defendant failed to meet his burden of presenting credible evidence that he was entrapped and that he was not predisposed to commit the crime charged.

2. Drugs—trafficking in cocaine by possession—sufficient evidence of constructive possession

The trial court did not err in a trafficking in cocaine by possession case by denying defendant's motion to dismiss for insufficient evidence that he possessed the cocaine. The State's evidence tended to show defendant's constructive possession of the cocaine at issue.

Appeal by Defendant from judgment and order entered 10 September 2010 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General Brent D. Kiziah, for the State.

Gilda C. Rodriguez for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Norman Adams ("Defendant") appeals from his convictions for trafficking in cocaine by possession, trafficking in cocaine by transportation, and conspiracy to traffic in cocaine by transportation. Defendant argues the trial court erred by (1) denying Defendant's request for an entrapment instruction and (2) denying Defendant's motion to dismiss. For the following reasons, we find no error.

I. Factual & Procedural Background

On 4 September 2007, the Mecklenburg County Grand Jury indicted Defendant for trafficking in cocaine by possession. On 24 March 2008, Defendant was indicted for trafficking in cocaine by transportation and conspiracy to traffic in cocaine by transportation, possession, and sale. The case was set for trial during the 6 September 2010 session of the Mecklenburg County Superior Court before Judge Linwood O. Foust. On 7 September 2010, the State dismissed the charges for conspiracy to possess a trafficking amount of cocaine and conspiracy to sell a trafficking amount of cocaine. On 7 September 2010, Defendant filed a notice of his intention to assert entrapment as an affirmative defense.

The State's evidence at trial tended to show the following. Defendant received several calls starting on 23 August 2007 from "Shaw," a confidential informant working with detectives from York County, South Carolina. Shaw asked Defendant for a "9," slang for 9 ounces of cocaine. Defendant told Shaw that he did not have any

cocaine but that he would "call a guy." Defendant called Kendrick Armstrong to ask about obtaining cocaine for Shaw. After Mr. Armstrong did not return Defendant's call, Defendant traveled to Mr. Armstrong's house to find him.

On 24 August 2007, Defendant drove Mr. Armstrong to Woodlawn Green Business Park in Charlotte, where Defendant had arranged with Shaw for a purchase of cocaine to take place. Detectives from the Charlotte-Mecklenburg Police Department who had been contacted by officials from York County observed from a distance a truck driven by Defendant arrive at the pre-arranged location. The detectives observed the truck drive through the business park, turn around, and then leave. Defendant did not see Shaw at the location, so he drove to Murphy's Tavern, located across the street from the business park.

At Murphy's Tavern, officers moved in to arrest both men. Detective Gregory Heifner approached the truck with his weapon drawn, announced that he was with the police, and ordered the occupants of the truck to raise their hands. Detective Heifner saw a "tennis-ball-sized" bag of white powder sitting on a set of scales on the floorboard of the console near the transmission hump between the seats of the truck. Officer Brian Walsh approached the driver's side door of the truck where he removed the Defendant from the truck and placed him under arrest. As Officer Walsh removed Defendant from the truck, he noticed a small bag of white powder fall to the ground.

Detective Kelly Little supervised the handling and collecting of evidence. Detective Little collected what he measured to be 87.5 grams of white powder from the bag sitting on the scales on the floorboard. He also collected what he measured as 10.7 grams of white powder from the ground next to the driver's side of the truck; 8.2 grams of marijuana; cell phones; two digital scales; and 9/10 of a gram of cocaine. Jennifer Liser, a forensic chemist for the Charlotte-Mecklenburg Police Department, tested the white powder collected from the scene of the arrest. Ms. Liser concluded the powder contained cocaine, the larger bag weighing 84.68 grams and the smaller bag weighing 8.60 grams.

Detective Dan Kellough interviewed Defendant later that night. Defendant told Detective Kellough that after picking up Mr. Armstrong, Defendant knew Mr. Armstrong had cocaine on him. Defendant said that they had left the business park because

Defendant did not see anyone there and that they went to Murphy's Tavern to find out where Shaw was. Defendant told Detective Kellough that he had been involved as a middle man in a drug deal at least one time prior to the incident in question.

At the conclusion of the State's evidence, Defendant made a motion to dismiss, which the trial court denied. Defendant testified on his own behalf. Defendant stated that Shaw called him repeatedly, up to 20 times in four hours. He testified that he borrowed a friend's truck to pick up Mr. Armstrong and that he didn't know anything about drugs. Defendant admitted on cross-examination that he had been the middle man in a purchase once before. Defendant renewed his motion to dismiss at the close of all of the evidence, and the trial court again denied his motion.

Defendant requested the pattern jury instruction regarding entrapment. The trial court denied Defendant's request. On 10 September 2010, a jury found Defendant guilty of trafficking in cocaine by possession, conspiracy to traffic in cocaine by transportation, and trafficking in cocaine by transportation. Defendant was sentenced to a minimum of 35 months and a maximum of 42 months imprisonment.

II. Jurisdiction & Standard of Review

Defendant appeals from a final judgment in superior court where he was convicted of a non-capital offense. Therefore, we have jurisdiction over his appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

The standard of review for a trial court's decision regarding a jury instruction is *de novo*. *State v. Jenkins*, 202 N.C. App. 291, 296, 688 S.E.2d 101, 105 (2010). We also review the trial court's denial of Defendant's motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

III. Analysis

A. Entrapment

[1] Defendant contends the trial court erred in denying Defendant's request for an entrapment instruction. We disagree.

