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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

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SUZANNE ST. CLAIR BOWRON BELK, MINOR CHILD, BY AND THROUGH HER GUARDIAN *AD LITEM*, SUZANNE B. BELK, PETITIONER v. WILLIAM I. BELK, RESPONDENT

No. COA11-604

(Filed 5 June 2012)

1. Appeal and Error—affirmative defenses—failure to present issue for review—argument deemed abandoned

The trial court did not err in a case involving the removal of respondent as custodian of all accounts created under the North Carolina Uniform Transfers to Minors Act for the benefit of his minor daughter by failing to dismiss the action based on the doctrines of *res judicata* and collateral estoppel. Respondent failed to present the Court of Appeals with an issue to review and respondent's argument as to his affirmative defenses was deemed abandoned.

2. Interest—interest on sum ordered to be reimbursed—North Carolina Uniform Transfers to Minors Act—lost income

The trial court did not err in a case involving the removal of respondent as custodian of all accounts created under the North Carolina Uniform Transfers to Minors Act (UTMA) for the benefit of his minor daughter by ordering respondent to pay interest on the sum he was ordered to reimburse for improper withdrawals, accruing from the dates of the wrongful disbursements. The trial court awarded interest on the wrongfully removed funds as a reimbursement of the lost income to the custodial account and did not award pre-judgment interest under N.C.G.S.

§ 24-5(b). Further, lost interest may be awarded as an item of damages in an accounting action under North Carolina's UTMA statute.

3. Attorney Fees—Uniform Transfers to Minors Act—allowed in action to fix rights and duties of party under trust agreement—against respondent in personal capacity for egregious conduct—reasonableness of fees supported

The trial court did not err by awarding attorney fees to petitioner in an action involving the removal of respondent as custodian of all accounts created under the North Carolina Uniform Transfers to Minors Act ("UTMA") for the benefit of his minor daughter.

4. Fiduciary Relationship—breach of fiduciary duty—North Carolina Uniform Transfers to Minors Act—speculative investment

The trial court did not err in a case involving the North Carolina Uniform Transfers to Minors Act by finding and concluding that a certain transaction was a speculative investment and was inappropriate for respondent to make as custodian for his minor daughter and that his making of the investment constituted a breach of his fiduciary duty. In dealing with custodial property, a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another.

5. Fiduciary Relationships—removal of custodian—North Carolina Uniform Transfers to Minors Act—findings and conclusions supported

Respondent's wholesale attack on each and every finding of fact made by the trial court in an action involving respondent's removal as custodian of all accounts created under the North Carolina Uniform Transfers to Minors Act for the benefit of his minor daughter was without merit. There was competent evidence in the record to support the trial court's findings and conclusions.

6. Appeal and Error—appellate rules violations—motion to dismiss denied

Petitioner's motion to dismiss respondent's appeal or, in the alternative, to strike respondent's brief before the Court of Appeals in a case involving respondent's removal as custodian of all accounts created under the North Carolina Uniform Transfers

to Minors Act for the benefit of his minor daughter, was denied. Although there were multiple violations of the rules of appellate procedure by respondent, the Court chose to address respondent's appeal.

Appeal by respondent from judgment entered 26 August 2010 and order entered 28 September 2010 by Judge W. Erwin Spainhour in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 March 2012.

Horack, Talley, Pharr & Lowndes, PA, by Elizabeth T. Hodges, Elizabeth J. James and Kary C. Watson, for petitioner appellee.

Nexsen Pruet, PLLC, by Eugene Boyce, for respondent appellant.

McCULLOUGH, Judge.

William I. Belk ("respondent") appeals from a judgment entered by the trial court removing him as custodian of all accounts created under the North Carolina Uniform Transfers to Minors Act ("UTMA") for the benefit of his minor daughter, Suzanne St. Clair Bowron Belk ("Suzanne"), and ordering him to reimburse one of such accounts for improper withdrawals, plus interest and attorney's fees. After careful review, we affirm.

I. Factual and Procedural Background

Petitioner Suzanne B. Belk ("petitioner") and respondent are the biological mother and father of Suzanne, a minor child born on 10 August 1993. Suzanne is the youngest child of petitioner and respondent. Suzanne's two older siblings are now legal adults.

Respondent is a member of the Belk family that established Belk Stores, Inc., the owner of Belk department stores located throughout the southeastern United States. Over a number of years, Suzanne's paternal grandparents, Mr. and Mrs. Irwin Belk, made gifts of shares of stock in Belk Stores, Inc. to Suzanne and her siblings. These shares of stock were sold in 1996, and respondent received the proceeds of the sale of Suzanne's stock as her custodian.

Respondent established multiple custodial accounts for Suzanne pursuant to UTMA, and respondent deposited the proceeds from the sale of Suzanne's stock into these accounts. The financial institutions where such accounts were established included First Union Brokerage Services, Inc. (the "First Union account"), Citi Group—Smith Barney (the "Smith Barney account"), and The Financial Network

(the "Financial Network account"). Each account was established for the benefit of Suzanne, and respondent served as custodian of each such account.

On 31 July 2001, petitioner and respondent separated, and Suzanne has resided with petitioner since the separation. Petitioner, as guardian *ad litem* for Suzanne, filed the present action against respondent on 11 September 2009, seeking to obtain an accounting from respondent regarding his management of Suzanne's custodial funds and, to the extent the court found that respondent acted in violation of his duties as custodian under UTMA, to recover misappropriated funds from respondent, along with interest and attorney's fees. The present action was initially commenced as a special proceeding before the Clerk of Superior Court for Mecklenburg County. The clerk of superior court recused herself from presiding over this special proceeding, and the proceeding was transferred to the Superior Court Division for trial. An evidentiary hearing was held on 8 and 9 July 2010, and on 13, 17, and 18 August 2010.

On 26 August 2010, the trial court entered judgment finding multiple withdrawals from the Smith Barney account were inappropriate, were not for Suzanne's benefit, and were not repaid by respondent. The trial court found that petitioner, on behalf of Suzanne, was entitled to reimbursement of the funds taken and misused by respondent from the custodial funds, totaling $71,869.80. The trial court further found that respondent must pay interest on the amount of lost income sustained as a result of the misuse of the custodial funds at the statutory interest rate of eight percent, totaling $58,944.24. In addition, the trial court found petitioner's attorney's fees were necessitated due to the vexatious refusal of respondent to provide an accounting to petitioner or to Suzanne as to the use of the custodial funds and that respondent should be required to reimburse petitioner for her reasonable and necessary attorney's fees, totaling $138,531.85. Based on those findings, the trial court concluded respondent should be removed as custodian for all of Suzanne's custodial accounts and ordered respondent to pay the above amounts for reimbursement, interest, and attorney's fees.

On 3 September 2010, petitioner filed a motion with the trial court pursuant to Rules 52(b) and 60(a) of the North Carolina Rules of Civil Procedure. On 28 September 2010, the trial court issued an order amending certain findings of fact and decretal portions of its 26 August 2010 judgment. In its amended findings of fact, the trial court corrected the sums owed by respondent, finding and concluding that

respondent should pay $73,269.80 in reimbursement for inappropriate withdrawals from the Smith Barney account, $58,944.24 in interest on the sum owed, and $138,043.55 in attorney's fees. From the trial court's judgment and order amending that judgment, respondent timely appealed to this Court.

II. Standard of Review

The applicable standard of review on appeal where, as here, the trial court sits without a jury, is " ' "whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." ' " *In re Estate of Archibald*, 183 N.C. App. 274, 276, 644 S.E.2d 264, 266 (2007) (quoting *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002) (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001))). "Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*." *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (citation omitted).

III. *Res Judicata* and Collateral Estoppel

[1] Respondent first presents the argument on appeal that the trial court erred in failing to dismiss the present action based on the doctrines of *res judicata* and collateral estoppel. However, respondent makes no clear argument in this section, other than stating that prior lawsuits between petitioner and respondent determined the issues presented here regarding Suzanne's UTMA accounts. Respondent does not include any standard of review that would be applicable to appellate review of the trial court's denial of his motion. Respondent only cites one case in this entire 'argument,' which citation has nothing to do with the merits of these defenses.

> The function of all briefs required or permitted by [our appellate] rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.

N.C. R. App. P. 28(a) (2012). Moreover, an appellant's brief must contain:

> An argument, to contain the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.
>
> The argument *shall* contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues.
>
> The body of the argument and the statement of applicable standard(s) of review *shall* contain citations of the authorities upon which the appellant relies.

N.C. R. App. P. 28(b)(6) (2012) (emphasis added).

Respondent's only citation as to this issue states that "[i]n a trial without a jury, it is the duty of the trial judge to resolve all issues raised by the pleadings and the evidence by making findings of fact and drawing therefrom conclusions of law upon which to base a final order or judgment." *Small v. Small*, 107 N.C. App. 474, 477, 420 S.E.2d 678, 681 (1992). We acknowledge this duty extends to all affirmative defenses raised by respondent in his answer. *Pittman v. Barker*, 117 N.C. App. 580, 591-92, 452 S.E.2d 326, 333 (1995).

Here, as respondent points out, the trial court failed to enter any written findings of fact regarding either of respondent's affirmative defenses. Ordinarily, when all such issues are not so resolved by the trial court, this Court must vacate the order or judgment and remand to the trial court for completion. *Small*, 107 N.C. App. at 477, 420 S.E.2d at 681. Nonetheless, in the present case, we decline to both vacate the trial court's judgment and remand the cause back to the trial court for entry of findings of fact as to respondent's affirmative defenses, as respondent has cited no authority nor presented a clear argument in support of the merits of his appeal on this issue. We also note respondent presented no argument whatsoever regarding his affirmative defense of the statute of limitations. " 'To obtain appellate review, a question raised by an [issue on appeal] must be presented *and argued* in the brief.' " *N.C. State Bar v. Gilbert*, 189 N.C. App. 320, 328, 663 S.E.2d 1, 6 (2008) (quoting *State v. Barfield*, 127 N.C. App. 399, 401, 489 S.E.2d 905, 907 (1997)). Because respondent has failed completely in his duty to present us with an issue to review, we deem respondent's argument as to his affirmative defenses to be abandoned. *Id.*

IV. Interest Award

[2] In his second argument on appeal, respondent argues the trial court erred in ordering him to pay interest on the reimbursement sum, accruing from the dates of the wrongful disbursements. Citing N.C. Gen. Stat. § 24-5(b) (2011), respondent contends the trial court could not award "pre-judgment interest" in this case because it made no finding that the reimbursement sum constitutes compensatory damages, and therefore, the trial court could only award interest from the date the judgment was entered. Respondent further contends the amount in dispute in this case was not readily ascertainable, also disqualifying the application of "pre-judgment interest." Despite respondent's arguments as to the applicable statutes for awarding pre-judgment interest, however, we believe it is clear from the trial court's order that it was neither operating under the statutes governing "interest on judgments" nor making an award of "pre-judgment interest" in this case.

Section 24-5(b) of our General Statutes, relied on by respondent, governs "interest on judgments" in actions not based on contract:

> In an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied. Any other portion of a money judgment in an action other than contract, except the costs, bears interest from the date of entry of judgment . . . until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

N.C. Gen. Stat. § 24-5(b). "The legal rate of interest shall be eight percent (8%) per annum for such time as interest may accrue, and no more." N.C. Gen. Stat. § 24-1 (2011).

Here, however, despite its reference to N.C. Gen. Stat. § 24-1, defining the legal rate of interest, the trial court did not purport to award pre-judgment interest or interest on the judgment in this case. The trial court made the following pertinent findings of fact and conclusions of law:

> [Finding of Fact] 15. The Petitioner, on behalf of the minor, is entitled to reimbursement of the funds taken and misused by the Respondent from the custodial funds, *plus interest*. This court has considered the expert testimony of Peter Bell, C.P.A. in determining *the amount of lost income* sustained as a result of the

> misuse of custodial funds. The court has elected to use Mr. Bell's "Method #2", as detailed in his report to the court *in determining the amount that should be repaid as lost income.* In that method, interest is calculated at the rate of eight percent—the statutory interest rate provided in N.C. Gen. Stat. § 24-1. Using that method, which the court finds presumptively reasonable in that it is statutory, the total interest that the Respondent should pay is $58,944.24.
>
> [Conclusion of Law] 4. The Respondent should be required to pay interest on funds improperly removed from the custodial account. Again, the court is mindful of the lack of case law in North Carolina [for] a case arising under the UTMA, and the court has again considered the law in other jurisdictions with similar statutes. In Wilson v. Wilson, the Kansas Court of Appeals upheld a lower court's ruling directing a custodian to repay the funds removed from a custodial account, with interest. Wilson v. Wilson, 37 Kan. App. 2d 564 (2007). This court is persuaded by the reasoning in the Wilson case. *If the Respondent had not improperly expended and invested Petitioner's custodial funds, the minor would have had the benefit of those funds growing in the custodial account.*
>
> [Decretal] 3. The Respondent, William I. Belk, shall reimburse the Smith Barney account in the amount of $71,869.80, plus interest in the amount of $58,944.24.

(Emphasis added.) The trial court's order amending certain findings of fact and decretal portions of its judgment did not alter these findings and conclusions regarding the amount of interest to be repaid by respondent.

From the trial court's findings of fact and conclusions of law, it is clear the trial court awarded interest on the wrongfully removed funds, accruing from the date the funds were removed, as a reimbursement of the lost income to the custodial account. The trial court was not purporting to award pre-judgment interest under N.C. Gen. Stat. § 24-5(b). The only reason the trial court mentions N.C. Gen. Stat. § 24-1 is because that statute establishes a legal rate of interest, which was employed by the expert witness in calculating the amount of interest that would have accrued on the withdrawn funds had they not been improperly removed by respondent.

Respondent does not appear to challenge the trial court's finding of fact as to the calculation of the amount of interest owed. Thus, that

finding is presumed correct and is binding on appeal. *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008). Rather, respondent appears to challenge only the trial court's conclusion of law that it may require respondent to pay such interest in the first instance. Thus, we review *de novo* the trial court's conclusion of law that lost interest may be awarded as an item of damages in an accounting action under North Carolina's UTMA statute.

Chapter 33A of our General Statutes, entitled "North Carolina Uniform Transfers to Minors Act," governs the creation and maintenance of UTMA accounts in this State. N.C. Gen. Stat. § 33A-12 (2011) establishes both a fiduciary duty of care owed to the minor by the custodian in managing the UTMA account and a duty to keep records of all transactions with respect to custodial property. *Id.* § 33A-12(b), (e). This section also mandates that the custodian make these records available for inspection by a parent or legal representative of the minor, or by the minor if the minor has attained the age of 14 years. *Id.* § 33A-12(e).

Under N.C. Gen. Stat. § 33A-19(a) (2011), a minor who has attained the age of 14 years, the minor's guardian of the person or legal representative, or an adult member of the minor's family, among others, may petition the court "for an accounting by the custodian or the custodian's legal representative." *Id.* Further, under N.C. Gen. Stat. § 33A-18(f) (2011), "an adult member of the minor's family, a guardian of the person of the minor, the guardian of the minor, or the minor if the minor has attained the age of 14 years may petition the court to remove the custodian for cause . . . ." *Id.* "If a custodian is removed under G.S. 33A-18(f), the court shall require an accounting and order delivery of the custodial property and records to the successor custodian and the execution of all instruments required for transfer of the custodial property." N.C. Gen. Stat. § 33A-19(d).

Notably absent under these UTMA provisions, however, are any directives to the trial court regarding the accounting remedy provided for under N.C. Gen. Stat. § 33A-19(a) and (d). Therefore, we must determine the extent of the remedy our Legislature intended to provide under this section. "The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute." *Tellado v. Ti-Caro Corp.*, 119 N.C. App. 529, 533, 459 S.E.2d 27, 30 (1995). Thus, when a statute is silent or ambiguous with respect to a specific issue, "the courts should consider the language of the statute, the spirit of the act, and what the act seeks to accom-

plish[,]" as well as "the law that existed at the time of the statute's enactment to determine legislative intent." *Id.*

Chapter 33A codifies the uniform statutory scheme addressing gifts to minors, which was drafted and approved by the National Conference of Commissioners on Uniform State Laws in order "to embody and to create uniformity among states' reforms in their custodianship statutes." Patricia Cramer Jenkins, Note, *North Carolina Enacts the Uniform Transfers to Minors Act*, 66 N.C. L. Rev. 1349, 1352 n.41 (1988); *see also* Unif. Transfers to Minors Act, Prefatory Note, 8C U.L.A. 3 (2001). Included in Chapter 33A of our General Statutes is the following section: "This Chapter shall be applied and construed to effect its general purpose to make uniform the law with respect to the subject of this Chapter among states enacting it." N.C. Gen. Stat. § 33A-23 (2011). As petitioner points out, the remedies available in an accounting action under North Carolina's UTMA statute presents an issue of first impression in this state. Indeed, the trial court noted "the lack of case law in North Carolina [for] a case arising under the UTMA[.]" Accordingly, as the trial court properly concluded, where North Carolina law fails to answer a question under UTMA, a uniform statutory scheme, "we may look to other jurisdictions' resolutions of the question to inform our own, thus encouraging cross-jurisdictional uniformity." *In re Gumpher*, 840 A.2d 318, 321 (Pa. Super. Ct. 2003); *see Skinner v. Preferred Credit*, 172 N.C. App. 407, 413, 616 S.E.2d 676, 680 (2005) ("Because this case presents an issue of first impression in our courts, we look to other jurisdictions to review persuasive authority that coincides with North Carolina's law."), *aff'd*, 361 N.C. 114, 638 S.E.2d 203 (2006).

In *Wilson v. Wilson*, 154 P.3d 1136 (Kan. Ct. App. 2007), cited by the trial court, the Court of Appeals of Kansas affirmed the district court's ordering a custodian, the father of the minor, to reimburse amounts determined to have been wrongfully taken from the minor's UTMA account, "plus interest." *Id.* at 1142, 1145, 1148. Similarly, in the case of *In re Marriage of Rosenfeld*, 668 N.W.2d 840 (Iowa 2003), the Supreme Court of Iowa found that a custodian, the father of the minor, had misappropriated his daughter's UTMA funds. *Id.* at 845. The Court held that "[w]hen a custodian misappropriates UTMA funds, the custodian shall reimburse the child for those funds." *Id.* Accordingly, the Supreme Court of Iowa, under *de novo* review, ordered the custodian to reimburse the total amount the minor's funds were worth after applying "an interest rate of five percent annually." *Id.*

In *Buder v. Sartore*, 774 P.2d 1383 (Colo. 1989), the Supreme Court of Colorado elaborated extensively on this issue. In *Buder*, the Court noted "[t]he overriding goal of the . . . UTMA is to preserve the property of the minor." *Id.* at 1387. The Court quoted the section of Colorado's UTMA statute providing for an accounting remedy, which is identical to N.C. Gen. Stat. § 33A-19(a), and stated this section "contains an implied grant of authority which permits a trial court to impose a wide variety of remedies." *Id.* at 1389. The Court further stated that because this section "authorizes the court to order a custodian to account for funds held on behalf of the minor[,]" the statute must be construed "as not only allowing the trial court to require a custodian to provide a statement of the account, but also as enabling the court to render a judgment should the statement indicate that the account had been improperly maintained." *Id.* The Court explained that "[t]he function of an accounting is to determine whether the custodian has properly maintained the account and, if not, to adjust the current account to reflect what is proper. When adjusting an account, the trial court is given broad discretion in fashioning an appropriate remedy." *Id.* at 1390 (citation omitted). Accordingly, the Supreme Court of Colorado affirmed the trial court's assessment of damages, holding "the trial court's order that [the custodian] pay . . . for loss of appreciation of the funds represents a realistic recognition of the opportunity costs associated with investing." *Id.*

Furthermore, although our Uniform Trust Code, by its terms, does not apply to Chapter 33A for custodial accounts, we nonetheless find similar provisions of our Uniform Trust Code persuasive in resolving this issue, especially given that the National Conference of Commissioners on Uniform State Laws, in drafting the Uniform Transfers to Minors Act, noted that "the Act might be considered a statutory form of trust or guardianship that continues until the minor reaches 21." Unif. Transfers to Minors Act, Prefatory Note, 8C U.L.A. 3 (2001); *see also Jenkins*, *supra*, 66 N.C. L. Rev. at 1354. Under N.C. Gen. Stat. § 36C-10-1002 (2011), a trustee who commits a breach of trust is liable for "[t]he amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred[.]" *Id.* § 36C-10-1002(a)(1); *see generally* 76 Am. Jur. 2d *Trusts* § 381 (2005) ("A trustee is chargeable in the accounting with interest for which he or she is liable as a consequence of some breach of duty in the administration of the trust. For example, *a trustee is liable for interest on trust property or funds invested imprudently* or unlawfully." (emphasis added)).

We find these authorities persuasive on this issue and recognize the greater weight of authority among other jurisdictions deciding this issue allow an award of interest, representing the loss of appreciation of the funds wrongfully disbursed, as an element of damages recoverable in an accounting action under UTMA. These authorities are consistent with the general definition of an "accounting," which is "an adjustment of the accounts of the parties *and a rendering of a judgment for the balance ascertained to be due*." 1 Am. Jur. 2d *Accounts and Accounting* § 52 (2005) (emphasis added); *see also* Black's Law Dictionary 21 (8th ed. 2007) (defining an "accounting" as "[a] legal action to compel a defendant to account for *and pay over* money owed to the plaintiff but held by the defendant," who is "often the plaintiff's agent." (emphasis added)).

We agree with the trial court's conclusion that respondent should be liable for the interest that would have accrued on the amount of the funds wrongfully disbursed from Suzanne's UTMA accounts, because, as the trial court reasoned, "[i]f the Respondent had not improperly expended and invested Petitioner's custodial funds, the minor would have had the benefit of those funds growing in the custodial account." In addition, we find no error by the trial court in selecting the legal rate of interest in calculating the amount of interest owed by respondent, given that such rate is established by statute. *Cf. Lea Company v. N.C. Bd. of Transportation*, 317 N.C. 254, 261, 345 S.E.2d 355, 359 (1986) (holding the statutory, legal rate of interest is deemed presumptively reasonable in condemnation proceedings). Accordingly, we find respondent's argument on this issue to be without merit, and we affirm the trial court's finding of fact, conclusion of law, and decretal award of interest to petitioner in the amount of $58,944.24.

V. Attorney's Fees

[3] We next address respondent's third and fourth arguments on appeal, in which respondent challenges the trial court's award of attorney's fees to petitioner.

A. *Statutory Authority*

Respondent first argues there is no statutory authority for awarding attorney's fees under Chapter 33A, and therefore, the trial court could not award attorney's fees to petitioner in this case as a matter of law. " '["]It is settled law in North Carolina that ordinarily attorneys fees are not recoverable as an item of damages or of costs, absent

express statutory authority for fixing and awarding them.["]' " *Eakes v. Eakes*, 194 N.C. App. 303, 312, 669 S.E.2d 891, 897 (2008) (quoting *Baxley v. Jackson*, 179 N.C. App. 635, 640, 634 S.E.2d 905, 908 (2006) (quoting *Records v. Tape Corp. and Broadcasting System v. Tape Corp.*, 18 N.C. App. 183, 187, 196 S.E.2d 598, 602 (1973))). This general rule is known as the "American rule." *Stephenson v. Bartlett*, 177 N.C. App. 239, 244, 628 S.E.2d 442, 445 (2006). "The simple but definitive statement of the rule is: '[C]osts in this State, are entirely creatures of legislation, and without this they do not exist.' " *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972) (alteration in original) (quoting *Office v. Commissioners*, 121 N.C. 29, 30, 27 S.E. 1003 (1897)).

Under UTMA, the clerk of superior court has original jurisdiction to order an accounting and determine the personal liability of the custodian and to enter orders relating to the removal of the custodian. *Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 72 (2002); N.C. Gen. Stat. § 33A-1(4), -18(f), -19. Such proceedings are "special proceedings" in which costs "shall be as allowed in civil actions, unless otherwise specially provided." N.C. Gen. Stat. § 6-26 (2011). When an issue of fact is raised before the clerk, "the clerk shall transfer the proceeding to the appropriate court[,]" in which "the proceeding is subject to the provisions in the General Statutes and to the rules that apply to actions initially filed in that court." N.C. Gen. Stat. § 1-301.2(b) (2011). Accordingly, "[t]he general rule in North Carolina is that attorney's fees are not allowed as a part of the costs *in civil actions or special proceedings*, unless there is express statutory authority for fixing and awarding the attorney's fees." *Alston v. Fed. Express Corp.*, 200 N.C. App. 420, 424, 684 S.E.2d 705, 707 (2009) (emphasis added). Respondent correctly points out that North Carolina's UTMA statute is silent regarding an award of attorney's fees and contains no express statutory authority for such an award.

Nonetheless, N.C. Gen. Stat. § 6-21 (2011) enumerates certain types of cases in which "attorneys' fees may be included as a part of the costs in such amounts as the court in its discretion determines and allows." *Hoskins v. Hoskins*, 259 N.C. 704, 708, 131 S.E.2d 326, 329 (1963); *see* N.C. Gen. Stat. § 6-21 ("The word 'costs' as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow[.]"). One such action listed under N.C. Gen. Stat. § 6-21 is "any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and

duties of parties thereunder." *Id.* § 6-21(2). Nothing in the legislative history of this section indicates that our Legislature intended to expressly limit the term "trust agreement," as it appears in section 6-21(2), to only those governed under our Uniform Trust Code, Chapter 36 of our General Statutes. Indeed, Chapter 36, by its terms, expressly excludes multiple types of "trusts," including "custodial arrangements under Chapter 33A of the General Statutes and Chapter 33B of the General Statutes [governing custodial *trusts*]." N.C. Gen. Stat. § 36C-1-102 (2011).

As noted in the previous discussion, the National Conference of Commissioners on Uniform State Laws included a prefatory note regarding UTMA, stating "the Act might be considered a *statutory form of trust* or guardianship that continues until the minor reaches 21." Unif. Transfers to Minors Act, Prefatory Note, 8C U.L.A. 3 (2001) (emphasis added). Leading treatises and other legal publications are consistent in recognizing the parallels between a custodial account established under UTMA and a formal trust, especially noting the similarity between the rights and duties of an UTMA custodian and a trustee. *See* 1 Austin Wakeman Scott, William Franklin Fratcher, & Mark L. Ascher, *Scott and Ascher on Trusts* § 2.3.12 (5th ed. 2006) (describing the similarities between an UTMA custodial account and a trust and noting that "the custodian has powers and duties that are quite similar to those of a trustee"); William M. McGovern, Jr., *Trusts, Custodianships, and Durable Powers of Attorney*, 27 Real Prop. Prob. & Tr. J. 1, 6-10 (1992) (explaining the "[s]imilarities [b]etween [t]rust and [c]ustodianship," noting that "[m]ost of the distinctions between custodianships and trusts are not significant" and that "[b]ecause custodianships and trusts are so similar, courts often equate them"); *see also* Black's Law Dictionary 19 (8th ed. 2007) (defining "custodial account" as an account over which "[t]he custodian has powers and fiduciary duties similar to those of a trustee, except that the custodian is not under a court's supervision"). Indeed, the Restatement (Third) of Trusts refers to UTMA custodial accounts as "virtual trusts," noting that UTMA custodial accounts "are substantively so similar to express private trusts in their characteristics, applicable legal principles, and role in the donative transfer of family property" and that any substantive differences between an UTMA custodial account and a trust "generally can be viewed as differences resulting from variations in the 'terms of the trust.' " Restatement (Third) of Trusts § 1 cmt. a, reporter's note cmt. a (2003). Courts in other states have also recognized the parallels between an UTMA cus-

todial account and a formal trust, especially with regard to the function of the custodian. *See Roberts v. Roberts*, 908 A.2d 1273, 1279 (N.J. Super. Ct. Ch. Div. 2006) ("In some respects, the custodial arrangement under the UTMA is like a trust."); *Richards v. Seattle Metro. Credit Union*, 68 P.3d 1109, 1113 (Wash. Ct. App. 2003) ("[A] custodian can function virtually as a trustee with respect to management of the custodial property."); *Sutliff v. Sutliff*, 528 A.2d 1318, 1323 (Pa. 1987) ("[A] custodian's duties may be more properly analogous to those of a trustee with the broadest possible discretionary powers."). *But see In re Marriage of Rosenfeld*, 668 N.W.2d 840, 844 (Iowa 2003) ("We disagree and conclude transfers made to children under UTMA are not trusts.").

Given this generally accepted categorization of UTMA accounts contained in the legislative history of the uniform law adopted by our Legislature, coupled with the fact that types of "trusts" other than those governed under our Uniform Trust Code exist under North Carolina law, we believe the generic provision in N.C. Gen. Stat. § 6-21(2) allowing for the award of attorney's fees in an action to fix the rights and duties of a party under a trust agreement encompasses actions under UTMA for the removal of a custodian and resulting accounting, such as the present case. When the court must order an accounting and determine the personal liability of the custodian under section 33A-19(a) or when the court must order the removal of a custodian under section 33A-18(f) of UTMA, the court is necessarily engaged in an action to determine the rights and duties of the custodian on the custodial account, a statutory form of trust agreement, thereby riggering the statutory authority under N.C. Gen. Stat. § 6-21(2) for attorney's fees in such actions.

Given the lack of case law in North Carolina on this issue, we again look to other jurisdictions' resolution of this issue in an effort "to make uniform the law" with respect to this issue. N.C. Gen. Stat. § 33A-23. We find the reasoning by the Supreme Court of Colorado in *Buder v. Sartore*, 774 P.2d 1383 (Colo. 1989), to be persuasive precedent on this issue. In Buder, the Supreme Court of Colorado likewise recognized the "general rule" that "absent a specific contractual, statutory, or procedural rule providing otherwise, attorney fees are generally not recoverable." *Id.* at 1390. Nonetheless, the Court noted that attorney's fees may be assessed in a breach of trust action, pursuant to the rationale that "the object of an award of attorney fees in a breach of trust action is to make the injured party whole again[.]" *Id.* at 1391. The Court further noted the rationale for awarding attor-

ney's fees in breach of trust actions is "equally applicable in an action against a custodian for breach of fiduciary duty." *Id.* "The fundamental purpose of performing an accounting in this case, that of making the children whole by returning them to the position they would have enjoyed had [the custodian] not imprudently invested their funds, would be frustrated by requiring them to pay attorney fees out of their funds." *Id.* Thus, the Supreme Court of Colorado held the trial court's "imposition of reasonable attorney fees is warranted." *Id.*

We also note that two other jurisdictions, Connecticut and Virginia, have likewise allowed attorney's fees awards in UTMA accounting proceedings in the face of the general American rule disallowing attorney's fees in the absence of express statutory authority. In *Mangiante v. Niemiec*, 910 A.2d 235 (Conn. App. Ct. 2006), the Appellate Court of Connecticut noted that "Connecticut generally follows the American rule with regard to attorney's fees." *Id.* at 238. Nonetheless, the Court noted that "our courts regularly have recognized limited equitable exceptions to the American rule." *Id.* The Court stated that such decisions "emphasize that the equitable nature of the underlying action provides a basis for the equitable award of attorney's fees" and noted that other jurisdictions, including Hawai'i, Maryland, Montana, and New Jersey, recognize a similar exception to the American rule for equitable actions. *Id.* at 239. The Appellate Court of Connecticut then held:

> The circumstances of this [UTMA accounting] case fully justify the trial court's invocation of equitable authority for awarding attorney's fees because, without such an award, the plaintiff could not be made whole. As the record demonstrates, at trial and on appeal, [the minor plaintiff] needed legal assistance to enable her to secure the trust corpus to which she was entitled under the act.

Id. The Court further noted:

> [T]he act expressly confers on the court the power to order an equitable remedy in the form of an accounting. . . . Actions for accounting generally invoke the equitable powers of the court. . . . A minor beneficiary who must expend more in attorney's fees to recover the corpus of the account than its original value cannot be made whole again without an award of attorney's fees.

Id. at 240-41.

Most recently, in *Carlson v. Wells*, 705 S.E.2d 101 (Va. 2011), the Supreme Court of Virginia likewise noted "[t]he general rule in this

Commonwealth is that in the absence of a statute or contract to the contrary, a court may not award attorney's fees to the prevailing party." *Id.* at 109 (alteration in original) (internal quotation marks and citation omitted). The Court noted that the facts underlying the UTMA action in that case established a "pattern of misconduct, specifically a pervasive, wanton dereliction of the duties imposed by the General Assembly on UTMA custodians[,]" such that an award of attorney's fees to the plaintiffs was permissible, given such an exception established in the state's prior case law. *Id.* at 109-10.

We note *Mangiante* and *Carlson* because these two additional cases bolster the greater weight of authority allowing for attorney's fees awards in actions for an accounting under UTMA. However, we further note the reasoning behind these holdings allowing such attorney's fees is nonetheless inapplicable under North Carolina law. Although our Supreme Court has stated that "[i]f an action is equitable in nature, the taxing of the costs is within the discretion of the court, and the court may allow costs in favor of one party or the other or require the parties to share the costs[,]" *Bailey v. State of North Carolina*, 348 N.C. 130, 162, 500 S.E.2d 54, 73 (1998), the Court has excluded attorney's fees as a type of "cost" which the trial court may award based on its equitable authority alone. *Hoskins*, 259 N.C. at 707-08, 131 S.E.2d at 328-29. In addition, this Court has recently noted that "[i]f relevant statutes do not permit reimbursement of attorneys' fees, we may not award attorneys' fees *even on equitable grounds.*" *Point Intrepid, LLC v. Farley*, _____ N.C. App. _____, _____, 714 S.E.2d 797, 805 (2011) (emphasis added); *see also McNeely*, 281 N.C. at 691, 190 S.E.2d at 185 ("Since costs may be taxed *solely* on the basis of statutory authority, it follows a fortiori that courts have no power to adjudge costs 'against anyone on mere equitable or moral grounds.' " (emphasis added) (quoting 20 C.J.S. *Costs* § 1, 2 (1940))).

Despite the holdings in *Buder*, *Mangiante*, and *Carlson*, respondent cites two other published cases from Kansas and Iowa and argues the greater weight of authority does not, in fact, allow attorney's fees in UTMA accounting actions. The first case cited by respondent is *Wilson v. Wilson*, 154 P.3d 1136 (Kan. Ct. App. 2007). In *Wilson*, the Court of Appeals of Kansas summarily noted that "[g]enerally, the district court is not authorized to award attorney fees in the absence of a statute or express provision in a contract[,]" and held, without further explanation, that "[h]ere, the district court did not have authority to award attorney fees." *Id.* at 1148. Accordingly, the Court denied the minors' request for attorney's fees in their UTMA accounting action.

The second case cited by respondent is *In re Marriage of Rosenfeld*, 668 N.W.2d 840 (Iowa 2003). In *Rosenfeld*, the Supreme Court of Iowa also noted that "[a]s a general rule in Iowa, . . . attorney fees are not allowed in the absence of a statute or contract authorizing such an award." *Id.* at 848. The Court then summarily noted that Iowa's UTMA statute "does not authorize a court to grant attorney fees" and declined to make an exception to the general principle in that case. *Id.* Our review of these two cases, however, does not reveal whether Kansas or Iowa has any statutory authority for an award of attorney's fees similar to N.C. Gen. Stat. § 6-21(2) for actions involving a determination of rights and liabilities under a trust agreement. Thus, we are not persuaded by the holdings in these two cases on this issue.

Rather, we believe the greater weight of authority allows for an award of attorney's fees in actions against an UTMA custodian for removal and an accounting. *See also* Susan T. Bart, *No Taxpayer Left Behind*: *Tax-Wise Techniques for Funding Education*, *in* Planning Techniques for Large Estates, SN048 ALI-ABA 1723, 1851 (2008) ("The plaintiffs in a successful action against a custodian for breach of fiduciary duties may collect attorneys' fees."); Major Paul M. Peterson, *The Uniform Transfers to Minors Act: A Practitioner's Guide*, Army Law at 3, 11 (May 1995) ("Courts may require custodians to pay the minor damages for any breach of fiduciary duty that causes a loss of custodial property. The custodian also may be required to pay the minor's attorneys fees.").

Further, we believe there is ample authority providing for not only an award of attorney's fees in this case, but also for that award to be assessed against respondent personally, as custodian, rather than against the corpus of Suzanne's UTMA account. Foremost, persuasive precedent from other jurisdictions on this issue reason that the goal of a breach of fiduciary duty action under UTMA is to make the minor beneficiary whole, which cannot be accomplished if the minor, either personally or by way of her account funds, must expend more in attorney's fees to recover the lost corpus of the account than its original value. *Buder*, 774 P.2d at 1391 ("The fundamental purpose of performing an accounting in this case, that of making the children whole by returning them to the position they would have enjoyed had [the custodian] not imprudently invested their funds, would be frustrated by requiring them to pay attorney fees out of their funds."); *Mangiante*, 910 A.2d at 241 ("We agree with the Supreme Court of Colorado that the goal of a breach of fiduciary duty action under the

act is to make the minor beneficiary whole. A minor beneficiary who must expend more in attorney's fees to recover the corpus of the account than its original value cannot be made whole again without an award of attorney's fees. Colorado law is consistent with the scholarly view that 'if the trustee was at fault in causing the litigation, he must personally bear the expenses of the litigation.' 3 W. Fratcher, Scott on Trusts (4th ed. 1988) § 188.4, p.69.").

Furthermore, because the legislative history of the uniform UTMA statute indicates that UTMA custodial accounts are regarded as a form of statutory trust, we again find similar provisions of our Uniform Trust Code as additional persuasive authority. Section 36C-10-1004 (2011) of our Uniform Trust Code expressly provides that "[i]n a judicial proceeding involving the administration of a trust, the court may award costs and expenses, including reasonable attorneys' fees, as provided in the General Statutes." *Id.* The Official Comment notes this section "codifies the court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial proceedings grounded in equity." N.C. Gen. Stat. § 36C-10-1004 official comment. Notably, the Official Comment to this section further provides:

> The court may award a party its own fees and costs from the trust. The court may also charge a party's costs and fees against another party to the litigation. *Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud.*

Id. (emphasis added).