The burden of proving the affirmative defense of entrapment lies with the defendant. *State v. Hageman*, 307 N.C. 1, 28, 296 S.E.2d 433, 448 (1982). "Before a Trial Court can submit such a defense to the jury there must be some credible evidence tending to support the defendant's contention that he was a victim of entrapment, as that

term is known to the law." *State v. Luster*, 306 N.C. 566, 571, 295 S.E.2d 421, 424 (1982) (quotation marks and citations omitted). In deciding whether an instruction on entrapment should be given, the evidence is viewed in the light most favorable to the defendant. *State v. Jamerson*, 64 N.C. App. 301, 303, 307 S.E.2d 436, 437 (1983).

A defendant must prove two elements to warrant an entrapment instruction: " '(1) law enforcement officers or their agents engaged in acts of persuasion, trickery or fraud to induce the defendant to commit a crime, and (2) the criminal design originated in the minds of those officials, rather than with the defendant.' " *State v. Branham*, 153 N.C. App. 91, 100, 569 S.E.2d 24, 29 (2002) (citation omitted). Entrapment " 'is not available to a defendant who was predisposed to commit the crime charged absent the inducement of law enforcement officials.' " *Id.* (citation omitted); *see also Luster*, 306 N.C. at 579, 295 S.E.2d at 428 ("When a defendant's predisposition to commit the crime charged is demonstrated, the defense of entrapment is not available to him."). The burden to prove a lack of predisposition remains with the defendant and is not shifted to the prosecution. *Hageman*, 307 N.C. at 28, 296 S.E.2d at 448. "Predisposition may be shown by a defendant's ready compliance, acquiescence in, or willingness to cooperate in the criminal plan where the police merely afford the defendant an opportunity to commit the crime." *Id.* at 31, 296 S.E.2d at 450.

Taking the facts in the light most favorable to Defendant, Shaw called Defendant repeatedly requesting cocaine. Defendant told him he would "call a guy." Defendant called Mr. Armstrong to try and get cocaine. Defendant then drove to Mr. Armstrong's house after he did not answer his phone. The next day, Defendant picked up Mr. Armstrong and drove him to a location previously arranged to meet Shaw. These actions by Defendant illustrate his "ready compliance, acquiescence in, [and] willingness to cooperate in the criminal plan" and thus his predisposition. In addition, Defendant admitted on cross-examination that he had been involved as a middle man on a prior deal, which further demonstrates a predisposition to commit the crime.

It is true that Defendant denied at trial arranging to meet Shaw and testified that he did not know he was arranging a cocaine deal. However, this testimony is to be weighed against the uncontradicted evidence of his physical presence at the scene of the cocaine purchase, his borrowing and driving the truck delivering the cocaine, the

phone calls to and from Shaw and Mr. Armstrong, and his admissions to law enforcement shortly after his arrest.

Defendant failed to meet his burden of presenting credible evidence that he was entrapped and that he was not predisposed to commit the crime charged. The trial court correctly denied Defendant's request for a jury instruction for entrapment.

B. Trafficking in Cocaine by Possession

[2] Defendant argues that the trial court erred in denying his motion to dismiss the trafficking in cocaine by possession charge because there was insufficient evidence that he possessed the cocaine. We disagree.

This Court must determine "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. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). The evidence must be viewed "in the light most favorable to the state, giving the state the benefit of every reasonable inference that might be drawn therefrom." *State v. Etheridge*, 319 N.C. 34, 47, 352 S.E.2d 673, 681 (1987).

" 'To prove the offense of trafficking in cocaine by possession, the State must show 1) knowing possession of cocaine and 2) that the amount possessed was 28 grams or more.' " *State v. Acolatse*, 158 N.C. App. 485, 488, 581 S.E.2d 807, 809 (2003) (citation omitted). "Possession can be actual or constructive. When the defendant does not have actual possession, but has the power and intent to control the use or disposition of the substance, he is said to have constructive possession." *State v. Baldwin*, 161 N.C. App. 382, 391, 588 S.E.2d 497, 504-05 (2003) (internal citation omitted).

Constructive possession can be inferred when there is evidence that a defendant had the power to control the vehicle where a controlled substance was found. *State v. Baublitz*, 172 N.C. App. 801, 810, 616 S.E.2d 615, 621 (2005). However, " 'where possession . . . is nonexclusive, constructive possession . . . may not be inferred without other incriminating circumstances.' " *Id.* (citation omitted) (alterations in original).

After receiving a phone call from Shaw requesting cocaine, Defendant contacted Mr. Armstrong to get the cocaine. After Defendant picked up Mr. Armstrong, Defendant drove to the location where Defendant had arranged with Shaw for the purchase to take

place. Defendant admitted to Detective Kellough that he knew Mr. Armstrong had the cocaine. When officers moved in to arrest Defendant, they found cocaine on scales in the center of the truck. Defendant was driving and thus in control of the truck. Defendant facilitated the transaction by providing the vehicle, transportation, and arranging the location. These are sufficient incriminating circumstances for the jury to infer that Defendant constructively possessed the drugs.

Although Defendant argues that he did not have exclusive possession of the truck, this is not necessary. Possession "may be in a single individual or in combination with another." *State v. Anderson*, 76 N.C. App. 434, 438, 333 S.E.2d 762, 765 (1985); *see also State v. Allen*, 279 N.C. 406, 412, 183 S.E.2d 680, 685 (1971) (finding constructive possession where there was power and intent to control disposition and use while acting in combination with others). Defendant could constructively possess the drugs in combination with Mr. Armstrong.

Thus, the State's evidence tended to show Defendant's constructive possession of the cocaine at issue, and his motion to dismiss was properly denied.

IV. Conclusion

For the forgoing reasons, we find

No error.

Judges THIGPEN and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. GREGORY ELLERBEE

No. COA11-1055

(Filed 7 February 2012)

1. Evidence—prior assault—no prejudice—no plain error

The trial court did not commit plain error in a first-degree burglary and assault inflicting serious bodily injury case by allowing the admission of evidence by the State that defendant had assaulted a witness's father. It was likely that the jury would have reached the same verdict even without the admission of the challenged evidence.

2. Evidence—prior conviction—impeachment—outside ten-year period—erroneous admission—not prejudicial

The trial court erred in a first-degree burglary and assault inflicting serious bodily injury case by allowing the State to impeach a witness with his prior conviction that was outside of the ten-year period prescribed by Rule of Evidence 609(b). However, the State presented overwhelming evidence to support defendant's convictions and the jury would not have reached a different verdict had the evidence not been admitted.

Appeal by defendant from judgments entered 8 March 2011 by Judge James G. Bell in Robeson County Superior Court. Heard in the Court of Appeals 11 January 2012.

Attorney General Roy Cooper, by Assistant Attorney General Charles G. Whitehead, for the State.

Winifred H. Dillon, attorney for defendant.

ELMORE, Judge.

Gregory Ellerbe (defendant) appeals from judgments entered upon jury convictions of 1) first degree burglary and 2) assault inflicting serious bodily injury. After careful consideration, we find no prejudicial error.

On 29 December 2005, George Harrington was asleep inside his residence located on Croom Road in Maxton. He was awakened by the noise of his front door being kicked in. A man then entered his bedroom and began beating and stomping Harrington. The man then yelled that he was going to kill Harrington, because Harrington owed

him money. Harrington recognized the man's voice as that of defendant. Defendant then dragged Harrington out of his bedroom and into the road. Defendant continued to beat and stomp Harrington in the road. Harrington was able to see defendant's face as this occurred.

Around this time, Katie Lane, Harrington's neighbor, heard the commotion outside. She recognized defendant's voice, and she heard him yell "I'm going to kill you." Lane then awoke her granddaughter, Abbie McRae. McRae ran out of the house and into the road towards defendant and Harrington. McRae had known defendant for her entire life. She observed defendant beating Harrington with a black object, slightly larger than his fist. McRae asked defendant why he was beating Harrington, and defendant responded that Harrington owed him money. McRae then witnessed defendant drive away in his car.

As a result of the attack, Harrington suffered many injuries including 1) cracked ribs, 2) a perforated liver, 3) difficulty breathing, 4) permanent damage to his left eye, and 5) an aggravated seizure disorder. He was hospitalized for more than a month.

Defendant was indicted for 1) assault inflicting serious bodily injury and 2) first degree burglary. On 28 February 2011, the case came on for trial by jury. At trial, during direct examination of McRae, the State read into evidence a prior written statement by McRae stating in part that McRae "stopped hanging out with the defendant when the defendant assaulted and knocked her father, Jeffrey McNair, out, because it was alleged that her father owed the defendant $15 for dope." Defendant did not object to the admission of this testimony. Also at trial, the State sought to impeach defendant's witness, Willie Ellerbee (Willie), with evidence that Willie was convicted of manslaughter on 18 March 1986, and that he was released from this conviction on 12 January 1991. Defendant objected to this conviction being used against his witness, but the trial court allowed the State to impeach Willie with the conviction.

On 4 March 2011, defendant was convicted of 1) assault inflicting serious bodily injury and 2) first degree burglary. The trial court imposed a sentence of 77 to 102 months for the burglary, and a consecutive 19 to 23 months for the assault. Defendant now appeals.

[1] Defendant first argues that the trial court committed plain error in allowing the admission of evidence by the State that defendant assaulted McRae's father. Specifically, defendant argues that this evidence was 1) irrelevant, 2) that it's admission violated Rule 404(b) and 3) that it was unduly prejudicial. We disagree.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." N.C.R. App. P. Art. II, Rule 10 (2011). "[O]ur review of those matters to which defendant did not object at trial is limited to plain error. 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. Chapman*, 359 N.C. 328, 349, 611 S.E.2d 794, 812 (2005) (quotations and citation omitted).

At trial, defendant did not object to the admission of McRae's prior statement. Therefore, this Court will conduct a plain error review, and we will analyze whether the jury probably would have reached a different verdict had the evidence not been admitted. After careful review of the record, we determine that the State offered the following evidence: 1) the testimony of Harrington, who stated that he observed defendant's face and recognized his voice during the beating, 2) the testimony of Lane, who stated that she recognized defendant's voice as being the one who was yelling at Harrington in the road, 3) the testimony of McRae, who witnessed defendant beating Harrington, who had a conversation with defendant, and who had known defendant her entire life. Thus, we conclude that the State presented overwhelming evidence to support the verdict. Accordingly, it is likely that the jury would have reached the same verdict even without the admission of McRae's prior statement.

[2] Defendant next argues that the trial court erred in allowing the State to impeach Willie with his prior conviction for manslaughter from 1986. Specifically, defendant argues that evidence of this conviction was not admissible under Rule 609(b), because it was outside of the ten-year period. We agree, but we conclude that defendant was not prejudiced by this error.