In *In re Trust Under Will of Jacobs*, 91 N.C. App. 138, 370 S.E.2d 860 (1988), this Court emphasized that "[g]eneral common law principles hold that a trustee's breach of trust subjects him to *personal liability." Id.* at 145, 370 S.E.2d at 865 (emphasis added). Finding the assessment of costs, including attorney's fees assessable to a fiduciary, both as a matter of then-existing statutory law and as a matter of common law in North Carolina, we stated in *Jacobs* that "damages for breach of trust are designed to restore the trust to the same position it would have been in had no breach occurred[,]" and therefore, "the court may fashion its order to fit the nature and gravity of the breach and the consequences to the beneficiaries and trustee." *Id.* at 146, 370 S.E.2d at 865. Accordingly, in *Jacobs*, this Court held that the "court's order mandating payment of costs, witness fees, and *attorney's fees* was a proper assessment of damages" against the trustee in

his individual capacity. *Id.* (emphasis added). This holding is binding precedent because the issue of a trustee's personal liability for costs, including attorney's fees, was specifically raised on appeal.

In the present case, the trial court made the following pertinent finding of fact:

> 16. The attorneys' fees incurred by the Petitioner *were necessitated due to the vexatious refusal of the Respondent to provide an accounting to the [Petitioner] or the minor as to the use of the custodial funds.* The Respondent *intentionally*, consistently throughout his tenure as custodia[n] *withheld information pertaining to the custodial property*, and informed the mother of the minor that, "My father gave that money to the children, and I can do with it what I want." ***Such conduct is egregious*** *and cannot be allowed to continue.* In addition, the Respondent kept no records whatsoever of the numerous transactions involving custodial property from the time he began serving as custodian. Instead, the only records were those maintained by Smith Barney and other financial institutions that were kept in the ordinary course of business by those institutions, and those records do not contain any information as to why or for what the expenditures were made. *The Respondent has failed miserably in meeting the requirements that he keep records of all transactions with respect to custodial property*, and until this proceeding was filed and until testimony in open court was almost concluded the Respondent withheld much of such information from the Petitioner. In order to represent the Petitioner in this matter it was necessary for her attorneys to expend numerous, laborious, tedious and painstaking discovery, including taking several depositions of the Respondent, to uncover the nature and extent of the misuse of custodial funds – all of which was *due to the recalcitrance of the Respondent in accounting for the use of custodial funds* as detailed above. The Respondent should be required to reimburse the Petitioner for her attorney's fees and expenses incurred in this proceeding. The court finds, based upon the affidavits of Petitioner's attorneys, and upon the sworn testimony of Elizabeth T. Hodges, Esq. in open court, that the legal services rendered were reasonable and necessary, and that the Petitioner's attorneys are entitled to payment for their fees and expenses from the Respondent in the sum of $138,531.85.

(Emphasis added.)

The trial court's finding of fact indicates that respondent undoubtedly would have been personally liable for the attorney's fees at issue, were this an ordinary breach of trust action. We recognize that in most instances, an award of attorney's fees in a breach of trust action or in an action for a breach of fiduciary duty under UTMA will not be taxable personally to the trustee or custodian simply for having made certain improper disbursements in violation of statutory requirements. Nonetheless, where the conduct of the trustee or custodian is egregious and warrants removal, as found by the trial court in the present case, we believe our case law and statutory authority clearly allow for the taxing of attorney's fees and costs against the trustee or custodian in a personal capacity.

Thus, we hold there exists statutory authority in this state to tax attorney's fees against respondent in a personal capacity as a result of his egregious conduct in breaching his fiduciary duties as a custodian under UTMA. Such holding comports with the greater weight of authority from other jurisdictions that have addressed this same issue. As petitioner points out, were we to construe these statutes differently, the resulting inequity to a minor beneficiary of an UTMA custodial account would be contrary to the legislative intent of that statute, to preserve the minor's property, and our UTMA statute would be reduced to a "hollow act," leaving little by way of repercussion against a custodian who engages in malfeasance contrary to his statutory duties.

B. Reasonableness

Respondent next argues that, even if the trial court had the authority to award attorney's fees to petitioner, the trial court's award in this case is erroneous because it is unreasonable. Respondent maintains only that the trial court awarded attorney's fees in an amount greater than the value of the claim presented, and this amount is unreasonable as a matter of law. Respondent does not challenge the sufficiency of the trial court's findings of fact on this issue, nor does respondent specify which, if any, of the particular charges submitted by petitioner's attorneys in an affidavit to the trial court are unreasonable.

> The allowance of attorney fees is in the discretion of the presiding judge, and may be reversed only for abuse of discretion. Accordingly, to overturn the trial court's decision, it must be shown that it is so arbitrary that it could not have been the result of a reasoned decision, or is manifestly unsupported by reason.

Furmick v. Miner, 154 N.C. App. 460, 462, 573 S.E.2d 172, 174 (2002) (internal quotation marks and citations omitted). "In order to demonstrate an abuse of discretion, the party challenging an award of attorney's fees must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *In re Clark*, 202 N.C. App. 151, 168, 688 S.E.2d 484, 494 (2010) (internal quotation marks and citations omitted).

> If the trial court determines that an award of attorney's fees is proper, it must also make factual findings concerning time and labor expended, the skill required, the customary fee for similar work, and the experience or ability of the attorney based on competent evidence. However, the trial court is not required to make detailed findings of fact for each factor.

Furmick, 154 N.C. App. at 462-63, 573 S.E.2d at 175 (citations omitted); *see also Williams v. New Hope Found., Inc.*, 192 N.C. App. 528, 530, 665 S.E.2d 586, 588 (2008) ("Before awarding attorney's fees, the trial court must make specific findings of fact concerning: (1) the lawyer's skill; (2) the lawyer's hourly rate; and (3) the nature and scope of the legal services rendered.").

Respondent's sole argument regarding the unreasonableness of the amount of attorney's fees awarded is that an award of attorney's fees cannot, as a matter of law, be greater than fifteen percent of the claim. Respondent relies on the case of *West End III Partners v. Lamb*, 102 N.C. App. 458, 402 S.E.2d 472 (1991), in support of his contention. However, the facts of *Lamb* involved the collection of an outstanding debt under a promissory note that also allowed for an award of attorney's fees "not exceeding a sum equal to fifteen percent (15%) of the outstanding balance." *Id.* at 459, 402 S.E.2d at 473 (internal quotation marks omitted). In *Lamb*, the trial court awarded an amount of attorney's fees to the defendants representing fifteen percent of the balance due on the outstanding debt prior to its payment by the plaintiffs pursuant to N.C. Gen. Stat. § 6-21.2(1), which, like the promissory note at issue in that case, allows for an award of attorney's fees not to exceed fifteen percent of the outstanding balance of a debt collected by or through an attorney after the debt's maturity. *Lamb*, 102 N.C. App. at 459-60, 402 S.E.2d at 474; N.C. Gen. Stat. § 6-21.2(1), (2) (2011). On appeal in *Lamb*, this Court held that although the statute at issue allowed for an award of attorney's fees up to fifteen percent, the trial court still must make a determination of what percentage in that allowable range is reasonable. *Lamb*, 102

N.C. App. at 460-61, 402 S.E.2d at 474. We then remanded the case for the trial court to make findings of fact as to the actual hours expended collecting the outstanding debt and the reasonable value of those services, as we could not determine from the record whether the fifteen percent fee was in fact a reasonable fee under the facts of that case. *Id.* at 461, 402 S.E.2d at 475. The present case involves neither the collection of an outstanding debt on a note nor the application of the provisions, including the fifteen percent cap, of N.C. Gen. Stat. § 6-21.2. Respondent's reliance on *Lamb* is entirely misplaced and respondent's argument on this issue is without merit.

We note that, ordinarily, we would be inclined to remand this issue to the trial court for the entry of additional and more detailed findings of fact regarding petitioner's attorney's skill, hourly rate, and the nature and scope of the legal services rendered, as required under our case law. However, respondent has not challenged the inadequacy of the trial court's findings of fact on appeal, and we decline to remand an issue not raised by the appellant on appeal. *First Charter Bank v. Am. Children's Home*, 203 N.C. App. 574, 580, 692 S.E.2d 457, 463 (2010) (" 'It is not the role of the appellate courts . . . to create an appeal for an appellant[.]' " (quoting *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005)).

Moreover, a close reading of the transcript and the record in this case reveals that petitioner's attorney submitted an affidavit to the trial court indicating her expertise as well as the hourly rates charged by her and her associates, partners, and paralegals. In addition, petitioner's attorney testified at the hearing as to her hourly rates, her experience and expertise in the area of family law, the fact that her hourly rates were commensurate with other attorneys of similar education and experience, and the nature and scope of services performed in this case. Further, petitioner's attorney was cross-examined regarding multiple pages of time sheets reflecting each individual task performed by all attorneys involved and the time denoted for each individual task. These time sheets were submitted as an exhibit to the trial court at the evidentiary hearing. These time sheets, in addition to petitioner's attorney's testimony, reveal the length of time expended by the attorneys in obtaining discovery documents, conducting depositions, and attending hearings. Thus, the record contains ample competent evidence supporting the trial court's conclusion that the amount of attorney's fees awarded in this case was reasonable. We therefore affirm the trial court's award of attorney's fees to petitioner.

VI. Breach of Fiduciary Duty

[4] In his fifth argument on appeal, respondent contends the trial court erred in finding and concluding that a certain transaction was a speculative investment inappropriate for him to make as custodian for Suzanne and that his making of the investment constituted a breach of his fiduciary duty.

In finding of fact number 12(b), the trial court addressed two checks made payable to "Piedmont Ventures" in the total amount of $51,868.92. The trial court found as fact that "Piedmont Ventures is a venture capital fund, and was a highly speculative, risky investment inappropriate for the Respondent to make as custodian for the minor." Respondent contends this finding of fact is actually a conclusion of law, that it is not supported by any other findings of fact as to the speculative nature of the Piedmont Ventures investment, and that there is no competent evidence to support a finding that the investment was speculative or inappropriate. Respondent contends the evidence showed he followed the "prudent investor" standard and that the Piedmont Ventures investment was a small percentage of the account corpus and never had a negative impact on the account funds.

N.C. Gen. Stat. § 33A-12(b) (2011) specifies the standard of care applicable to a custodian under UTMA: "In dealing with custodial property, a custodian shall observe the standard of care that would be observed by a *prudent person dealing with property of another* and is not limited by any other statute restricting investments by fiduciaries." *Id.* (emphasis added). This section "*restates* and makes somewhat stricter the *prudent man fiduciary standard for the custodian*[.]" Unif. Transfers to Minors Act § 12, Comment, 8C U.L.A. 50 (2001) (emphasis added). Thus, despite respondent's reference to the "prudent investor" rule, which is explicitly adopted under our Uniform Trust Code, N.C. Gen. Stat. § 36C-9-901 (2011), Chapter 33A explicitly adopts a different standard, a stricter variation of the "prudent person" or "prudent man" rule, for UTMA accounts. *Compare* Unif. Transfers to Minors Act § 12, Comment, 8C U.L.A. 50 (2001) (noting section 12(b) of the UTMA statute "*restates* and makes somewhat stricter the *prudent man fiduciary standard for the custodian*" (emphasis added)), *with* N.C. Gen. Stat. § 36C-9-901(a) (establishing that "a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the *prudent investor rule*" (emphasis added)). Moreover, in his reply brief, respondent expressly acknowledges that "the prudent person stan-

dard" is "the appropriate standard of care" in this action under UTMA.

The original variation of the prudent person rule is stated in Restatement (Second) of Trusts § 174 (1959) as a duty "to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property[.]" Nonetheless, in making investments of trust funds, the trustee is under a duty "to make such investments and only such investments as a prudent man would make of his own property having in view *the preservation of the estate* and the amount and regularity of the income to be derived[.]" Restatement (Second) of Trusts § 227(a) (1959) (emphasis added). Accordingly, "a trustee is not generally authorized to make or retain trust investments that are speculative, even where they are of such promise and character that a prudent person might make them for himself." 76 Am. Jur. 2d *Trusts* § 483 (2005).

This rule against speculation is consistent with the stricter prudent person standard set forth under the UTMA statute, under which the "overriding goal . . . is to preserve the property of the minor." *Buder*, 774 P.2d at 1387. Thus, under the applicable prudent person rule, an UTMA custodian "is forbidden" from "invest[ing] [even] a small portion of [the custodial funds] speculatively[,]" which includes "[i]nvestment in new enterprises." Paul G. Haskell, *The Prudent Person Rule for Trustee Investment and Modern Portfolio Theory*, 69 N.C. L. Rev. 87, 92-93 (1990). "Under the prudent person rule, any speculative investment is a breach of trust." *Id.* at 94. Furthermore,

> [t]he standard of prudence is applied to each investment in isolation. Each investment is either in compliance or it is not, without regard to its relationship to other investments in the portfolio. The trustee is liable for loss in value of any improper investment, without regard to the performance of any other investment, proper or improper, or to the performance of the portfolio as a whole.

Id. at 93.

In *Carlson v. Wells*, 705 S.E.2d 101 (Va. 2011), the Supreme Court of Virginia discussed at length the prudent person standard of care as specifically applied to UTMA custodians. Consistent with the foregoing principles, the Court stated that "[t]he conduct of fiduciaries held to the Prudent Person Rule is evaluated with respect to each individual investment. The performance of an investment portfolio as a whole is not considered." *Id.* at 106. "By contrast, the Prudent Investor

Rule permits fiduciaries to engage in reasonable speculation to benefit from the higher returns of modestly riskier investments, while concomitantly shifting the focus of evaluating the fiduciary's conduct from the performance of individual investments to the portfolio as a whole." *Id.* In *Carlson*, the Court noted the General Assembly amended Virginia's UTMA statute in 2007 to incorporate the prudent investor rule. *Id.* at 107; *see* Va. Code Ann. § 31-48(B) (2011) ("In dealing with custodial property, a custodian shall observe the standard of care set forth in the Uniform Prudent Investor Act[.]"). However, North Carolina's UTMA statute expressly retains the prudent person rule and has not applied the prudent investor standard to custodial accounts under UTMA. *See* N.C. Gen. Stat. § 33A-12(b); N.C. Gen. Stat. § 36C-9-901(d)(1)(d).

We first note the trial court's finding of fact that the Piedmont Ventures investment was highly speculative and risky is indeed a finding of fact, not a conclusion of law. "As a general rule, . . . any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact." *Sheffer v. Rardin*, _____ N.C. App. _____, _____, 704 S.E.2d 32, 35 (2010) (internal quotation marks and citations omitted). Here, the classification of the investment at issue is clearly a finding of fact, deduced from the evidence presented regarding the nature of the investment.

There is ample evidence in the record, including testimony by respondent himself, referring to Piedmont Ventures as a "venture capital fund" that invested in "[s]tart-up companies." Richard Alexander provided further testimony regarding the Piedmont Ventures investment, stating expressly that such investment was a "risky investment." In addition, Peter Bell ("Bell"), a certified public accountant, testified as an expert that the Piedmont Ventures venture capital fund "would not be a prudent investment if it were a significant part. It would have to be a relatively immaterial part of the overall portfolio." Bell testified that "[f]or that type of risk, . . . given the fiduciary responsibilities, you certainly wouldn't risk more than a couple of percentages, *at most*, of the overall portfolio, one or two percent." (Emphasis added.) Respondent, in his brief, admits that the Piedmont Ventures investment "was never more than 2.5% of the total corpus value of the UTMA assets[,]" which is notably more than that considered prudent according to the expert testimony. Thus, the trial court's finding of fact that the Piedmont Ventures investment was

highly risky and speculative and inappropriate for Suzanne's UTMA funds is supported by competent evidence and supports the trial court's conclusion of law that such disbursement was in violation of his fiduciary duty under UTMA.

VII. Wrongful Disbursements Under UTMA

[5] In his final argument on appeal, respondent challenges almost all findings of fact regarding the disbursements he made from Suzanne's UTMA account. Respondent groups these disbursements into three categories and appears to argue the trial court erred in finding and concluding these disbursements were wrongful and not in Suzanne's best interests.

It is the duty of the custodian to

> *keep records of all transactions with respect to custodial property*, including information necessary for the preparation of the minor's tax returns, and shall make them available for inspection at reasonable intervals by a parent or legal representative of the minor, or by the minor if the minor has attained the age of 14 years.

N.C. Gen. Stat. § 33A-12(e) (emphasis added). Thus, here it was the duty of respondent to present the trial court with proper records denoting the propriety of each challenged expenditure. *Carlson*, 705 S.E.2d at 107. Upon a careful review of the record, and of each challenged disbursement found by the trial court, we find competent evidence in the record to support the trial court's findings and conclusions that each disbursement was inappropriate. Most notably, for a large portion of the transactions, respondent was unable to properly account for the disbursement of the funds, in violation of his duty under section 33A-12(e) of UTMA. Further, respondent has failed to show how the trial court's findings of fact were not supported by any competent evidence produced at the hearing. We find respondent's wholesale attack on each and every finding of fact by the trial court to be without merit.

VIII. Petitioner's Motion to Dismiss For Violation of Appellate Rules

[6] Petitioner has filed a motion to dismiss respondent's appeal or, in the alternative, to strike respondent's brief before this Court, citing multiple violations by respondent of the rules of appellate procedure. We recognize that respondent has, in fact, violated certain of our appellate rules, some of which have been denoted throughout the foregoing opinion. Respondent's brief is considerably lacking in

authority for his arguments, and we note that in some instances, respondent's arguments adopted an emotional tone and resorted to unprofessional personal attacks against petitioner and the trial court. While we are cognizant of these transgressions, we nonetheless chose to address the merits of respondent's issues where possible, in light of our Supreme Court's opinion in *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008). Accordingly, we deny petitioner's requests.

IX. Conclusion

We hold the trial court's award of interest, representing the loss of appreciation of the funds wrongfully disbursed, was proper as an element of damages in the present action for an accounting and removal of respondent as custodian under North Carolina's UTMA statute. We also hold that, because the legislative history of the uniform UTMA statute adopted in full by our Legislature indicates that custodial accounts under UTMA are to be regarded as a form of statutory trust, there exists statutory authority under N.C. Gen. Stat. § 6-21(2) for an award of attorney's fees in an action for the removal of a custodian and for an accounting and determination of personal liability under UTMA. An award of interest and attorney's fees in UTMA actions has likewise been affirmed by the majority of other jurisdictions that have addressed these same issues.

In addition, where the trial court finds the custodian's conduct in managing the custodial property has been egregious, thereby warranting removal, we hold an award of attorney's fees may be taxed against the custodian personally, as the trial court properly did in the present case. Although the trial court must ordinarily enter detailed findings of fact regarding the attorney's skill and hourly rate, the time and labor expended, and the scope and nature of tasks performed when making a determination of a reasonable attorney's fees award, we nonetheless hold the record contains sufficient evidence to support the trial court's conclusion that the amount of attorney's fees awarded to petitioner in this case was reasonable.

We further hold that the record contains sufficient evidence to support all of the trial court's findings of fact regarding the inappropriateness of the disbursements made by respondent, particularly the speculative nature of the Piedmont Ventures investment, in violation of the prudent person fiduciary standard imposed on custodians under UTMA.

Finally, we deem respondent's arguments as to his affirmative defenses abandoned, as respondent failed completely in his duty to follow the appellate rules and provide a coherent argument containing legal authority in support of that argument. While we recognize respondent's appellate rules violations, we nonetheless deny petitioner's motions to dismiss respondent's appeal and to strike respondent's brief, in light of this opinion.

The trial court's judgment and order amending that judgment is thereby affirmed.

Affirmed.

Judges STEELMAN and HUNTER, JR. (Robert N.) concur.

BARRY HOYT BODIE, PLAINTIFF v. CLAIRE VOEGLER BODIE, DEFENDANT

No. COA11-999

(Filed 5 June 2012)

1. Divorce—equitable distribution—divisible property—additional findings necessary

The trial court erred in an equitable distribution case by failing to make adequate findings of fact and conclusions of law regarding $216,000.00 in post-separation debt payments made by defendant. The trial court's equitable distribution order was reversed and remanded for additional findings of fact concerning the existence or distribution of any divisible property and an amended distributional decision.

2. Divorce—equitable distribution—divisible property—increase in value of marital home

The trial court did not err in an equitable distribution case by failing to classify, value, and distribute as divisible property the alleged increase in the net value of the parties' marital homes as proposed by plaintiff. The trial court was not required to accept and make findings of fact based upon the testimony of plaintiff's real estate expert and the trial court's order specified that the properties in question should be sold, with the proceeds to be divided equally between the parties. The case was remanded for

the trial court to determine the source of funds used to make post-separation debt payments and plaintiff's credit for those payments.

3. Divorce—equitable distribution—marital debt—insufficient findings

The trial court's findings of fact in an equitable distribution case concerning the classification, value, and distribution of certain items of marital debt were insufficient for the Court of Appeals to determine whether the judgment reflected a correct application of the law. The case was remanded for further findings of fact regarding the challenged debts.

4. Divorce—equitable distribution—distribution of property—no abuse of discretion

Plaintiff's argument in an equitable distribution case that the trial court erred by "failing to distribute" certain properties and that certain conditions placed on the sale of these properties imposed "improper burdens" on plaintiff was meritless. Plaintiff failed to explain how the trial court's decision with respect to this issue rested upon an error of law and plaintiff failed to advance any argument tending to support a determination that the trial court abused its discretion in the course of deciding to allocate these responsibilities to plaintiff.

5. Divorce—equitable distribution—vehicle—no abuse of discretion

Plaintiff's argument in an equitable distribution case that the trial court erred in failing to value, classify, and distribute a G6 Pontiac vehicle lacked merit. Plaintiff failed to make any argument specifically addressing the down payment that he allegedly provided in connection with this vehicle, explain how he was in any way prejudiced by the manner in which the trial court addressed any issue relating to this vehicle, or assert that the trial court abused its discretion by failing to distribute the amount of the down payment to him.

6. Divorce—equitable distribution—marital property—divisible property—classification and valuation—no error

Plaintiff's argument in an equitable distribution case that based upon the reasons asserted elsewhere in his brief, the trial court failed to classify and value all of the marital and divisible property of the parties was without merit.

7. Divorce—alimony—dependent spouse—accustomed standard of living—no error

The trial court in a divorce case did not erroneously fail to find that defendant was a "dependent spouse" for alimony-related purposes. Even if the trial court erred, defendant was still not entitled to an award of alimony given the complete absence of any indication that plaintiff was in a position to make alimony payments to defendant.

Appeal by plaintiff from order entered 3 August 2009 by Judge Mack Brittain in Transylvania County District Court and by defendant from order entered 25 February 2011 by Judge David K. Fox in Transylvania County District Court. Heard in the Court of Appeals 11 January 2012.

Dameron Burgin Parker Jackson Wilde & Walker, P.A., by Phillip T. Jackson, for Plaintiff.

Donald H. Barton for Defendant.

ERVIN, Judge.

Plaintiff Barry Hoyt Bodie appeals from an order distributing the parties' marital and divisible property and Defendant Claire Voegler Bodie appeals from an order denying her alimony claim. On appeal, Plaintiff argues that the trial court erred by failing to properly classify, value, and distribute certain items of property, while Defendant argues that the trial court erroneously rejected her alimony claim. After careful consideration of the parties' challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's equitable distribution order should be affirmed in part and reversed and remanded for additional findings in part and that the trial court's alimony order should be affirmed.

I. Background

A. Substantive Facts

The parties were married on 16 April 1996 and moved to Brevard, where Plaintiff began working as a physician at Western Carolina Urological Associates, in 1997. In 2008, Plaintiff transferred his practice to Transylvania Physician Services. The parties had one child in 1999. The parties separated 2 July 2005 and divorced on 15 September 2006.

After moving to Brevard, the parties purchased a home located at 98 Soquilli Drive. In January 2004, the Soquilli property was refinanced, resulting in a total indebtedness associated with that home of $256,000.00. A second mortgage in the amount of $26,000.00 was taken out on the Soquilli property later in 2004. The Soquilli property had an appraised value of $255,000.00 as of the date of separation, with an outstanding balance of about $241,000.00 associated with the first deed of trust and an outstanding balance of $26,000.00 associated with the second deed of trust. On 5 January 2009, the Soquilli property was appraised at $275,000.00. As of 15 July 2009, the balance on the first deed of trust was approximately $233,100.00, while the obligation associated with the second deed of trust had been fully satisfied.

Prior to the date of separation, the parties purchased a second marital home located on Country Club Circle. The Country Club Circle property had an appraised value of $450,000.00 on the date of separation, subject to an outstanding indebtedness of $460,000.00. As of 5 January 2009, the Country Club Circle property had an appraised value of $475,000.00 and was subject to an outstanding secured indebtedness totaling approximately $435,400.00. Additional facts relating to the parties' assets and liabilities will be provided at appropriate places throughout the remainder of this opinion.

B. Procedural History

On 3 August 2005, Plaintiff filed an action for child custody and equitable distribution. On 18 August 2005, Defendant filed an answer to Plaintiff's complaint and asserted various counterclaims. The parties' pleadings raised the following issues: child custody, child support, divorce from bed and board, post-separation support, alimony, and equitable distribution.

On 11 July 2006, the trial court entered an order requiring Plaintiff to pay the mortgage on the Country Club Circle property for the following year. On 18 December 2006, the trial court entered an order addressing the parties' custody and child support claims. On 9 November 2007, a consent order was entered providing that the two homes owned by the parties would be listed for sale and that the net proceeds resulting from the sale would be placed in the trust account of Plaintiff's attorney. On 12 February 2008, an order was entered giving Plaintiff possession of the Country Club Circle property.

On 3 August 2009, the trial court entered an equitable distribution order, from which Plaintiff attempted to appeal to this Court. On 7

December 2010, we dismissed Plaintiff's appeal as having been taken from an unappealable interlocutory order. *Bodie v. Bodie*, ____ N.C. App ____, 702 S.E.2d 556 (2010) (unpublished). On 25 February 2011, the trial court entered an order denying Defendant's alimony claim. After all proceedings at the trial court level had been concluded, Plaintiff noted a second appeal to this Court from the equitable distribution order and Defendant noted an appeal to this Court from the alimony order.

II. Equitable Distribution Order

A. Post-separation Marital Debt Payments

[1] In its order, the trial court found as a fact that:

> 10. The Court finds that Husband has paid $216,000.00 towards the mortgage, insurance, upkeep and taxes for the marital residences after the DOS and that these payments were for marital debt.

In his brief, Plaintiff argues that the "trial court made no determination about the existence or distribution of any divisible property, even though the trial court's findings of fact acknowledged the existence of at least $216,000.00 in divisible property." Having made the finding of fact recited above, Plaintiff contends that the trial court should have classified the debt payments as divisible property and included the value of these payments in its subsequent distribution decision. We agree.

N.C. Gen. Stat. § 50-20(a) provides that, in an equitable distribution proceeding, "the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section." As a result:

> The first step of the equitable distribution process requires the trial court to classify all of the marital and divisible property—collectively termed distributable property—in order that a reviewing court may reasonably determine whether the distribution ordered is equitable. In fact, "to enter a proper equitable distribution judgment, the trial court must specifically and particularly classify and value all assets and debts maintained by the parties at the date of separation."

Robinson v. Robinson, ____ N.C. App ____, ____, 707 S.E.2d 785, 789 (2011) (citing *Cunningham v. Cunningham*, 171 N.C. App. 550, 555-

56, 615 S.E.2d 675, 680 (2005), and quoting *Dalgewicz v. Dalgewicz*, 167 N.C. App. 412, 423, 606 S.E.2d 164, 171 (2004)). "It is not enough that evidence can be found within the record which could support such classification; the court must actually classify all of the property and make a finding as to the value of all marital [and divisible] property." *Robinson*, ____ N.C. App at ____ 707 S.E.2d at 790 (citing *Warren v. Warren*, 175 N.C. App. 509, 514-15, 623 S.E.2d 800, 804 (2006)).

According to N.C. Gen. Stat. § 50-20(b)(4)d, divisible property includes "[i]ncreases and decreases in marital debt and financing charges and interest related to marital debt." For that reason, a trial judge deciding an equitable distribution case must make findings classifying and distributing increases and decreases in marital debt. In this case, after finding that Plaintiff "paid $216,000.00 towards the mortgage, insurance, upkeep and taxes for the marital residences after the DOS and that these payments were for marital debt," the trial court failed to classify these payments as divisible property or make specific findings distributing this divisible property. We believe that the trial court's failure to make such findings and a related distribution decision constituted an error of law.

"A spouse is entitled to some consideration, in an equitable distribution proceeding, for any post-separation payments made by that spouse (from non-marital or separate funds) for the benefit of the marital estate. Likewise, a spouse is entitled to some consideration for any post-separation use of marital property by the other spouse." *Walter v. Walter*, 149 N.C. App. 723, 731, 561 S.E.2d 571, 576-77 (2002) (citing *Edwards v. Edwards*, 110 N.C. App. 1, 11, 428 S.E.2d 834, 838, *disc. review denied*, 335 N.C. 172, 436 S.E.2d 374 (1993), and *Becker v. Becker*, 88 N.C. App. 606, 607-08, 364 S.E.2d 175, 176-77 (1988)). For that reason, the trial court may, after classifying post-separation debt payments as divisible property, distribute the payments unequally. *Stovall v. Stovall*, ____ N.C. App ____, ____, 698 S.E.2d 680, 686 (2010) (stating that "the trial court properly classified defendant's post-separation payments as divisible property," that the trial court concluded that " 'defendant is entitled to a credit of $ 160,000 for the payments of the marital debt,' " and that, although "the trial court labeled the $160,000.00 as a 'credit[,]' in actuality, it treated the $160,000.00 as divisible property and concluded that an equal distribution was not equitable"). Plaintiff has not cited any cases, and we know of none, holding that a spouse is entitled to a "credit" for post-separation payments made using marital funds. As a result, in order

to properly evaluate the trial court's treatment of post-separation marital debt payments, the source of the funds used to make the payments should be identified.

The equitable distribution order at issue here does not include a finding that the post-separation payments in question constituted divisible property or any findings regarding the extent, if any, to which Plaintiff paid these marital debts using separate property. Although the trial court found that Plaintiff paid $216,000.00 towards the mortgage, insurance, upkeep and taxes on the marital residences after the date of separation; that a 401(k) retirement account associated with Plaintiff's employment at Western Carolina Urology had a date of separation "marital component" of approximately $225,600.00; that, after the date of separation, the value of Plaintiff's 401(k) account experienced passive fluctuations stemming from market pressures; and that Plaintiff spent approximately $335,000.00 from the 401(k) account after the date of separation, including $125,000.00 used to reduce marital debts and about $167,888.00 used to cover personal, non-marital expenses, the trial court never addressed the extent to which specific post-separation debts were paid using Plaintiff's separate property or the manner in which any payments made using Plaintiff's separate property should be recognized in the equitable distribution process.

According to N.C. Gen. Stat. § 50-20(b)(4)(a), "[a]ll appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution" shall be classified as divisible property, with the exception that "appreciation or diminution in value which is the result of post-separation actions or activities of a spouse shall not be treated as divisible property."

> [U]nder the statute, there is a distinction between active and passive appreciation when classifying divisible property. . . . "The General Assembly has given divisible property status only to passive increases in value of marital and divisible property." "[P]assive appreciation" refers to enhancement of the value of property due solely to inflation, changing economic conditions, or market forces, or other such circumstances beyond the control of either spouse. . . . "Active appreciation," on the other hand, refers to "financial or managerial contributions" of one of the spouses.

Brackney v. Brackney, 199 N.C. App. 375, 385-86, 682 S.E.2d 401, 408 (2009) (quoting S. Reynolds, 3 *Lee's North Carolina Family Law*

§ 12.52(b)(i) (5th ed. 2002), and quoting *O'Brien v. O'Brien*, 131 N.C. App. 411, 420, 508 S.E.2d 300, 306 (1998), *disc. review denied*, 350 N.C. 98, 528 S.E.2d 365 (1999)), *petition for disc. review withdrawn*, 363 N.C. 853, 694 S.E.2d 200 (2010). The trial court's finding that the post-separation fluctuation in the value of Plaintiff's 401(k) account was passive suggests that Plaintiff made no post-separation contributions to that account, although the trial court did not make an express finding to that effect. In light of Plaintiff's admission that he spent approximately $335,000.00 from the 401(k) account after the date of separation, one could infer from other information in the record that the value of his 401(k) account increased by at least $110,000.00 after the date of separation. Assuming that the full amount of this increase was passive, one could conclude that the entire $335,000.00 expenditure was divisible property, a determination which would, presumptively, suggest that $167,500.00 should be distributed to each spouse. The trial court's finding that Plaintiff spent $167,888.00 from the 401(k) account for the purpose of covering personal expenses suggests that the trial court might have believed that Plaintiff spent "his half" on personal expenses. The trial court did not, however, make findings of fact addressing these or other relevant issues, so we are unable to determine whether the trial court's treatment of the payments made from Plaintiff's 401(k) account rested on a proper understanding of the applicable law.

In addition, the trial court's findings fail to address the source from which Plaintiff obtained the funds used to make the post-separation marital debt payments. Defendant asserts that Plaintiff made the relevant marital debt payments from funds contained in his 401(k) account, a position which Plaintiff's testimony to the effect that he used monies from the 401(k) account to make a significant portion of the debt payments tends to support. If Plaintiff spent $167,000.00 derived from the 401(k) account to cover personal expenses and $216,000.00 derived from the 401(k) account to reduce marital debt, then the 401(k) account would necessarily have increased in value to at least $383,000.00. However, Plaintiff only admitted spending $335,000.00, which leaves $48,000.00 in post-separation debt payments unexplained. Simply put, without additional findings, the numbers in the equitable distribution order "don't add up." As a result, we conclude that this case should be remanded to the trial court for the purpose of making additional findings of fact which (1) classify, value, and distribute the passive increase in the value of Plaintiff's 401(k) account after the date of separation; (2) identify the extent, if any, to which Plaintiff paid marital debt using his separate

funds; (3) resolve the existing mathematical discrepancies in the equitable distribution order; and (4) properly distribute all divisible property.

In urging us to conclude that the trial court properly addressed the issues surrounding the $216,000.00 in post-separation debt payments that Plaintiff made, Defendant contends that Plaintiff's payments were made, at least in part, pursuant to a court order. However, Defendant does not explain how this fact has any bearing on the manner in which these post-separation payments should be classified or distributed. In addition, Defendant asserts that Plaintiff received rental income from the marital residences; that Defendant obtained tax benefits from having reduced the indebtedness against the real property; and that Plaintiff "used marital funds from his 401(k) [account] to pay" the marital debts. We are unable to determine, however, what impact the other factors cited by Defendant have on the extent to which the post-separation debt payments that Plaintiff made should be treated as divisible property and the manner in which those payments should be distributed between the parties given the deficiencies in the trial court's findings noted above. As a result, we conclude that the trial court's equitable distribution order should be reversed and that this case should be remanded to the trial court for the making of additional findings of fact and an amended distributional decision.

B. Increase in Value of Marital Homes

[2] Secondly, Plaintiff contends that the trial court erred by "failing to classify, value, and distribute the increase in the net value of the marital homes as divisible property." In seeking to persuade us of the validity of this argument, Plaintiff discusses two possible causes of a change in the value of the marital residences, each of which will be considered separately.

In his brief, Plaintiff notes that the trial court found that the value of the two properties "fluctuated" after the date of separation as a result of market pressures and that any resultant change in value was passive. Plaintiff asserts that, by making this finding, the trial court "acknowledges that there exists divisible property related to the increase in fair market value" of the two properties. In addition, Plaintiff claims that the "undisputed evidence" of Jack Cook, a real estate appraiser who testified on Plaintiff's behalf, established that the value of the Country Club Circle property increased by $25,000.00 and that the value of the Soquilli property increased by $20,000.00 between the date of separation and the date of divorce. As a result,

Plaintiff claims that the trial court committed prejudicial error by failing to classify the change in value set out in Mr. Cook's testimony as divisible property and to distribute that property in an equitable manner. We do not find this argument persuasive.

The essential problem with this aspect of Plaintiff's argument is that the trial court was not required to accept and make findings of fact based upon the testimony to which Plaintiff refers. "Uncontradicted expert testimony is not binding on the trier of fact. Questions of credibility and the weight to be accorded the evidence remain in the province of the finder of facts." *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994) (citing *Correll v. Allen*, 94 N.C. App. 464, 470, 380 S.E.2d 580, 584 (1989)). As a result, the trial court did not err by failing to make findings and conclusions based upon the proposed values advocated by Plaintiff's expert. Moreover, the trial court's order specifies that the properties in question should be sold, with the proceeds to be divided equally between the parties. In light of that fact, we are unable to determine how Plaintiff has been prejudiced by the trial court's failure to specifically assign a value to the passive change in value of the properties based on the testimony of Mr. Cook.

As a more general matter, we perceive a potential inconsistency between the manner in which Plaintiff contends that the marital debt payments discussed above and the change in the value of the marital residences should be treated. In essence, Plaintiff may be arguing that the trial court should have classified, valued, and distributed the change in the value of the marital residences stemming from the reduction in the amount of marital debt associated with Plaintiff's post-separation debt payments. If Plaintiff is, in fact, making such an argument, he appears to be seeking credit for both the amount by which the mortgage was reduced and a credit for the payments themselves. In support of his proposed approach to resolving these issues, Plaintiff cites *Warren*, 175 N.C. App. at 514-15, 623 S.E.2d at 804, in which post-separation debt payments were made from a spouse's separate funds instead of marital property. As we have already indicated, the equitable distribution order must be remanded for additional findings addressing whether Plaintiff's post-separation debt payments were made from separate or marital funds. If Plaintiff used his separate funds to make these payments, the equitable distribution order entered on remand should account for that fact in an appropriate manner. Given the procedural context that presently exists in this case, it would be premature for us to speculate concerning the manner in which the trial court should assess the post-separation debt

payments and any related change in the value of the relevant real property given that the extent, if any, to which the post-separation payments were made using Plaintiff's separate property remains to be determined. For that reason, we simply conclude that the trial court should address and resolve this issue on remand once the source of the funds used to make the post-separation debt payments has been established.