"Rule 609(b) is to be used for purposes of impeachment. The use of this rule is necessarily limited by that focus: it is to reveal not the character of the witness, but his credibility." *State v. Ross*, 329 N.C. 108, 119, 405 S.E.2d 158, 165 (1991) (citation omitted). "Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction . . . unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances sub-

stantially outweighs its prejudicial effect." *State v. Blankenship*, 89 N.C. App. 465, 467, 366 S.E.2d 509, 510 (1988) (citation omitted). "We interpret this part of Rule 609(b) to mean that the trial court must make findings as to the specific facts and circumstances which demonstrate the probative value outweighs the prejudicial effect." *State v. Hensley*, 77 N.C. App. 192, 195, 334 S.E.2d 783, 785 (1985).

Here, at trial the State sought to impeach Willie with his prior conviction for manslaughter. Willie was convicted of manslaughter on 18 March 1986, and he was released from this conviction on 12 January 1991. Thus, the conviction was outside of the ten-year period prescribed by Rule 609(b). Furthermore, the trial court did not make any findings as to the specific facts and circumstances regarding the probative value of this conviction. Therefore, we conclude that the trial court erred in admitting evidence of this conviction under Rule 609(b). We must next determine whether defendant was prejudiced by this error.

"A defendant is prejudiced by [an error] . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443 (2011)

For the reasons previously discussed in this opinion, we conclude that the State presented overwhelming evidence to support defendant's convictions, and we are not persuaded that the jury would have reached a different verdict had evidence of Willie's prior conviction not been admitted. Thus, we conclude that evidence of this prior conviction was admitted in error, but defendant was not prejudiced by this error.

No prejudicial error.

Judges BRYANT and ERVIN concur.

PROCAR II, INC., PLAINTIFF v. TONY M. DENNIS AND BETTY D. LAMBERT, DEFENDANTS

No. COA11-1018

(Filed 7 February 2012)

Contracts—insufficient consideration—not enforceable—dismissal proper

The trial court did not err by dismissing plaintiff's case with prejudice where the trial court correctly determined that an agreement between the parties was not supported by adequate consideration, and that the agreement was not enforceable between the parties.

Appeal by plaintiff from judgment entered 15 February 2011 by Judge W. Erwin Spainhour in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 January 2012.

June K. Allison and William A. Navarro, attorneys for plaintiff.

Derek P. Adler and Troy J. Stafford, attorneys for defendants.

ELMORE, Judge.

Procar II, Inc. (plaintiff) appeals a judgment for involuntary dismissal with prejudice. After careful consideration, we affirm.

In 1995, Robert Brent McKinney formed Procar, Inc., a company that was engaged in framing contracting and concrete work. In 2005, McKinney formed Procar II, Inc. (plaintiff). At this time, Procar, Inc. began performing primarily concrete work, and plaintiff performed primarily framing work. Both companies were owned entirely by McKinney, and McKinney served as the sole director and president of both Procar, Inc. and plaintiff. The two companies also shared 1) employees, 2) an office, 3) a mailing address, 4) a telephone number, 5) a fax number, and 6) an email address.

For many years, Procar, Inc. and plaintiff provided labor to Southeastern Material, Inc. (Southeastern). Betty Lambert (defendant Lambert) was the secretary and treasurer of Southeastern. Tony M. Dennis (defendant Dennis) was the president of Southeastern. In paying invoices to Procar, Inc. and to plaintiff, Southeastern made its checks payable to simply "Procar." On 16 June 2008, defendants both signed a "Personal Guaranty Agreement" (the agreement) obligating themselves to personally guarantee the indebtedness of Southeastern

"due to and owing to Procar, Inc. and/or any of its divisions, subsidiaries, and affiliates including interest and Attorney's Fees." At the time the agreement was executed, the amount owed by Southeastern to plaintiff was approximately $611,500.00. Plaintiff continued to extend credit to Southeastern after the agreement was executed.

On 30 December 2009, Southeastern filed for bankruptcy protection. On 5 February 2010, plaintiff filed a complaint seeking to recover from defendants $515,724.97, the total amount allegedly owed to plaintiff by Southeastern at the time of the bankruptcy filing. On 7 May 2010, defendants filed an answer and a motion to dismiss plaintiff's claim for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6). In that motion, defendants asserted in part that the agreement was not supported by adequate or sufficient consideration. On 15 October 2010, plaintiff filed a motion for summary judgment pursuant to Rule 56, asserting that there was no genuine issue as to any material fact. On 23 November 2010, defendants filed their own motion for summary judgment pursuant to Rule 56. On 23 December 2010, the trial court entered an order denying both parties' motions for summary judgment. On 26 January 2011, the case came on for trial. Following the trial, the trial court entered a judgment for involuntary dismissal. In that judgment the trial court concluded that there was no valid and enforceable contract between plaintiff and defendants because 1) there was no consideration for the agreement and 2) plaintiff was not a subsidiary, division, or affiliate of Procar, Inc., and therefore plaintiff could not seek to enforce the agreement. Plaintiff now appeals.

Plaintiff first argues that it is an affiliate of Procar, Inc., and that it is entitled to enforce the agreement. We agree in part with plaintiff's argument.

This Court notes that what constitutes an "affiliate" appears to be an unsettled area of our law. Both parties in their briefs direct this Court's attention to cases from other jurisdictions. However, Black's Law Dictionary defines an "affiliate" as "a corporation that is related to another corporation by shareholding or other means of control: a subsidiary, parent or sibling corporation." *Black's Law Dictionary*, (8th ed. 2004).

Here, McKinney was the sole owner, director, and president of both Procar, Inc. and plaintiff. He ran both companies from the same office, with the same telephone number, mailing address, fax number, and email address. He also staffed both companies with the same

employees, and he titled them with essentially the same name. Furthermore, he accepted checks payable simply to "Procar" as payment for work done by both Procar, Inc. and plaintiff. Based on these facts, we are persuaded to classify Procar, Inc. and plaintiff as sibling corporations. Thus, under the aforementioned definition, Procar, Inc. and plaintiff would be considered "affiliates."