C. Classification of Certain Marital Debts

[3] Next, Plaintiff argues that the trial court erred by "failing to classify, value and distribute certain items of marital debt." More specifically, Plaintiff contends that the trial court erred by (1) failing to classify and distribute as marital debt the personal guarantee that he made in connection with a loan incurred by Western Carolina Urology; (2) failing to find that a 2004 loan made from Plaintiff's 401(k) account was a marital debt; (3) failing to find that the obligation to repay a loan that Plaintiff received from Western Carolina Urology was a marital debt; (4) failing to make appropriate findings of fact concerning the second mortgage on the Soquilli property; (5) failing to find that "some portion" of the parties' 2005 tax obligation was a marital debt; and (6) failing to find that a loan that Plaintiff made from his 401(k) account in 2007 was utilized to pay the arrearage on an obligation which encumbered the parties' marital residences.

According to well-established North Carolina law, "the trial court is required to classify, value and distribute, if marital, the debts of the parties to the marriage." *Miller v. Miller*, 97 N.C. App. 77, 79, 387 S.E.2d 181, 183 (1990). "The trial court's findings of fact regarding marital debts must be specific enough to allow an appellate court to determine whether the judgment reflects a correct application of the law." *Pott v. Pott*, 126 N.C. 285, 288, 484 S.E.2d 822, 825 (1988) (citing *Armstrong v. Armstrong*, 322 N.C. 396, 405, 368 S.E.2d 595, 599-600 (1988). After carefully examining the record, we have been unable to identify any findings addressing the amount of the debts in question, the source from which those debts were paid, or the extent to which those debts should be treated as marital debt. Instead of attempting to defend the trial court's treatment of these debts, Defendant makes what appears to be an equitable argument that relies upon various aspects of the record that are not reflected in the trial court's findings of fact. In light of that fact, the fact that these debts may be interrelated with the issues that we have addressed above, and the fact that the findings that the trial court may ultimately make with respect to these debt-related issues may affect the ultimate size of the marital

estate and the manner in which it should be distributed between the parties, we are unable to conclude that the trial court's error was harmless. As a result, we conclude that the trial court should, on remand, make appropriate findings addressing the debts listed above, including determining the amount of those debts, whether those debts should be treated as marital or separate debts, the source from which those debts have been paid, and the effect that these additional findings should have on the ultimate distributional decision.

D. Country Club and Soquilli Properties

[4] Next, Plaintiff contends that the trial court erred by "failing to distribute" the Country Club property and the Soquilli property and that certain conditions placed on the sale of these properties imposed "improper burdens" on Plaintiff. Plaintiff's arguments lack merit.

In the equitable distribution order, the trial court found, in pertinent part, that:

> 3. . . . The parties stipulated certain real property owned by the parties on the Date of Separation . . . to be marital property. This real property includes the residence known as 25 Country Club Circle[, and] . . . real property known as 98 Soquilli Drive, Brevard, NC and the parties stipulated this to be marital property. . . . Both parcels of real property have been listed for sale pursuant to previous agreements between the parties and orders of the Court. . . .
>
> . . . .
>
> 17. The Court has considered an exclusive in-kind distribution of the marital estate but finds as a fact that such an exclusive distribution is not practical given the nature of the assets and debts which are the marital estate. Such a distribution is in fact not possible given the agreement of the parties regarding the interim distributions of marital property.
>
> 18. . . . [T]he Court finds as fact that an unequal division of the marital estate would be equitable and that the assets and debts should be distributed as follows: . . . [T]he marital real property being sold as agreed between the parties. . . . Further, the Court finds it to be equitable that Husband continues to pay the mortgage, insurance, taxes and maintenance expenses on the real properties until the same are sold. . . .

Based on these and other findings, the trial court concluded that "[t]he presumption that an in-kind division is equitable has been rebutted by the greater weight of the evidence" and ordered that:

> The Country Club Circle and Soquilli properties shall be sold at a price agreed to by the parties. . . . Upon the sale of each parcel of marital real estate the net proceeds shall be split evenly between the parties. Should either parcel be sold and the net proceeds result in a deficiency being owed[,] then Husband shall be responsible for satisfying the deficiency on the parcel. Should either property be leased while awaiting sale, then Husband shall be entitled to the rental income from the property(ies) in order to offset the expenses for the properties. . . .

In his brief, Plaintiff argues that the trial court "did not distribute" the marital residences in its equitable distribution judgment and contends that the trial court's order, instead of providing for "a distribution of the marital homes by the trial court," "placed these two marital assets in a holding pattern." Plaintiff does not, however, explain the basis for his contention that the trial court "did not distribute" the marital real estate. For example, he has not argued that the trial court lacked authority to order the transfer or sale of real property in the course of entering an equitable distribution judgment or dispute the fact that, prior to the equitable distribution hearing, the parties agreed to sell the properties and signed a Memorandum of Judgment and Order to that effect on 9 November 2007. In addition, Plaintiff has not challenged the trial court's findings regarding the parties' real property or argued that the trial court erred by incorporating the parties' agreement concerning the sale of these properties into its equitable distribution order. In short, Plaintiff has simply failed to explain how the trial court's decision with respect to this issue rested upon an error of law, necessitating the conclusion that this aspect of Plaintiff's argument is without merit.

In addition, Plaintiff also asserts that the trial court's decision to require him to pay expenses associated with the properties pending their sale and to make up any deficiency upon sale imposed "improper burdens" upon him. "Ultimately, the court's equitable distribution award is reviewed for an abuse of discretion and will be reversed 'only upon a showing that it [is] so arbitrary that it could not have been the result of a reasoned decision.' " *Brackney*, 199 N.C. App. at 381, 682 S.E.2d at 405 (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). Plaintiff has, however, failed to advance any argument tending to support a determination that the

trial court abused its discretion in the course of deciding to allocate these responsibilities to Plaintiff or to articulate any justification for his statement that the trial court committed an error of law by placing "improper burdens" upon him. Thus, this aspect of Plaintiff's argument lacks merit as well.

E. Pontiac Automobile

[5] At the equitable distribution hearing, Plaintiff testified that:

> Q What about that Pontiac G6?
>
> A That was a car that was bought for Claire's son, that I had about $2500 on the down payment for, that was purchased in June of 2005; late May or early June.
>
> . . . .
>
> BY THE COURT: Mr. Gardo, am I understanding then that the only payment Dr. Bodie is contending would be a marital debt, if anything, will be the $2500 down payment that was made on the vehicle sometime shortly before the date of separation; is that correct?
>
> BY MR. GARDO: Yes, sir.

In his brief, Plaintiff argues that the trial court erred "in failing to value, classify, and distribute the G6 Pontiac." Once again, we conclude that Plaintiff's argument lacks merit.

"In equitable distribution proceedings, the party claiming a certain classification has the burden of showing, by a preponderance of the evidence, that the property is within the claimed classification." *Brackney*, 199 N.C. App. at 383, 682 S.E.2d at 406 (citing *Joyce v. Joyce*, 180 N.C. App. 647, 650, 637 S.E.2d 908, 911 (2006)). In this case, neither Plaintiff nor Defendant listed the automobile as a marital asset on their equitable distribution affidavits. At the equitable distribution hearing, Plaintiff's evidence regarding the Pontiac was limited to a request that the $2,500.00 down payment be treated as marital debt. Plaintiff has not, on appeal, made any argument specifically addressing the down payment that he allegedly provided in connection with this vehicle, explained how he was in any way prejudiced by the manner in which the trial court addressed any issue relating to this vehicle, or asserted that the trial court abused its discretion by failing to distribute the amount of the down payment to him. As a result, we conclude that Plaintiff has not shown that the trial court committed any error of law relating to the Pontiac that was purchased for Defendant's son.

F. Adequacy of Equitable Distribution Order

[6] Finally, Plaintiff argues that, based upon "the reasons asserted" elsewhere in his brief, the trial court "failed to classify and value all of the marital and divisible property of the parties." We have previously addressed Plaintiff's contentions regarding the manner in which the trial court addressed specific items of property and debt elsewhere in this opinion. Although Plaintiff makes the generalized assertion that the equitable distribution judgment "fails to state the value of the distributable property," the only distributable assets which Plaintiff contends that the trial court failed to value were the Country Club property and the Soquilli property.

N.C. Gen. Stat. § 50-21(b) provides, in pertinent part, that, "[f]or purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties[.]" In its order, the trial court stated that:

> 3. . . . The parties stipulated certain real property owned by the parties on the Date of Separation . . . to be marital property. This real property includes the residence known as 25 Country Club Circle[.] . . . The Court finds that this property had a DOS Fair Market Value of $450,000 and carried indebtedness of $460,000.00 so that this property had a net DOS Fair Market Value . . . of [negative $10,000.00]. The parties own real property known as 98 Soquilli Drive[.] . . . The Court finds that this property had a DOS Fair Market Value of $255,000.00 and carried indebtedness of $241,115.38 so that this property had a DOS [Fair Market Value] of $13,884.62.

Plaintiff has neither challenged the values assigned to these properties nor articulated any reason for concluding that this finding did not constitute an adequate valuation of the properties in question. Moreover, as we have previously noted, Plaintiff has failed to describe how he was in any way prejudiced by the trial court's treatment of this issue. As we have already noted, the equitable distribution order provides for an equal division of the proceeds from the sale of the real property. Moreover, despite the fact that Plaintiff objects to the fact that the trial court failed to state the percentage to be distributed to each spouse, he has not explained how he has been prejudiced by the omission of this figure, which can readily be calculated using information contained in the findings and conclusions from the trial court's order. Finally, Plaintiff has not asserted that the equitable distribution order was unfair or an abuse of discretion. Thus, we conclude that Plaintiff's final argument is without merit.

G. Equitable Distribution Conclusion

Thus, we conclude that the trial court's equitable distribution order should be reversed and that this case should be remanded to the trial court for additional findings regarding (1) the classification, value, and distribution of Plaintiff's 401(k) account, including the passive appreciation of that account between the date of separation and the date of distribution; (2) the classification, value, and distribution of the expenditures that Plaintiff made from the funds contained in his 401(k) account, including the extent to which and purposes for which he spent the passive appreciation of the 401(k) account between the date of separation and the date of distribution; (3) the classification, value, and distribution of Plaintiff's post-separation payments on marital debt, including the extent to which these payments were made with marital or separate funds; and (4) the classification, value, and distribution of the specific items of debt listed in Section II.C above. After making these additional findings, the trial court should make any conclusions of law and adjustments to its distributional decision necessitated by these additional findings of fact. The trial court may, in its discretion, agree to receive additional evidence concerning these unresolved issues. With those exceptions, however, the trial court's equitable distribution order should be, and hereby is, affirmed.

III. Defendant's Appeal

[7] In challenging the trial court's dismissal of her alimony claim, Defendant asserts that the trial court erroneously failed to find that she was a "dependent spouse" for alimony-related purposes. More specifically, Defendant contends that the trial court failed to properly consider her accustomed standard of living during the marriage in making its alimony-related decision. We do not find Defendant's argument persuasive.

A. Standard of Review

N.C. Gen. Stat. § 50-16.3A(a) provides that, "[i]n an action brought pursuant to Chapter 50 of the General Statutes, either party may move for alimony[,]" with the court being authorized to "award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors[.]" N.C. Gen. Stat. § 50-16.1A(2) defines a "dependent spouse" as "a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and sup-

port or is substantially in need of maintenance and support from the other spouse." " 'The burden of proving dependency is upon the spouse asserting the claim for alimony.' " *Williamson v. Williamson*, ____ N.C. App ____, ____ 719 S.E.2d 625, 627 (2011) (quoting *Loflin v. Loflin*, 25 N.C. App. 103, 103, 212 S.E.2d 403, 404 (1975).

" 'When the trial court sits without a jury, the standard of review on appeal 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.' " *Williamson*, ____ N.C. App at ____, 719 S.E.2d at 626 (quoting *Oakley v. Oakley*, 165 N.C. App. 859, 861, 599 S.E.2d 925, 927 (2004) (internal quotation marks and citation omitted)). If the trial court's findings "are unchallenged on appeal, they are presumed correct and binding on this Court." *Lange v. Lange*, 167 N.C. App. 426, 430, 605 S.E.2d 732, 735 (2004) (citing *In re Beasley*, 147 N.C. App. 399, 405, 555 S.E.2d 643, 647 (2001)). The same standard of review applies regardless of whether the trial court's order was entered after a full trial on the merits or whether, as in this case, the trial court dismissed the relevant claim at the conclusion of the evidence presented by the party seeking relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b). *Bauman v. Woodlake Partners, LLC*, 199 N.C. App. 441, 445, 681 S.E.2d 819, 822-23 (2009).

B. Discussion

"To be a dependent spouse, one must be either actually substantially dependent upon the other spouse or substantially in need of maintenance and support from the other spouse." *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000) (internal quotation marks omitted). In *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980), the Court held that the term "actually substantially dependent"

> implies that the spouse seeking alimony must have actual dependence on the other in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation. . . . Thus, to qualify as a 'dependent spouse' . . . one must be actually without means of providing for his or her accustomed standard of living.

" '[I]n other words, the court must determine whether one spouse would be unable to maintain his or her accustomed standard of living, established prior to separation, without financial contribution from the other.' " *Helms v. Helms*, 191 N.C. App. 19, 23-24, 661 S.E.2d 906, 909, (quoting *Vadala v. Vadala*, 145 N.C. App. 478, 481, 550 S.E.2d

536, 538 (2001)), *disc. review denied*, 362 N.C. 681, 670 S.E.2d 233, (2008). "It necessarily follows that the trial court must look at the parties' income and expenses in light of their accustomed standard of living." *Helms*, 191 N.C. App at 24, 661 S.E.2d at 910 (citing *Williams*, 299 N.C. at 182, 261 S.E.2d at 856 (stating that "[t]he incomes and expenses measured by the standard of living of the family as a unit must be evaluated from the evidence presented."). In addition, "[j]ust because one spouse is a dependent spouse does not automatically mean the other spouse is a supporting spouse. To be a supporting spouse, one must be the spouse upon whom the other spouse is either 'actually substantially dependent' or 'substantially in need of maintenance and support.' . . . A surplus of income over expenses is sufficient in and of itself to warrant a supporting spouse classification." *Barrett*, 140 N.C. App. at 373, 536 S.E.2d at 645 (citing Williams, 299 N.C. at 186, 261 S.E.2d at 857, and *Beaman v. Beaman*, 77 N.C. App. 717, 723, 336 S.E.2d 129, 133 (1985)).

In an attempt to demonstrate the validity of her alimony claim, Defendant offered evidence tending to show that her gross annual income exceeded $50,000.00, that her monthly net income was approximately $4,400.00, and that her monthly expenses were about $4,278.00 in 2009. As Defendant concedes in her brief, the "testimony at the Permanent Alimony hearing indicated that the Defendant-Appellant was able to meet her current living expenses, which included a $200.00 monthly contribution to a 'Child Savings Account' plan for the minor child." In its order, the trial court made unchallenged findings summarizing Defendant's testimony concerning her income and expenses and determined that "there is a surplus left to the defendant each month, after deducting all of her expenses from her net monthly income." As a result, the record adequately supported the trial court's determination that Defendant was not, in fact, a dependent spouse for alimony-related purposes.

In seeking to persuade us to reach a different result, Defendant points to evidence tending to show that she was required to maintain a lower standard of living than had been the case prior to the parties' separation. Defendant is correct in asserting that the fact that she is able to meet her current expenses does not necessarily preclude a determination that she is a dependent spouse entitled to receive alimony if the evidence shows that (1) she is unable to maintain the standard of living to which she was accustomed during her marriage and (2) Plaintiff had the means to pay her a sufficient amount of alimony to enable her to maintain her previous standard of living.

However, we are not persuaded by Defendant's argument given the facts of this case. In support of this contention, Defendant argues that she "presented evidence of the standard of living that she enjoyed while married to [Plaintiff]" and "evidence that she could not afford that standard of living on her current income" and asserts that the trial court erroneously failed to make findings of fact regarding the parties' accustomed standard of living or Plaintiff's ability to provide an amount of alimony sufficient to "allow her to maintain the accustomed standard of living that she enjoyed while married[.]" We do not believe that the trial court erred by failing to award alimony to Defendant based upon this "change in lifestyles" theory.

The first problem with Defendant's "change in lifestyles" theory is that the record clearly shows that the "lifestyle" in question was not sustainable. When asked about the "lifestyle changes" that she experienced after separating from Plaintiff, however, Defendant testified that she no longer lived in the home that she had previously occupied, that she now had to work full time, that she could no longer afford pets, that she took fewer vacations, and that she had to adhere to a budget for her living expenses. Defendant did not dispute that the parties' previous standard of living had been "artificially maintained" by the "massive infusion of debt." For example, the record reflects that, in 2003, Plaintiff borrowed $50,000.00 from his 401(k) account to make payments on the couple's credit card debt. Based upon the evidence relating to this issue, the trial court made undisputed findings of fact to the effect that:

> 18. The defendant testified that since [the] date of separation that she has had a change in the lifestyle she had enjoyed during the last several years of her marriage[.] . . . However, the defendant admitted that during the last several years of the parties' marriage, their lifestyle had required ever increasing debt, and in the year 2003 the plaintiff had to borrow fifty thousand ($50,000.00) dollars from his retirement account to pay towards the parties' credit card debt.
>
> 19. The Court finds that during the last several years of the parties' marriage, their lifestyle was maintained by ever increasing debt, especially by use of credit cards. The debt which accompanied their lifestyle meant that the parties' standard of living could not be maintained in the future.

Defendant has cited no authority establishing that alimony may be properly awarded for the purpose of maintaining a "lifestyle" that rests upon such a shaky foundation, and we know of none.

Secondly, Defendant failed to present evidence tending to establish the standard of living that the parties would have been able to afford given their incomes and expenses during the marriage or the amount of money that would have been necessary to enable Defendant to maintain such an affordable lifestyle. In fact, when asked how much alimony she wanted, Defendant replied that she was "not really sure." Thus, for both of these reasons, the trial court did not err by determining that Defendant was not a dependent spouse.

Finally, Defendant failed to present any evidence tending to show that, at the time of the alimony hearing, Plaintiff was able to provide her with additional funds for the purpose of maintaining the standard of living that the parties could have afforded during their marriage. In fact, Defendant's counsel conceded that Plaintiff was in bankruptcy and that Defendant lacked the "ability to collect" any sums that were awarded in alimony. As a result, even if the trial court erred by failing to find that Defendant was a dependent spouse, Defendant was still not entitled to an award of alimony given the complete absence of any indication that Plaintiff was in a position to make alimony payments to Defendant. As a result, for all of these reasons, the trial court did not err by rejecting Defendant's alimony claim.

EQUITABLE DISTRIBUTION ORDER: AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

ALIMONY ORDER: AFFIRMED.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. TAVIEOLIS EUGENE HUNT

No. COA11-1223

(Filed 5 June 2012)

1. Appeal and Error—notice of appeal—Convicted Sex Offender Permanent No Contact Order—imposed civil remedy—certiorari granted

Defendant's petition for *certiorari* was granted in his appeal from a "Convicted Sex Offender Permanent No Contact Order." Although defendant's appeal from the order imposing a civil rem-

edy, as opposed to a criminal punishment, failed to comply with Rule 3(a), our courts had not yet addressed the civil nature of the order from which he appealed.

2. Constitutional Law—unconstitutional punishment—Convicted Sex Offender Permanent No Contact Order—civil remedy

Defendant's argument in a statutory rape and sexual offense case that a Convicted Sex Offender Permanent No Contact Order was part of his criminal sentence and was an unconstitutional punishment was meritless. The legislature intended for N.C.G.S. § 15A-1340.50 to serve as a civil remedy and the effects of the law do not negate its civil intent. The requirement that defendant have no contact with the person he victimized was not, therefore, a punishment as contemplated by N.C. Const. art. XI, § 1.

3. Constitutional Law—due process—Convicted Sex Offender Permanent no contact order—notice not required

Defendant's constitutional right to due process of law was not violated in a statutory rape and sexual offense case where the State did not provide him with notice that it intended to seek a Convicted Sex Offender Permanent no contact order. Assuming, *arguendo*, that a protected liberty interest was at stake, N.C.G.S. § 15A-1340.50 does not require the State to give defendant notice that it intended to seek the No Contact Order.

4. Constitutional Law—double jeopardy—Convicted Sex Offender Permanent No Contact Order—civil remedy

Defendant's right to be free from double jeopardy in a statutory rape and sexual offense case was not violated when the trial court sentenced him to a term of imprisonment and subjected him to a Convicted Sex Offender Permanent No Contact Order. N.C.G.S. § 15A-1340.50 constitutes a civil remedy and the imposition of a No Contact Order does not implicate the constitutional protection against double jeopardy.

5. Sexual Offenders—permanent no contact order—statutory mandate complied with

The trial court did not err in a statutory rape and sexual offense case by failing to hold a hearing, make findings of fact, or enter grounds for entering a Convicted Sex Offender Permanent No Contact Order. The trial court complied with the statutory framework set forth in N.C.G.S. § 15A-1340.50. Defendant was

given the opportunity to show cause why the no contact order should not be entered and the trial court made four findings of fact.

Appeal by defendant from order entered 14 April 2011 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 6 March 2012.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Menard, for the State.

Linda B. Weisel, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Tavieolis Eugene Hunt appeals from a "Convicted Sex Offender Permanent No Contact Order" ("No Contact Order" or "the order") entered on 14 April 2011 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Defendant contends on appeal that: (1) the No Contact Order imposed a criminal punishment not permitted by Article XI, Section I of the North Carolina Constitution; (2) the lack of notice from the State that it intended to seek the No Contact Order violated defendant's right to due process of law; (3) the No Contact Order subjected defendant to double jeopardy; and (4) the trial court did not follow the statutory procedure required by N.C. Gen. Stat. § 15A-1340.50 (2009) when entering the No Contact Order. After careful review, we hold that the imposition of the No Contact Order does not constitute a criminal punishment; rather, it is civil in nature. We further hold that defendant's constitutional rights were not violated and that the trial court complied with the mandates of N.C. Gen. Stat. § 15A-1340.50.

Background

On 29 March 2010, defendant was indicted on six counts of statutory rape or sexual offense pursuant to N.C. Gen. Stat. § 14-27.7A(a) (2009). The State alleged that defendant had forcible sexual intercourse with his thirteen-year-old half-sister on three occasions, engaged in cunnilingus with her on two occasions, and forced her to perform fellatio on one occasion. On 14 April 2011, defendant entered a plea of guilty. In accord with the plea agreement, the trial court consolidated the six charges into one count for sentencing purposes, found a mitigating factor (defendant had a support system in the community), sentenced defendant to 300-369 months imprisonment, and dismissed defendant's habitual felon charge.

The State requested that the No Contact Order be entered as permitted by N.C. Gen. Stat. § 15A-1340.50. The State claimed that the minor victim wanted the No Contact Order to be entered; that the victim had reason to fear future contact with defendant because defendant would likely be aware of her contact information; and that the offense perpetrated against the victim was violent and unprovoked. On two occasions the trial court gave defendant an opportunity to address any matter raised at the sentencing hearing. Defendant chose to apologize to the victim and her family but did not contest his sentence or the No Contact Order. The trial court utilized AOC form 620 to enter the No Contact Order. The trial court found:

> 1. The defendant was convicted of a criminal offense requiring registration under Article 27A of Chapter 14 of the General Statutes, as shown on the attached judgment and the attached AOC-CR-615, which are incorporated herein by reference.
>
> 2. The State requested that the Court determine whether to issue a permanent no contact order prohibiting contact by the defend-ant with the victim for the remainder of the defendant's natural life.
>
> 3. Following the State's request, the Court ordered the defendant to show cause why the Court should not issue a permanent no contact order prohibiting contact by the defendant with the victim for the remainder of the defendant's natural life.

Based on the State's argument, the trial court found that the following grounds existed for the victim to fear future contact with defendant: (1) "[t]he defendant is her half-brother, and would be aware of her address and contact information[,]" and (2) "[t]he offense was violent and unprovoked." The trial court concluded as a matter of law that "reasonable grounds exist for the victim to fear any future contact with the defendant." The trial court then entered the following restrictions:

> 1. The defendant shall not threaten, visit, assault, molest, or otherwise interfere with the victim.
>
> 2. The defendant shall not follow the victim, including at the victim's workplace.
>
> 3. The defendant shall not harass the victim.
>
> 4. The defendant shall not abuse or injure the victim.

> 5. The defendant shall not contact the victim by telephone, written communication, or electronic means.
>
> 6. The defendant shall refrain from entering or remaining present at the victim's residence, school, place of employment . . . at times when the victim is present.

The pre-printed AOC form states that the No Contact Order "is incorporated into the judgment imposing sentence in this case." Defendant signed an acknowledgment on the form certifying that he "was notified of the above no contact order by the Court." Defendant was made aware that violating the No Contact Order constitutes a Class A1 misdemeanor.

The prosecutor informed the trial court that the State was seeking to classify defendant as a sexually violent predator; however, that determination would need to be made at a later date. The trial court partially completed a "Judicial Findings and Order for Sex Offenders - Active Punishment" form. The trial court found that defendant had committed a "sexually violent offense," that defendant was not a recidivist, that he was not convicted of an aggravated offense, and that he was convicted of an offense that involved the physical, mental, or sexual abuse of a minor. The trial court did not determine whether defendant was required to register as a sex offender or whether he was subject to satellite based monitoring ("SBM"). The notation "to be determined at a later date[,]" was written at the top of the form.

On 26 April 2011, defendant entered a *pro se* notice of appeal. He was subsequently assigned appellate counsel.

Discussion

I. Grounds for Appellate Review

[1] First, we must determine if this appeal is properly before us. Defendant claims that he has a right to appeal from his guilty plea pursuant to N.C. Gen. Stat. § 15A-1444(a1) and (a2)(2) (2009). Alternatively, defendant recognizes that if the No Contact Order from which he appeals imposes a civil remedy as opposed to a criminal punishment, then he was required to comply with Rule 3(a) of the North Carolina Rules of Appellate Procedure when filing his notice of appeal. *State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010) (holding that the defendant was required to comply with Rule 3(a) when appealing an order requiring the defendant to enroll in

SBM, which has been held to be a civil regulatory scheme). Defendant acknowledges that he did not comply with Rule 3(a) and asks this Court to grant his petition for writ of *certiorari*.

As discussed *infra*, we hold that the No Contact Order imposes a civil remedy. Consequently, we hold that a notice of appeal from this order must comply with Rule 3(a). *Id.* Defendant did not properly file his notice of appeal; however, "[d]efendant would have needed a considerable degree of foresight in order to understand" that his notice of appeal was ineffective at the time he entered it given the fact that our courts have not addressed the civil nature of the order from which he appealed. *State v. Clark*, ____ N.C. App. ____, ____, 714 S.E.2d 754, 761 (2011) (internal quotation omitted). This Court has granted *certiorari* in similar circumstances. *Id.; State v. Carter*, ____ N.C. App. ____, ____, 718 S.E.2d 687, 698-99 (2011). Thus, "[i]n the interest of justice, and to expedite the decision in the public interest," *Brooks*, 204 N.C. App. at 195, 693 S.E.2d at 206, we grant defendant's petition for writ of *certiorari*.

II. North Carolina Constitution Article XI, Section I

[2] First, we address defendant's claim that N.C. Gen. Stat. § 15A-1340.50 permits an unconstitutional punishment. Defendant did not object to entry of the order on constitutional grounds at the sentencing hearing; however, N.C. Gen. Stat. § 15A-1446(d)(18) (2009) states that a defendant is not required to object at the sentencing hearing if "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." Consequently, we address defendant's argument that the No Contact Order was part of his criminal sentence and was an unconstitutional punishment. *See State v. Borges*, 183 N.C. App. 240, 245, 644 S.E.2d 250, 254 (2007) (holding that the defendant's argument that a statute violated the *ex post facto* clause of the North Carolina Constitution was preserved pursuant to N.C. Gen. Stat. § 15A-1446(d)(18) despite the defendant's failure to present that argument to the trial court at sentencing).

Here, defendant specifically claims that Article XI, Section I of the North Carolina Constitution does not contemplate the No Contact Order as a permissible criminal punishment. The provision states:

> The following *punishments* only shall be known to the laws of this State: death, imprisonment, fines, suspension of a jail or prison term with or without conditions, restitution, community

> service, restraints on liberty, work programs, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State.

N.C. Const. art. XI, § 1 (emphasis added). The State contends that the statute at issue constitutes a civil remedy and is not a punishment, thereby removing it from the scope of N.C. Const. art. XI, § 1. Consequently, the dispositive inquiry is whether the No Contact Order is a criminal punishment (i.e. punitive) or a civil remedy.

This Court has held that the requirement that convicted sex offenders comply with registration requirements pursuant to N.C. Gen. Stat. § 14-208.5, *et. seq.* (2009), is civil in nature as opposed to punitive. *State v. White*, 162 N.C. App. 183, 590 S.E.2d 448 (2004); *accord State v. Sakobie*, 165 N.C. App. 447, 451-52, 598 S.E.2d 615, 618 (2004). Our Supreme Court has held that our State's SBM statutory scheme, N.C. Gen. Stat. § 14–208.40, *et. seq*. (2009), is likewise civil in nature. *State v. Bowditch*, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010).[1] Our courts have not addressed whether a No Contact Order is civil or punitive. The framework for deciding whether a statute is civil or punitive is well settled.

> We must ascertain whether the legislature meant the statute to establish civil proceedings. If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and non-punitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil.

Smith v. Doe, 538 U.S. 84, 92, 155 L. Ed. 2d 164, 176 (2003) (citations and quotation marks omitted). "In summary, a court looks first at the intended purpose of the law. If the declared purpose was to enact a civil regulatory scheme, then the court determines whether either the purpose or effect is so punitive as to negate any intent to deem the scheme civil." *White*, 162 N.C. App. at 192, 590 S.E.2d at 454. " '[O]nly the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal

1. While many of the cases cited herein address the defendant's argument that the statute at issue violated the *ex post facto* clause of the United States and North Carolina Constitutions, the dispositive issue, as here, was whether the statute was civil or criminal. Therefore, even though the ultimate determination in this case pertains to N.C. Const. art. XI, § 1, not the *ex post facto* clause, these cases are relevant to the civil versus criminal analysis.

penalty[.]" *Smith*, 538 U.S. at 92, 155 L. Ed. 2d at 176 (quoting *Hudson v. United States*, 522 U.S. 93, 100, 139 L. Ed. 2d 450, 459 (1997)).

A. Legislative Intent

"Our analysis begins with discerning through statutory construction the legislative objective, whether announced expressly or indicated impliedly," regarding the civil or criminal classification of N.C. Gen. Stat. § 15A-1340.50. *Bowditch*, 364 N.C. at 342, 700 S.E.2d at 6 (citations and quotation marks omitted). "The text, structure, manner of codification, and enforcement procedures of the statutory scheme are a few of the probative indicators of legislative intent." *Id.* As with the SBM statutory scheme, the legislature did not expressly label N.C. Gen. Stat. § 15A-1340.50 as civil or criminal, nor did it enact a section specifying its purpose. The session law merely states that it is

> An Act to Provide That When Sentencing a Defendant Convicted of a Sex Offense and Upon Request of the District Attorney, the Court May Enter a Permanent No Contact Order Prohibiting Any Future Contact of a Convicted Sex Offender with the Crime Victim if the Court Determines That Appropriate Grounds Exist for the Order.

2009 N.C. Sess. Laws ch. 380, § 1. Though instructive, the title of the session law does not explicitly relay the purpose behind its enactment. However, the text of the statute itself sheds additional light on its purpose. First, the statute makes clear that grounds must "exist for the victim to fear any future contact with the defendant[.]" N.C. Gen. Stat. § 15A-1340.50(e). Second, the statute sets forth six enumerated restrictions that the defendant must abide by, if so ordered by the court, such as contacting, threatening, assaulting, molesting, following, harassing, or abusing the victim. N.C. Gen. Stat. § 15A-1340.50(f)(1)-(6). When viewing the session law title and the relevant portions of the statute, the legislative purpose becomes clear—to protect an individual who fears contact with the defendant from being contacted or harmed, either mentally or physically, by the convicted sex offender who purportedly victimized him or her. This protection is needed due to the well-established fact that "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune v. Lile*, 536 U.S. 24, 33, 153 L. Ed. 2d 47, 56 (2002); *see also Bowditch*, 364 N.C. at 352, 700 S.E.2d at 12 ("The risk of recidivism posed by sex offenders has been widely documented and is well established."). The Court in *Bowditch*, 364 N.C. at 342, 700

S.E.2d at 6, and *White*, 162 N.C. App. at 193, 590 S.E.2d at 455, recognized that one of the primary purposes of the SBM and registration statutes respectively is to protect society from recidivists. The *Bowditch* Court ultimately concluded: "The SBM program at issue was enacted with the intent to create a civil, regulatory scheme to protect citizens of our state from the threat posed by the recidivist tendencies of convicted sex offenders." 364 N.C. at 352, 700 S.E.2d at 13. While the statute at issue in this case only protects one citizen from the threat posed by recidivist tendencies, as opposed to all citizens of our state, the statute nonetheless serves an almost identical function. Arguably, the statute presents a more concrete function in that it offers protection to one who has already been victimized and is still in fear of the defendant as opposed to protecting the general population against a more unspecified threat. We hold that the desire of the legislature to protect a citizen who has been victimized and is in fear of further contact from the defendant, who is part of a class of known recidivists, demonstrates an intent to create a civil, regulatory statute.

Defendant points to the fact that the statute is located in Chapter 15A, the "Criminal Procedure Act," after the statute pertaining to restitution and prior to the statute pertaining to probation. "However, placement in a criminal code is not dispositive." *Bowditch*, 364 N.C. at 343, 700 S.E.2d at 7. In *White*, this Court noted that our criminal code "contains many provisions that do not involve criminal punishment." 162 N.C. App. at 193, 590 S.E.2d at 455 (citation and quotation marks omitted). In fact, the No Contact Order at issue, though located in the criminal code, is similar in substance to the civil no-contact order issued pursuant to Chapter 50C. N.C. Gen. Stat. § 50C-5 (2009). Both orders require that the defendant have no contact with the victim or physically harm him or her. *Id.*; N.C. Gen. Stat. § 15A-1340.50(f). The key difference between the two statutes, however, is that N.C. Gen. Stat. § 50C-5 does not require that the victim suffer any physical harm prior to entry of the order, whereas an N.C. Gen. Stat. § 15A-1340.50 order is only entered after the defendant has been convicted of a sex offense. Again, N.C. Gen. Stat. § 15A-1340.50 is specifically intended to protect a victim from sex offenders who quite frequently repeat the unlawful conduct. It is logical, therefore, that the No Contact Order entered after a conviction is placed in the criminal statute, despite its civil regulatory intent. In sum, the location of the statute in the criminal code, while relevant, does not negate its civil intent since "[t]he location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." *Smith*, 538 U.S. at 86, 155 L. Ed. 2d at 178. We hold that

placement in the criminal code does not demonstrate a legislative intent to utilize a No Contact Order as a criminal punishment.

Defendant also points to the fact that the No Contact Order is enforced by our state's law enforcement agencies pursuant to N.C. Gen. Stat. § 15A-1340.50(g). Defendant claims that the involvement of police evidences a criminal rather than civil intent. Defendant fails to argue who, other than law enforcement, would have the means to enforce the No Contact Order. Clearly, a victim who is being contacted, threatened, visited, assaulted, molested, or otherwise violated would likely need an immediate intervention. Consequently, the only logical choice for enforcement of the No Contact Order is the law enforcement agencies of this state. *See Bowditch*, 364 N.C. at 344, 700 S.E.2d at 7 ("[U]tilizing [the Department of Correction]'s administrative and personnel resources for the SBM program appears to make sound organizational and fiscal sense."). Unlike the SBM program and the registration system, a defendant who is ordered not to contact the victim does not have to follow-up with any government entity. He or she does not have to be monitored or register his or her address. In other words, there is no supervision of the defendant with regard to the No Contact Order. Consequently, if the defendant violates the terms of the order, then there is no one the victim can contact except law enforcement. Moreover, as stated *supra*, the sex offender registration program has been held to be a civil regulatory scheme. A sex offender who fails to register his or her address under that scheme is subject to immediate arrest by law enforcement. N.C. Gen. Stat. § 14-208.11(a1) (2009). Therefore, police enforcement of a civil statute does not automatically render the statute criminal.

Finally, defendant argues that the legislature intended for the statute to be criminal because the statute states that "[t]he no contact order shall be incorporated into the judgment imposing the sentence on the defendant for the conviction of the sex offense." N.C. Gen. Stat. § 15A-1340.50(e). This appears to be a logistical mechanism since the order is entered at the sentencing hearing along with the judgment. Again, there is no follow-up procedure in the statute whereby the defendant is registered or monitored; therefore, the order remains with the defendant's criminal file and is not forwarded to the Division of Criminal Information, the Department of Correction, or the local sheriff for oversight. If a defendant violates the order, he or she is subject to arrest and conviction of a Class A1 misdemeanor. N.C. Gen. Stat. § 15A-1340.50(g). The fact that the order is incorporated with the judgment for ease of enforcement does not render the statute criminal.

In sum, a convicted sex offender is required to register with the State, and, in some instances, ordered to enroll in a SBM program. *White* and *Bowditch* held that these requirements serve a civil regulatory purpose. It is clear that the legislature intended for N.C. Gen. Stat. § 15A-1340.50 to serve as a regulatory tool to protect individuals from recidivist tendencies. *See Bowditch*, 364 N.C. at 344, 700 S.E.2d at 7 (holding that SBM is "another regulatory tool in an effort to defend against an unacceptable threat to public safety").

B. Effect of the Statute

Next, we must determine whether the statute at issue "is so punitive in purpose or effect that the legislature's civil intent is negated." *Id.* at 344, 700 S.E.2d at 8.

> [T]he following five factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.

Id. at 345, 700 S.E.2d at 8 (internal quotation marks omitted). Defendant does not specifically address any of these factors in his brief; however, we must engage in this analysis to determine whether the statute is civil or criminal in its application.

i. Historical Treatment

"A historical survey can be useful because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such." *Smith*, 538 U.S. at 97, 155 L. Ed. 2d at 180. We fail to see how the No Contact Order is similar in effect to our traditional means of punishment. Defendant is not subjected to confinement by the State, and, unlike parole or probation, which have historically been considered forms of punishment, *Bowditch*, 364 N.C. at 345-46, 700 S.E.2d at 8, defendant is not supervised by the State after entry of the No Contact Order. Defendant's only obligation under the order is to refrain from interacting with the victim in any way.