However, whether plaintiff, as an affiliate of Procar, Inc., could enforce the agreement turns upon whether the underlying agreement itself was enforceable. Therefore, we will turn our attention to plaintiff's second argument, that the agreement was supported by adequate consideration, because it covered future extensions of credit.

As a general rule, "a guaranty [agreement] executed independently of the main debt must be supported by independent consideration." *International Harvester Credit Corp. v. Bowman*, 69 N.C. App. 217, 221, 316 S.E.2d 619, 621 (1984) (citation omitted). However, in *Gillespie v. De Witt*, this Court held that "when the guaranty which is separate from the original indebtedness covers future as well as existing indebtedness, there is consideration for the guaranty apart from the principle indebtedness which was previously in existence." 53 N.C. App. 252, 280 S.E.2d 736 (1981).

Here, plaintiff sought payment for indebtedness incurred before the agreement was executed. The trial court found that the agreement did not apply to both existing and future debts of Southeastern, and therefore the agreement was not supported by adequate consideration. On appeal, plaintiff argues that the language of the agreement does not state "*now* due to and owing" or "*currently* due to and owing," and therefore it should be plainly interpreted as meaning "*whenever* due and owing." Based on this interpretation, plaintiff argues that the agreement applied to future extensions of credit. We disagree.

"When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of construction, cannot reject what the parties inserted or insert what the parties elected to omit." *Taylor v. Gibbs*, 268 N.C. 363, 365, 150 S.E.2d 506, 507 (1966) (quotations and citations omitted). In *De Witt* this Court held that a guaranty agreement applied to future extensions of credit when that agreement stated "now owing or due, or which may ***hereafter***, from time to time, be owing or due, and ***howsoever heretofore or hereafter created or arising or evidenced.***" 53 N.C. App. 252, 261, 280 S.E.2d 736, 742-43 (1981) (quotations omitted) (emphasis added).

Here, the agreement makes no mention of any future obligations; it states simply "due to and owing." Furthermore, as plaintiff has correctly argued in its brief, this Court may not insert any terms into the agreement. Thus, we reject plaintiff's suggestion that the agreement should be interpreted as "*whenever* due to and owing." Without future language, the agreement falls short of the example evidenced in *De Witt*. Accordingly, we conclude that the agreement did not apply to future extensions of credit. Thus, the trial court correctly determined that the agreement was not supported by adequate consideration, and that the agreement is not enforceable between the parties.

Affirmed.

Judges BRYANT and ERVIN

MARYELLEN KENTON, PLAINTIFF v. JAMES P. KENTON, DEFENDANT

No. COA11-531

(Filed 7 February 2012)

Domestic Violence—protective order—no findings or conclusions of violence—order void ab initio

The trial court erred by denying defendant's motion to dismiss plaintiff's motion to renew a consent Domestic Violence Protective Order (DVPO). The consent DVPO was void *ab initio* because it contained no findings of fact or conclusions of law establishing that defendant committed an act of domestic violence.

Appeal by defendant from orders entered 14 January 2011 and 11 February 2011 by Judge Jeffrey E. Noecker in New Hanover County District Court. Heard in the Court of Appeals 16 November 2011.

Ward and Smith, P.A., by John M. Martin and Lauren T. Arnette, for defendant-appellant.

No brief for plaintiff.

HUNTER, Robert C., Judge.

James P. Kenton ("defendant") appeals from the trial court's 14 January 2011 order renewing a consent Domestic Violence Protection Order that was issued 8 January 2010 in New Hanover County District

Court by Judge Sandra Ray Criner (the "Consent DVPO"). Defendant argues the trial court erred by (1) denying his motion to dismiss plaintiff Maryellen Kenton's motion to renew the Consent DVPO; and (2) entering an order renewing the Consent DVPO for a term of one year. After careful review, we reverse the order denying defendant's motion to dismiss and vacate the order renewing the Consent DVPO.

Background

The evidence tended to establish the following facts: defendant and plaintiff were previously married and have two minor children. Plaintiff filed a complaint and motion for a DVPO against defendant on 11 December 2009. Plaintiff claimed that on that date defendant attempted to cause or intentionally caused her bodily injury and that defendant posed a danger of "serious and immediate injury" to her and her children.

On 8 January 2010, plaintiff and defendant entered into a consent DVPO, by which the trial court ordered that defendant "shall not commit any ~~further~~ acts of abuse or make any threats of abuse"; the word "further" was struck through with a line. In addition to identifying the parties' respective counsel, the trial court made one finding of fact in the order:

> The parties agree to entry of this order *without express findings of fact regarding the behavior of either party.* The parties have two minor children and their attorneys shall make arrangements for Defendant's custodial periods in accordance with the Separation and Property Settlement Agreement or established by any court order in the pending custody action.

(Emphasis added.) The trial court also noted that the "[p]arties waive conclusion[s] of law." Thus, the Consent DVPO contained no finding of fact or conclusion of law that defendant committed an act of domestic violence as defined in N.C. Gen. Stat. § 50B-1(a) (2011). The Consent DVPO was made effective until 8 January 2011.

On 25 May 2010, an arrest warrant was issued for defendant for the offense of assault on a female committed against plaintiff. The warrant alleged that on 11 December 2009 defendant committed the same acts of violence against plaintiff as plaintiff had alleged in her 11 December 2009 complaint and motion for a domestic violence protection order. Defendant was arrested on 8 July 2010 and entered an *Alford* guilty plea to the charge on 26 October 2010. The trial court granted a prayer for judgment continued.

On 6 January 2011, plaintiff filed a motion to renew the Consent DVPO, which was to expire on 8 January 2011. In her motion, plaintiff claimed that defendant "has shown he continues to be a threat," cited his guilty plea to the 11 December 2009 assault, and stated that she feared for her safety.

During a 14 January 2011 hearing on plaintiff's motion, defendant moved to dismiss the motion on the ground that the Consent DVPO was facially invalid because the order contained no finding of fact or conclusion of law that defendant committed an act of domestic violence, as required by N.C. Gen. Stat. § 50B-3(a). Acknowledging that the Consent DVPO lacked a conclusion of law or finding of fact regarding an act of domestic violence, the trial court took judicial notice of defendant's 8 July 2010 *Alford* guilty plea to "judicially establish[]" that defendant committed an act of domestic violence. Accordingly, the trial court denied defendant's motion to dismiss plaintiff's motion to renew the order.

The trial court next heard arguments on plaintiff's motion to renew the Consent DVPO and renewed the order for a one-year period expiring on 14 January 2012. Defendant appeals from the trial court's orders.

Discussion

Defendant claims that the trial court erred by denying his motion to dismiss plaintiff's motion to renew the Consent DVPO because the Consent DVPO was void *ab initio*. Defendant bases his argument on the fact that the Consent DVPO contained no findings of fact or conclusions of law establishing that he committed an act of domestic violence. Because we are bound by this Court's decision in *Bryant v. Williams*, 161 N.C. App. 444, 446-47, 588 S.E.2d 506, 507-08 (2003), we must agree.

In *Bryant*, a divided panel of this Court vacated a consent order entered pursuant to N.C. Gen. Stat. § 50B-3 because the order lacked a finding that an act of domestic violence had been committed. *Bryant*, 161 N.C. App. at 446-47, 588 S.E.2d at 507-08. The majority in *Bryant* observed that our General Statutes required protective orders and consent orders entered pursuant Chapter 50B be entered " 'to bring about a *cessation* of acts of domestic violence.' " *Id.* (quoting N.C. Gen. Stat. § 50B-3(a) (2001)) (emphasis added). Without a finding by the trial court that an act of domestic violence had occurred, the trial court had no authority under Chapter 50B to enter an order for the purpose of *ceasing* domestic violence between the parties. *Id.*

("The court's authority to enter a protective order or *approve a consent agreement* is dependent upon finding that an act of domestic violence occurred and that the order furthers the purpose of ceasing acts of domestic violence." (emphasis added) (citing *Brandon v. Brandon*, 132 N.C. App. 646, 654, 513 S.E.2d 589, 595 (1999)).

We note that N.C. Gen. Stat. § 50B-3 was amended multiple times after our decision in *Bryant*. In 2005, the Legislature amended section 50B-3(a) deleting the language regarding "cessation" that was quoted in *Bryant*. 2005 N.C. Sess. Laws ch. 423, sec. 1 (effective 1 October 2005). However, the same amendment to the statute specified that "[i]f the court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from *further* acts of domestic violence." *Id.* (codified at N.C. Gen. Stat. § 50B-3(a) (2011) (emphasis added)).

We discern no meaningful distinction between the amended language of N.C. Gen. Stat. § 50B-3(a) (2011) and the language of N.C. Gen. Stat. § 50B-3(a) (2001) quoted in *Bryant*, 161 N.C. App. at 446, 588 S.E.2d at 507-08. Our conclusion is supported by the preamble to 2005 N.C. Sess. Laws ch. 423, which states, *inter alia*, that the 2005 amendment was intended to "CLARIFY AND ENHANCE THE LAWS RELATING TO DOMESTIC VIOLENCE." Therefore, we must conclude the precedent set by *Bryant* is controlling in this case. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

Thus, we hold that because the Consent DVPO, entered 8 January 2010 by Judge Criner, lacked any finding that defendant committed an act of domestic violence it was void *ab initio*. Consequently, the trial court erred by denying defendant's motion to dismiss plaintiff's motion to renew the Consent DVPO and erred by ordering the Consent DVPO renewed for a period of one year. Accordingly, we reverse the 11 February 2011 order denying defendant's motion to dismiss plaintiff's motion to renew the 8 January 2010 consent DVPO. The 14 January 2011 order renewing the consent DVPO is vacated.

Reversed & Vacated

Judges GEER and HUNTER, Jr., Robert N., concur.

STATE OF NORTH CAROLINA v. XAVIER HOSEA SHAW

No. COA11-874

(Filed 7 February 2012)

1. Criminal Law—defendant's presence at trial—no absolute right to waive

Defendant's argument in a robbery with a dangerous weapon, possession of a firearm by a felon, and violent habitual felon case that he was entitled to a new trial because the trial court erred in forcing him to be present at his trial was overruled. Defendant did not raise any constitutional issues in support of his argument before the trial court and those issues were not considered for the first time on appeal. Further, a defendant's right to waive presence for entry of pleas under N.C.G.S. § 15A-1011 is not applicable to waiver of presence at trial. Finally, there are no cases recognizing a defendant's absolute right to not be present at trial.

2. Criminal Law—defendant restrained in courtroom—not entitled to new trial

Defendant in a robbery with a dangerous weapon, possession of a firearm by a felon, and violent habitual felon case was not entitled to a new trial where the court required defendant to be restrained in the courtroom. Defendant acknowledged the considerable case law against his position on this issue and admitted that his argument standing alone was insufficient to call for a new trial.