Our Supreme Court has noted that, historically, punishments have subjected a criminal defendant to shame and public disgrace. *Id.* at 347, 700 S.E.2d at 9. To the extent that the No Contact Order is part of the public record and may bring about some level of public disgrace, "[a]ny shame that [defendant] may experience results from his

previous conviction, not from disclosure of that fact to the public. Indeed, [defendant's] conviction and sentence is already a matter of public record." *State v. Mount*, 78 P.3d 829, 838 (Mont. 2003).

ii. Affirmative Restraint or Disability

To determine whether the No Contact Order imposes an affirmative disability or restraint, we must consider "how the effects of [the order] are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith*, 538 U.S. at 99-100, 155 L. Ed. 2d at 181. In applying this test, our Supreme Court stated in *Bowditch*, "[t]here is no denying that being subjected to SBM has an impact on the lives of its participants. Yet, when viewed in light of other civil, regulatory schemes, we cannot conclude that the effects of SBM transform it into criminal punishment." 364 N.C. at 348, 700 S.E.2d at 10. The Court then compared the restraints on the defendant to other civil regulatory schemes, such as occupational debarment and post-incarceration involuntary confinement, and found the restraints of SBM to be "no more onerous[.]" *Id.* at 349-50, 700 S.E.2d at 10-11. While defendant is not allowed to contact his victim, we cannot say that this restriction is more onerous than the requirements of occupational debarment, involuntary commitment, or SBM. In fact, the disability or restraint in this circumstance is quite minor compared to the requirements of SBM where activities such as bathing, swimming, and travelling by airplane are limited by the monitoring device. *Id.* at 350, 700 S.E.2d at 11. Defendant is not required to appear before law enforcement, register his address with the sheriff, or wear a monitoring device; he must simply refrain from contacting his victim. We hold that the effects of the No Contact Order at issue in this case are minor and indirect, and, therefore, the effects are not punitive.

iii. Traditional Aims of Punishment

Next, we must determine if the No Contact Order promotes the traditional aims of punishment. "Retribution and deterrence are the two primary objectives of criminal punishment." *Id.* at 351, 700 S.E.2d at 12 (citation and quotation marks omitted). As stated *supra*, the No Contact Order, like the SBM and registration programs, "is concerned with protecting the public against recidivist tendencies of convicted sex offenders. Thus, the fact that it applies only to individuals convicted of prior criminal conduct is consistent with its regulatory purpose and not indicative of a retributive nature." *Id.* Regarding deterrence, the No Contact Order may have a deterrent effect since

defendant knows that any further assault on his victim will likely lead to arrest. Nevertheless, "[a]ny number of governmental programs might deter crime without imposing punishment. To hold that the mere presence of a deterrent purpose renders such sanctions criminal . . . would severely undermine the Government's ability to engage in effective regulation." *Smith*, 538 U.S. at 102, 155 L. Ed. 2d at 183 (internal quotation marks omitted). Consequently, we hold that the No Contact Order does not promote the traditional aims of punishment such that the statute is rendered punitive.

iv. Rational Connection to a Nonpunitive Purpose

The Supreme Court in *Smith* noted that whether a statute has a rational connection to a nonpunitive purpose was the most significant factor in its analysis. *Id.* at 102, 155 L. Ed. 2d at 183. There is no dispute in this case that the No Contact Order has a rational connection to a nonpunitive purpose—protection of a sexual assault victim from further contact or molestation by her assailant.

v. Excessiveness with Respect to Purpose

Finally, we must examine whether the No Contact Order is excessive with respect to purpose. We hold that it is not.

"This inquiry 'is not an exercise in determining whether the legislature has made the best choice possible to address the problem' but 'whether the regulatory means chosen are reasonable in light of the nonpunitive objective.' " *Bowditch*, 364 N.C. at 351-52, 700 S.E. 2d at 12 (quoting *Smith*, 538 U.S. at 105, 155 L. Ed. 2d at 185). Here, the statute is reasonable "compared to the unacceptable risk against which it seeks to protect." *Id.* at 352, 700 S.E.2d at 12. Those defendants subject to a No Contact Order have committed sexual offenses against their victims. N.C. Gen. Stat. § 15A-1340.50(a). Imposition of the No Contact Order is limited to situations where the victims have expressed a reasonable fear of future contact from their attackers. N.C. Gen. Stat. § 15A-1340.50(e). In other words, not every defendant who has committed a sexual offense is automatically subject to a No Contact Order. The statute is quite narrow.

Moreover, a defendant may make a motion at any time to rescind a No Contact Order and the trial court may grant the motion if it "determines that reasonable grounds for the victim to fear any future contact with the defendant no longer exist[.]" N.C. Gen. Stat. § 15A-1340.50(h). Accordingly, the statute's "reasonableness is supported by its limited application and its potentially limited duration."

Bowditch, 364 N.C. at 352, 700 S.E.2d at 12 (analyzing the reasonableness of SBM); *see White*, 162 N.C. App. at 197, 590 S.E.2d at 457 ("Since North Carolina only requires registration [for sex offenders] for ten years, . . . we hold that the registration requirements are not excessive in light of the General Assembly's nonpunitive objective." (internal citation omitted)). We hold that N.C. Gen. Stat. § 15A-1340.50 is not excessive with respect to purpose.

Based on the foregoing, we hold that the legislature intended for N.C. Gen. Stat. § 15A-1340.50 to serve as a civil remedy and that the effects of the law do not negate its civil intent. The requirement that defendant have no contact with the person he victimized is not, therefore, a punishment as contemplated by N.C. Const. art. XI, § 1.

III. Due Process

[3] Next, defendant argues that his constitutional right to due process of law was violated because the State did not provide him with notice that it intended to seek the No Contact Order. Defendant claims that the statute is unconstitutional on its face and as applied to defendant. Defendant did not object at the sentencing hearing on due process grounds; however, to the extent that this argument was not preserved, we decide, in our discretion, to review it pursuant to N.C. R. App. P. 2 (2012).

The Fifth and Fourteenth Amendments to our federal Constitution guarantee that the State shall not deprive any person of "life, liberty, or property without due process of law." "Once a protected life, liberty, or property interest has been demonstrated, the Court 'must inquire further and determine exactly what procedure or process is due.' " *State v. Stines*, 200 N.C. App. 193, 196, 683 S.E.2d 411, 413 (2009) (quoting *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (internal quotation marks omitted)). Assuming, *arguendo*, that a protected liberty interest is at stake, we hold that defendant was not entitled to prior notice by the State that it would seek the No Contact Order at the sentencing hearing.

N.C. Gen. Stat. § 15A-1340.50 does not contain a notice requirement. Nevertheless, a criminal defendant is made aware by the statute that he or she may be subject to the mandates of a No Contact Order if he or she is convicted of a reportable sex offense and the victim has a reasonable fear of future contact from the defendant. N.C. Gen. Stat. § 15A-1340.50(a)(3), (e). The defendant is further made aware that the proceedings for a No Contact Order occur at

sentencing upon request by the district attorney. N.C. Gen. Stat. § 15A-1340.50(b). Defendant cannot claim that he was unaware that this statute was in effect at the time he was convicted and sentenced and that there was a possibility that he would be asked to show cause why the No Contact Order should not be entered. *See Texaco, Inc. v. Short*, 454 U.S. 516, 532, 70 L. Ed. 2d 738, 752 (1982) ("Generally a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply."); *State v. Bryant*, 359 N.C. 554, 566, 614 S.E.2d 479, 486 ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." (quoting *Cheek v. United States*, 498 U.S. 192, 199, 112 L. Ed. 2d 617, 628 (1991)).

Again, we find guidance on this issue in our Court's examination of the SBM statutory scheme, and we find *State v. Jarvis*, ____ N.C. App. ____, 715 S.E.2d 252 (2011), to be on point. There, this Court interpreted N.C. Gen. Stat. § 14–208.40A (2009), and held that the defendant's due process rights were not violated where the statute permitted the trial court to order the defendant to enroll in SBM at the sentencing hearing. *Jarvis*, ____ N.C. App. at ____, 715 S.E.2d at 258. The defendant was not given advance notice that a SBM hearing would take place at sentencing, but he was given the opportunity to be heard and present evidence to refute the State's claim that he was eligible for SBM. *Id.* We find the procedural application of N.C. Gen. Stat. § 14–208.40A to be analogous to N.C. Gen. Stat. § 15A-1340.50.

Defendant relies heavily on *Stines* to support his position that advance notice by the State was required. However, *Stines* is readily distinguishable. In *Stines*, we examined N.C. Gen. Stat. § 14–208.40B (2009), which required the State to notify an individual who is not incarcerated, but potentially subject to SBM, to report to court for a SBM hearing. We held that the notice requirement of N.C. Gen. Stat. § 14–208.40B requires the State to inform the defendant that the Department of Correction has determined that he or she falls into one of the specific categories of sex offenders listed in N.C. Gen. Stat. § 14–208.40(a) (2009). *Stines*, 200 N.C. App. at 199, 683 S.E.2d at 415. The obvious distinction between N.C. Gen. Stat. § 14–208.40A, as interpreted by *Jarvis*, and N.C. Gen. Stat. § 14–208.40B, as interpreted by *Stines*, is that a defendant is not afforded notice of a hearing where the hearing is conducted during sentencing after a conviction, whereas a defendant who is being brought back for a hearing after release from incarceration is required to be provided detailed notice

by the State regarding why he or she is being hailed to court. Based on our holding in *Jarvis*, we hold that N.C. Gen. Stat. § 15A-1340.50 does not require the State to give defendant notice that it intended to seek the No Contact Order, and this lack of notice does not violate defendant's right to due process of law. The statute is not, therefore, unconstitutional on its face or as applied to defendant.

IV. Double Jeopardy

[4] Defendant argues that his right to be free from double jeopardy was violated when the trial court sentenced him to a term of imprisonment and subjected him to the No Contact Order. To the extent that defendant did not preserve this argument due to his failure to object at sentencing, we review the argument pursuant to N.C.R. App. P. 2 (2012). Because N.C. Gen. Stat. § 15A-1340.50 constitutes a civil remedy, we hold that imposition of a No Contact Order does not implicate the constitutional protection against double jeopardy. *See State v. Williams*, ____ N.C. App. ____, ____, 700 S.E.2d 774, 777-78 (2010) (recognizing that double jeopardy does not apply where a defendant is subject to a civil remedy as opposed to a criminal punishment).

V. Statutory Procedure for Imposition of the No Contact Order

[5] Defendant argues that even if his constitutional rights were not violated, the trial court nevertheless erred by failing to hold a hearing, make findings of fact, or enter grounds for entering the order. We disagree.

N.C. Gen. Stat. § 15A-1340.50(b) states that upon a request from the district attorney for the trial court to enter a No Contact Order, "[t]he judge shall order the defendant to show cause why a permanent no contact order shall not be issued and shall hold a show cause hearing as part of the sentencing procedures for the defendant." We do not interpret this statute to mean that the trial court must delineate the sentencing hearing from the show cause hearing. In other words, the trial court need not suspend the sentencing hearing and hold a separate show cause hearing. In the present case, the district attorney requested that the No Contact Order be entered and defendant was given the opportunity to show cause why it should not be entered. Defendant chose to remain silent on that matter. We hold that the trial court sufficiently complied with the statute.

N.C. Gen. Stat. § 15A-1340.50(e) also requires the trial court to enter written findings of fact and grounds for entering the order. The trial court did so in this case. As detailed *supra*, the trial court made

four findings of fact and listed two grounds for entering the order. Defendant claims that the trial court did not properly find that he was convicted of a reportable sex offense because the court incorporated form AOC-CR-615, which had not been completed at that time. The fact that the form was not complete and defendant had not yet been ordered to register or enroll in SBM does not negate the fact that the trial court determined that defendant had been "convicted of a criminal offense requiring registration under Article 27A of Chapter 14 of the General Statutes[.]" Defendant's argument is without merit. We hold that the trial court complied with the statutory framework set forth in N.C. Gen. Stat. § 15A-1340.50 when it entered the No Contact Order.

Conclusion

In sum, we hold that N.C. Gen. Stat. § 15A-1340.50 constitutes a civil remedy as opposed to a criminal punishment. Defendant's constitutional rights were not violated in this case. We further hold that the trial court followed the statutory mandates when entering the No Contact Order. Accordingly, we affirm the trial court's Convicted Sex Offender Permanent No Contact Order.

Affirmed.

Chief Judge MARTIN and Judge STEPHENS concur.

MICHAEL TOPP; DUNCAN THOMASSON; MARTIN KOOYMAN AND BLACK PEARL ENTERPRISES, LLC, PLAINTIFFS V. BIG ROCK FOUNDATION, INC.; CRYSTAL COAST TOURNAMENT, INC.; CARNIVORE CHARTERS, LLC; EDWARD PETRILLI; JAMIE WILLIAMS; TONY R. ROSS AND JOHN DOE, DEFENDANTS

No. COA11-681

(Filed 5 June 2012)

1. Venue—change of venue—right to request change not waived—no abuse of discretion

The trial court did not err in a breach of contract case arising out of a fishing tournament by granting defendants' motion to change venue. Defendants did not implicitly waive their right to request a change of venue due to their participation in the litigation prior to filing their motion and the trial court did not abuse its discretion in granting the motion.

2. Contracts—breach of contract—decision of tournament rules committee—appropriate test—decision not arbitrary—due process

The trial court did not err in a breach of contract case by granting defendants' motion for summary judgment. The trial court did not err in applying a test requiring evidence of fraud, bad faith, or arbitrariness to overturn the decision of the tournament rules committee and the board of directors and the Court of Appeals adopted the test. Further, plaintiffs presented no evidence that the board's decision was arbitrary or manifestly unreasonable or that the board did not afford plaintiffs procedural due process.

3. Judges—recusal—moot

Plaintiffs' argument in a breach of contract case that the trial judge committed reversible error in denying their motion to recuse was moot as plaintiffs had the benefit of a *de novo* review of the summary judgment issue in which the Court of Appeals substituted its opinion for that of the trial judge.

Appeal by Plaintiffs from orders entered 27 August 2010 by Judge J. Carlton Cole in Dare County Superior Court and 14 March 2011 by Judge John E. Nobles, Jr. in Carteret County Superior Court. Heard in the Court of Appeals 16 November 2011.

Gay, Jackson & McNally, L.L.P., by Andy W. Gay and Darren G. Jackson, for Plaintiffs-appellants.

Ward and Smith P.A., by E. Bradley Evans, for Defendants-appellees Big Rock Foundation, Inc. and Crystal Coast Tournament, Inc.

Wheatly, Wheatly, Weeks & Lupton, P.A., by Claud R. Wheatly, III and Chadwick I. McCullen, for Defendants-appellees Carnivore Charters, LLC, Edward Petrilli, Jamie Williams, and Tony R. Ross.

HUNTER, JR., Robert N., Judge.

Michael Topp, Duncan Thomasson, Martin Kooyman, and Black Pearl Enterprises, LLC ("Plaintiffs") appeal from the trial courts' orders relating to Plaintiffs' breach of contract claim against Big Rock Foundation, Inc. ("Big Rock Foundation"), Crystal Coast Tournament, Inc. ("Crystal Coast Tournament"), and John Doe.

Plaintiffs argue Judge J. Carlton Cole erred in granting the motion to change venue filed by Big Rock Foundation, Crystal Coast Tournament, and John Doe. Plaintiffs additionally argue Judge John E. Nobles, Jr. erred by denying Plaintiffs' motion to recuse himself from consideration of the proceedings; by denying Plaintiffs' motion to strike affidavits filed by Big Rock Foundation and Crystal Coast Tournament in support of their motion for summary judgment; and by granting summary judgment in favor of Big Rock Foundation, Crystal Coast Tournament, Carnivore Charters, LLC, Edward Petrilli, Jamie Williams, Tony R. Ross, and John Doe ("Defendants"). For the following reasons, we affirm.

I. Facts & Procedural Background

Plaintiffs were contestants in the 2010 Big Rock Blue Marlin Tournament (the "Tournament"), a saltwater fishing tournament operated by defendant Crystal Coast Tournament. On 14 June 2010, the first fishing day of the Tournament, Plaintiffs' boat, the Citation, departed Hatteras at approximately 6:30 a.m. for the Tournament fishing grounds. On board the Citation were Captain Eric Holmes, First Mate Peter Wann, Martin Kooyman, Duncan Thomasson, and Michael Topp.[1]

As the Citation was underway and inside the three-mile boundary defining state territorial waters, Wann began preparing bait and rigging equipment to be used for the day's fishing. The Tournament rules prohibited any lines or teasers to be placed in the water before 9:00 a.m.; by that time Plaintiffs had travelled out of state waters and into the Exclusive Economic Zone ("EEZ").[2] At approximately 10:30 a.m., Plaintiffs hooked an 883-pound blue marlin. Plaintiffs received permission from the Tournament Rules Committee to hand-line the fish. After several hours, Plaintiffs were able to haul the marlin on board the boat at approximately 3:15 p.m. The boat was approximately 25 miles off the North Carolina coast, in the EEZ, at the time the fish was hooked and when it was hauled on board the Citation.

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1. At the time Plaintiffs filed their complaint, Martin Kooyman, Duncan Thomasson, and Michael Topp were the managing members of Black Pearl Enterprises, LLC, which owned the Citation.

2. The Exclusive Economic Zone is the area running three nautical miles to 200 nautical miles from shore. 16 U.S.C. § 5102(6). These 'federal waters' are, in general, regulated by the U.S. government under the Magnuson [Fishery Conservation and Management] Act. The area from the shore out to three nautical miles is generally regulated by the states[.]" *N.C. Fisheries Ass'n, Inc. v. Brown*, 917 F. Supp. 1108, 1115 n.15 (E.D. Va. 1996).

After securing the marlin on the boat, the Citation headed back to the Tournament weigh station in Morehead City. En route, Wann realized he and the others aboard the Citation were likely to be subjected to questioning when they made it ashore, so he reviewed the Tournament rules. Rule 9 of the Tournament rules states that all boats "must" have a highly migratory species fishing permit ("HMS permit") on board the boat when engaged in fishing. Rule 9 further provides that "[t]he North Carolina Division of Marine Fisheries will require a recreational fishing license for anyone participating in fishing aboard a vessel. This includes a license for the captain, the mate and the anglers." The rules further state that at least one person on each team is responsible for knowing the rules, including any changes announced at the Captain's Meeting. At the Captain's Meeting before the Tournament began, the need for a North Carolina Costal Recreational Fishing License ("CRFL") was emphasized, and the captains were warned not to risk losing one million dollars because of the lack of a license.

After reading the Tournament rules, Wann asked Captain Holmes if they possessed a blanket fishing license on the boat; Holmes replied they did not. Concerned that he did not possess a valid CRFL, Wann used a laptop computer to check the status of his license via the internet. However, he could not conclusively determine whether he had an active license. Thinking that "two licenses would be better than none," Wann used the laptop to obtain a license; the transaction was effective at 5:51 p.m. Plaintiffs brought their catch to the weigh station, where it was accepted as the first catch of the Tournament weighing over 500 pounds.

Upon conclusion of the Tournament, Plaintiffs appeared to be entitled to a first place prize of $910,062.50; Defendants' vessels, Carnivore and Wet-N-Wild, qualified for second and third place, respectively, with a 528-pound marlin and a 460-pound marlin. Before awarding the prize money, Crystal Coast Tournament learned that Wann had been fishing without a CRFL on the day the Citation caught the 883-pound marlin. On 19 June 2010, Captain Holmes and Wann were required to take polygraph tests pursuant to Tournament rule 17. When Holmes was asked if he knew of any reason why the Citation and its catch should be disqualified, he mentioned the possibility that Wann did not possess a CRFL when the marlin was caught. When Wann was subjected to a polygraph test, he was asked three times whether he had an active CRFL when he landed the marlin on the Citation; on the third time he was asked, he answered " 'No.' "

At the request of the Citation owners, Wann reported to the North Carolina Marine Fisheries Commission ("MFC"). Wann admitted to the MFC that after leaving the dock at approximately 6:30 a.m. on 14 June 2010, while the Citation was in state waters, he prepped for the day's fishing by thawing bait, rigging bait, and coiling leaders. The MFC issued Wann a citation for engaging in recreational fishing at 6:35 a.m. on 14 June 2010 without a valid CRFL in violation of N.C. Gen. Stat. § 113-174.1; "[r]ecreational fishing" includes "any activity preparatory to" the taking of any finfish, "the taking of which is subject to regulation by the Marine Fisheries Commission[.]" N.C. Gen. Stat. § 113-174(4) (2011). The Tournament Rules Committee and Board of Directors determined that Wann's failure to have a valid CRFL before 5:51 p.m. on 14 June 2010 was a violation of the Tournament rules and disqualified the Citation and its catch.

On 25 June 2010, Plaintiffs initiated the underlying action in Dare County Superior Court by filing a complaint alleging, *inter alia*, breach of contract by Big Rock Foundation. Subsequently, Plaintiffs amended the complaint to include Defendants Crystal Coast Tournament and John Doe. In response, Big Rock Foundation and Crystal Coast Tournament claimed, *inter alia*, that Plaintiffs' claim was barred by Plaintiffs' material breach of the parties' contract. By consent orders, the parties agreed the contested prize money would not be paid pending an order of the court and joined as necessary parties the second and third place Tournament winners, Carnivore Charters and Edward Petrilli (the owners and/or managers of the vessel Carnivore), Tony Ross (the owner of the vessel Wet-N-Wild), and Jamie Williams. Subsequently, Defendants Big Rock Foundation and Crystal Coast Tournament filed a motion to change venue to Carteret County. Judge J. Carlton Cole granted the motion, which was entered on 27 August 2010.

On 18 January 2011, in Carteret County Superior Court, Defendants Big Rock Foundation and Crystal Coast Tournament moved for summary judgment with supporting depositions, answers to interrogatories, and other materials. Weeks later, Defendants filed two affidavits in support of the motion. On 25 February 2011, Plaintiffs moved to have the trial court disregard the affidavits as untimely and filed a motion requesting Judge Nobles recuse himself from further consideration of the lawsuit. A hearing on the parties' motions was held in the Craven County Courthouse in New Bern on 3 March 2011.

The trial court denied Plaintiffs' motion to recuse and their motion to strike Defendants' supporting affidavits, concluding the affidavits were supplemental to materials filed with the motion for summary judgment. The trial court also granted summary judgment in favor of Defendants on all issues, ordering Crystal Coast Tournament to pay the prize money to the second and third place Tournament winners and that Plaintiffs were to recover nothing from Defendants. Plaintiffs appeal.

II. Jurisdiction

As Plaintiffs appeal from the final judgments of a superior court, appeal lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

III. Analysis

A. Change of Venue

[1] Plaintiffs argue that Judge Cole erred in granting Defendants' motion to change venue to Carteret County. Specifically, Plaintiffs contend Defendants implicitly waived their right to request a change of venue due to their participation in the litigation prior to filing their motion. We disagree.

Five days after the order to join the additional Defendants was entered, Big Rock Foundation and Crystal Coast Tournament filed a motion to change venue from Dare County to Carteret County. Defendants argued that because the majority of witnesses lived in Carteret County and a majority of the events underlying the suit occurred there, the convenience of the witnesses and the ends of justice were better served by changing the venue to Carteret County.

Plaintiffs cite this Court's decision in *Miller v. Miller* for the proposition that parties can waive the right to contest venue through implied consent. 38 N.C. App. 95, 97-98, 247 S.E.2d 278, 279-80 (1978) (waiver found where nearly one year passed between the defendant filing a motion to change venue and the first hearing where the defendant requested a continuance and then failed to appear at the second hearing). However, Plaintiffs' reliance on *Miller* is misplaced. Here, Defendants did not fail to pursue their motion by delay or inaction as occurred in *Miller* and cases cited therein. *See id.* Rather, Defendants timely filed their motion to change venue twenty-two days after they filed their answer to Plaintiffs' complaint. The timing of Defendants' motion does not constitute a waiver of their right to seek a change of

venue. *See Hawley v. Hobgood*, 174 N.C. App. 606, 607, 610, 622 S.E.2d 117, 118, 120 (2005) (distinguishing *Miller*, *supra*, and holding the defendant's nine-month delay between the filing of his motion to change venue and the filing of his notice of hearing on the motion was not an implied waiver of his right to seek a change of venue even after he had participated in discovery); *see also McCullough v. Branch Banking & Trust Co.*, 136 N.C. App. 340, 350, 524 S.E.2d 569, 575-76 (2000) (noting that motions to change venue based on the convenience of witnesses, pursuant to N.C. Gen. Stat. § 1-83(2) (1999), must be filed after the party's answer is filed).

Plaintiffs additionally argue that the ends of justice were not promoted by the change of venue to Carteret County. We disagree.

Pursuant to N.C. Gen. Stat. § 1-83(2) (2011), a court may change venue "[w]hen the convenience of witnesses and the ends of justice would be promoted by the change." Here, Defendants requested a change of venue to Carteret County because "the vast majority of witnesses to these events reside in Carteret County" and many of the underlying events occurred there. While we agree with Plaintiffs that the jury pool's knowledge of the Tournament is not a reason to change venue, we conclude that Judge Cole did not abuse his discretion in granting the motion. *See McCullough*, 136 N.C. App. at 350, 524 S.E.2d at 576 (finding no abuse of discretion in trial court's granting of motion for change of venue to county where most of the witnesses lived and all of the underlying events occurred). Plaintiffs' argument is overruled.

B. Summary Judgment

[2] Plaintiffs argue that Judge Nobles committed reversible error in granting Defendants' motion for summary judgment because the trial court applied a standard that is not the law of North Carolina, requiring a showing of fraud, bad faith, or arbitrariness in order to overturn the decision of Crystal Coast Tournament to disqualify the Citation and its catch. Alternatively, Plaintiffs argue that if the trial court did not err in adopting this rule, summary judgment was not proper as Plaintiffs presented evidence raising a genuine issue of material fact as to whether the Tournament Rules Committee and the Board of Directors breached the contract between the parties by arbitrarily disqualifying the Citation and its catch. We disagree with both arguments and affirm the trial court's grant of summary judgment in favor of Defendants.

We review the trial court's order granting summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). Summary judgment is proper only when the record reveals " 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Id.* at 523-24, 649 S.E.2d at 385 (quoting N.C. R. Civ. P. 56(c)).

The parties have not cited, and we have not found, a case from this state reviewing the decision of a tournament rules committee. Judge Nobles, "persuaded by authority from other jurisdictions," applied a test requiring evidence of fraud, bad faith, or arbitrariness to overturn the decision of the Crystal Coast Tournament Rules Committee and Board of Directors to disqualify the Citation and its catch. We find persuasive authority cited by Defendants in support of this test and hereby adopt it. *See Lough v. Varsity Bowl, Inc.*, 243 N.E.2d 61, 63 (Ohio 1968) (concluding that the decision by a bowling association to disqualify bowlers would not be disturbed absent a showing of "arbitrariness, fraud, or collusion" or that the bowlers were not afforded procedural due process). "[W]here the duly adopted laws of a voluntary association provide for the final settlement of disputes among its members, by a procedure not shown to be inconsistent with due process, its action thereunder is final and conclusive and will not be reviewed by the courts in the absence of arbitrariness, fraud, or collusion." *Id.*

Whether a board's decision is to be disturbed due to arbitrariness, fraud, or collusion is a question of law. *Id.* at 62. Because this standard gives great deference to the decision-making board, we equate it with an abuse of discretion standard and hold that such arbitrariness, fraud, or collusion is shown if the reasoning of the board is manifestly unreasonable. *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (The reviewing court may find abuse of discretion only if the trial court's actions are "manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." (citation omitted)); *see also Smith v. Beaufort County Hosp. Ass'n, Inc.*, 141 N.C. App. 203, 210, 540 S.E.2d 775, 780 (2000), *aff'd per curiam*, 354 N.C. 212, 552 S.E.2d 139 (2001).

In addition to a showing of arbitrariness, fraud, or collusion, we hold a voluntary association's decision may also be overturned if it did not afford the complaining party procedural due process (notice and an opportunity to be heard). *See Lough*, 243 N.E.2d at 63 (The

action of a board is final and will not be disturbed on appeal in the absence of arbitrariness, fraud, or collusion or "a procedural scheme which is not in accord with due process.").

Even applying the *Lough* standard, Plaintiffs contend granting summary judgment was improper because a genuine issue of material fact exists as to whether the decision to disqualify the Citation and its catch from the Tournament was an arbitrary one resulting in a breach of the contract between Plaintiffs and Crystal Coast Tournament. We disagree. The burden of pleading and proving arbitrariness as a prima facie matter lies with the plaintiff. *See id.* (affirming the voluntary association's disqualification of a bowling team because the team failed to allege evidence indicating the decision was the result of arbitrariness, fraud, or collusion because this standard, though not officially state law, was the common law).

Here, an examination of Plaintiffs' amended complaint reveals no forecast of evidence raising any genuine issue of material fact that the decision of Crystal Coast Tournament to disqualify Big Rock Foundation was arbitrary. Rule 9 of the Tournament required participants to comply with state and federal regulations. Rule 9 also required all boats to have an HMS permit on board when engaged in fishing as well as a "recreational fishing license [(CRFL)] for anyone participating in fishing aboard a vessel." The rules further stated that at least one person on each team is responsible for knowing the rules, including any changes announced at the Captain's Meeting. At the Captain's Meeting, the need for a CRFL was emphasized, and the captains were warned not to risk losing one million dollars because of the lack of a license. Still, Wann admitted to the Tournament Rules Committee that he did not have a valid CRFL, thereby violating the Tournament rules and North Carolina law. Rule 20 stated, "Any boat breaching any of the above Tournament Rules may be disqualified, except as previously stated. Decisions of the Rules Committee and Board of Directors are final." Accordingly, the Citation was disqualified from the Tournament, and another vessel was named the winner of the Tournament. Nevertheless, the prize money has not been awarded to anyone because Defendants consented to an order to hold the contested prize money until this matter has been decided. Based on this evidence, we hold Plaintiffs presented no evidence that the board's decision to disqualify the Citation for failure to have a CRFL on board was manifestly unreasonable. As such, there is no genuine issue of material fact on whether the board's decision was infected by arbitrariness, collusion, or fraud.

Plaintiffs also presented no evidence that the board did not afford Plaintiffs procedural due process, and, thus, we hold the trial court did not err in granting summary judgment for Defendants.

C. Motion to Recuse

[3] Plaintiffs finally argue that Judge Nobles committed reversible error in denying their motion to recuse because it would be reasonable to question the impartiality of his ruling. Since Plaintiffs now have the benefit of a *de novo* review of the summary judgment issue in which this Court substitutes its opinion for that of the trial judge, whether this Court reverses or affirms Judge Noble's decision to remain on the case is for all practical purposes moot. Therefore, we do not reach the issue.

IV. Conclusion

We conclude that Judge Cole did not err by granting Defendants' motion to change venue, and his order is affirmed. We also conclude that Judge Nobles did not err in granting Defendants' motion for summary judgment as Plaintiffs did not forecast sufficient evidence that their disqualification from the Big Rock Blue Marlin Tournament was arbitrary, and his order is also affirmed.

Affirmed.

Judge GEER concurs.

Judge HUNTER, Robert C., concurs in part and dissents in part in a separate opinion.

HUNTER, Robert C., Judge, concurring in part, and dissenting, in part.

I concur with the majority that the trial court did not err in granting Defendants' motion to change venue. I must, however, respectfully dissent from the majority's opinion for two reasons. First, I would reverse the trial court's order denying Plaintiffs' motion to recuse as I conclude Judge Nobles should have referred the motion to another judge for an independent hearing. Second, apart from the recusal motion, I conclude the trial court erred in granting summary judgment in favor of Defendants.

I. Motion to Recuse

Plaintiffs argue that Judge Nobles committed reversible error in denying their motion to recuse as it would be reasonable to question the impartiality of his ruling. The majority concludes this issue is rendered moot by our *de novo* review of the trial court's decision to grant summary judgment. However, this Court has recently reviewed a recusal motion under similar circumstances. *See Sapp v. Yadkin* County, ____ N.C. App. ____, ____, 704 S.E.2d 909, 913-14 (2011) (reviewing the trial court's denial of a motion to recuse and granting of a motion for summary judgment where both orders were entered by the same judge). I conclude the majority's position may discourage trial courts from giving proper consideration to recusal motions, including referring the motions to another judge for disposition, when it is apparent a subsequent *de novo* review by an appellate court may negate an error in denying the motion. Upon reviewing Plaintiffs' argument, I conclude Judge Nobles should have referred the motion to be decided by another judge.

This Court reviews the denial of a motion to recuse for abuse of discretion. *SPX Corp. v. Liberty Mut. Ins. Co.*, ____ N.C. App. ____, ____, 709 S.E.2d 441, 450 (2011). The North Carolina Code of Judicial Conduct provides, in pertinent part, that "[o]n motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned[.]" Code of Judicial Conduct, Canon 3(C)(1), 2012 Ann. R. N.C. 542. The party seeking disqualification bears the burden of producing substantial evidence that the judge would be unable to rule impartially due to personal bias, prejudice, or interest. *In re Faircloth*, 153 N.C. App. 565, 570, 571 S.E.2d 65, 69 (2002). If the allegations in a recusal motion are of sufficient force "to proceed to find facts, or if a reasonable man knowing all of the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner, the trial judge should either recuse himself or refer the recusal motion to another judge." *Id.*

Here, in support of their motion, Plaintiffs' called opposing counsel, Mr. Wheatly, whose testimony established that, in addition to practicing law together for a number of years, he and Judge Nobles vacationed together multiple times *after* Plaintiffs filed their complaint and while the case was pending. In response, Judge Nobles questioned whether Plaintiffs had any witnesses to show that in the six years since he ended his practice with Mr. Wheatly there had been

any favoritism. Plaintiffs' counsel conceded there had been no indication of favoritism by Judge Nobles. Before denying Plaintiffs' motion, Judge Nobles concluded, *inter alia*, that he did not "see where there's any undue influence by the fact that [he] practiced law with Mr. Wheatly up until six years ago"; that he had not held any pecuniary interest in Mr. Wheatly's law firm for six years; that, as far as he was aware, all of the cases pending at the time he was practicing at Mr. Wheatley's law firm had been disposed of; and that he did not possess "any particular feeling of leaning towards one side or the other."

From my review of the transcript it is apparent that Plaintiffs' assertions were of sufficient force to prompt the trial court to proceed to find facts on the motion. Consequently, the trial judge should have recused himself or referred the motion to another judge. *Id.*; *N.C. Nat. Bank v. Gillespie*, 291 N.C. 303, 311, 230 S.E.2d 375, 380 (1976) (concluding the trial judge should have recused himself or referred the recusal motion to another judge as "it was not proper for th[e] trial judge to find facts so as to rule on his own qualification to preside when the record contained no evidence to support his findings"). After referring the motion to another judge, Judge Nobles could have filed affidavits or sought to provide oral testimony to address the allegations in the motion. *Gillespie*, 291 N.C. at 311, 230 S.E.2d at 380.

I do not consider the mere fact that Judge Nobles practiced law with Mr. Wheatly until six years before the hearing to be grounds for recusal or referral of the recusal motion to another judge. However, I conclude Mr. Wheatly's testimony regarding his vacations with Judge Nobles during the pendency of the action was sufficient to warrant referral of the recusal motion to another judge; this testimony would prompt a reasonable person to doubt the judge's ability to impartially rule on the motion. *Faircloth*, 153 N.C. App. at 570, 571 S.E.2d at 69.

In reaching this decision, I do not conclude that Judge Nobles's ruling on the motion was, in fact, partial to Defendants or that members of the judiciary may not socialize with members of the bar in the jurisdiction where he or she presides. *See* Code of Judicial Conduct, Canon 5(A), 2012 Ann. R. N.C. 548 ("A judge may . . . engage in the arts, sports, and other social and recreational activities, if such avocational activities do not substantially interfere with the performance of the judge's judicial duties."). Nor do I suggest that every motion to recuse should be referred to another judge. Rather, I merely apply

existing caselaw to the unique facts of this case and conclude that, here, the motion to recuse should have been decided by another judge. Under these facts, failure to refer the recusal motion would not only allow a reasonable person to question the impartiality of the judge's ruling on the motion, but may also result in a chilling effect on the moving party. Therefore, I would reverse Judge Nobles's denial of Plaintiffs' motion to recuse and remand for entry of an order referring the recusal motion to another superior court judge.

II. Summary Judgment

Plaintiffs argue that Judge Nobles committed reversible error in granting Defendants' motion for summary judgment because the trial court applied a standard that is not the law of North Carolina requiring a showing of fraud, bad faith, or arbitrariness in order to overturn the decision of Crystal Coast Tournament to disqualify the Citation and its catch. I agree with the majority's adoption of the test set forth in *Lough v. Varsity Bowl, Inc.*, 243 N.E.2d 61, 63 (Ohio 1968) (concluding that the decision by a bowling association to disqualify bowlers would not be disturbed unless the association did not afford the contestants due process or there was a showing of "arbitrariness, fraud, or collusion" on the part of the association). However, I conclude summary judgment was not proper as a genuine issue of material fact exists as to whether the decision to disqualify the Citation and its catch from the Tournament was an arbitrary decision resulting in a breach of the contract between Plaintiffs and Crystal Coast Tournament.

Plaintiffs and Crystal Coast Tournament agree that upon Plaintiffs' entry into the Tournament they were parties to a contract; Plaintiffs paid an entry fee of $18,025.00 to compete for the Tournament prize money. *See Malone v. Topsail Area Jaycees*, 113 N.C. App. 498, 504, 439 S.E.2d 192, 195 (1994) (concluding the "plaintiff had essentially contracted for the prize money by entering the [golf] tournament and by hitting the hole in one"). "In order for a breach of contract to be actionable it must be a material breach, one that substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform." *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003). If either party to a bilateral contract commits a material breach of its terms, the nonbreaching party is excused from its obligation to perform. *Coleman v. Shirlen*, 53 N.C. App. 573, 577-78, 281 S.E.2d 431, 434 (1981), *superseded on other grounds by* N.C. Gen. Stat. § 50–13.2(a) (2011). However,

> [w]hen there are several terms in a contract, a breach committed by one of the parties may be a breach of a term which the parties have not, upon a reasonable construction of the contract, regarded as vital to its existence. Such a term is said to be subsidiary, and a breach thereof does not discharge the other party.

Statesville Flour Mills Co. v. Wayne Distrib. Co., 171 N.C. 708, 711, 88 S.E. 771, 773 (1916) (citation and quotation marks omitted) (concluding that the plaintiff's alleged breach of contract, if a breach at all, did not justify the defendant's failure to perform under the contract). Thus, where nonperformance of one contract condition "does not materially impair the benefit from the performance of the others" and the loss resulting from the breached condition is capable of compensation in damages, the breach is not fatal to performance of the contract. *Id.* at 712, 88 S.E. at 773 (citation and quotation marks omitted). Here, if Wann's failure to possess a CRFL was not a significant violation of the Tournament rules, it would not excuse Defendants from their obligations under the contract, which included refraining from arbitrary disqualifications.

Pursuant to the Tournament rules, disqualification is not required when a boat breaches one of the rules. Rather, rule 20 specifies that a boat "may be disqualified" for violating a Tournament rule. Because the Rules Committee and Board of Directors have discretion in reaching their decision, it follows that they must consider whether a violation of the rules is a material violation and what penalty is appropriate. If the violation is significant, disqualification would not be arbitrary; if the violation is not significant, however, some penalty short of disqualification may have been appropriate, such as a monetary penalty.

Here, Plaintiffs' violation of the Tournament rules did not afford Plaintiffs any competitive advantage. There were no allegations that Plaintiffs had "lines or teasers in the water" before official fishing hours began (rule 3) or outside of the Tournament fishing boundaries (rule 6); engaged in fishing on more than four of the allotted fishing days (rule 3); altered the weight of the fish (rule 16); or used prohibited equipment or a prohibited fishing method (rules 4 and 12). On the contrary, Plaintiffs contacted the Rules Committee and received express permission to hand-line the marlin in order to bring the fish on board the Citation. Assuming, *arguendo*, that Wann was required to possess a CRFL by state law or by the Tournament rules, the first mate's failure to possess a CRFL provided no advantage to Plaintiffs over other competitors; other prize winners did not possess individ-

ual CRFLs and instead relied upon their boat's blanket fishing license. Additionally, Wann acquired a CRFL before reentering state waters with the blue marlin.[1] Had Plaintiffs violated a rule that provided them with a competitive advantage, disqualification would not have been arbitrary. *See Ahrens v. McDaniel*, 336 S.E.2d 505, 506-07 (S.C. Ct. App. 1985) (where the fishing tournament grievance committee disqualified the contestants' fish upon discovery that their fish had ice in its stomach and where the tournament winner was determined by the weight of the fish and the tournament rules required there be "no foreign matter" inside the fish).

Additionally, the Tournament registration form and official weigh ticket required contestants to provide a HMS permit number, which each boat was required to have pursuant to rule 9. That these Tournament forms do not mention the CRFL is further evidence that the failure to possess a CRFL is not a breach of a material term of the contract. Thus, I conclude that Plaintiffs' disqualification for the first mate's failure to possess a CRFL raises a genuine issue of material fact as to whether the decision of the Rules Committee and Board of Directors was arbitrary and therefore a breach of the parties' contract. Accordingly, I would hold that summary judgment was improper and reverse that part of the trial court's order.

In sum, I concur with the majority that Judge Cole did not err by granting Defendants' motion to change venue. I would hold, however, that Judge Nobles erred in deciding Plaintiffs' motion to recuse instead of referring the motion to another judge. Consequently, I would reverse that part of the trial court's order and remand for entry of an order referring the motion to another superior court judge. Apart from the denial of the recusal motion, I would also hold that Judge Nobles erred in granting Defendants' motion for summary judg-

1. In support of their motion for summary judgment, Defendants submitted a 1998 Advisory Opinion from the North Carolina Attorney General's Office that stated the MFC's Marine Patrol could cite state-registered vessels for violations of state fishing laws in the waters of the EEZ, if certain conditions described in the Advisory Opinion were met. In opposition to Defendants' motion, Plaintiffs submitted a joint press release issued by the North Carolina Wildlife Resources Commission and the Division of Marine Fisheries th¬at stated "[r]ecreational anglers who catch fish from three miles to 200 miles offshore will be required to have this [Costal Recreational Fishing L]icense *in order to transport fish back to the shore.*" (Emphasis added.) While I do not conclude whether the Marine Patrol had the authority to issue a citation to Wann for activities in the EEZ, I note that Wann's citation for fishing without a CRFL was issued for fishing at 6:35 a.m., at which time the boat was in state waters and Wann was preparing bait.

ment as Plaintiffs raised a genuine issue of material fact as to whether their disqualification from the Big Rock Blue Marlin Tournament was arbitrary and thus a material breach of the parties' contract; I would reverse the portion of the order granting summary judgment in favor of Defendants. Accordingly, I do not reach Plaintiffs' argument regarding their motion to strike Defendants' affidavits filed in support of the motion for summary judgment.

VAUGHN SCOTT MILLER, PLAINTIFF v. ELIZABETH SZILAGYI, SZ*B CORPORATION, MICHAEL MCNAMARA, JAMES H. THOMPSON AND MARY M. THOMPSON, DEFENDANTS

No. COA11-1458

(Filed 5 June 2012)

1. Appeal and Error—interlocutory orders and appeals—adverse ruling as to jurisdiction—immediately appealable

Plaintiff's appeal from the trial court's interlocutory order dismissing some, but not all, defendants for lack of personal jurisdiction was proper pursuant to N.C.G.S. § 1-277(b), which provides that any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant.

2. Jurisdiction—personal—insufficient minimum contacts—contract—communications

The trial court did not err by granting defendants' motion to dismiss plaintiff's cause of action for a lack of personal jurisdiction. A contract between plaintiff and defendants was insufficient on its own to establish minimum contacts, as were defendants' numerous telephone calls, emails, and other communications to plaintiff in North Carolina.

Appeal by plaintiff from order entered 15 September 2011 by Judge John O. Craig, III, in Surry County Superior Court. Heard in the Court of Appeals 21 March 2012.

Robinson, Bradshaw & Hinson, P.A., by R. Steven DeGeorge, for the plaintiff.

John J. Korzen for the defendants.

THIGPEN, Judge.

Vaughn Scott Miller ("Plaintiff") appeals from an order of the trial court granting James and Mary Thompson's ("the Thompsons") N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) motion to dismiss Plaintiff's cause of action against the Thompsons due to a lack of personal jurisdiction. On appeal, Plaintiff contends there are sufficient minimum contacts between the Thompsons and North Carolina to establish specific jurisdiction.[1] We affirm the order of the trial court.

The record tends to show the following: On 19 July 2006, Plaintiff —who, at the time of the filing of the complaint in this case, was a resident of Surry County, North Carolina[2]—and Richard Hadden, who is not a party to this lawsuit, entered into an agreement ("First Agreement") with the Thompsons to purchase Healthmark Corporation, Inc., Healthmark of Walton, Inc., and Healthmark of Walton Rural Health Clinic, Inc., (collectively, "Healthmark"), as well as the partnership assets of JTMT, LLP, the Hospital Annex Building, and a quantity of land owned by the Thompsons.[3] Plaintiff wrote a $360,000.00 check to be deposited into a trust account retained by the Thompsons' attorney. Of the $360,000.00, $50,000.00 was deemed nonrefundable, and $310,000.00 was to be refunded to Plaintiff upon certain circumstances.

The parties did not close on the First Agreement. Instead, on 7 February 2007, the Thompsons informed Plaintiff that the First Agreement had expired. The Thompsons retained the entire $360,000.00 deposit.

On 7 April 2008, the Thompsons entered into an agreement ("Second Agreement") with Doctors Hospital of Defuniak Springs, Inc. ("Doctors Hospital"), pursuant to which the Thompsons agreed to sell, and Doctors Hospital agreed to purchase, the capital stock of

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1. Other causes of action remain pending against three Defendants in this action, Elizabeth Szilagyi, SZ*B Corporation, and Michael McNamara (collectively, with the Thompsons, "Defendants").

2. Plaintiff subsequently moved to Kentucky

3. Healthmark consists of companies incorporated under the law of Florida, headquartered and operating in Florida, and only doing business in Florida.

Healthmark. Plaintiff was the vice president and director of Doctors Hospital, which was a North Carolina corporation with its principal place of business in Surry County, North Carolina.

On 14 April 2008, Mr. Thompson sent Plaintiff an unsigned agreement ("Third Agreement") for Doctors Hospital's purchase of the capital stock of Healthmark. Plaintiff signed the agreement in his capacity as vice president and director of Doctors Hospital and had it notarized in Surry County, North Carolina. The Thompsons signed the agreement on 15 April 2008.

On 28 March 2011, Plaintiff filed a complaint against Defendants, which contained no allegations pertaining to personal jurisdiction, to recover the refundable $310,000.00 portion of the deposit from the First Agreement.

On 27 April 2011, the Thompsons filed a N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) motion to dismiss the complaint for a lack of personal jurisdiction on the grounds that the Thompsons did not have sufficient minimum contacts with North Carolina. The Thompsons stated in their motion that they "have had no contacts with North Carolina and have not purposefully availed themselves of the privilege of conducting activities within North Carolina." The Thompsons also submitted a brief in support of their motion to dismiss, which included three affidavits. Plaintiff filed a brief in opposition to the motion to dismiss, which also included three affidavits.

On 15 September 2011, the trial court entered an order granting the Thompson's N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) motion to dismiss Plaintiff's cause of action against the Thompsons. The trial court concluded:

> Subjecting the Thompsons to the jurisdiction of North Carolina would violate the due process clause of the United States Constitution because the Thompsons did not have sufficient minimum contacts with North Carolina[,] and thus the exercise of jurisdiction would not comport with traditional notions of fair play and substantial justice.

From this order, Plaintiff appeals.

I: Interlocutory Order

[1] Preliminarily, we note that the order from which Plaintiff appeals is an interlocutory order, because it dismisses Plaintiff's cause of action against the Thompsons, but not Plaintiff's causes of action

against the remaining defendants—Elizabeth Szilagyi, SZ*B Corporation, and Michael McNamara. Plaintiff's claims against Elizabeth Szilagyi, SZ*B Corporation, and Michael McNamara are still pending. *See Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002) ("An order is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the rights of *all the parties* involved in the controversy") (emphasis added). "Generally, there is no right to appeal from an interlocutory order." *Id.* However, Plaintiff's appeal in this case is proper pursuant to N.C. Gen. Stat. § 1-277(b) (2011), which provides that "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant[.]" *See also Dailey v. Popma*, 191 N.C. App. 64, 68, 662 S.E.2d 12, 15 (2008) (holding, "[s]ince plaintiff's claim was dismissed as a result of the trial court's decision that it lacked personal jurisdiction over defendant, plaintiff has a right to an immediate appeal of that order"). We now address the merits of Plaintiff's appeal.

II: Personal Jurisdiction

[2] On appeal, Plaintiff contends that the trial court erred in concluding the Thompsons did not have sufficient "minimum contacts" with North Carolina to support the exercise of personal jurisdiction over them. Plaintiff further contends the trial court erred in concluding that Plaintiff failed to meet his burden of proof with regard to personal jurisdiction. We disagree with both contentions.

"The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record[.]" *Bell v. Mozley*, ____ N.C. App. ____, ____, 716 S.E.2d 868, 871 (2011) (quotation omitted). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Id.* (quotations omitted). "We review *de novo* the issue of whether the trial court's findings of fact support its conclusion of law that the court has personal jurisdiction over defendant." *Id.* (citation omitted).

"Our courts engage in a two-step inquiry to resolve whether personal jurisdiction over a non-resident defendant is properly asserted: first, North Carolina's long-arm statute must authorize jurisdiction over the defendant. If so, the court must then determine whether the exercise of jurisdiction is consistent with due process." *Bauer v.*

Douglas Aquatics, Inc., ____ N.C. App. ____, ____, 698 S.E.2d 757, 760 (2010) (citation omitted).

Plaintiff asserts and Defendants do not dispute that pursuant to N.C. Gen. Stat. § 1-75.4(5)(d), a component of the North Carolina long-arm statute, the Thompsons are subject to personal jurisdiction because there exists an action related to "goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction[.]" Defendant states that the Thompsons directed Plaintiff to send the $360,000.00 check, drawn on Plaintiff's North Carolina bank account, to the Thompsons' attorney in Florida. Defendant also cites *Lab. Corp. of Am. Holdings v. Caccuro*, ____ N.C. App. ____, 712 S.E.2d 696 (2011), for the proposition that the check constituted a "thing of value" for purposes of N.C. Gen. Stat. § 1-75.4(5)(d). *See id.* at ____, 712 S.E.2d at 700 (holding that "all that is required to satisfy N.C. Gen. Stat. § 1-75.4(5)(d) is that a defendant demanded money from the plaintiff and the plaintiff paid the money from North Carolina"). We agree with Plaintiff's assertion that North Carolina's long-arm statute authorizes personal jurisdiction over the Thompsons. Therefore, we must now determine whether the exercise of jurisdiction over the Thompsons is consistent with due process.

"The Due Process Clause of the Fourteenth Amendment operates to limit the power of a state to assert *in personam* jurisdiction over a non-resident defendant." *Hiwassee Stables, Inc. v. Cunningham*, 135 N.C. App. 24, 28, 519 S.E.2d 317, 320 (1999) (citations omitted). "In order for personal jurisdiction to exist, a sufficient connection between defendant and the forum state must be present so as to make it fair to require defense of the action in the forum state." *Id.* (citations omitted). "The pivotal inquiry is whether the defendant has established certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* (quotations omitted).

"There are two types of personal jurisdiction. General jurisdiction exists when the defendant's contacts with the state are not related to the cause of action but the defendant's activities in the forum are sufficiently continuous and systematic. Specific jurisdiction exists when the cause of action arises from or is related to defendant's contacts with the forum." *Skinner v. Preferred Credit*, 361 N.C. 114, 122, 638 S.E.2d 203, 210 (2006) (quotation omitted). Plaintiff in this case only argues that specific jurisdiction exists. "[F]or the pur-

poses of asserting specific jurisdiction, [o]ur focus should . . . be upon the relationship among the defendant, this State, and the cause of action." *Id.* at 123, 638 S.E.2d at 210 (quotation omitted).

> The factors used in determining the existence of minimum contacts include (1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties. To effectuate minimum contacts, a defendant must have acted to purposefully avail itself of the privileges of conducting activities within this state, thus invoking the benefits and protection of our laws. Additionally, the relationship between defendant and North Carolina must be such that defendant should reasonably anticipate being haled into court in this state. In considering the foreseeability of litigation, the interests of, and fairness to, both the plaintiff and the defendant must be considered and weighed. As the United States Supreme Court has explained, the
>
> > "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or a third person . . . . Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State.

Hiwassee Stables, 135 N.C. App. at 28-29, 519 S.E.2d at 320-21 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 542, 105 S. Ct. 2174, ____ (1985)) (internal citations and quotations omitted) (emphasis in original).

"A plaintiff bears the burden of establishing that some ground exists for the exercise of personal jurisdiction over a defendant." *Jaeger v. Applied Analytical Indus. Deutschland GMBH*, 159 N.C. App. 167, 170, 582 S.E.2d 640, 643-44 (2003). "The trial court may conduct an evidentiary hearing including testimony or depositions, but the plaintiff maintains the ultimate burden of proving personal jurisdiction by a preponderance of the evidence at the evidentiary hearing or at trial." *Id.* at 170, 582 S.E.2d at 644. Moreover, "[w]hen the parties submit 'dueling affidavits' under the third category, the trial court may decide the matter from review of the affidavits, or the court may direct that the matter be heard wholly or partly on oral testimony or depositions." *Bauer v. Douglas Aquatics, Inc.*, ____ N.C. App. ____, ____, 698 S.E.2d 757, 761 (2010) (quotation omitted). "In either case,

the plaintiff bears the burden of proving, by a preponderance of the evidence, grounds for exercising personal jurisdiction over a defendant." *Id.* (citation omitted).

In this case, Plaintiff does not challenge the sufficiency of the evidence to support the trial court's findings. Rather, Plaintiff contends that the facts of this case require a different legal conclusion, that specific jurisdiction existed as to the Thompsons. Therefore, we must determine whether the trial court's unchallenged findings of fact, which are presumed to be supported by competent evidence, support the trial court's conclusion of law that "[s]ubjecting the Thompsons to the jurisdiction of North Carolina would violate the due process clause[.]"

The trial court made the following pertinent findings of fact in its order dismissing Plaintiff's complaint against the Thompsons:

> 6. Healthmark consists of companies incorporated under the law of Florida, headquartered and operating in Florida, owned by a Florida resident, and not doing business in North Carolina.
>
> 7. Other than the purchase of certain hospital equipment in 2005, neither Healthmark nor JTMT, LLP[,] conducted business in, advertised in, solicited for business in, or shipped goods into North Carolina.
>
> 8. Miller contacted Mr. Thompson while Mr. Thompson was in Florida, about buying Healthmark, the partnership assets of JTMT, LLP, the Hospital Annex Building and the land.
>
> 9. Miller's Complaint does not allege that the Thompsons reached into North Carolina and solicited him as a buyer; instead, "Miller learned that the Thompsons were interested in selling certain businesses."
>
> 10. Aside from the possible refund of $310,000 of the Deposit to Miller in North Carolina or Kentucky, the Thompsons were to perform the First Agreement entirely in Florida.
>
> 11. Neither James nor Mary Thompson had ever physically been to North Carolina to discuss any of the matters alleged in the Complaint.
>
> 12. The attorney for the Thompsons who received the Deposit is located in Florida and is licensed in Florida.
>
> 13. The First Agreement was signed and notarized in Florida.

14. On April 7, 2008, almost two years after the First Agreement was signed, and over one year after the Thompsons notified Miller that the First Agreement had expired, a Second Agreement was made between the Thompsons and a North Carolina corporation, Doctors Hospital of DeFuniak Springs, Inc. ("Doctors Hospital"), which is not a party to this lawsuit. Miller was a Vice President and director of Doctors Hospital. The Second Agreement involved the sale of the same entities and land as in the First Agreement. Miller signed the Second Agreement as Vice President of Doctors Hospital.

15. On or about April 15, 2008, a Third Agreement was signed between the Thompsons and Doctors Hospital, again involving the sale of the same entities and land as in the First Agreement and Second Agreement. Miller signed the Third Agreement and had it notarized in Surry County, North Carolina.

16. The Thompsons and other representatives of Healthmark directed email, fax and telephone communications to Miller in North Carolina in both 2006 and 2008 as set forth in the two Affidavits submitted by Miller in opposition to the Thompsons' Motion to Dismiss. The first Affidavit submitted by Mr. Miller is very specific about the dates of emails, faxes and telephone communications to him and contains supporting exhibits. Paragraphs 9-21 of the first Affidavit refer to agreements, faxes, emails and phone calls which took place in 2008. Similarly, exhibits 5-19 to the first Miller Affidavit are agreements, faxes, emails and references to telephone calls which took place in 2008. Paragraph 3 of the Second Affidavit of Mr. Miller references "approximately 25 emails and faxes" and "approximately 40 telephone calls" but does not indicate when the emails and faxes were sent or when the telephone calls were placed nor does this Second Affidavit contain copies of any of the emails or faxes.

Based on the foregoing findings of fact, the trial court made the following conclusions of law:

7. Miller and the Thompsons agree that this Court does not have general jurisdiction over the Thompsons. In fact, Miller's counsel stated in open Court that it was his contention that if this Court has jurisdiction over the Thompsons, it is specific jurisdiction.

8. Specific jurisdiction exists if the defendants have purposely directed their activities toward a resident of the forum and the

cause of action relates to those activities. This inquiry focuses on whether the defendants purposefully availed themselves of the privilege of conducting activities in [this] state, thereby invoking the benefits and protections of the forum state's law. See Wyatt v. Walt Disney World, Co., 151 N.C. App. 158, 165, 565 S.E.2d 705, 710 (2002).

. . .

11. The Thompsons did not purposely direct their activities toward a resident of this state because they did not personally avail themselves of the privilege of conducting activities in North Carolina, and thus they did not invoke the benefits and protections of North Carolina's laws.

12. Because the Thompsons live and work in Florida and the First Agreement was to be performed in Florida, it would create a burden on the Thompsons to appear in North Carolina to defend this action.

13. Miller has attempted to conflate the activities surrounding the First Agreement signed on July 17, 2006 with the Second and Third Agreements signed On April 7, 2008 and April l5, 2008, respectively. Because the Second and Third Agreements were signed almost two years after the First Agreement, and because Miller was not personally a party to the Second or Third Agreements, the Court concludes that activities surrounding the Second and Third Agreements are irrelevant for purposes of determining whether the Thompsons had sufficient minimum contacts with North Carolina such that this Court could exercise specific jurisdiction over them.

14. Subjecting the Thompsons to the jurisdiction of North Carolina would violate the due process clause of the United States Constitution because the Thompsons did not have sufficient minimum contacts with North Carolina and thus the exercise of jurisdiction would not comport with traditional notions of fair play and substantial justice.

15. Miller has failed to meet his burden of establishing that this Court has jurisdiction over the Thompsons.

Plaintiff contends, contrary to the trial court's conclusion, that the facts of this case are sufficient to establish minimum contacts such that the court had specific jurisdiction over the Thompsons. Plaintiff

specifically contends (1) the contracts between Plaintiff, Doctors Hospital, and the Thompsons are sufficient to establish minimum contacts, and (2) the Thompsons' numerous telephone calls, emails, and other communications to Plaintiff in North Carolina were sufficient to establish minimum contacts. We disagree with both contentions and address each in turn.

First, Plaintiff emphasizes that the Thompsons entered into three contracts with either Plaintiff, a North Carolina resident, or Doctors Hospital, a North Carolina corporation. Plaintiff argues that *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 348 S.E.2d 782 (1986), stands for the proposition that the contracts alone are a sufficient basis for personal jurisdiction. We find this argument unconvincing.

As an initial matter, we believe the trial court was correct in concluding that the Second Agreement and the Third Agreement are "irrelevant for purposes of determining whether the Thompsons had sufficient minimum contacts with North Carolina such that this Court could exercise specific jurisdiction over them." "[F]or the purposes of asserting specific jurisdiction, [o]ur focus should . . . be upon the relationship among the defendant, this State, and the cause of action." *Skinner*, 361 N.C. at 123, 638 S.E.2d at 210. The cause of action against the Thompsons in this case is for the recovery of the refundable $310,000.00 portion of the deposit pursuant to the First Agreement. The Second Agreement and the Third Agreement between the Thompsons and Doctors Hospital are not mentioned in Plaintiff's complaint. Morever, Doctors Hospital was not a party to the First Agreement or this action. We conclude the trial court did not err by concluding that the Second and Third Agreements are outside the scope of "the relationship among the defendant, this State, and the cause of action." *Id.*

We must now determine whether the First Agreement was sufficient to establish minimum contacts.

> In determining whether a single contract may serve as a sufficient basis for the exercise of *in personam* jurisdiction, it is essential that there be some act by which defendant purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws. . . . For only then will the non-resident have acted in such a way such that he can reasonably anticipate being haled into court there. . . . Otherwise, exercise of *in personam* jurisdiction over a

> nonresident would violate standards of fair-play and substantial justice.

Charter Med., Ltd. v. Zigmed, Inc., 173 N.C. App. 213, 216, 617 S.E.2d 352, 355, *appeal dismissed*, 360 N.C. 61, 623 S.E.2d 580 (2005) (quotation omitted). "[T]he mere act of entering a contract with a forum resident does not provide the necessary contacts when all elements of the defendant's performance are to occur outside the forum." *Id.* at 217, 617 S.E.2d at 355 (quotation omitted). "[I]n cases of contract disputes, the touchstone in ascertaining the strength of the connection between the cause of action and the defendant's contacts is whether the cause of action arises out of attempts by the defendant to benefit from the laws of the forum state by entering the market in the forum state." *Id.* at 217, 617 S.E.2d at 356 (quotation omitted).

Tom Togs states that "[a]lthough a contractual relationship between a North Carolina resident and an out-of-state party alone does not *automatically* establish the necessary minimum contacts with this State, nevertheless, a single contract may be a sufficient basis for the exercise of *in personam* jurisdiction if it has a substantial connection with this State." *Tom Togs*, 318 N.C. at 367, 348 S.E.2d 782 at 786. (emphasis in original). The Court in *Tom Togs* explained:

> [T]he defendant made an offer to plaintiff whom defendant knew to be located in North Carolina. Plaintiff accepted the offer in North Carolina. The contract was therefore made in North Carolina, as we discussed earlier. The contract was for specially manufactured goods, shirts in this case, for which plaintiff was to be paid over $44,000. Defendant was told that the shirts would be cut in North Carolina, and defendant also agreed to send its personal labels to plaintiff in North Carolina for plaintiff to attach to the shirts. Defendant was thus aware that the contract was going to be substantially performed in this State. The shirts were in fact manufactured in and shipped from this State. After defendant contacted the plaintiff to complain about the shirts, defendant then returned them to this State. We therefore conclude that the contract between defendant and plaintiff had a "substantial connection" with this State.

Id. at 367, 348 S.E.2d at 786-87.

In *Tom Togs*, the facts establishing a substantial connection between the defendant and the State of North Carolina contrast starkly with the facts of the present case. Here, the record shows that Plaintiff, not the Thompsons, initiated the offer by contacting the

Thompsons in Florida. According to the complaint, Plaintiff "learned" that the Thompsons were interested in selling certain businesses, and Plaintiff "became interested in the possibility of purchasing Healthmark." Plaintiff's purchase from the Thompsons—primarily, the purchase of Healthmark—consisted of companies incorporated under the law of Florida, headquartered and operating in Florida, and not doing business in North Carolina. The purchase agreement was signed and notarized in Florida. With one exception—the purchase of certain hospital equipment in 2005—neither Healthmark nor JTMT, LLP, conducted business in, advertised in, solicited for business in, or shipped goods into North Carolina. With the exception of the possible refund of $310,000 of the deposit to Plaintiff in North Carolina or Kentucky, the Thompsons were to perform the First Agreement entirely in Florida. Moreover, the Thompsons had never physically been to North Carolina to discuss any of the matters alleged in the complaint. Based on the foregoing, we neither believe that the Thompsons purposefully availed themselves of the privilege of conducting activities within North Carolina, *Charter Med., Ltd.*, 173 N.C. App. at 216, 617 S.E.2d at 355, nor that the Thompsons attempted to benefit from the laws of North Carolina by entering the market in this State, *Id.* at 217, 617 S.E.2d at 356. Therefore, we conclude the trial court's findings of fact with regard to the First Agreement between Plaintiff and the Thompsons supported the trial court's conclusion that the First Agreement was insufficient to establish specific jurisdiction. *See CFA Medical, Inc. v. Burkhalter*, 95 N.C. App. 391, 396, 383 S.E.2d 214, 217 (1989) (holding, "[w]here the record is clear that the contract was entered into outside North Carolina, where there is no provision in the contract requiring the defendant to perform services within North Carolina, where the defendant has performed all services under the contract outside North Carolina, where for the life of the contract the defendant has not been in the state for any purpose and, most importantly, where the defendant has not originated contact with any North Carolina market or industry, minimum contacts cannot be found[;] [t]he act of entering a contract with a forum resident does not provide the necessary contacts when the defendant's performance is to occur exclusively outside the forum[;] [f]urthermore, the mere mailing of a payment from outside the state is not sufficient to sustain *in personam* jurisdiction in the forum state") (internal citations omitted).

We next address Plaintiff's contention that the Thompsons' numerous telephone calls, emails, and other communications to Plaintiff in North Carolina were sufficient to establish minimum con-

tacts. Plaintiff argues that *Brown v. Ellis*, 363 N.C. 360, 678 S.E.2d 222 (2009), stands for the proposition that "telephone calls and emails to North Carolina [are] sufficient for personal jurisdiction." We are not persuaded by this argument.

In *Brown*, the North Carolina Supreme Court concluded that the "plaintiff alleged sufficient facts in his complaint to support the trial court's determination that personal jurisdiction over [the] defendant exists under North Carolina's long-arm statute."[4] *Id.* at 361, 678 S.E.2d at 222. The plaintiff in *Brown* alleged causes of action against the defendant for alienation of affection and criminal conversation. *Id.* at 361, 678 S.E.2d at 222. The plaintiff further alleged that he resided in Guilford County, North Carolina, with his wife and daughter, and that defendant resided in Orange County, California. The plaintiff in *Brown* also alleged the following:

> [The] plaintiff's wife and defendant were both employed by the same parent company and worked together on numerous occasions. Plaintiff alleged defendant willfully alienated the affections of plaintiff's wife by, among other actions, "initiating frequent and inappropriate, and unnecessary telephone and e-mail conversations with [plaintiff's wife] on an almost daily basis." The telephone conversations between defendant and plaintiff's wife "often occurred in the presence of plaintiff and his minor child" and "involved discussions of defendant's sexual and romantic relationship with plaintiff's spouse." Plaintiff alleged that "through numerous telephone calls and e-mails to plaintiff's spouse, [defendant] has arranged to meet, and has met with plaintiff's spouse on numerous occasions outside the State of North Carolina, under the pretense of business-related travel." The complaint further alleged that plaintiff's wife and defendant committed adultery during these business trips, which further alienated and destroyed the marital relationship between plaintiff and his wife. In support of his complaint, plaintiff submitted an affidavit alleging that "the majority of defendant's conduct which constitutes an alienation of affections occurred within the jurisdiction of North Carolina" and that "[e]vidence as to the frequent electronic and telephonic contact between defendant and plaintiff's

4. On remand from our Supreme Court, this Court further concluded that the "plaintiff has alleged sufficient facts to satisfy minimum contacts[,]" and the "defendant's rights to due process in regard to personal jurisdiction have not been violated." *Brown v. Ellis*, __ N.C. App. __, __, 696 S.E.2d 813, 819 (2010), *disc. review denied*, 365 N.C. 209, 709 S.E.2d 928 (2011).

> spouse can be established through records and witnesses located in the State of North Carolina."

Id. at 361-62, 678 S.E.2d at 222-23. Our Supreme Court concluded the plaintiff's complaint alleged sufficient facts to authorize the exercise of personal jurisdiction over the defendant pursuant to N.C. Gen. Stat. § 1-75.4(4)(a). *Id.* at 364, 678 S.E.2d at 224.

In this case, Defendant cites *Brown* for the proposition that "[p]ersonal jurisdiction may be based on placing telephone calls, and sending emails to a North Carolina resident." This, we believe, is not the holding of *Brown*. The Court in *Brown* emphasized that the phone calls and emails from the defendant to the plaintiff's wife in North Carolina were "almost daily[.]" By means of the phone calls and emails, the defendant was able to arrange meetings with the plaintiff's wife, including meetings out-of-state "under the pretense of business-related travel." *Brown*, 363 N.C. at 362, 678 S.E.2d at 223. This was especially pertinent to the plaintiff's cause of action for alienation of affections because the "plaintiff's wife and [the] defendant committed adultery during these business trips[.]" *Id.* Moreover, the plaintiff in *Brown* submitted an affidavit alleging that "the majority of [the] defendant's conduct which constitutes an alienation of affections occurred within the jurisdiction of North Carolina" and that "[e]vidence as to the frequent electronic and telephonic contact between defendant and plaintiff's spouse can be established through records and witnesses located in the State of North Carolina." *Id.* The evidence of numerous phone calls and communications in *Brown* was important because the defendant made these contacts in order to engage in conduct constituting an alienation of affection, including meetings and out-of-town travel with the plaintiff's spouse. The foregoing were sufficient "act[s] by which defendant purposefully availed [him]self of the privilege of conducting activities within the forum State[.]" *Charter Med., Ltd.*, 173 N.C. App. at 216, 617 S.E.2d at 355.

In this case, Plaintiff places emphasis on the fact that in both the present case and in *Brown* there were numerous phone calls from the defendants to North Carolina. Plaintiff states that the Thompsons and their agents made more than 100 telephone calls to Plaintiff in North Carolina and that approximately 40 telephone calls and 25 emails were related to the First Agreement. However, phone calls, like contracts, do not *automatically* establish the necessary minimum contacts with this State for the establishment of personal jurisdiction. We

reiterate that "there be some act by which defendant purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws. . . . For only then will the non-resident have acted in such a way such that he can reasonably anticipate being haled into court there[.]" *Charter Med., Ltd.*, 173 N.C. App. at 216, 617 S.E.2d at 355; *see also Buck v. Heavner*, 93 N.C. App. 142, 145, 377 S.E.2d 75, 77-78 (1989) (explaining that "[i]n cases involving specific jurisdiction, the focus of the minimum contacts inquiry is on the relationship among the defend-ant, the forum state, and the litigation[;] [t]he resolution of the inquiry necessarily turns on the facts of each case, . . . but it is essential that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of the forum state's laws") (internal citations omitted). In this case, Plaintiff has not demonstrated how the correspondences from the Thompsons to Plaintiff in North Carolina constituted a purposeful availment by the Thompsons "of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws. . . . [such that the Thompsons] can reasonably anticipate being haled into court there[.]" *Charter Med., Ltd.*, 173 N.C. App. at 216, 617 S.E.2d at 355. Moreover, although Plaintiff generally states that "all" of the phone calls and emails were "related to this lawsuit[,]" Plaintiff does not provide any elaboration on how the correspondences related specifically to Plaintiff's only claim against the Thompsons, which sought recovery of the $310,000.00 refundable portion of the deposit pursuant to the First Agreement. *Compare*, *Brown*, 363 N.C. 360, 678 S.E.2d 222 (holding jurisdiction in North Carolina was proper on the plaintiff's claim of alienation of affection when the defendant corresponded with the plaintiff's wife "almost daily" and planned out-of-state trips with the plaintiff's wife during which time the plaintiff's wife and the defendant committed adultery). Based on the foregoing, we conclude that, on the facts of this particular case, the correspondence by the Thompsons with Plaintiff in North Carolina was insufficient to establish minimum contacts.

For the foregoing reasons, we conclude the trial court did not err by entering the 15 September 2011 order allowing the Thompson's Rule 12(b)(2) motion to dismiss Plaintiff's claims against the Thompsons for lack of personal jurisdiction. The Thompsons did not have sufficient minimum contacts with North Carolina, and thus the

exercise of jurisdiction would not have comported with traditional notions of fair play and substantial justice.

AFFIRMED.

Judges CALABRIA and ERVIN concur.

MICRO CAPITAL INVESTORS, INC., Plaintiff v. BROYHILL FURNITURE INDUSTRIES, INC., Defendant

No. COA11-982

(Filed 5 June 2012)

1. Jurisdiction—breach of contract—standing—implied stipulation—contract applied to plaintiff

Plaintiff had standing to bring a lawsuit against defendant for breach of contract where the parties apparently agreed that Section 10 of the contract applied to plaintiff and defendant rather than a third party (Whittier) and defendant, defendant appeared not to have ever raised the issue of standing and itself expressly read "Buyer" as "Plaintiff" in its summary judgment brief, and the Court of Appeals treated this as an implied stipulation between the parties to substitute plaintiff for Whittier in Section 10.

2. Contracts—breach of Contract— essential term vague—no meeting of minds

The trial court did not err in a breach of contract case by entering summary judgment in favor of defendant. Section 10 of the contract was not enforceable because, under the circumstances of this case, the term "total heating bill" was too indefinite, demonstrating that there was no meeting of the minds as to that essential term.

3. Pretrial proceedings—motion to amend denied—undue delay

The trial court did not err in a breach of contract case by denying plaintiff's motion for leave to amend its complaint to include a claim for *quantum meruit*. Plaintiff could have argued *quantum meruit* in the alternative before defendant moved for summary judgment and plaintiff's only reason for moving to amend more

than eleven months after filing its complaint and three months after amending its complaint a first time was that the motion was a response to defendant's summary judgment motion.

Appeal by plaintiff from orders entered 28 January 2011 and 1 February 2011 by Judge Edgar B. Gregory and order entered 24 January 2011 by Judge Yvonne Mims Evans in Caldwell County Superior Court. Heard in the Court of Appeals 25 January 2012.

James, McElroy & Diehl, P.A., by John Parke Davis and Preston O. Odom III, for plaintiff.

Kilpatrick Townsend & Stockton LLP, by Susan H. Boyles and Dustin T. Greene, for defendant.

ELMORE, Judge.

Micro Capital Investors, Inc. (plaintiff), appeals from an order entering summary judgment in favor of Broyhill Furniture Industries, Inc. (defendant), and an order denying plaintiff's motion for leave to amend its complaint. After careful consideration, we affirm the orders of the trial court.

I. Background

This case revolves around a furniture manufacturing plant and warehouse in Lenoir. The plant, known as the Harper Plant, occupies approximately 333,677 square feet. The warehouse, known as the Harper Warehouse, shares a wall with the Harper Plant but is much smaller, occupying approximately 80,000 square feet. In addition to a wall, the Plant and Warehouse share a heating system, which is at the center of this dispute. Two wood-burning boilers generated heat for both the Plant and the Warehouse using wood waste, a byproduct of the furniture manufacturing process. The boilers are located in the Plant and send steam to pipes and radiators in the Warehouse. They also provide the steam energy needed to operate the equipment used to manufacture furniture in the Plant.

In 2005, The Woodsmiths Company (Woodsmiths) sought to buy the Harper Plant from defendant after a hurricane destroyed its primary manufacturing facility in Florida. However, Woodsmiths could not obtain financing for the purchase, so it arranged for another company, The Whittier Group, Inc. (Whittier), to purchase the plant and manufacturing equipment and then lease them to Woodsmiths. Whittier and defendant agreed on the terms of purchase and executed

an Agreement of Sale (Agreement) on 31 October 2005; however, the deal fell through because the parties could not agree on how to split the cost of heating the Plant and the Warehouse, which would remain occupied by defendant and was not part of the transaction.

The parties continued to negotiate, and Woodsmiths brought in a second investor, plaintiff, at Whittier's insistence. On 8 November 2005, plaintiff, defendant, and Whittier executed an Amendment to Agreement of Sale (Amendment), which amended the Agreement to provide that Whittier would purchase the Plant's machinery and equipment and plaintiff would purchase the Plant's real property. The Amendment replaced the "Purchase Price" section of the Agreement with new language, which eliminated a financing provision and required the full purchase price to be paid by check at the closing. The Amendment also included these provisions:

> 3. Continuing Effect. Except as expressly modified by the terms and provisions of this Amendment, each and every term and provision of the Agreement is unchanged and shall continue in full force and effect.
>
> * * *
>
> 6. Terms. Except as otherwise set forth herein, all capitalized terms utilized in this Amendment shall have the meaning ascribed to those same terms in the Agreement.