Appeal by Defendant from judgment entered 18 February 2011 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 12 January 2012.

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

Richard E. Jester for Defendant.

STEPHENS, Judge.

Defendant Xavier Hosea Shaw was indicted on one count each of robbery with a dangerous weapon, possession of a firearm by a felon, and having attained violent habitual felon status. Shaw pled not guilty

to the charges and was tried by a jury in Wake County Superior Court, the Honorable Paul G. Gessner presiding. The jury returned verdicts finding Shaw guilty of the charges. The trial court arrested judgment on the charges of possession of a firearm by a felon and of having attained violent habitual felon status and sentenced Shaw to life imprisonment without parole on the charge of robbery with a dangerous weapon. Shaw gave notice of appeal in open court.

[1] On appeal, Shaw first argues that he is entitled to a new trial because the trial court erred in "forcing [] Shaw to be present" at his trial. Shaw contends that he had "an absolute right to waive his presence at trial" such that the trial court's denial of Shaw's "waiver of appearance"—in which Shaw attempted to "specifically waive[] his right to be present at every stage of his trial"—was error warranting a new trial. We are unpersuaded.

As authority supporting the existence of an absolute right to waive one's presence at trial, Shaw references (1) a citizen's right to travel protected by the United States Constitution; (2) a defendant's right to waive presence for entry of pleas under N.C. Gen. Stat. § 15A-1011; and (3) various North Carolina cases recognizing a criminal defendant's limited right to waive presence at some stages of trial. In our view, however, none of these authorities establish the existence of an absolute right to waive presence at trial.

Regarding Shaw's constitutional argument, we note that Shaw did not raise any constitutional issues in support of his waiver argument before the trial court. Because constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988), to the extent Shaw bases his argument on constitutional grounds, such argument is not properly before this Court.

As for Shaw's contention that section 15A-1011—which sets out the procedure for a defendant to waive appearance and plead not guilty, N.C. Gen. Stat. § 15A-1011(d) (2009)—this Court has previously held that section 15A-1011(d) "applies to a defendant's waiver of her right to be present for entry of pleas" and "is not applicable where a defendant waives her right to be present at other times during her trial." *State v. Whitted*, ___ N.C. App. ___, ___, 705 S.E.2d 787, 794 (2011). As section 15A-1011 is not applicable to waiver of presence at trial, it cannot provide support for Shaw's argument that he has an absolute right to waive his presence at trial.

Finally, regarding the purported case law recognizing a right to waive trial presence, we note that our Courts have consistently held only that a defendant in a non-capital felony trial *may* voluntarily waive his right to confrontation by failing to appear at his trial subsequent to the commencement of trial. *See*, *e.g.*, *State v. Richardson*, 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991). However, there are no cases recognizing a defendant's absolute right to not be present at trial. Rather, our Supreme Court long ago held that

> [t]he court will always require the presence of the prisoner in court during the trial . . . if he be in close custody of the law, unless in case the prisoner expressly himself, and not by counsel, waives his right to be present; but the court may require it, if it shall deem it advisable to do so.

State v. Kelly, 97 N.C. 404, 407-08, 2 S.E. 185, 187 (1887). Clearly, then, our Supreme Court has contemplated a trial court's power to require a defendant's presence at his trial, even despite that defendant's attempted waiver. Further, Shaw offers no support, either logical or precedential, for the contention that the limited ability to waive one's right to be present implicates a concomitant and absolute right of absence. Indeed, persuasive authority contends otherwise. *Singer v. United States*, 380 U.S. 24, 34-35, 13 L. Ed. 2d 630, 638 (1965) ("The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right. . . . Moreover, it has long been accepted that the waiver of constitutional rights can be subjected to reasonable procedural regulations . . . ."); *United States v. Moore*, 466 F.2d 547, 548 (3d Cir. 1972) ("While [the Federal Rules of Evidence] permit the court to continue the trial when the defendant absents himself, [they do] not, concomitantly, vest a *right of absence* in a defendant."). We agree with this authority. In our view, Shaw has failed to establish that he had any right to be absent at trial. Accordingly, the trial court's denial of Shaw's attempted waiver of presence was not error warranting a new trial. Shaw's argument is overruled.

[2] Shaw also argues that he is entitled to a new trial because the court erred "in requiring [] Shaw to be restrained in the courtroom." However, Shaw acknowledges the "considerable case law against [his] position" on this issue and admits that his argument "standing alone is insufficient to call for a new trial." We agree. As noted by Shaw, the trial court complied with all applicable law regarding

Shaw's restraint. Therefore, we conclude that Shaw is likewise not entitled to a new trial on this issue.

NO ERROR.

Judges STROUD and BEASLEY concur.

IN THE MATTER OF J.S.L.

No. COA11-928

(Filed 7 February 2012)

Termination of Parental Rights—paternity testing—motion erroneously denied

The trial court erred by denying respondent's motion for DNA paternity testing in a termination of parental rights case. Respondent contested paternity in his answer and nothing in the record showed that the question of paternity had ever been determined judicially or otherwise prior to the filing of the petition. Further, the court's subsequent termination of respondent's parental rights did not render the error non-prejudicial or moot as the order had collateral legal consequences.

Appeal by respondent from order entered 29 April 2011 by Judge John B. Carter in Robeson County District Court. Heard in the Court of Appeals 23 January 2012.

No brief filed for petitioner-appellee or guardian ad litem.

Jeffrey L. Miller for respondent-appellant.

McCULLOUGH, Judge.

The mother (hereinafter "petitioner") of J.S.L., a child born out of wedlock, filed a petition to terminate the parental rights of respondent, whom she alleged to be the biological father of J.S.L. Because no father was named on the birth certificate, petitioner also sought to terminate the parental rights of any possible unknown father. Respondent, *pro se*, filed an answer to the petition in which he denied paternity and moved for DNA paternity testing. The trial court subsequently appointed an attorney to represent respondent, and at the call

of the case for hearing, respondent's attorney renewed the request for paternity testing. The court denied the motion and proceeded to conduct the hearing upon the petition. The court filed an order on 29 April 2011 terminating respondent's parental rights to the child pursuant to N.C. Gen. Stat. § 7B-1111(5) and (7) (2011). Respondent filed notice of appeal on 17 May 2011 from the order terminating his parental rights. He filed the record on appeal and a petition for writ of certiorari in the event the notice of appeal did not adequately preserve an appeal from the order denying his request for DNA paternity testing. We allow the petition.

Respondent contends that the court erred by denying his motion for DNA paternity testing. We agree. N.C. Gen. Stat. § 8-50.1(b1) (2011) mandates that in "any civil action in which the question of parentage arises, the court *shall*, on motion of a party, order . . . blood or genetic marker tests, to be performed by a duly certified physician or other expert." *Id.* (emphasis added). "In cases where the issue of paternity has not been litigated . . . or in cases where the alleged father has never admitted paternity, G.S. § 8-50.1 controls and the request for a paternity test *will* be allowed." *Ambrose v. Ambrose*, 140 N.C. App. 545, 546, 536 S.E.2d 855, 857 (2000) (emphasis added). Respondent contested paternity in his answer, and nothing in the record shows that the question of paternity had ever been determined judicially or otherwise prior to the filing of the petition.

We further conclude that the court's subsequent termination of respondent's parental rights did not render the error non-prejudicial or moot. "A civil appeal is not moot when the challenged judgment may cause collateral legal consequences for the appellant." *In re A.K.*, 360 N.C. 449, 453, 628 S.E.2d 753, 756 (2006). Here, the court's order has collateral legal consequences; namely, termination of respondent's parental rights could form the basis for terminating respondent's parental rights to other children. *See* N.C. Gen. Stat. § 7B-1111(a)(9) (2011) (permitting termination of parental rights on the ground that "[t]he parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home"). If the court had ordered DNA paternity testing, and respondent had been excluded by such testing as being the father, then the court would have been required to dismiss the petition against respondent.

We therefore reverse the order and remand to the district court for a new hearing where the district court shall order DNA testing to establish paternity. Our disposition renders it unnecessary to consider respondent's other three contentions.

Reversed and remanded.

Chief Judge MARTIN and Judge BRYANT concur.

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

CRIMINAL LAW—Continued

CRIMINAL LAW—Continued

all evidence pertaining to defendant's location when he fired the shotgun. Further, the trial court took steps to mitigate the impact of the prosecutor's statement by sustaining defendant's objection and instructing the jury to disregard it. **State v. Sistler, 60.**

Plea agreement—specific performance of provision—risk conviction—plea agreements encouraged—The superior court erred in a trafficking in opiate, possession of drug paraphernalia, and simple possession of clonazepam case by setting aside a plea agreement and proceeding to trial. Defendant's motion for return of seized property requested specific performance of a provision of the plea agreement and requiring defendant to risk conviction merely by seeking specific performance of the State's obligation under the plea agreement would chill the practice of plea bargaining, which should be encouraged. **State v. King, 384.**

Plea agreement—specific performance—funds returnable—The superior court erred in a trafficking in opiate, possession of drug paraphernalia, and simple possession of clonazepam case by denying specific performance of a plea agreement to return money which had been seized from defendant or which was derived from money seized from defendant. It was within the State's power to return funds in the amount seized from defendant, regardless of whether the exact cash seized could have been returned. **State v. King, 384.**

Prosecutor's argument—right to enter home revoked—law enforcement could have helped—The trial court did not commit plain error in a first-degree murder case by failing to intervene *ex mero motu* during the prosecutor's closing argument allegedly insinuating that defendant's right to enter a home had been revoked or by overruling defendant's objection after the prosecutor stated defendant could have called law enforcement to help him retrieve his clothes from the residence. The consent issue was immaterial, and the law enforcement statement was grounded in reason and common sense. **State v. Sistler, 60.**

Right to open and close argument—reading from witness's statement on cross-examination—not introduction of evidence—Defendant received a new trial where the trial judge deprived him of the right to open and close argument to the jury based on a ruling that defendant introduced evidence during his cross-examination of the victim. Defense counsel read aloud several portions of the victim's statement in an apparent attempt to point out inconsistencies with his trial testimony, but those statements were directly related to the direct examination and defendant did not formally introduce the statements into evidence. **State v. Hogan, 305.**

Self-defense—notice not provided—not supported by evidence—There was no error in a first-degree murder prosecution in the denial of defendant's requested jury instruction on voluntary manslaughter based on imperfect self-defense. Defendant did not provide the notice required by statute for self-defense and the evidence was not sufficient for the instruction; moreover, any error was harmless because the totality of the evidence indicated that defendant was the aggressor. **State v. Pender, 233.**

DAMAGES AND REMEDIES

Restitution—sufficiency of evidence—A *de novo* review revealed that the trial court did not err by ordering defendant to pay restitution for a wrecked automobile. The prosecutor's introduction of the actual title registration of the car showed the owner of the car and its value. **State v. Watkins, 94.**