After the Amendment was executed and the sale completed, plaintiff entered into a lease with Woodsmiths for the use of the Plant. Under the lease, Woodsmiths agreed to pay for all utilities, including heat. Woodsmiths also entered into a lease with Whittier for the use of the Plant equipment. Although the lease agreement itself is not in the appellate record, paid invoices show that Woodsmiths paid Whittier $40,000.00 per month for use of the equipment. Defendant continued to occupy the Warehouse.

The Agreement included a number of exhibits and schedules, including Exhibit D, the post-closing schedule. According to section 2 of the Agreement, "Machinery and Equipment Sold and Purchased," Exhibit D dictated that defendant remove the machinery and equipment listed in Exhibit C "prior to Closing or after Closing according to" the post-closing schedule, which was attached and incorporated by reference. Exhibit D included the following two sections, which address the heating system:

> 9. Seller shall assist Buyer in determining the best course of action to heat the Premises over the winter. Should Buyer and Seller agree that converting one or both boilers to natural gas capable is most advantageous, Seller shall assist Buyer in retrofitting a natural gas fired burner to one or both boilers in the Premises. If another solution is selected, Seller will assist Buyer in purchasing and installing such a solution. Notwithstanding anything contained herein to the contrary, Seller shall not be obligated to pay any part of the expense incurred to purchase, install, retrofit or modify any equipment or facilities under this paragraph.
>
> 10. The Leased Warehouse does not contain its own heating system and will need to be serviced by whatever heating system is decided upon for the Premises. Buyer shall supply sufficient heat from the heating system in the Premises to adequately heat the Leased Warehouse from the date of Closing to the date Seller no longer continues to rent the Leased Warehouse. Buyer may charge Seller for one-fourth (1/4th) of the total heating bill for the Premises and the Leased Warehouse, subject to adjustment in the event either party's operations require more heat than currently anticipated. Buyer agrees to sign such further documents as Seller requires at Closing to evidence the agreement in this paragraph.

Despite the language in section 10 of Exhibit D (Section 10), defendant was not charged for heating the Warehouse until 25 February 2009, when Woodsmiths sent a letter to defendant seeking $384,342.00 to compensate Woodsmiths for ¼ of the heating expenses generated during the previous four winters (a total of $1,537,369.00). The letter, written by Michael Munoz, included the following relevant language:

> In November 2005 I purchased from Broyhill Furniture Industries Inc. the Harper plant located at 418 NW Prospect St., Lenoir, NC. As part of that purchase, my company was required to provide heat to the co-located warehouse for the duration of Broyhill's lease of that facility. I have been providing heat over the last 4 seasons per Exhibit D, Section 10. Section 10 allows me to charge Broyhill 25% of my heating costs. I have never invoiced Broyhill for these costs and I wish to do so now.

Defendant paid $50,000.00 in response to this demand and offered to pay additional funds for heat when it received proof that heat was actually supplied to the Warehouse. On 31 October 2009, Munoz sent

a second letter to defendant with an updated cost breakdown showing that defendant's share of Woodsmiths's heating expense was now $459,968.00. Defendant refused to pay because it was never provided with sufficient documentation to support Woodsmiths's contention that heat was supplied to the Warehouse or the costs associated with generating that heat.

Plaintiff then brought this lawsuit on 30 December 2009, suing defendant for breach of contract. Plaintiff's claim hinges on Section 10, which it claims requires defendant to "be responsible" for ¼ of the "total heating bill" for the Plant and Warehouse. In its complaint, plaintiff alleged that it had supplied heat to the Warehouse since November 2005 and had invoiced defendant for $474,302.00, although it did not include that invoice with the complaint or within the appellate record.

On 29 November 2010, defendant moved for summary judgment, arguing that the agreement was unenforceable because the term "total heating bill" was ambiguous and the parties had never reached an agreement about what elements would properly comprise the "total heating bill." A hearing before Judge Edgar B. Gregory was set for 9:00 a.m. on Monday, 13 December 2010, to hear defendant's motion. At 4:31 p.m. on Friday, 10 December 2010, plaintiff filed a motion for leave to amend its complaint pursuant to Rule 15 to include a claim for *quantum meruit*. On 17 December 2010, following the summary judgment hearing, Judge Gregory sent an email to the parties stating that he had drafted an order granting defendant's order of summary judgment but that he would wait to sign the order until after a ruling on the pending motion to amend. Judge Yvonne Mims Evans heard the motion to amend on 18 January 2011 and entered an order denying it on 24 January 2011. Judge Gregory then entered the summary judgment order on 28 January 2004, followed by an amendment correcting the names of the attorneys, entered on 1 February 2011.

Plaintiff appeals from both the summary judgment order and the order denying its motion for leave to amend. We affirm both orders.

II. Arguments

A. Standing

[1] Though not addressed in the parties' briefs, this Court first addresses the issue of standing. The express language of the disputed language in Section 10, which recites the obligations of "Buyer" and "Seller," states that *Whittier* has the right to collect ¼ of the "total

heating bill" from defendant, *not plaintiff* or Woodsmiths. The Agreement defines "Buyer" as Whittier; it defines plaintiff as "Micro Capital" and uses "Buyer" and "Micro Capital" throughout the document and on the signature blocks, supporting the conclusion that the obligations of Whittier and plaintiff under the contract were not interchangeable. In addition, Exhibit D arises under the machinery and equipment section of the Agreement, which would apply to Whittier, which purchased the machinery and equipment, rather than plaintiff, which purchased the real property. Woodsmiths was not a party to the contract at all. The record does not include any express agreement between Whittier and plaintiff transferring to plaintiff Whittier's right to collect ¼ of the "total heating bill" from defendant. Thus it is not clear to this Court why plaintiff brought this suit rather than Whittier. Nevertheless, the parties seem to have agreed that Section 10 applies to plaintiff and defendant rather than Whittier and defendant. Defendant appears not to have ever raised the issue and itself expressly read "Buyer" as "Plaintiff" in its summary judgment brief. Accordingly, we treat this as an implied stipulation between the parties to substitute plaintiff for Whittier in paragraph 10 of Exhibit D.[1] *See Accelerated Framing, Inc. v. Eagle Ridge Builders, Inc.*, _____ N.C. App. _____, _____, 701 S.E.2d 280, 283 (2010) (holding that parties can stipulate that they were both parties to a contract and thus the real parties in interest, even when one party did not sign the contract).

B. Summary Judgment

[2] We next address whether the trial court erred by granting defendant's motion for summary judgment and hold that it did not.

> The party moving for summary judgment is entitled to judgment as a matter of law only when there is no genuine issue of material fact. The party moving for summary judgment bears the burden of bringing forth a forecast of evidence which tends to establish that there is no triable issue of material fact. To overcome a motion for summary judgment, the nonmoving party must then produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a *prima facie* case at trial.

1. Confusion may have arisen because Mark Munoz is an officer of plaintiff Micro Capital, Whittier, and Woodsmiths. He is also an officer of the company that owns the Warehouse, Mark Munoz LLC. According to his deposition testimony, these companies are all independent and have no corporate relationship to one another. At times, as demonstrated by the heating invoices sent to defendant, Munoz conflated his distinct roles in these companies.

> Before summary judgment may be entered, it must be clearly established by the record before the trial court that there is a lack of any triable issue of fact. In making this determination, the evidence forecast by the party against whom summary judgment is contemplated is to be indulgently regarded, while that of the party to benefit from summary judgment must be carefully scrutinized. Further, any doubt as to the existence of an issue of triable fact must be resolved in favor of the party against whom summary judgment is contemplated.

Creech v. Melnik, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (quotations and citations omitted; alteration in original). We review an order of summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

Plaintiff argues that defendant's obligation under Section 10 is enforceable, while defendant counters that Section 10 is not enforceable because the term "total heating bill" is too indefinite, demonstrating that there was no meeting of the minds as to that essential term. We agree with defendant.

> There is no contract unless the parties assent to the same thing in the same sense. A contract is the agreement of two minds—the coming together of two minds on a thing done or to be done. A contract, express or implied, executed or executory, results from the concurrence of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree.

Williams v. Jones, 322 N.C. 42, 49, 366 S.E.2d 433, 438 (1988) (quotations and citation omitted). "[I]n order to constitute a valid and enforceable contract there must be an agreement of the parties upon the essential terms of the contract, definite within themselves or capable of being made definite." *Brawley v. Brawley*, 87 N.C. App. 545, 549, 361 S.E.2d 759, 762 (1987) (citation omitted). "[A] contract will not be held unenforceable because of uncertainty if the intent of the parties can be determined from the language used, construed with reference to the circumstances surrounding the making of the contract, and its terms reduced to a reasonable certainty." *Id.* (citations omitted).

Under other circumstances, the term "total heating bill" might be definite, but under these circumstances, it was not. Because of the unusual heating system—wood-burning boilers that run on wood waste, a byproduct of the manufacturing process that takes place

within the Plant, which also power the manufacturing equipment—there was no "heating bill" from a third party like the power company. Instead, Woodsmiths generated invoices that were broken down into the following components: direct consumable expense, utilities, boiler dust machinery rents/leases, labor, and fire and boiler insurance. A former Broyhill employee stated that he was surprised by these charges and, in his view, "the only charges that should be on a heating bill for the property would be fuel, boiler operator wages, and a nominal fee for utilities." It is clear from the record that, before the Amendment was executed, the parties discussed at length how the properties were heated and whether plaintiff should install a different heating system, given the general decline in furniture manufacturing and thus an associated decline in the availability of wood waste. However, from both Munoz's testimony and the affidavits submitted by defendant's employees, the parties never agreed what components would constitute a "total heating bill" and, thus, the term was too indefinite to be enforceable. Accordingly, we affirm the order of the superior court granting defendant's motion for summary judgment.

C. Motion to Amend

[3] Plaintiff next argues that the trial court abused its discretion by denying its motion to amend its complaint. We disagree.

Motions to amend are governed by North Carolina Civil Procedure Rule 15(a), which provides, in relevant part, that "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (2011).

> A ruling on a motion for leave to amend is addressed to the sound discretion of the trial judge and the denial of such a motion is not reviewable absent a clear showing of abuse of discretion.
>
> A trial court abuses its discretion only where no reason for the ruling is apparent from the record. Our Courts have held that reasons justifying denial of leave to amend are undue delay, bad faith, undue prejudice, and futility of amendment.

Rabon v. Hopkins, ____ N.C. App. ____, ____, 703 S.E.2d 181, 184 (2010) (quotations and citations omitted), *disc. review denied*, 365 N.C. 195, 710 S.E.2d 22 (2011).

Here, as in *Rabon*, it appears that the trial court based its decision on undue delay.

> This Court has held that a trial court may appropriately deny a motion for leave to amend on the basis of undue delay where a party seeks to amend its pleading after a significant period of time has passed since filing the pleading and where the record or party offers no explanation for the delay. *See Media Network, Inc. v. Long Haymes Carr, Inc.*, 197 N.C. App. 433, 447-48, 197 N.C. App. 433, 678 S.E.2d 671, 681 (2009) (affirming denial of leave to amend where defendant filed motion three months after filing answer and offered no credible explanation for the delay); *Walker v. Sloan*, 137 N.C. App. 387, 402, 529 S.E.2d 236, 247 (2000) (affirming denial where there was nothing in the record to explain why plaintiff waited until three months after defendant filed answer); *Caldwell's Well Drilling, Inc. v. Moore*, 79 N.C. App. 730, 731, 340 S.E.2d 518, 519 (1986) (affirming denial of leave to amend where record did not indicate why plaintiff waited three months from filing of answer before moving to amend complaint).

Id. at _____, 703 S.E.2d at 184. In *Rabon*, we affirmed a trial court's denial of a motion to amend when the plaintiff moved to amend the complaint nine months after filing it without providing a sufficient explanation for the delay. *Id.* at _____, 703 S.E.2d at 185.

Here, plaintiff moved to amend more than eleven months after filing its complaint and three months after amending its complaint a first time to increase the damages sought. The substance of the second amendment was to add a claim for *quantum meruit*, a claim that could have been argued in the alternative in the original complaint or in the first amended complaint based on the information known to plaintiff at the time. At the motion hearing, the only explanation offered by plaintiff for the delay was that the motion was a response to defendant's summary judgment motion; plaintiff wanted to present an alternative theory of recovery "in case summary judgment was granted in favor of the defendant." However, plaintiff could have argued *quantum meruit* in the alternative before defendant moved for summary judgment, and plaintiff did not offer any explanation for its failure to do so. Accordingly, we cannot conclude that the trial court abused its discretion by denying the motion.

Moreover, we note that plaintiff filed its motion to amend at 4:31 p.m. on the Friday before the summary judgment hearing, which was scheduled for 9:00 a.m. the following Monday. This Court has previously affirmed an order denying a motion to amend that was brought the same day that a summary judgment ruling was delivered "in order

to avoid a possible adverse summary judgment ruling," explaining that the timing supported a finding of undue delay. *Williams v. Craft Dev., LLC*, 199 N.C. App. 500, 510, 682 S.E.2d 719, 726 (2009) (internal quotation marks omitted). We also held that filing the motion to amend in order to avoid an adverse summary judgment ruling also supported findings of "bad faith" and "undue prejudice." *Id.* Although plaintiff filed its motion on the eve of the summary judgment hearing rather than on the day that the ruling came down, the timing still supports our conclusion that the trial court did not abuse its discretion by denying plaintiff's motion.

III. Conclusion

Accordingly, we affirm both the summary judgment orders and the order denying plaintiff's motion to amend.

Affirmed.

Judge BRYANT concurs.

Judge ERVIN concurs in part and dissents in part per separate opinion.

ERVIN, Judge, concurring in part and dissenting in part.

Although I concur in the Court's treatment of the issue of standing and the Court's decision to affirm Judge Evans' denial of Plaintiff's motion to amend its complaint, I am unable to concur in its decision to affirm Judge Gregory's decision to grant summary judgment in favor of Plaintiff. As a result, I concur in the Court's decision in part and dissent from that decision in part.

As the Court notes, the extent to which Judge Gregory's orders granting summary judgment in favor of Defendant should or should not be affirmed hinges upon whether the contractual provision requiring Defendant to pay for heat supplied to the warehouse in the amount of "one-fourth (1/4th) of the total heating bill for the Premises and the Leased Warehouse, subject to adjustment in the event either party's operations require more heat than currently anticipated," is so vague as to be unenforceable. Although well-established North Carolina law clearly provides that "the terms of a contract must be sufficiently definite that a court can enforce them," *Wein II, LLC v. Porter*, 198 N.C. App. 472, 480, 683 S.E.2d 707, 713 (2009) (citation omitted), and that, since "price or compensation is an essential ingre-

dient of every contract," the price to be paid for a service provided pursuant to a contract "must be definite and certain or capable of being ascertained from the contract itself," *Howell v. Allen & Co.*, 8 N.C. App. 287, 289, 174 S.E.2d 55, 56 (1970), "[w]here the parties have attempted to put in writing an agreement fixing the rights and duties owing to each other, courts will not deny relief because of vagueness and uncertainty in the language used, if the intent of the parties can be ascertained." *Goodyear v. Goodyear*, 257 N.C. 374, 379, 126 S.E.2d 113, 117 (1962). For that reason, since "[t]he law . . . does not favor the destruction of contracts on account of uncertainty," "courts should attempt to determine the intent of the parties from the language used, construed with reference to the circumstances surrounding the making of the contract." *Welsh v. Northern Telecom, Inc.*, 85 N.C. App. 281, 290, 354 S.E2.d 746, 751 (citing *Fisher v. Lumber Co.*, 183 N.C. 486, 490, 111 S.E. 857, 860 (1922), and *Chew v. Leonard*, 228 N.C. 181, 185, 44 S.E.2d 869, 872 (1947)), *disc. review denied*, 320 N.C. 638, 360 S.E.2d 107 (1987).

As I read the relevant contractual language, the parties clearly agreed that Plaintiff was obligated to provide adequate heat to the warehouse from the facilities that provided heat to the entire premises and that Defendant would pay one quarter of the "total heating bill" in return for the provision of that service. I also conclude that the expression "total heating bill," when read in light of the fact that there was no third party supply of heat to the premises, clearly makes reference to the cost incurred in providing the needed heat. At an absolute minimum, this understanding of the parties' contract is a reasonable construction of the relevant contractual language which the jury should be allowed to consider in the course of deciding this case. *Williams v. Jones*, 322 NC. 42, 52, 366 S.E.2d 433, 440 (1988) (holding, where "the plaintiff presented evidence which demonstrates that the terms alleged by the defendants to be indefinite were in fact sufficiently well delineated to all parties," the entry of judgment notwithstanding the verdict in favor of the defendants was inappropriate despite the fact that the defendants contested the plaintiff's evidence concerning the manner in which the relevant contractual language should be construed). Unlike the situation in *Connor v. Harless*, 176 N.C. App. 402, 406, 626 S.E.2d 755, 758 (2006), *disc. review denied*, 361 N.C. 219, 642 S.E.2d 247 (2007), the agreement at issue here provides for a single standard for use in determining the price to be charged for the provision of heat rather than contemplating the use of multiple appraisals without specifying any means for reconciling the inevitable differences between the opinions devel-

oped by multiple appraisers. In addition, unlike the situation in *Chappell v. Roth*, 353 N.C. 690, 693, 548 S.E.2d 499, 500 (2001) (holding that a settlement agreement in which the parties failed to agree upon the terms of a release was unenforceable), and *Rosen v. Rosen*, 105 N.C. App. 326, 328, 413 S.E.2d 6, 8 (1992) (holding that a parent's agreement to "assist" his children in obtaining a college education was unenforceable given the absence of any standard by which an appropriate level of assistance could be determined), the parties did actually reach a complete agreement which specified the nature of the service to be provided and a single standard for use in determining the price to be paid for that service. Thus, the agreement between the parties can reasonably be construed to mean that the price to be paid for the heat supplied to the warehouse would be one-fourth of the cost incurred in connection with the provision of heat to the entire premises. As a result, the ultimate question before the Court is whether a provision requiring Defendant to pay one-fourth of the cost of providing heat to the premises is so vague as to be unenforceable. I do not believe that it is.

The "cost" of providing a particular service is, in essence, "an amount that has to be paid or spent to buy or obtain something." *New Oxford English Dictionary* 392 (3d ed. 2010). For that reason, I believe that the relevant contractual language requires Defendant to pay one-fourth of the amount that Plaintiff had to spend in order to provide heat to the premises in return for the provision of heat to the warehouse. Although the exact cost of heating the premises is not set out in the agreement, I believe that the cost of providing that service can, in fact, be calculated, with the cost incurred in heating the premises being nothing more than a question of fact that should be resolved by the trier of fact following the presentation of the parties' evidence. As a result, I do not believe that the price term at issue here is so vague as to be unenforceable and disagree with the Court's conclusion to the contrary.[1]

The other arguments advanced in support of the result reached by the Court do not strike me as persuasive. The fact that the parties may not have discussed the specific components of the required cost determination in detail at the time that they executed the contract and now disagree over how the relevant cost should be calculated does not, in my view, suffice to show that the price term at issue here

1. The problems inherent in the result reached by the Court should be apparent when one considers how frequently cost-plus contracts that lack an exact formula for making the necessary cost calculation are encountered in the North Carolina economy.

is so vague as to be unenforceable given that the applicable standard is a relatively clear one and given that the relevant amount can be calculated using the applicable standard. Similarly, the fact that the parties appear to have contemplated a possible change in the manner in which the premises were to be heated does not mean that there was no "total heating bill" associated with the operation of whatever facilities were actually used to provide needed heat. Furthermore, the fact that "Buyer agrees to sign such further documents as Seller requires at Closing to evidence the agreement in this paragraph" does not establish that the price term is unenforceable given that the standard set out in the contract is, in my view, sufficiently clear and given that there is no evidence that Defendant ever requested that additional documents be executed at or before the time that the underlying transaction closed. Although Defendant contends that the relevant contractual language is nothing more than an unenforceable agreement to agree, *Northington v. Michelotti*, 121 N.C. App. 180, 184, 464 S.E.2d 711, 714 (1995) (stating that "a so-called 'contract to make a contract' is not a contract at all"), the language in question clearly requires Plaintiff to provide adequate heat to Defendant and requires Defendant to pay one quarter of the cost of heating the premises in return for the provision of that service. The fact that the parties agreed to make an "adjustment in the event either party's operations require more heat than currently anticipated" does not strike me as relevant given the absence of any indication that either party ever requested that an adjustment of the type contemplated by this language be made. In addition, the fact that heat was provided to the premises using a system that served a number of different purposes, while perhaps adding an additional layer of complexity to the cost calculation, does not suffice to render the relevant price term unenforceable given the finder of fact's ability to make appropriate cost allocations. Finally, the fact that Plaintiff's calculation of the cost of providing heat to the premises has "evolved" and includes, at least in my opinion, certain costs that are not encompassed within the price term set out in the contract does not render the price term unenforceable given the parties' ability to present evidence concerning what is and is not a proper component of the cost of providing heat and the ability of the trier of fact to determine what is and is not a proper component of the cost of heating the premises. Thus, none of the arguments advanced in support of the result reached by the Court strike me as persuasive.

Thus, I believe that the record evidence, when taken in the light most favorable to Plaintiff, would support a determination that the relevant contractual language should be construed so as to require Defendant to pay one-fourth of the cost of heating the premises in return for the provision of heat to the warehouse and that the calculation of this figure is a question of fact to be determined by the trier of fact. For that reason, I am unable to join the Court's conclusion that the price term associated with the heating service that Plaintiff was required to provide to Defendant is so vague as to be unenforceable as a matter of law. As a result, I respectfully dissent from the Court's decision to affirm Judge Gregory's decision to grant summary judgment in favor of Defendant and would, instead, reverse Judge Gregory's decision to grant summary judgment in favor of Defendant and remand this case to the Caldwell County Superior Court for further proceedings. I do, however, concur in the remainder of the Court's opinion.

ROBERT L. SANFORD, PLAINTIFF v. ROGER WILLIAMS, SR., AND WIFE KESIA H. WILLIAMS AND THE CITY OF HICKORY, A NORTH CAROLINA MUNICIPAL CORPORATION, DEFENDANTS

No. COA11-1066

(Filed 5 June 2012)

1. Real Property—restrictive covenants—specific performance—covenants enforceable—covenants not violated

The trial court did not err by granting summary judgment in favor of defendants on plaintiff's claim for specific performance of restrictive covenants. Although plaintiff had a right to enforce the covenants against defendants, defendants' carport was a permissible structure under the restrictive covenants and the ten-foot side setback requirement which applied to all "homes" pursuant to the covenants did not apply to the carport.

2. Jurisdiction—building permit—subject matter jurisdiction—administrative remedies not exhausted

The trial court erred in a zoning and building permit case by failing to dismiss plaintiff's request for a writ of mandamus due to a lack of subject matter jurisdiction. Plaintiff's request for a writ of mandamus specifically concerned defendants' zoning and building permits and plaintiff should have timely appealed the issuance

of those permits to the board of adjustment. Having failed to exhaust his administrative remedies, the trial court was without subject matter jurisdiction to rule on plaintiff's request for a writ of mandamus.

Appeal by plaintiff and defendants from order entered 5 April 2011 by Judge Robert C. Ervin in Catawba County Superior Court. Heard in the Court of Appeals 7 February 2012.

Wesley E. Starnes, P.C., by Wesley E. Starnes, for the plaintiff.

Patrick Harper & Dixon, LLP, by Michael J. Barnett, for Defendants Roger Williams, Sr. and Kesia H. Williams.

Gorham, Crone, Green & Steele, LLP, by John W. Crone, III, for Defendant the City of Hickory.

THIGPEN, Judge.

Robert Sanford ("Mr. Sanford"), Roger Williams, Sr., and his wife, Kesia H. Williams ("Mr. and Mrs. Williams"), and the City of Hickory appeal from a summary judgment order. We must determine whether the trial court erred by (I) granting summary judgment to Mr. and Mrs. Williams on Mr. Sanford's claim for specific performance of certain restrictive covenants; (II) granting Mr. Sanford's motion for summary judgment on his request for a writ of mandamus against the City of Hickory; and (III) ordering the City of Hickory to "make a decision as to the zoning matters in this case within thirty (30) days[.]" Because there is no genuine issue of material fact as to whether the carport violates the restrictive covenants, we affirm the portion of the trial court's order granting summary judgment to Mr. and Mrs. Williams. Furthermore, because the trial court was without subject matter jurisdiction to rule on Mr. Sanford's request for a writ of mandamus against the City of Hickory, we vacate the portions of the order granting Mr. Sanford's motion for summary judgment on his request for a writ of mandamus and ordering the City of Hickory to make a decision within thirty days.

I. Factual and Procedural History

Mr. Sanford and Mr. and Mrs. Williams are neighbors who own property in the Huntington Forest Subdivision in Hickory, North Carolina. Mr. Sanford and Mr. and Mrs. Williams purchased their properties subject to certain restrictive covenants executed on 17 October 1969 by A B C & M, Inc., the developer of the subdivision.

In late May or early June of 2008, Roger Williams entered into a contract to construct a detached carport at his residence. On 3 June 2008, the City of Hickory issued a zoning permit and Catawba County issued a building permit for the construction of the carport. Both permits included a side setback requirement of five feet.

In August 2008, the City of Hickory Planning and Development Department ("Planning and Development Department") received a request from Mr. Sanford's daughter to investigate the carport. On 7 August 2008, the Planning and Development Department issued a verbal stop work order in connection with its investigation of the carport. However, because the carport was essentially complete at that time, the Catawba County building inspector proceeded with his final inspection. On 18 August 2008, the carport passed final inspection and a certificate of compliance was issued by the Catawba County building inspector.

On 10 October 2008, the City of Hickory Zoning Enforcement Division sent a letter to Mr. and Mrs. Williams regarding a potential zoning violation. The letter stated that "[i]t is the determination of the City that a zoning violation appears to exist regarding an encroachment of the newly constructed carport on your property into the setback area" and "the City will stay any fines or actions for a period of 30 days" to allow Mr. and Mrs. Williams to obtain a survey of their property. Mr. Sanford obtained a survey of his property in September 2008. No further action was taken by the City of Hickory.

On 16 January 2009, Mr. Sanford filed a complaint against Mr. and Mrs. Williams seeking specific performance of certain restrictive covenants and zoning requirements and alleging a claim of trespass. The City of Hickory was later joined as a necessary party. Mr. and Mrs. Williams and the City of Hickory filed motions to dismiss for failure to state a claim and also filed answers alleging several defenses. On 10 March 2011, Mr. Sanford filed a motion for summary judgment. After a hearing on Mr. Sanford's motion, the trial court entered an order on 5 April 2011. The trial court ordered (1) summary judgment be entered against Mr. Sanford, as the moving party, and granted summary judgment to Mr. and Mrs. Williams on Mr. Sanford's claim for specific performance; (2) Mr. Sanford's motion for summary judgment be granted as to his request for a writ of mandamus against the City of Hickory; and (3) the City of Hickory to "make a decision as to the zoning matters in this case within thirty (30) days of the entry of this Order and . . . notify each party in writing of its decision."

Mr. Sanford appeals from the portion of the trial court's order granting summary judgment to Mr. and Mrs. Williams on Mr. Sanford's claim for specific performance. Mr. and Mrs. Williams and the City of Hickory appeal from the portions of the trial court's order granting Mr. Sanford's motion for summary judgment on his request for a writ of mandamus against the City of Hickory and ordering the City of Hickory to "make a decision as to the zoning matters in this case within thirty (30) days[.]"

II. Standard of Review

"The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted). Summary judgment is appropriate "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) (2011). "Summary judgment, when appropriate, may be rendered against the moving party." *Id.* "[T]he trial judge must view the presented evidence in a light most favorable to the nonmoving party and the party moving for summary judgment bears the burden of establishing the lack of any triable issue." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citations omitted). Where the trial court's order does not state the legal basis for its ruling, "if the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Wein II, LLC v. Porter*, 198 N.C. App. 472, 478, 683 S.E.2d 707, 712 (2009) (quotation omitted).

III. Mr. Sanford's Appeal

[1] Mr. Sanford contends the trial court erred by granting summary judgment to Mr. and Mrs. Williams on Mr. Sanford's claim for specific performance of the restrictive covenants. Specifically, Mr. Sanford contends that he has a right to enforce the covenants against Mr. and Mrs. Williams and that Mr. and Mrs. Williams violated the covenants.

A. Right to Enforce Covenants

Mr. Sanford first contends that he has a right to enforce the covenants against Mr. and Mrs. Williams. We agree.

Regarding the enforcement of restrictions on the use of real property in conjunction with a general plan of development, our Supreme Court has outlined the following principles:

1. Where the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, either on the theory that there is a mutuality of covenant and consideration, or on the ground that mutual negative equitable easements are created.

2. The right to enforce the restrictions in such case is not confined to immediate purchasers from the original grantor. It may be exercised by subsequent owners who acquire lots in the subdivision covered by the general plan through *mesne* conveyances from such immediate purchasers.

3. The restrictions limiting the use of land in the subdivision embraced by the general plan can be enforced against a subsequent purchaser who takes title to the land with notice of the restrictions.

4. A purchaser of land in a subdivision is chargeable in law with notice of restrictions limiting the use of the land adopted as a part of a general plan for the development or improvement of the subdivision if such restrictions are contained in any recorded deed or other instrument in his line of title, even though they do not appear in his immediate deed.

Rice v. Coholan, 205 N.C. App. 103, 112, 695 S.E.2d 484, 490-91 (quoting *Sedberry v. Parsons*, 232 N.C. 707, 710-11, 62 S.E.2d 88, 90-91 (1950)), *disc. review denied*, 364 N.C. 435, 702 S.E.2d 303 (2010).

In this case, Mr. and Mrs. Williams state in their brief that Mr. Sanford purchased his property "in 1981 from Jerry and Hortense Jordan" and that Mr. and Mrs. Williams are "successors in interest" to the developer who "purchased their property in 2004 from Temple Baptist Church of Hickory, Inc." Mr. and Mrs. Williams' brief also states that both they and Mr. Sanford "purchased their properties subject to certain restrictive covenants[.]" Mr. and Mrs. Williams do not contend they did not have notice of the restrictive covenants. Accordingly, pursuant to the principles outlined in *Rice*, as a subsequent purchaser of a lot in the subdivision, Mr. Sanford may enforce the restrictive covenants against Mr. and Mrs. Williams, who are also

subsequent purchasers who took title to the land with notice of the restrictions. *See id.*[1]

B. Summary Judgment

Mr. Sanford next contends the trial court erred by granting summary judgment to Mr. and Mrs. Williams because Mr. and Mrs. Williams violated the restrictive covenants. We disagree.

i. Judicial Construction of Restrictive Covenants

Restrictive covenants "are not favored by the law and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land." *J. T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, 70, 274 S.E.2d 174, 179 (1981) (internal citation omitted). However, "clearly and narrowly drawn restrictive covenants . . . are legitimate tools which may be utilized by developers and other interested parties to guide the subsequent usage of property." *Id.* at 71, 274 S.E.2d at 179. Restrictive covenants may be enforced at the summary judgment stage "unless a material issue of fact exists as to the validity of the contract, the effect of the covenant on the unimpaired enjoyment of the estate, or the existence of a provision that is contrary to the public interest." *Page v. Bald Head Ass'n*, 170 N.C. App. 151, 155, 611 S.E.2d 463, 466 (quotation and quotation marks omitted), *disc. review denied*, 359 N.C. 635, 616 S.E.2d 542 (2005).

"Sound judicial construction of restrictive covenants demands that if the intentions of the parties are to be followed, each part of the covenant must be given effect according to the natural meaning of the words, provided that the meanings of the relevant terms have not been modified by the parties to the undertaking." *J. T. Hobby & Son*, 302 N.C. at 71, 274 S.E.2d at 179 (citations omitted). "In interpreting ambiguous terms in restrictive covenants, the intentions of the parties at the time the covenants were executed ordinarily control, and evidence of the situation of the parties and the circumstances surrounding the transaction is admissible to determine intent." *Angel v. Truitt*, 108 N.C. App. 679, 681, 424 S.E.2d 660, 662 (1993) (citation and quotation marks omitted). "Intent is . . . properly discovered from

1. We note that pursuant to paragraph two of the restrictive covenants, Mr. Sanford, as an owner of real property in the subdivision, can enforce the restrictions against "the parties hereto, or any of them or their heirs, or assigns[.]" The developer is the only party to the restrictive covenants; thus, Mr. and Mrs. Williams contend Mr. Sanford cannot enforce the restrictive covenants against them because they are not "heirs" or "assigns" of the developer. We, however, find *Rice* controlling and reject this argument.

the language of the document itself, the circumstances attending the execution of the document, and the situation of the parties at the time of execution." *Id.* at 682, 424 S.E.2d at 662 (citation omitted).

ii. Carport as a Permissible Structure

Mr. Sanford first contends Mr. and Mrs. Williams' carport violates the following restriction:

> 4. All lots in said subdivision as shown on said plat shall be used for residential purposes. No buildings shall be erected, altered, placed or permitted to remain on any lot other than one detached single family dwelling not to exceed two and one-half stories in height and a private garage which may have as a part of said garage, a storage room.

Pursuant to paragraph 4, the only buildings permitted to remain on a subdivision lot are "one detached single family dwelling" and "a private garage[.]" Mr. Sanford contends the carport is not a "garage" for purposes of paragraph 4; therefore, the carport is prohibited by the restrictive covenants unless it is part of the "single family dwelling[.]" Mr. and Mrs. Williams contend the carport is a "garage", and alternatively, that it is a permissible type of auxiliary structure. We agree with Mr. and Mrs. Williams.

The restrictive covenants do not specifically define "carport" or "garage"; however, both terms are mentioned in paragraph 8 as types of auxiliary structures to the single-family residence. Paragraph 8 provides as follows:

> That no single-family residence having less than 1,400 square feet of heated floor space exclusive of garage, carport, basement, or other auxiliary structure shall be erected on the lot. Any residence having living quarters of more than one floor must contain at least 1,000 square feet of heated floor space on the principal floor and a total of not less than 1,800 square feet of heated floor space exclusive of garage, carport, basement, or other auxiliary structure.

Furthermore, we conclude the ordinary or customary meaning of "garage" in 1969, the time the restrictive covenants were executed, is sufficiently broad to include a "carport." *See Wein II*, 198 N.C. App. at 480, 683 S.E.2d at 713 ("Unless the covenants set out a specialized meaning, the language of a restrictive covenant is interpreted by using its ordinary meaning."). A dictionary with the copyright date on or about the time the restrictive covenant was executed "is an appropriate place to ascertain the then customary definitions of words and

terms." *Angel*, 108 N.C. App. at 683, 424 S.E.2d at 663 (applying a definition from the 1982 edition of The American Heritage Dictionary to determine the customary definition of the term "mobile home" as used in a restrictive covenant executed in 1981) (citation omitted). The 1967 edition of Webster's Seventh New Collegiate Dictionary defines "garage" as "a shelter . . . for automotive vehicles[.]" *Webster's Seventh New Collegiate Dictionary* 344 (1967). The same dictionary defines "carport" as "an open-sided automobile shelter usu[ally] formed by extension of a roof from the side of a building[.]" *Id.* at 128. Using these accepted definitions, and considering the language in the restrictive covenants, we conclude the developer intended for a "carport" to be a permissible type of "garage" or "shelter for automotive vehicles" under the restrictive covenants.

Additionally, although the parties dispute whether the carport is attached to Mr. and Mrs. Williams' residence, the restrictive covenants do not require that a garage be attached to the single family dwelling to be a permissible structure. Finally, we reiterate that restrictive covenants "will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land." *J. T. Hobby & Son*, 302 N.C. at 70, 274 S.E.2d at 179 (internal citation omitted). Accordingly, we conclude that Mr. and Mrs. Williams' carport is a permissible structure under the restrictive covenants.

iii. Carport as Part of the "Home"

Mr. Sanford also contends Mr. and Mrs. Williams' carport violates the following restriction:

> 9. All homes constructed shall be at least forty (40) feet from the front property line and ten (10) feet from either side property line. Side yard, rear yard and corner lot requirements shall conform to Section RA-12 Residential Zoning Ordinance of City of Hickory.

Specifically, Mr. Sanford contends the ten feet side setback requirement in paragraph 9 applies to the carport because "home" refers to the house and all adjacent structures, including the carport. Mr. and Mrs. Williams contend, however, that the term "home" in paragraph 9 refers only to the "dwelling place" and does not include the carport; therefore, the ten feet side setback requirement does not apply to the carport. We agree with Mr. and Mrs. Williams.

The restrictive covenants do not specifically define "home"; however, several paragraphs treat a "single family dwelling" or "residence" separately from a "garage" or "carport[.]" Paragraph 4 states

that the only buildings permitted on a subdivision lot are "one detached single family dwelling" and "a private garage[.]" Paragraph 8 states in part that "no single-family residence having less than 1,400 square feet of heated floor space exclusive of garage, carport, basement, or other auxiliary structure shall be erected on the lot." Moreover, paragraph 7 specifically restricts the use of outbuildings, including a garage, and states, "No trailer, basement, tent, shack, garage, or other outbuildings erected on these residential lots shall be, at any time, used as a residence, temporarily or permanently[.]"

Additionally, in looking at the ordinary meaning of the word "home," we find the 1967 edition of Webster's Seventh New Collegiate Dictionary instructive. *See Wein II*, 198 N.C. App. at 480, 683 S.E.2d at 713; *Angel*, 108 N.C. App. at 683, 424 S.E.2d at 663. This dictionary defines "home" as "a family's place of residence[.]" *Webster's Seventh New Collegiate Dictionary* 397. Using this accepted definition, along with the language in the restrictive covenants, we conclude the developer did not intend for the term "home" to include a "garage" or any other "outbuildings" in which a person or family did not reside.

Furthermore, if the developer intended for the ten feet side setback requirement in paragraph nine to apply to the garage, carport, or other auxiliary structures, it could have clearly expressed such an intention. For example, the developer could have written that "all homes, garages, carports, or other auxiliary structures shall be at least ten feet from either side property line." Because the developer did not express such an intention, "[t]his Court may not restrict the use of the property when the restrictive covenant has failed to do so in a clear manner." *Winding Ridge Homeowners Ass'n, Inc. v. Joffe*, 184 N.C. App. 629, 641, 646 S.E.2d 801, 809 (2007) (Geer, K., dissenting), *rev'd per curiam for the reasons stated in the dissent*, 362 N.C. 225, 657 S.E.2d 356 (2008); *see J. T. Hobby & Son*, 302 N.C. at 75, 274 S.E.2d at 182 (stating that restrictive covenants must be "clearly and unambiguously drafted").

For the foregoing reasons, we conclude the ten feet side setback requirement which applies to "[a]ll homes" pursuant to paragraph 9, does not apply to a "garage" or "carport." Thus, there is no genuine issue of material fact regarding whether Mr. and Mrs. Williams' carport violated the restrictive covenants. *See Hodgin v. Brighton*, 196 N.C. App. 126, 129, 674 S.E.2d 444, 446 (2009) (holding that the language of the restrictive covenant was clear and unambiguous as to whether the side lot limits applied to a garage where the restrictions "expressly except[] attached garages from the setback restrictions

applicable to other outbuildings" and "[n]othing in the restrictions suggests that an attached garage is subject to the twenty-five feet setback for the primary residence"). We hold the trial court did not err by granting summary judgment to Mr. and Mrs. Williams on Mr. Sanford's claim for specific performance.[2]

IV. Defendants' Appeal

Mr. and Mrs. Williams and the City of Hickory (collectively "Defendants") contend the trial court erred by (I) failing to dismiss Mr. Sanford's request for a writ of mandamus due to a lack of subject matter jurisdiction; (II) granting Mr. Sanford's motion for summary judgment on his request for a writ of mandamus and failing to enter summary judgment against Mr. Sanford, as the moving party, and in favor of Defendants on Mr. Sanford's request for a writ of mandamus; and (III) ordering the City of Hickory to "make a decision as to the zoning matters in this case within thirty (30) days[.]"

A. Subject Matter Jurisdiction

[2] Defendants first contend the trial court erred by failing to dismiss Mr. Sanford's request for a writ of mandamus due to a lack of subject matter jurisdiction. Defendants raised the issue of subject matter jurisdiction before the trial court at the hearing on summary judgment, but admit they "did not file a motion to dismiss for lack of subject matter jurisdiction before the hearing[.]" However, "it is well-established that an issue of subject matter jurisdiction may be raised at any stage of a case and may be raised by a court on its own motion." *Laurel Valley Watch, Inc. v. Mountain Enterprises of Wolf Ridge, LLC*, 192 N.C. App. 391, 404, 665 S.E.2d 561, 570 (2008). "Furthermore, a universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Id.* (quotation and quotation marks omitted). Thus, we will first address the issue of whether the trial court had subject matter jurisdiction over Mr. Sanford's request for a writ of mandamus.

"As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts."

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2. Mr. Sanford also contends the trial court erred by denying his motion for summary judgment on his claim for specific performance of the restrictive covenants. We first note that the trial court did not specifically deny Mr. Sanford's motion for summary judgment; rather, the trial court entered summary judgment against him, as the moving party, and granted summary judgment in favor of Mr. and Mrs. Williams. Moreover, because we hold the trial court did not err by granting summary judgment in favor of Mr. and Mrs. Williams, we will not address this argument.

Id. at 403, 665 S.E.2d at 569 (quotation omitted). "If a plaintiff has failed to exhaust its administrative remedies, the court lacks subject matter jurisdiction and the action must be dismissed." *Justice for Animals, Inc. v. Robeson County*, 164 N.C. App. 366, 369, 595 S.E.2d 773, 775 (2004) (citation omitted).

"The board of adjustment is an administrative body with quasi-judicial power whose function is to review and decide appeals which arise from the decisions, orders, requirements or determinations of administrative officials, such as building inspectors and zoning administrators." *Midgette v. Pate*, 94 N.C App. 498, 502, 380 S.E.2d 572, 575 (1989) (citations omitted). North Carolina General Statutes § 160A-388(b) "confers on the board [of adjustment] appellate jurisdiction to review the acts of those charged with enforcing the zoning ordinance." *Id.* at 502, 380 S.E.2d at 575 (citation omitted). Specifically, N.C. Gen. Stat. § 160A-388(b) (2011) provides that "the board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of that ordinance." "Once the municipal official has acted, for example by granting or refusing a permit, any person aggrieved may appeal to the board of adjustment." *Midgette*, 94 N.C. App. at 502-03, 380 S.E.2d at 575 (citing N.C. Gen. Stat. § 160A-388(b)).

The ordinance at issue in this case tracks the procedures set forth in Chapter 160A. Namely, Article 2, Section 2.12.1 of the City of Hickory Land Development Code (the "Land Development Code") provides that "[t]he Board of Adjustment shall be authorized to hear and decide appeals where it is alleged there is an error in any order, requirement, decision, or determination made by an administrative official in the administration or enforcement of the provisions of this Land Development Code."

In this case, Defendants contend that because Mr. Sanford is contesting the issuance of the zoning and building permits, he should have first appealed to the board of adjustment to exhaust his administrative remedies. Mr. Sanford contends, however, that he is not contesting the issuance of the zoning and building permits because he never contended that Mr. and Mrs. Williams could not construct a carport. Rather, Mr. Sanford argues the issue is whether the side setback requirement has been violated, an issue the City of Hickory has not yet determined. Because we conclude the side setback requirement is an issue directly related to the issuance of the zoning permit, we agree with Defendants.

We find this case analogous to *Midgette*, 94 N.C. App. at 498, 380 S.E.2d at 572. In *Midgette*, the defendant town issued building and special use permits to the plaintiff's neighbors, the defendant property owners, for the construction of a swimming pool and bathhouse. *Id.* at 499, 380 S.E.2d at 573. After the swimming pool and bathhouse were built, plaintiff filed a complaint alleging that the pool, bathhouse, and fence enclosing them violated the town's zoning ordinances and the subdivision's protective covenants due to their distance from various right-of-ways. *Id.* at 500, 380 S.E.2d at 573-74. The plaintiff also alleged that the sale of memberships to the defendants' pool violated the zoning ordinances and protective covenants. *Id.* at 500, 380 S.E.2d at 574. Plaintiff sought, among other things, that "a writ of mandamus issue to direct the town officials to enforce the zoning ordinance[.]" *Id.* This Court distinguished the plaintiff's complaints "which arise as result of the permits which were granted to the [defendants] [from] those which would be the result of a refusal by town officials to enforce the ordinance[.]" *Id.* at 501, 380 S.E.2d at 574. Regarding the plaintiff's claims for "sale of memberships for use of the pool, the building of structures not covered by the permits, and parking[,]" this Court held that "plaintiff has stated a proper claim against the Town for mandamus . . . as there has been no decision by a zoning administrator from which she may appeal, she may not go forward under N.C.G.S. § 160A-388(b) to contest the use . . . of the pool[.]" *Id.* at 503, 380 S.E.2d at 575 (citation omitted). However, regarding the complaints that arose as result of the defendants' permits, this Court held as follows:

> Plaintiff has alleged the special damages required to assert standing under N.C.G.S. § 160A-388(b) as an aggrieved person. Thus, she could have contested the permits had she timely filed with the board of adjustment. Plaintiff's complaints specifically concerning defendants' special use, or building permits, may only be remedied by first appealing to the board of zoning adjustment. She failed to do so and therefore she cannot now attack these permits.

Id. (internal citations omitted).

Here, the zoning and building permits authorize the construction of a detached carport with a five foot side setback. Both of the permits and the certificate of compliance state that the carport "must be detached from home for the 5' setback." Although Mr. Sanford contends he is not challenging the issuance of the permits, he also argues that because the carport is not an accessory structure under the Land

Development Code, "it is part of the principal structure and must meet the ten feet [side] setback." We conclude that the issue of whether a five or ten foot side setback applies, and the issue of whether the carport violates the side setback, "arise as result of the permits" that were granted to Mr. and Mrs. Williams, *see id.* at 501, 380 S.E.2d at 574 (distinguishing the plaintiff's claims "which arise as result of the permits" from "those which would be the result of a refusal by town officials to enforce the ordinance"), and "specifically concern[]" Mr. and Mrs. Williams' zoning and building permits. *See id.* at 503, 380 S.E.2d at 575 (holding that the plaintiff's argument that the defendant's pool, bathhouse, and fence violated zoning ordinances due to the distance from various right-of-ways "specifically concern[ed] [the] defendants' special use, or building permits").

"Once the municipal official has acted, f*or example by granting or refusing a permit*, any person aggrieved may appeal to the board of adjustment." *Id.* at 502-03, 380 S.E.2d at 575 (emphasis added) (quotation and quotation marks omitted); *see also* N.C. Gen. Stat. § 160A-388(b). Because Mr. Sanford's request for a writ of mandamus specifically concerns Mr. and Mrs. Williams' zoning and building permits, he should have timely appealed the issuance of these permits to the board of adjustment. *See Midgette*, 94 N.C. App. at 503, 380 S.E.2d at 575 ("Plaintiff's complaints specifically concerning defendants' special use, or building permits, may only be remedied by first appealing to the board of zoning adjustment. She failed to do so and therefore she cannot now attack these permits."). Mr. Sanford failed to first appeal to the board of adjustment, and therefore he cannot now attack the permits. *See id.*; *Laurel Valley Watch*, 192 N.C. App. at 403-04, 665 S.E.2d at 569-70 (holding that the trial court was without subject matter jurisdiction to rule on the plaintiff's claims because the plaintiff "did not exhaust its administrative remedies before seeking relief in the courts" when the plaintiff filed its case directly in the superior court, thereby "bypass[ing] the statutorily prescribed procedures for resolving zoning disputes") (citation omitted). Having failed to exhaust his administrative remedies, we conclude the trial court was without subject matter jurisdiction to rule on Mr. Sanford's request for a writ of mandamus against the City of Hickory. We, therefore, will not address Defendants' remaining argument on appeal.

In summary, we affirm the portion of the trial court's order granting summary judgment to Mr. and Mrs. Williams on Mr. Sanford's claim for specific performance. Additionally, we vacate the portions of the trial court's order granting Mr. Sanford's motion for summary

judgment on his request for a writ of mandamus and ordering the City of Hickory to "make a decision as to the zoning matters in this case within thirty (30) days[.]"

AFFIRMED in part; VACATED in part.

Judges HUNTER and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. MARK BRADLEY CARVER

No. COA11-1382

(Filed 5 June 2012)

1. Homicide—first-degree murder—sufficient evidence—defendant near crime scene—DNA matched to defendant

The trial court did not err in a first-degree murder case by denying defendant's motion to dismiss. There was sufficient evidence that defendant committed the murder, including that at the time the victim's body was discovered defendant was fishing at a spot a short distance from the crime scene and had been there for several hours, and that while defendant repeatedly denied ever touching the victim's vehicle, DNA found on the victim's vehicle was, with an extremely high probability, matched to defendant.

2. Homicide—first-degree murder—jury question—acting in concert—question not answered directly—elements of first- and second-degree murder instructed upon

The trial court did not err in a first-degree murder case by refusing to answer the jury's question about whether it was still to consider acting in concert. Although the trial court did not answer the question directly, the trial court did review the elements of first- and second-degree murder in its reinstruction.

3. Homicide—first-degree murder—record not sufficient—jury instruction sufficient

The trial court did not err in a first-degree murder case by allowing the State to urge the jury to convict defendant under the doctrine of acting in concert when the trial court did not instruct the jury on acting in concert. Defendant failed to satisfy his burden of presenting an adequate record to support his contention. Further, the trial court's instruction and reinstruction consis-

tently and adequately conveyed to the jury that the State was required to prove that *defendant* killed the victim.

Appeal by Defendant from judgment dated 18 March 2011 by Judge Timothy S. Kincaid in Gaston County Superior Court. Heard in the Court of Appeals 24 April 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Danielle Marquis Elder, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse Jr., for Defendant.

STEPHENS, Judge.

Following his indictment on one count of first-degree murder, Defendant Mark Bradley Carver pled not guilty to the charge and was tried by a jury in Gaston County Superior Court, the Honorable Timothy S. Kincaid presiding. The evidence presented by the State tended to show that the victim was found dead beside her car on the shore of the Catawba River, and that Carver and his cousin were fishing close by at the time the victim's body was discovered and near the time the victim was murdered. The victim had been strangled to death with a ribbon from a gift bag in her car, the drawstring of her sweatshirt, and a bungee cord similar to another cord in the trunk of her car. Law enforcement's investigation of the murder revealed that DNA samples taken from the victim's car matched Carver's and his cousin's DNA profiles. When Carver was confronted with this evidence, he denied, as he repeatedly had done before, ever seeing or touching the victim or her car. Further, despite his statements that he had never seen the victim, Carver told law enforcement officers that the victim was a "little thing," and he demonstrated the victim's height relative to his own.

Following the presentation of evidence and after the trial court instructed the jury on the charges of first- and second-degree murder, the jury found Carver guilty of first-degree murder. The trial court sentenced Carver to life imprisonment without parole. Carver appeals.

[1] On appeal, Carver first argues that the trial court erred by denying his motion to dismiss because there was insufficient evidence that Carver committed the murder. We disagree. A trial court properly denies a motion to dismiss based on an alleged absence of evidence

that the defendant committed the charged offense where the court determines that there is substantial evidence—*i.e.*, "relevant evidence that a reasonable mind might accept as adequate to support a conclusion"—that the defendant committed the offense charged. *State v. Cross*, 345 N.C 713, 716-17, 483 S.E.2d 432, 434 (1997). This Court reviews *de novo* a trial court's ruling on a motion to dismiss, and we view the evidence in the light most favorable to the State, giving the State every reasonable inference therefrom. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007).

In this case, there is only circumstantial evidence to show that Carver committed the murder: at the time the victim's body was discovered, Carver was fishing at a spot a short distance from the crime scene and had been there for several hours; and Carver repeatedly denied ever touching the victim's vehicle, but DNA found on the victim's vehicle was, with an extremely high probability, matched to Carver.[1] "Most murder cases are proved through circumstantial evidence," *State v. Banks*, ____ N.C. App. ____, ____, 706 S.E.2d 807, 813 (2011), and where the evidence presented is circumstantial, "the question [] is whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (internal quotation marks omitted). Such an inference was permissible from the circumstances present in *State v. Miller*, 289 N.C. 1, 220 S.E.2d 572 (1975), where our Supreme Court held that the existence of physical evidence establishing a defendant's presence at the crime scene, combined with the defendant's statement that he was never present at the crime scene and the absence of any evidence that defendant was ever lawfully present at the crime scene, permits the inference that the defendant committed the crime and left the physical evidence during the crime's commission. 289 N.C. at 6, 220 S.E.2d at 575. In *Miller*, as in this case, where the defendant's statement that he was never present at, and never touched any part of, the crime scene was shown by physical evidence—in that case, fingerprints; in this case, DNA—to be false, "the most compelling permissible inference arising from [the] defendant's falsehood" is that he left the physical evidence at the crime scene in the course of committing the crime.[2] *See id.* Otherwise, had his DNA

1. A DNA sample found on the victim's car was "126 million times more likely to be observed from [] Carver[, a Caucasian,] than if it came from another unrelated individual in the North Carolina Caucasian population."

2. We note that although the physical evidence in *Miller* was the defendant's fingerprints and not his DNA, the logic of the rule from *Miller* applies equally to DNA and fingerprints, and the only potential difference in application of the rule to DNA is the

been left at any other time and under lawful circumstances, "he would have so stated when the potentially incriminating presence of his [DNA] was brought to his attention by the [law enforcement] officers." *See id.*

Carver's denial and the DNA's contradiction thereof, viewed in the light most favorable to the State, are sufficient to establish that the DNA could only have been left at the time the offense was committed. *See id.; see also State v. Wade*, 181 N.C. App. 295, 299, 639 S.E.2d 82, 86 (2007) ("Statements by the defendant that he had never been at the crime scene are sufficient to show that a fingerprint lifted from the premises could only have been impressed at the time of the crime."). The establishment of that fact warrants denial of Carver's motion to dismiss. *Cross*, 345 N.C at 718, 483 S.E.2d at 435 (where defendant contends that there was insufficient evidence of his guilt, evidence showing that the fingerprint "could only have been impressed at the time the crime was committed," "standing alone, was sufficient to send [the] case to the jury"). Accordingly, we conclude that the trial court did not err in denying Carver's motion to dismiss. This is so despite Carver's erroneous contention that, absent evidence of motive, the State failed to present substantial evidence that Carver murdered the victim in this case. "Motive is not an element of first-degree murder, nor is its absence a defense," *State v. Elliot*, 344 N.C. 242, 273, 475 S.E.2d 202, 216 (1996), *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997), and while it is "relevant to identify an accused as the perpetrator of the crime," *State v. Bell*, 65 N.C. App. 234, 238, 309 S.E.2d 464, 467 (1983), *aff'd per curiam*, 311 N.C. 299, 316 S.E.2d 72 (1984), the State presented sufficient evidence to identify Carver as the perpetrator by proving Carver's presence near the scene of the murder near the time of death in combination with his DNA-controverted statement that he never saw or touched the victim's car. Carver's argument is overruled.

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strength of the conclusion as to the defendant's presence supported by the physical evidence, *i.e.*, that fingerprint evidence may be so accurate as to conclusively establish a defendant's presence while DNA evidence may not. *See id.* at 3-4, 6, 220 S.E.2d at 574, 575 ("The use of fingerprint evidence for identification purposes is so general and so accurate that in many cases it has been expressly declared that the courts will take judicial notice thereof."; "Defendant's thumbprint on the lock conclusively establishes that defendant was [at the crime scene] *at some unspecified time.*" (emphasis in original)). However, because Carver concedes in his brief that the DNA evidence established his presence at the crime scene in this case, stating that the only connection between himself and the victim was "his having touched her car," we need not address the accuracy and ubiquity of DNA analysis *vis-à-vis* fingerprint analysis, and we find that the rule from *Miller* is perfectly applicable in this case.

[2] Carver next argues that the trial court erred by "refusing to answer the jury's question about whether it was 'still to consider acting in concert.' " We disagree.

Once the jury had begun their deliberations, they sent a written question to the trial judge, asking, "Are we still to consider acting in concert?" The following colloquy between the court and counsel then ensued:

> THE COURT: . . . . Of course, the [c]ourt didn't instruct them on acting in concert so it would be—it would probably be appropriate to go ahead and read the instruction to them and tell them that the law that they are to consider is the law that the [c]ourt has given them without stepping into that minefield.
>
> [Prosecutor]: That would be acceptable to the State.
>
> [Defense counsel]: Yes, sir.

Thereafter, the trial court reinstructed the jury on the law that the court read to the jury in the initial instructions. In neither instance did the court charge the jury on an acting in concert theory, having earlier denied the State's request for such an instruction.

We first note that defense counsel neither objected when the trial court announced its decision to reinstruct the jury with the same instructions as those given before the jury began its deliberations, nor did defense counsel note an objection when given an opportunity after the court's reinstruction. As such, Carver failed to properly preserve this issue for appellate review. *See State v. Weddington*, 329 N.C. 202, 210, 404 S.E.2d 671, 677 (1991) (holding that where jurors requested clarification on an instruction, and the defendant's trial counsel agreed to the court's plan to reread all instructions on the elements of the offense, the defendant "will not be heard to complain on appeal" that the instructions should have been otherwise); N.C. R. App. P. 10(a) (requiring a defendant to object and be heard outside the presence of the jury to properly preserve a claim of error in a jury charge).

Further, were this argument properly preserved, it would certainly be overruled. Carver erroneously bases his argument that the trial court's refusal to directly answer the jury's question was improper on our Supreme Court's decision in *State v. Hockett*, in which the trial court refused to answer the jury's questions concerning the law as instructed and the Supreme Court ordered a new trial, stating that "the trial court should have at least reviewed the ele-

ments of the offenses if it was not going to directly answer the [jury's] question as defense counsel had requested." 309 N.C. 794, 802, 309 S.E.2d 249, 253 (1983); *see also State v. Moore*, 339 N.C. 456, 465, 451 S.E.2d 232, 236 (1994) (explaining the holding in *Hockett*). As the trial court here did review the elements of first- and second-degree murder in its reinstruction, the court did not run afoul of the holding in *Hockett*. Carver's argument is overruled.

[3] Relatedly, Carver argues that the trial court's decision to not instruct the jury on acting in concert, but to allow the State to present to the jury the State's "theory of the case," which Carver contends urged the jury to convict Carver under the doctrine of acting in concert, was erroneous and compounded the alleged error from the trial court's failure to directly answer the jury's question. We are unpersuaded.

The doctrine of acting in concert allows a defendant to be found guilty for crimes committed by another person if that person and the defendant join in a common purpose to commit the crime. *State v. Evans*, 346 N.C. 221, 228, 485 S.E.2d 271, 275 (1997), *cert. denied*, 522 U.S. 1057, 139 L. Ed. 2d 653 (1998). Presumably, Carver's argument is based upon the contention that the State, in its closing argument, informed the jurors that they could convict Carver of murder even if they determined that Carver's cousin had committed the murder. However, because the closing arguments were not transcribed and are not before this Court on appeal, Carver has failed to satisfy his burden of presenting an adequate record to support his contention. *See State v. Brogden*, 329 N.C. 534, 546, 407 S.E.2d 158, 166 (1991) (noting that the defendant has the burden of providing an appellate record adequate to allow determination of the defendant's issues). As such, we cannot conclude that the alleged arguments by the State were prejudicial to Carver. *State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254 (noting that the appellate court cannot assume or speculate that there was prejudicial error when none appears in the record), *disc. review denied*, 315 N.C. 188, 337 S.E.2d 862 (1985). Furthermore, the trial court's instruction and reinstruction consistently and adequately conveyed to the jury that the State was required to prove that *Carver* killed the victim. The court instructed the jury that they could find Carver guilty of first-degree murder only if the State proved beyond a reasonable doubt: (1) "that [Carver] intentionally and with malice killed [the victim]"; (2) "that [Carver's] acts were a proximate cause of [the victim's] death"; (3) "that [Carver] intended to kill [the victim]"; (4) "that [Carver] acted with premeditation"; and (5) "that [Carver] acted with deliberation." "The law presumes that

jurors follow the court's instructions." *State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 535 (2004), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). While the State's "theory of the case" may have been that Carver and his cousin were both involved in the murder, Carver has presented nothing to indicate that the jury ignored the court's instructions and attributed any of Carver's cousin's actions to Carver. Accordingly, we cannot conclude that the trial court's decision to not instruct the jury on acting in concert, but to allow the State to argue its theory of the case was error. Carver's argument is overruled.

NO ERROR.

Judge MCGEE concurs.

Judge HUNTER, ROBERT N., JR., dissents with a separate opinion.

HUNTER, JR., Robert N., Judge, dissenting.

I dissent from the majority opinion and would hold the trial court erred in denying the defendant's motion to dismiss the first degree murder charge due to a lack of substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.

" 'Upon [the] defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890 (2000) (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) (emphasis added). "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 (1995).

The majority aptly notes that most murder cases are proven through circumstantial evidence. However,

> [i]f the evidence presented is circumstantial, the court must consider whether a *reasonable inference* of defendant's guilt may be drawn from the circumstances. Once the court decides that a *reasonable inference* of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citations and quotation marks omitted) (second alteration in original) (first two emphases added). Moreover,

> [w]hen the evidence establishing the defendant as the perpetrator of the crime is circumstantial, courts often [look to] proof of motive, opportunity, capability and identity to determine whether a reasonable inference of defendant's guilt may be inferred or whether there is merely a suspicion that the defendant is the perpetrator.

State v. Hayden, ____ N.C. App. ____, ____, 711 S.E.2d 492, 494 (2011) (quotation marks and citation omitted) (alteration in original). However, " 'evidence of either motive or opportunity alone is insufficient to carry a case to the jury.' " *Id.* at ____, 711 S.E.2d at 495 (citation omitted) (where the trial court erred by denying the defendant's motion to dismiss when the State presented substantial motive evidence but the only evidence of opportunity was evidence that placed the defendant near the location where the victim was found) (quoting *State v. Bell*, 65 N.C. App. 234, 240—41, 309 S.E.2d 464, 468—69 (1983) (where the trial court erred by denying the defendant's motion to dismiss when the State presented substantial opportunity evidence but no evidence of motive)); *but c.f. State v. Stone*, 323 N.C. 447, 453-54, 373 S.E.2d 430, 434 (1988) (affirming the trial court's denial of the defendant's motion to dismiss because though the State presented no evidence of motive, it presented *more* circumstantial evidence of opportunity than was presented in *Bell*, including evidence that the defendant's gun was the one used to kill the victim, that the defendant's car's tire treads matched those found at the crime scene, that the defendant had ample time to commit the murder, and that the murder was committed using ammunition matching that found in the defendant's possession).

"When the question is whether evidence of *both* motive and opportunity will be sufficient to survive a motion to dismiss, the answer . . . [depends on] the strength of the evidence of motive and

opportunity, as well as other available evidence, rather than an easily quantifiable 'bright line' test." *Bell*, 65 N.C. App. at 239, 309 S.E.2d at 468. Instead, "[e]ach case turns on its own peculiar facts and a decision in one case is rarely controlling in another." *State v. White*, 293 N.C. 91, 95, 235 S.E.2d 55, 58 (1977). In the case *sub judice*, similar to *Bell* and *Stone*, the State presented zero evidence of motive. It is this absence of motive evidence *combined* with the lack of opportunity evidence that makes this case analogous to *Hayden* and *Bell* and distinguishable from *Stone*.

The evidence at trial showed the following: the defendant was fishing with his cousin at a location near the spot where the victim was found strangled to death, lying outside of her car. Police saw the defendant loading fishing equipment into his car when the victim's body was found but did not question him at that time. No evidence (such as matching tire treads or footprints as in *Stone* and *Barnett*) was presented that the defendant actually traveled the path between the two locations. The defendant later returned to the crime scene and asked police if he could retrieve fishnets he left while fishing earlier that day. He was denied access. Along with the defendant and his cousin, at least five other people were near the area where the victim was found, one of whom actually discovered her body. No DNA sample was taken from the man who discovered the victim. Only after the police canvassed surrounding areas did a detective speak to the defendant at his home and learn he was fishing near where the victim was found. After this interview, the defendant was not arrested nor was he even labeled a suspect in the murder.

Unlike in *Stone* and *Barnett*, where the State presented evidence connecting the defendants to the murder weapons, the State here presented no evidence whatsoever connecting the defendant to any of the three ligatures used to suffocate the victim. Moreover, the coroner testifying for the State could not determine the victim's time of death, making it unreasonable for a juror to infer the victim could have died only during the time the defendant was fishing at the nearby location.

The majority places great emphasis on the fact that the defendant's DNA was found on the victim's vehicle. However, the majority fails to mention that this DNA was not semen, blood, or saliva DNA; it was *touch* DNA, which is DNA gathered from skin cells, the testing for which is relatively new and not as accurate as blood or saliva DNA testing. Moreover, it is noteworthy that the defendant's DNA (touch

or otherwise) was not found anywhere else on the outside or the inside of the vehicle. The defendant's DNA also was not found anywhere on the victim nor was it found on any of the three ligatures used to suffocate the victim. His cousin's touch DNA, however, was found on the inside of the car near the passenger's seat.

Nevertheless, relying on *State v. Miller*, the majority concludes that the defendant's touch DNA on the victim's vehicle along with the defendant's statement to the police that he was never at the crime scene and the absence of any evidence that the defendant was lawfully present at the crime scene permits the inference that the defendant committed the crime and left his touch DNA during the crime's commission. *See State v. Miller*, 289 N.C. 1, 6, 220 S.E.2d 572, 575 (1975). The majority notes that our Supreme Court in *Miller* held that when a defendant says he was never present at the crime scene but his fingerprints are found at the scene and no evidence is presented that he was ever lawfully at the crime scene, "the most compelling permissible inference arising from [the] defendant's falsehood" is that he left the fingerprints at the crime scene in the course of committing the crime. *See id.* Otherwise, had the fingerprints been left at another time, the defendant "would have so stated when the potentially incriminating presence of his [fingerprints] was brought to his attention by the officers." *Id.*

I, however, disagree with the majority's application of *Miller* to the case *sub judice*. First, *Miller* requires that fingerprint evidence be "accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed" before allowing the inference that the defendant must have been present during the commission of the crime. *Id.* at 4, 220 S.E.2d at 574. The only evidence indicating the defendant left the touch DNA on the car at the time of the murder is that he happened to be fishing near the location where the victim was found. There is no other evidence tying the defendant to the crime scene. As such, I cannot hold that substantial evidence of circumstances accompanies the defendant's touch DNA on the victim's car to indicate such DNA could only have been left at the time the murder was committed.

Moreover, this case is distinguishable from *Miller* because the physical evidence found at the scene was touch DNA, not fingerprint

evidence.[1] The majority acknowledges this difference yet nevertheless equates the two types of evidence. The majority chooses not to address "the accuracy and ubiquity of DNA analysis vis-à-vis fingerprint analysis" because the defendant "concedes in his brief that the DNA evidence established his presence at the crime scene in this case, stating that the only connection between himself and the victim was 'his having touched her car.' " I, however, do not read the defendant's brief to have made such a concession. Admitting to having touched the victim's car does not admit presence at the crime scene because cars are mobile objects, often parked in public places and touched, intentionally or not, by countless people throughout a given day. As the defendant's touch DNA was matched only to the outside of the victim's vehicle and only in one place, one cannot draw a reasonable inference that the defendant must only have touched the victim's car at the crime scene and thus was involved in her murder. Such an inference "is far too tenuous to be considered as substantial proof of anything." *See Bell*, 65 N.C. App. at 241, 309 S.E.2d at 469 (where the inference that the defendant owned the knife used to kill the victim was too tenuous to constitute substantial evidence even though a knife consistent with the one used to kill the victim was found near the defendant). In fact, the State's own touch DNA expert testified there is no way to tell *when* the defendant's touch DNA sample was left on the vehicle. "In order for this Court to hold that the State has presented sufficient evidence of defendant's opportunity to commit the crime in question, the State must have presented at trial evidence not only placing the defendant at the scene of the crime, but placing him there at the time the crime was committed." *Hayden*, ____ N.C. App. at ____, 711 S.E.2d at 497.

As I do not equate the defendant's concession to touching the victim's car to mean he was present at the crime scene, I find it necessary to address the accuracy and ubiquity of touch DNA analysis versus fingerprint testing to determine whether the logic of *Miller* applies equally to touch DNA as it does to fingerprints. I would hold that it does not. The State's second expert on touch DNA testified at trial that touch DNA testing is a relatively new technique and is not as reliable as saliva and blood DNA testing. The expert also described a phenomenon known as secondary skin cell transfers, where if person A touches person B, and person B touches a pen, person A's DNA can be found on the pen. On the other hand, "[t]he use of fingerprint evidence for identification purposes is so general and so accurate that in

1. The defendant's fingerprints were not found anywhere on the victim or her vehicle.

many cases it has been expressly declared that the courts will take judicial notice thereof." *Miller*, 289 N.C. at 6, 220 S.E.2d at 575. Moreover, while our Supreme Court in *Miller* references ten cases that review the sufficiency of fingerprint evidence to establish the identity of an accused before announcing the rule that the majority relies on in this case, I cannot find even one case in North Carolina that has reviewed the sufficiency of touch DNA evidence to establish the identity of an accused, much less any case in this state that even discusses the accuracy of touch DNA. With such little guidance on the accuracy of touch DNA combined with the fact that the defendant's touch DNA was found on the outside of the victim's mobile car and could have been left at any time, I cannot apply the rule in *Miller* here because I cannot equate fingerprint and touch DNA analysis.

The only remaining relevant evidence in our review of the trial court's denial of the defendant's motion to dismiss is that during questioning of the defendant (which happened consensually six times), the defendant consistently denied knowing the victim. However, when the officer interrogating him instructed him to stand and describe how tall the victim was, Defendant stood and indicated how tall she was compared to his own height. He said he did not know her but maybe saw her on television. Testimony from two officers indicates both that the case was not televised and that it was highly televised. Taken in the light most favorable to the State, I admit this raises a suspicion of the defendant's guilt; however, it does not place him at the scene nor connect him to the brutal strangulation of the victim. It is merely insufficient to surpass "the realm of suspicion and conjecture" and does not constitute substantial evidence connecting the defendant to the crime. *See State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967). In *Cutler*, the State presented that, on the day the victim was murdered, a truck similar to the defendant's was seen at the scene of the crime both before and after the body was discovered, and the truck's interior was covered in human blood. *Id.* at 380–81, 156 S.E.2d at 680. Also on the day of the murder, the State showed that the defendant went to the home of a relative 500 yards from the crime scene and was described as drunk and "bloody as a hog" with a large gash on his head; after the murder, the defendant was found by police wearing bloody clothing and was found in possession of a knife that was covered in both human blood and a hair deemed "similar" to the chest hair of the victim. *Id.* at 381–82, 156 S.E.2d at 681. Still, our Supreme Court reversed the trial court's denial of the defendant's

motion for nonsuit for lack of substantial evidence because there was no motive for the defendant to kill the victim nor was there sufficient opportunity evidence connecting the defend ant to the crime; the evidence amounted to only a "conjecture" that the defendant committed the crime. *Id.* at 383–84, 156 S.E.2d at 682.

Here, like in *Cutler*, the evidence presented 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. *See also State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) (If evidence presented 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," the motion to dismiss should be allowed, "even though the suspicion aroused by the evidence is strong." (internal citation omitted)). Accordingly, I cannot agree that the *reasonable* mind standard would allow a court to accept the above evidence as adequate to support the conclusion that the defendant committed first degree murder on a theory of premeditation and deliberation.

I also note in this case the trial court dismissed the charge of conspiracy to commit first degree murder due to lack of substantial evidence connecting the defendant to the crime. In my opinion, that decision supports my view that there is no substantial evidence to support the defendant's commission of first degree murder alone. Therefore, I would reverse the judgment of the trial court.

STATE OF NORTH CAROLINA v. ANDRE SHARROD SHARPLESS

No. COA11-1343

(Filed 5 June 2012)

1. Evidence—witness testimony—personal beliefs—not victim's impressions

The trial court did not err in a felony first-degree murder, attempted robbery with a dangerous weapon, first-degree burglary, and assault with a deadly weapon with intent to kill inflicting serious injury case by allowing a witness to testify regarding the victim's impressions when the victim first opened the door and allegedly struggled with defendant. The witness testified regarding his own beliefs of the sequence of events that took

place at the door between the victim and defendant, not the victim's impression of defendant.

2. Evidence—hearsay—911 report—anonymous phone call—door not opened

The trial court erred in a felony first-degree murder, attempted robbery with a dangerous weapon, first-degree burglary, and assault with a deadly weapon with intent to kill inflicting serious injury case by allowing the State to offer into evidence a 911 report, including the phone call of an anonymous citizen that officers should treat the third victim at the hospital, defendant, as a suspect because he had been involved in a narcotics robbery. The anonymous call was hearsay and defendant had not opened the door to the admission of the substance of the anonymous call.

Appeal by defendant from judgments entered 8 March 2011 by Judge Kenneth F. Crow in New Hanover County Superior Court. Heard in the Court of Appeals 3 April 2012.

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

Glover & Petersen, P.A., by Ann B. Petersen, for defendant appellant.

McCULLOUGH, Judge.

Andre Sharrod Sharpless ("defendant") appeals from his convictions of felony first-degree murder, attempted robbery with a dangerous weapon, first-degree burglary, and assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWITKISI"). Defendant was sentenced to life without parole based on the murder conviction and received sentences of 103 to 133 months for burglary and 116 to 149 months for AWDWITKISI to run consecutively with the murder charge. For the following reasons, we award defendant a new trial.

I. Background

On the evening of 30 November 2009, at around 6:30 p.m., Tarell Phillips, the victim, and his friend, Kamala Dowd, were at Phillips' house on North 10th Street, Wilmington, North Carolina, when someone knocked on the door. The two had been friends since childhood and were expecting two other friends, who were going to join in watching a football game on television. Phillips got up to answer the

door while Dowd remained seated on the couch, with his back towards the door. Dowd testified at trial that as Phillips opened the door Dowd heard some noise, which he thought was Phillips welcoming someone into the house. However, he then heard Phillips say, "Come on, man," which is when he stood up and turned around thinking Phillips was in danger and was questioning the person at the door.

As he turned around, Dowd saw Phillips "tussling" with a man with dreadlocks who did not have a mask on. Dowd perceived that Phillips was trying to keep the man out of the house. However, at that point, two other men, both wearing bandanas and masks over their faces, barged in. The second intruder then shot Dowd once in the stomach and when Dowd saw the shooter prepare to shoot again he raised his arms to shield himself, which resulted in him getting shot in both wrists by a single shot. Dowd then fell to the floor where he lay still, unable to see anything that was going on. He heard another gunshot, at which point he got up and ran out of the house. He ran around the corner and hid behind a shed where he called 911 to report the shooting. He then called his uncle to pick him up and transport him to the hospital. Dowd was unsure whether he saw two or three men enter Phillips' house because at various times he mentioned the unmasked man who struggled with Phillips, and two masked men, one with a red bandana and the other with a black mask.

During the break-in, Phillips ended up being shot four to five times. He managed to call 911 and was still on the phone when officers arrived. Phillips was transferred to New Hanover Regional Medical Center, where he ultimately died as a result of blood loss.

Defendant testified at trial that on the morning of the murder his girlfriend had driven him to his mother's house. She picked him up around noon and drove him to a friend's house. She also gave him one of her cell phones because the battery had died in his. While at another friend's house, defendant decided that he wanted to buy some marijuana from Phillips, also known by defendant as Rell, from whom he occasionally purchased. Phillips occasionally dealt marijuana to friends for recreational use. Their usual procedure consisted of defendant calling Phillips and placing an order. Then, defendant would call again when he was outside Phillips' house and Phillips would come out to make the exchange.

However, on the day of the murder, because defendant's cell phone battery was dead, he could not call ahead. As a result, he just walked to Phillips' house to knock on the door. When he got to

Phillips' house, defendant noticed a van parked outside. He knocked on the door of the house and when Phillips answered he asked defendant why he had not called ahead. Phillips told defendant to come in, at which point the two masked men rushed in, pushing defendant into Phillips. Defendant ended up being shot in his right forearm during the intrusion. After being shot, defendant lay on the floor, not far from the front door, until the shooting stopped and he saw the man in the black mask run out the back door. At that point, he proceeded to run out of the house to the nearby home of his friend, Kenneth Gore a/k/a "Little Rell," on North 11th Street, because he lost his girlfriend's cell phone while fleeing and could not call anyone. Gore called defendant's mother and 911 while defendant lay bleeding on Gore's front porch.

Sergeant Kelvin Hargrove responded to the call to Gore's house where he found defendant on the porch. At Phillips' house, investigators recovered several bullets and casings matching a .40 caliber gun and a .38 caliber/.357 magnum gun, meaning there were two shooters. Investigators also used gunshot residue ("GSR") kits on the hands of Phillips, Dowd, and defendant. The GSR kits did not indicate any residue on the hands of Dowd or defendant, but did indicate some on Phillips' hands, from either firing a gun or being in close proximity to the firing of one. Investigators finally took blood swabs from the front door, living room, hallway, and first bedroom where Phillips was found. A swab from the hallway matched defendant's blood. Defendant gave three interviews to police, one at the hospital, and two at the police station, with his being arrested after the third interview on 3 December 2009.

While in the county jail, defendant was placed in the same pod as Tige Utley. Utley had been in the jail since October 2009 on a series of charges, of which if convicted he would face a sentence greater than his life expectancy. In the first week of January 2010, Utley sent a letter to the New Hanover County District Attorney, mentioning that he had useful information regarding the charges against defendant. He claimed that while the two were in the same pod, defendant told Utley about his role in the murder, armed robbery, and home invasion. Utley sought a concession in his charges in exchange for testifying against defendant. He received a plea bargain from an assistant district attorney, but later wrote the district attorney saying that the concessions were not enough. The parties eventually reached an agreement which consolidated Utley's charges into a single judgment of 36 to 53 months in addition to any time received from three indictments for possession of heroin with intent to sell and deliver.

At trial, Utley testified that he and defendant were in the recreation yard when defendant asked him what he knew about GSR testing. Utley told defendant that he was familiar with the testing, however, he could not explain the procedure at trial. Utley claimed defendant told him that he was interested in the subject because he was waiting for results. Defendant stated to Utley that he had not shot anyone, but had actually been shot. Defendant testified that he never had this discussion with Utley.

In another instance, Utley, defendant, and another inmate named Dwayne Burton, were sitting in a holding cell on 17 December 2009. Utley claimed that he overheard defendant tell Burton that he needed some money and that these two guys had offered to pay defendant to knock on Phillips' door so they could gain entry. According to Utley, defendant went to Phillips' house with two guys, one known as Hell Rell. Defendant also allegedly told Burton that he had pulled a gun on Phillips, Phillips wrestled it away from him, and the other guy reached over defendant and shot Phillips. Allegedly, defendant got some marijuana out of the robbery, but not everything that he wanted because it all happened too quickly. Defendant remembered being in the holding cell that day with Utley and Burton, but denied ever talking to the two of them. James Oxendine also testified at the trial that he had been in the holding cell with the three other men, but that he never heard defendant discuss the shooting. Oxendine testified that the cell was so small that it was not possible to have a private conversation and that he and defendant had actually talked about defendant's attorney because he had previously been represented by her.

Utley testified to a final instance, a week later, where he was seated next to defendant during visitation. Defendant was talking to his sister and Utley to his mother. Utley testified that he heard defendant tell his sister not to worry because the GSR results showed he did not fire a gun and for her to also get word to Hell Rell that everything was all right. Visitation logs showed that defendant did meet with his sister around that time, and that Utley was not in the visitation area at the same time. The visitation logs did show that Utley and defendant were at visitation together at one point, but that was prior to the two being in the holding cell together and defendant had actually been talking to his girlfriend at that time. Defendant's sister testified that the two had talked about Christmas and defendant's girlfriend. Furthermore, defendant's sister testified that they did not discuss their cousin Titus Grady, otherwise known as Hell Rell.

Also at trial, Deborah Cottle, Deputy Director of the New Hanover County 911, testified to computer generated reports from the night of the shooting. The reports included a "be on the lookout" ("BOLO") call from police, describing the suspect as a black male wearing a red hoodie or sweater with blue jeans and white tennis shoes. Cottle further testified, over objection, to information regarding a call, four and half hours later, from an anonymous citizen alerting authorities to the possibility that the third individual shot and taken to the hospital, meaning defendant, should also be considered a suspect in the shooting.

On 11 January 2010, a New Hanover County grand jury returned two indictments against defendant charging him with five crimes: (1) AWDWITKISI on Dowd; (2) attempted murder of Dowd; (3) murder of Phillips; (4) first-degree burglary of a dwelling house while it was occupied by Phillips and Dowd; and (5) robbery with a firearm of drugs and money from Phillips and Dowd. The charges were consolidated and came up for trial on 21 February 2011. At the close of evidence the State dismissed the attempted murder charge, but the charge of murder was submitted to the jury on the theory of felony murder. The jury returned guilty verdicts on 8 March 2011, for which defendant received a sentence of life without parole on the murder charge to run consecutively with sentences of 103 to 133 months on the burglary and robbery charges and 116 to 149 months on the AWDWITKISI charge. The same day the trial court arrested judgment on the robbery charge, but reimposed the sentence on the burglary charge. Defendant gave oral notice of appeal.

II. Analysis

A. Admission of Dowd's Testimony

[1] Defendant raises two issues on appeal, with his first being that the trial court erred in allowing Dowd to testify regarding Phillips' impressions when Phillips first opened the door and allegedly struggled with defendant. Defendant contends that Dowd did not have direct personal knowledge of Phillips' impressions of the man at the door, as Phillips was the only person with personal knowledge of his own thoughts. We disagree.

"[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000). "A trial court abuses its discretion if its determination is 'manifestly unsupported by reason' and is 'so arbitrary that it could not have been the result of a reasoned decision.' "

State v. Lasiter, 361 N.C. 299, 301-02, 643 S.E.2d 909, 911 (2007) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). "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." *Id.* at 302, 643 S.E.2d at 911. "Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001). "The purpose of Rule 602 is to prevent a witness from testifying to a fact of which he has no direct personal knowledge[,]" *State v. Cole*, 147 N.C. App. 637, 645, 556 S.E.2d 666, 671 (2001), and " '[p]ersonal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception.' " *State v. Poag*, 159 N.C. App. 312, 323, 583 S.E.2d 661, 669 (2003) (quoting N.C. Gen. Stat. § 8C-1, Rule 602, official commentary (1999)).

Defendant first argues that the trial court erred in allowing Dowd to testify regarding Phillips' perceptions as Phillips opened the door to his home on the evening of the shooting. Defendant acknowledges that Dowd's own impressions of the struggle at the door are admissible lay opinion, but he claims that any testimony by Dowd regarding Phillips' impressions were not helpful for a clear understanding of Dowd's testimony or any fact at issue. As stated above, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, Rule 602 (2011). Where a

> witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (2011). Moreover, " '[o]pinion evidence is generally inadmissible "whenever the witness can relate the facts so that the jury will have an adequate understanding of them and the jury is as well qualified as the witness to draw inferences and conclusions from the facts." ' " *State v. Watson*, 294 N.C. 159, 165, 240 S.E.2d 440, 445 (1978) (quoting *State v. Lindley*, 286 N.C. 255, 257, 210 S.E.2d 207, 209 (1974)).

In making this argument, defendant contends that Phillips' perception of the person at the door is a critical issue of fact within the case and is inadmissible under Rule 602 because the State did not pre-

sent evidence that Dowd had personal knowledge of Phillips' impressions while at the front door. Furthermore, defendant argues Dowd did not testify in the form of an opinion, but plainly stated that Phillips questioned the man at the door, did not welcome him into the house, and thought the man was coming in to do harm. According to defendant, Dowd did not have personal knowledge of the situation as his back was to the door. Dowd did not see the situation until he stood up and turned around to see defendant already lying on top of Phillips.

Consequently, defendant argues Dowd could describe everything that happened, but the jury was just as well qualified as Dowd to draw any inferences as to what Phillips perceived during the intrusion, based on the facts elicited at trial. Along these lines, defendant claims Dowd's testimony was a "meaningless assertion" which did not warrant inclusion, because it was of little assistance to the jury. Defendant cites to two cases from our Supreme Court where it ruled certain opinion evidence to have been improperly allowed, but we do not believe either case applies to this case. First, defendant cites to *Watson*, 294 N.C. 159, 240 S.E.2d 440, where a witness did not observe the robbery, but testified that the "defendant had robbed the station[.]" *Id.* at 165, 240 S.E.2d at 445. Although, in the case at hand, Dowd may not have visually observed the altercation at the door, he did hear what went on. Clearly, that is sufficient to distinguish this case from *Watson*. Additionally, defendant cites to *State v. Cuthrell*, 233 N.C. 274, 63 S.E.2d 549 (1951), where a witness testified that a building had been " 'set afire,' " yet the witness had not arrived at the scene until after the fire had been put out. *Id.* at 275, 63 S.E.2d at 550. Again, the present case differs in that Dowd observed the situation by listening in on what happened with Phillips at the front door. Either way, defendant contends the incorrect admission of Dowd's testimony warrants reversal because there is a possibility that a different result would have been reached had Dowd's testimony not been admitted. *See* N.C. Gen. Stat. § 15A-1443(a) (2011).

The State, alternatively, argues the trial court properly allowed Dowd's testimony because the testimony related to his personal observations and not to those of Phillips. At trial, Dowd testified that he thought Phillips was welcoming someone into the house, "[b]ut [he] realized quickly that it was like a tussle[,]" and then he heard Phillips say, "Come on, man." Dowd was then asked how he perceived the manner in which Phillips made the comment to which he responded by stating, "[i]t put me in the vibe of that he was in danger

and he was kind of questioning like whoever the guy was, what is he doing, you know." Defendant objected to this final statement, but the trial court overruled it relying on the State's claims that Dowd was clearly stating his personal observations of the situation. Dowd went on to state that he thought it was a tussle at the door "because [Phillips] wasn't welcoming him into his house, he was checking his door to see who it was." Defendant again objected, but it was again overruled. Finally, Dowd testified that Phillips "was checking his door to see who it was but once he opened the door, he seen that the guy was trying to come in to cause harm so he was trying to close the door." Once again defendant objected, but the trial court again overruled it.

The State contends that even if Dowd's testimony encompassed some beliefs or conclusions regarding Phillips' state of mind, the testimony was based on Dowd's personal observations and knowledge. Under Rule 602, there was "evidence [] introduced sufficient to support a finding that [Dowd] has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, Rule 602. Likewise, as stated above, " '"personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception."' " *State v. Wilkerson*, 363 N.C. 382, 414, 683 S.E.2d 174, 194 (2009), *cert. denied*, ____ U.S. ____, 176 L. Ed. 2d 734 (2010) (quoting N.C. Gen. Stat. § 8C-1, Rule 602, official commentary). Dowd merely gave his understanding and interpretation of what went on at the door based on his sitting in the next room and being able to hear the whole situation.

> "The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence."

State v. Lloyd, 354 N.C 76, 109, 552 S.E.2d 596, 620 (2001) (quoting *State v. Leak*, 156 N.C. 643, 647, 72 S.E. 567, 568 (1911) (citation omitted)). Consequently, Dowd testified regarding his own beliefs of the sequence of events that took place at the door between Phillips and the unmasked man, and it was not error for the trial court to admit Dowd's testimony at trial.

B. Admission of Anonymous Call

[2] Defendant's second argument on appeal is that the trial court erred in allowing the State to offer into evidence the 911 report,

including the phone call of an anonymous citizen that officers should treat the third victim at the hospital as a suspect because he had been involved in a narcotics robbery. Specifically, defendant contends the anonymous call was hearsay and thus incompetent evidence. We agree.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2011). Generally, the statement of a declarant is inadmissible at trial where the declarant is unavailable to serve as a witness. *See* N.C. Gen. Stat. § 8C-1, Rule 804(a) (2011). However, " '[e]vidence which might not otherwise be inadmissible against a defendant may become admissible to explain or rebut other evidence put in by the defendant himself.' " *State v. Maynard*, 311 N.C. 1, 28, 316 S.E.2d 197, 212 (1984) (quoting *State v. Small*, 301 N.C. 407, 436, 272 S.E.2d 128, 145-46 (1980)). Nevertheless, this does not give the State *carte blanche* to offer incompetent evidence. *See State v. Lynch*, 334 N.C. 402, 412-13, 432 S.E.2d 349, 354-55 (1993). We review the admission of otherwise inadmissible evidence, where the defendant first opened the door for abuse of discretion. *See State v. McClary*, 157 N.C. App. 70, 79, 577 S.E.2d 690, 696 (2003).

Defendant contends his constitutional rights were violated by not being able to cross-examine the anonymous caller at trial, in violation of the Confrontation Clause as established in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), and *Davis v. Washington*, 547 U.S. 813, 165 L. Ed. 2d 224 (2006). Furthermore, defendant admits that information regarding the BOLO of a suspect wearing a red hoodie or sweater was accurate, as it was taken directly from the 911 log, but he contends the anonymous call, which came four and a half hours after the initial BOLO, did not relate any information explaining the reason for the BOLO. As a result, defendant argues there is a real possibility that evidence of the call influenced the jury, and had it not been allowed in as evidence, there is a reasonable possibility that a different result would have occurred.

On the other hand, the State claims defendant opened the door to the admission of the 911 call from the unknown caller. Debra Cottle briefly testified in the State's case-in-chief, but not about the unidentified 911 call suggesting defendant's involvement in a narcotics robbery. Defendant subsequently recalled Ms. Cottle and questioned her regarding the shooting of Phillips. At defendant's request, Ms. Cottle had prepared the report of all the 911 calls, which contained the initial BOLO describing a "black male, red hoodie or sweater, blue

jeans, white tennis shoes, suspect." On cross-examination she testified that the BOLO did not give its source or how it was obtained. Then, over objection, Ms. Cottle testified that there was another call regarding the shooting from an unidentified citizen. The call was "[a]dvising that a third victim that came to the hospital with the shooting was involved in some type of 1098," which is a narcotics robbery, and that he was "possibly the suspect in the whole thing. 1083." Furthermore, Ms. Cottle added that the person "didn't have or wouldn't divulge solid details. Just wanted to let detectives know the word on the street so they could look at the third victim as a suspect."

"[A] trial court may permit otherwise inadmissible evidence to be admitted if the opposing party opens the door through cross-examination of the witness." *State v. Thaggard*, 168 N.C. App. 263, 273, 608 S.E.2d 774, 782 (2005). " 'Opening the door' is the principle where one party introduces evidence of a particular fact and the opposing party may introduce evidence to explain or rebut it, even though the rebuttal evidence would be incompetent or irrelevant, if offered initially." *Id.* " '[T]he law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself.' " *State v. Garner*, 330 N.C. 273, 290, 410 S.E.2d 861, 870 (1991) (alteration in original) (quoting *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)). The State recognizes that the later call is inadmissible hearsay, which is the reason it did not elicit the testimony during its case-in-chief. However, it contends defendant opened the door by creating the impression that the police had not developed or received any information leading them to view defendant as a suspect. Defendant had the crime scene technician testify that it collected clothing from where defendant was located consisting of a black shirt and black hoodie, while the BOLO description was different. The State elicited the anonymous phone call to refute and rebut defendant's allegedly misleading impression that he could not have been involved in the crime.

While defendant may have opened the door to the admission of further evidence regarding his potential involvement in the robbery, we do not believe defendant opened the door to the admission of the substance of improper hearsay statements.

> Generally, much latitude is given counsel on cross-examination to test matters related by a witness on direct examination. *State v. Burgin*, 313 N.C. 404, 329 S.E.2d 653 (1985). The scope of cross-examination is subject to two limitations: (1) the discretion

of the trial court; and (2) the questions offered must be asked in good faith. *State v. Dawson*, 302 N.C. 581, 585, 276 S.E.2d 348, 351 (1981).

State v. Warren, 327 N.C. 364, 373, 395 S.E.2d 116, 121-22 (1990). Here, the State admitted that the anonymous phone call amounted to hearsay, yet it still elicited evidence regarding the call for the truth of the matter asserted. The anonymous tip included allegations that defendant was part of a trio involved in a particular narcotics robbery, but there was no other evidence to substantiate these claims. The State could have certainly elicited at trial that there was an anonymous call that rebutted the initial BOLO, but we believe it was prejudicial for the State to elicit the substance of the call, which improperly created an image for the jury of defendant as a person involved in a narcotics robbery gone awry. Thus, the trial court abused its discretion in allowing the admission of the substance of the anonymous call over defendant's objection such that there is a probability that the jury might have otherwise reached a different verdict. Consequently, we must reverse on this issue and remand for a new trial.

Reversed and remanded for a new trial.

Chief Judge MARTIN and Judge BRYANT concur.

STATE OF NORTH CAROLINA v. MONTARIO ANTWOND GLENN

No. COA11-1488

(Filed 5 June 2012)

1. Appeal and Error—preservation of issues—failure to raise specific argument

The trial court did not err in a felony possession of cocaine case by denying defendant's motion to dismiss for insufficient evidence. Although the indictment alleged that defendant possessed .1 grams of cocaine while the State's evidence showed that defendant possessed only .03 grams of cocaine, defendant failed to raise a specific argument at trial regarding dismissal based on a fatal variance and the argument was waived on appeal. Further, in its discretion, the Court of Appeals reviewed the argument and found it had no merit.

2. Attorneys—request to remove court-appointed attorney—complaints not sufficient for removal—sufficient inquiry—no ineffective assistance

The trial court did not abuse its discretion in a possession of cocaine case by failing to conduct a meaningful inquiry into defendant's complaints regarding his court-appointed attorney and denying defendant's requests to remove his attorney. Defendant's complaints regarding his dissatisfaction with his attorney's work and trial strategy were not a sufficient basis for the appointment of substitute counsel. None of the circumstances surrounding these complaints were such as to render defense counsel's assistance ineffective.

3. Jury—contact with police officer witnesses—inadvertent, brief, and harmless—motion for mistrial properly denied

The trial court did not err by denying defendant's motion for a mistrial in a felony possession of cocaine case where three law enforcement officers who were witnesses in the case walked through the jury assembly room in the presence of some jurors. The contact was inadvertent, brief, and ultimately harmless.

Appeal by defendant from amended judgment entered on or about 9 June 2011 by Judge Joseph N. Crosswhite in Superior Court, Rowan County. Heard in the Court of Appeals 4 April 2012.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General E. Burke Haywood, for the State.

Michael E. Casterline, for defendant-appellant.

STROUD, Judge.

Montario Antwond Glenn ("defendant") appeals from convictions for felony possession of cocaine and attaining the status of habitual felon. For the following reasons, we find no error in defendant's trial.

I. Background

On 27 August 2007, defendant was indicted for one count of felony possession with intent to sell and/or deliver cocaine, committing an offense while on pretrial release, and attaining the status of habitual felon. Defendant was tried on these charges at the 6 June 2011 Session of Criminal Court, Rowan County. The State's evidence tended to show that on 9 January 2007 Detective C.M. Walker with the

Kannapolis Police Department went to defendant's residence to serve a warrant for defendant's arrest. Detective Walker knocked on the door, identified himself to defendant, and defendant opened the front door and "then [defendant] just kind of nonchalantly turned and walked away from [Detective Walker] ____ walked into the apartment away from [him]." While talking with defendant, Detective Walker followed defendant into the apartment. While Detective Walker explained to defendant that he had a warrant for his arrest, he noticed that defendant was moving something around in his hand, which led Detective Walker to believe defendant was trying to conceal something. As he approached defendant, Detective Walker told defendant to put his hands behind his back, but defendant began "flail[ing] his arms, not as if he was trying to hurt [Detective Walker] but as if he were trying to prevent [him] from placing [defendant] under arrest." Detective Walker got defendant to the ground and radioed for assistance. He was then able to put handcuffs on defendant and place him under arrest. Before the struggle, Detective Walker thought he heard "a rustling noise[,]" like a plastic baggie in defendant's hand but, once defendant was in custody, he could not locate anything on the floor around defendant. Detective Roth arrived at the scene about five minutes after Detective Walker's call for assistance. Detective Walker explained the situation to him and they both could not locate anything on the floor around defendant in the apartment. Detective Walker then sat defendant in a chair, asked him to open his mouth, and noticed something in defendant's mouth. Detective Roth then told defendant that if he did not open his mouth he would spray him with pepper spray. Defendant then spit two plastic baggies out of his mouth, containing what appeared to be cocaine. It was Detective Walker's concern that if defendant ingested drugs he would become sick or die. Detective Roth then collected the two baggies, put them in a sealed plastic bag, and Detective Walker turned the plastic bag over to the police station's evidence property storage area. The plastic baggies were sent for analysis. Jennifer Lindley, a forensic drug chemist with the North Carolina State Bureau of Investigation, testified that the packages taken from defendant contained 0.03 grams of cocaine hydrochloride.

Defendant did not present any evidence at trial. On 8 June 2011, a jury found defendant guilty of felony possession of cocaine. On 9 June 2011, a jury found that defendant had attained the status of habitual felon. On the same day, the trial court sentenced defendant to a term of 80 to 105 months imprisonment. Defendant gave notice

of appeal in open court. On appeal, defendant contends that (1) the trial court erred in denying his motions to dismiss for insufficiency of the evidence; (2) the trial court failed to conduct a meaningful inquiry into his complaints regarding his trial counsel and erroneously denied his requests to remove his court-appointed attorney; (3) the trial court erred in not declaring a mistrial; and (4) his habitual felon status should be declared void since the underlying conviction for felony possession of cocaine was in error.

II. Motion to dismiss

[1] Defendant contends that the trial court erred in denying his motions to dismiss, as there was insufficient evidence to support his conviction for felony possession of cocaine. Defendant argues that there was a "fatal variance" in the indictment, as it alleged that he "did possess .1 grams of Cocaine" and the State's evidence which showed that he was in possession of only 0.03 grams of cocaine. Defendant contends that even though this fact was not necessary for a conviction for possession of cocaine, the State chose to allege it in their indictment, the State was required to and failed to prove this fact, and therefore, the trial court erred in denying his motion to dismiss.

We note that defense counsel raised a motion to dismiss at the close of the State's evidence but when asked whether he wanted to be heard on that motion, defense counsel stated, "I'll rest my argument on the evidence heard by the Court, Your Honor." The trial court denied defendant's motion. Defense counsel stated that defendant would not be presenting any evidence. Out of the presence of the jury, the State made the following statement regarding the indictment:

> [The STATE]: Yes. Your Honor, there's—in the court file I see there's an indictment in this case. The body—language of the indictment is possession of cocaine, which is what he is charged with. But there's surplusage in the title. It is not possession with intent. It's just possession of cocaine. I want to make sure that everybody is aware of that and that's just a mistake. But the actual body and language of the indictment is correct. It is just possession of cocaine.
>
> THE COURT: Okay. Which would be a Class I felony?
>
> [THE STATE]: Yes. And the calendar reflects incorrectly, also, because it's reflecting that title. So it's really just possession of cocaine.

THE COURT: Yes, sir.

In response, defense counsel made the following statement:

> [DEFENSE COUNSEL]: Judge, I think the substantive language of the indictment indicates the underlying—just the possession of cocaine. I don't believe there has been any evidence of possession with intent. If the State were to elect to proceed with —on a possession with intent, we'd have a motion regarding the language of the indictment. But I think they can overcharge in an indictment. I just don't think they can undercharge and try to charge—[.]

The trial court informed the parties that he was allowing the indictment to be amended "to reflect the Class I possession of a controlled substance." Defendant did not raise any objection to this amendment. Defense counsel then renewed his motion to dismiss at the close of all evidence, stating that he was "rely[ing] on the same facts of the case, Your Honor." The trial court again denied his motion and moved to the jury charge conference.

"[A] fatal variance between the indictment and proof is properly raised by a motion for judgment as of nonsuit or a motion to dismiss, since there is not sufficient evidence to support the charge laid in the indictment." *State v. Faircloth*, 297 N.C. 100, 107, 253 S.E.2d 890, 894 (citations omitted), *cert. denied*, 444 U.S. 874, 62 L.Ed. 2d 102 (1979). "A motion to dismiss [for a variance] is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged." *State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971). "A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged." *Id.* Here, the record does not contain any argument at trial by defense counsel that the charges should be dismissed because there was a fatal variance between the indictment and evidence presented. We have recently stated that

> [g]enerally, "error may not be asserted upon appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion." N.C. Gen. Stat. § 15A-1446(a) (2009); N.C.R. App. P. (10)(a)(1). Objections must "stat[e] the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. (10)(a)(1). "Failure to make an appropriate and timely motion or objection constitutes a waiver of the

> right to assert the alleged error on appeal . . . ." N.C. Gen. Stat. § 15A-1446(b).

State v. Edmonds, ____ N.C. App. ____, ____, 713 S.E.2d 111, 114 (2011). As the above portions of the transcript show, defense counsel's only objection regarding the indictment was whether the State was going to pursue the charge of possession with intent, which the State ultimately did not pursue. Since defendant failed to raise a specific argument regarding dismissal based on a fatal variance at trial, those arguments have been waived on appeal. *See id.* However in our discretion, we have reviewed this issue and find it has no merit.

III. Substitute counsel

[2] Defendant next contends that "the trial court erred when it failed to conduct a meaningful inquiry and denied [his] repeated requests to remove his court-appointed attorney."

> In *State v. Covington*, our Supreme Court stated that
>
> > [t]he right to the assistance of counsel and the right to face one's accusers and witnesses with other testimony are guaranteed by the Sixth Amendment to the Federal Constitution which is made applicable to the States by the Fourteenth Amendment, and by Article I, Sections 19 and 23 of the Constitution of North Carolina. The right to the assistance of counsel includes the right of counsel to confer with witnesses, to consult with the accused and to prepare his defense.
> >
> > *State v. Cradle*, 281 N.C. 198, 207, 188 S.E.2d 296, 302 (1972) (citations omitted). Errors arising pursuant to the United States Constitution are presumed prejudicial unless the appellate court finds that the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2007). "The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." *Id.* Our Supreme Court applies this principle to errors arising pursuant to the North Carolina Constitution. *State v. Bunch*, 363 N.C. 841, 844, 689 S.E.2d 866, 868 (2010) (quoting *State v. Huff*, 325 N.C. 1, 33, 381 S.E.2d 635, 654 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990)).

205 N.C. App. 254, 256, 696 S.E.2d 183, 185 (2010). "Absent a showing of a [S]ixth [A]mendment violation", we review the denial of a motion to appoint substitute counsel under an abuse of discretion standard. *State v. Hutchins*, 303 N.C. 321, 336, 279 S.E.2d 788, 798 (1981) (citation omitted).

> While it is a fundamental principle that an indigent defendant in a serious criminal prosecution must have counsel appointed to represent him, *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799 (1963), an indigent defendant does not have the right to have counsel of *his choice* appointed to represent him. This does not mean, however, that a defendant is never entitled to have new or substitute counsel appointed. A trial court is constitutionally required to appoint substitute counsel whenever representation by counsel originally appointed would amount to denial of defendant's right to effective assistance of counsel, that is, when the initial appointment has not afforded defendant his constitutional right to counsel.

State v. Thacker, 301 N.C. 348, 351-52, 271 S.E.2d 252, 255 (1980) (citations and footnote omitted) (emphasis in original). "Substitute counsel is required and must be appointed when defendant shows good cause, such as a conflict of interest or a complete breakdown in communications." *State v. Nelson*, 76 N.C. App. 371, 373, 333 S.E.2d 499, 501 (1985) (citations omitted), *aff'd as modified on other grounds*, 316 N.C. 350, 341 S.E.2d 561 (1986). On the other hand,

> when it appears to the trial court that the original counsel is reasonably competent to present defendant's case and the nature of the conflict between defendant and counsel is not such as would render counsel incompetent or ineffective to represent *that* defendant, denial of defendant's request to appoint substitute counsel is entirely proper.

Thacker, 301 N.C. at 352, 271 S.E.2d at 255 (citations omitted) (emphasis in original). General dissatisfaction or disagreement over trial tactics is not a sufficient basis to appoint new counsel. *See State v. Prevatte*, 356 N.C. 178, 216, 570 S.E.2d 440, 461 (2002) (noting that "[a]n indigent defendant has no right to replace appointed counsel merely because the defendant is dissatisfied with the present attorney's work or because of a disagreement over trial tactics."), *cert. denied*, 538 U.S. 986, 155 L.Ed. 2d 681 (2003).

Specifically, defendant contends that he repeatedly informed the judge that his defense counsel was not "doing a good job representing his interests, and that he had had very little contact with [defense counsel] before trial" and "he wasn't sure [defense counsel] had his best interest at heart." Defendant contends that "[t]he trial court did not conduct a serious and focused inquiry into the nature of the conflict between" defendant and defense counsel and "was unable to

ascertain whether the conflict was so severe that it would render counsel incompetent or ineffective to represent that defendant." (emphasis omitted). Defendant concludes that this failure to investigate amounted to an abuse of discretion, this violation of his constitutional rights was presumed prejudicial, and his conviction should be reversed as the State cannot show that this error was "harmless beyond a reasonable doubt."

Here, defendant makes no argument regarding any conflict of interest. *See Nelson*, 76 N.C. App. at 373, 333 S.E.2d at 501. The trial transcript shows that at two separate times during his trial defendant voiced his desire to hire new counsel and have his appointed counsel dismissed. However, a thorough review of the transcript shows that a majority of defendant's complaints were directed towards defense counsel's choice of trial strategy or defendant's general dissatisfaction with defense counsel. As to trial strategy, defendant complained that defense counsel was trying to coerce him into taking a plea bargain, had only spent 50 hours working on his case, and, on the second day, it appears that he was unhappy with defense counsel's cross-examination of Detective Walker. In voicing his general dissatisfaction, defendant stated that he felt defense counsel "hasn't really been representing me the best way that his—that I feel like he can[;]" defense counsel did not have "his best interest at heart[;]" and defendant felt the "he [had not] really done nothing [sic] for [him]." As noted above, complaints regarding defendant's dissatisfaction with a defendant's trial counsel's work or trial strategy are not a sufficient basis for the appointment of substitute counsel. *See Prevatte*, 356 N.C. at 216, 570 S.E.2d at 461.

As to defendant's complaints regarding a lack of communication with his trial counsel, we note that defendant on the first day of trial complained that he had not seen his counsel prior to trial "like once every eight months." On the second day of trial, there was an outburst by defendant in open court while he was conferring with defense counsel during the cross-examination of Detective Walker, indicating that there were some communication difficulties between defendant and his trial counsel. Even so, we find nothing in the record to show that "the nature of the conflict between defendant and counsel [was] . . . such as would render counsel incompetent or ineffective to represent" defendant. *See Thacker*, 301 N.C. at 352, 271 S.E.2d at 255. The transcript shows that after defendant voiced his complaints there were several instances where the trial court stopped the trial or recessed the trial early so that defendant could confer with defense

counsel. Even after defendant complained during cross examination of Detective Walker that he was not receiving "a fair trial," the trial court stopped the trial and gave defendant time to talk with defense counsel before bringing in the jury; when cross-examination resumed, defense counsel indicated that after conferring with defendant he had specific questions from defendant to ask the witness. Therefore, we cannot say that there was a "complete breakdown in communications"[,] *see Nelson*, 76 N.C. App. at 373, 333 S.E.2d at 501, which would justify the appointment of substitute counsel.

As to defendant's arguments regarding the trial court's inquiry into defendant's request for substitute counsel, we note that the *Thacker* Court expressly rejected the defendant's argument "that failure to make a detailed inquiry [into an alleged conflict with appointed counsel] amounts to a *per se* violation of defendant's right to counsel." 301 N.C. at 353, 271 S.E.2d at 255 (emphasis added). Our Supreme Court held that "when faced with a claim of conflict and a request for appointment of substitute counsel, the trial court must satisfy itself only that present counsel is able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective." *Id.* at 353, 271 S.E.2d at 256. Here, as noted above, defendant twice requested substitute counsel. In the first instance, defendant's concerns were based on a disagreement as to defense counsel's trial strategy, a lack of communication between defendant and defense counsel, and defendant's general dissatisfaction with defense counsel. After hearing defendant's concerns, the State argued that appointment of substitute counsel would not be appropriate as defense counsel had been "work[ing] diligently" on defendant's case, including filing motions on his behalf, and another attorney would just delay the case. We note that defense counsel had filed two pre-trial motions on behalf of defendant. The trial court agreed with the comments from the State, and further noted that the case was five years old, that he had handled many cases with defense counsel, and that defense counsel was "very experienced" and "very competent." The trial court denied defendant's motion and gave them an opportunity to "talk among yourselves."

On the second day of trial, defendant again voiced his dissatisfaction with defense counsel's representation, stated that he wanted to hire his own lawyer, claimed that he was not getting a fair trial, and disagreed with defense counsel's trial strategy regarding the questions defense counsel was asking Detective Walker on cross-examination. The trial court, after listening to defendant's concerns, told defendant that

defense counsel had "tried a lot of cases, and he's practiced law a long time. So I do want to encourage you to listen to his advice about what can be asked and what can't be asked." The trial court then stopped the trial and gave defendant time to talk with defense counsel before bringing in the jury. In both instances, the trial court made sufficient inquiry to determine that the nature of the conflicts were defendant's general dissatisfaction with defense counsel, communication problems, and trial strategy. None of the circumstances surrounding these complaints, as determined above, were such as to render defense counsel's assistance ineffective. The trial court also voiced his confidence in defense counsel, noting his competence, trial experience, and diligent work on defendant's case. Therefore, having learned "that present counsel [was] able to render competent assistance and that the nature or degree of the conflict [was] not such as to render that assistance ineffective[,]" *see Thacker*, 301 N.C. at 353, 271 S.E.2d at 256, the trial court did not abuse its discretion in denying defendant's motions for substitute counsel.

IV. Mistrial

[3] Defendant next contends that "the trial court erred in not declaring a mistrial when three law enforcement officers walked through the jury assembly room in the presence of some jurors." Defendant argues that the trial court should have conducted an inquiry with jurors pursuant to N.C. Gen. Stat. § 15A-1211(b) to determine if the contact by the officers had been prejudicial to defendant, as these were three witnesses for the State. Defendant concludes that it was error for the trial court not to grant his motion for a mistrial "because the integrity of this verdict is in doubt" due to these officers "marching through [the] jury room" and there "was no way to know what the impact of this event might be on the objectivity of the jurors."

Generally, "the trial court possesses broad discretionary powers to conduct a fair and just trial." *State v. Garcell*, 363 N.C. 10, 44, 678 S.E.2d 618, 639 (citation and quotation marks omitted), *cert. denied*, ____ U.S. ____, 175 L.Ed. 2d 362 (2009). N.C. Gen. Stat. § 15A-1061 states, in pertinent part, that

> [u]pon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.

N.C. Gen. Stat. § 15A-1061 (2007). But "[n]ot every disruptive event which occurs during trial automatically requires the court to declare a mistrial." *State v. Allen*, 141 N.C. App. 610, 617, 541 S.E.2d 490, 496 (2000) (citation omitted), *disc. review denied and appeal dismissed*, 353 N.C. 382, 547 S.E.2d 816 (2001). "Our standard of review when examining a trial court's denial of a motion for mistrial is abuse of discretion." *State v. Simmons*, 191 N.C. App. 224, 227, 662 S.E.2d 559, 561 (2008) (citation omitted). We find that the case before us is analogous to *State v. Washington*, 141 N.C. App. 354, 540 S.E.2d 388 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001).

In *Washington*, the defendant argued that "the trial court erred by not declaring a mistrial *sua sponte* after a bailiff entered the jury room during deliberations." *Id.* at 375, 540 S.E.2d at 402 (footnote omitted). This Court stated that

> [a]ppellate courts are deferential to the trial court's exercise of discretion in this area because a " 'trial judge is in a better position to investigate any allegations of misconduct, question witnesses and observe their demeanor and make appropriate findings.' " *State v. Rutherford*, 70 N.C. App. 674, 677, 320 S.E.2d 916, 919 (1984) (citation omitted).
>
> "Misconduct must be determined by the facts and circumstances of each case . . . ." *Id.* " 'The circumstances must be such as not merely to put suspicion on the verdict, because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely matter of suspicion, it is purely a matter in the discretion of the presiding judge.' " [*State v. Sneeden*, 274 N.C. 498, 504, 164 S.E.2d 190, 195 (1968)](quoting *Lewis v. Fountain*, 168 N.C. 277, 279, 84 S.E. 278, 279 (1915)).
>
> The great weight of authority sustains the rule that . . . a verdict will not be disturbed because of a conversation between a juror and a stranger when it does not appear that such conversation was prompted by a party, or that any injustice was done to the person complaining, and he is not shown to have been prejudiced thereby, and this is true of applications for new trial by the accused in a criminal case as well as of applications made in civil actions. . . . [A]nd if a trial is really fair and proper, it should not be set aside because of mere suspicion or appearance of irregularity which is shown to have done no actual injury. Generally speaking, neither the common law nor statutes contemplate as ground for a new trial a conversation between a juror and a third

> person unless it is of such a character as is calculated to impress the case upon the mind of the juror in a different aspect than was presented by the evidence in the courtroom, or is of such a nature as is calculated to result in harm to a party on trial. The matter is one resting largely within the discretion of the trial judge.
>
> *Id.* (alteration in original) (citation omitted).

Id. at 376-77, 540 S.E.2d at 403. In concluding that there was no abuse of discretion as "there was no misconduct affecting the jury" and overruling the defendant's argument, this Court stated that

> the evidence showed that when the intrusion by the bailiff became known to the court, the trial judge put the bailiff under oath, determined that the bailiff had, without authorization of the court, knocked on the door of the jury room, that he did so because another bailiff had asked him to retrieve some magazines for defendant, that the bailiff said nothing to the jurors and the jurors said nothing to him, and that he heard no deliberations and had no other contact with the jurors. Neither the State nor defendant accepted the court's invitation to make further inquiry of the bailiff, and defendant did not then seek a mistrial.

Id. at 377, 540 S.E.2d at 403.

Likewise here, the record shows no misconduct affecting the jury. Defense counsel raised a motion for mistrial on the second day of trial stating that three police officers and witnesses in the trial, Detective Walker, Detective Roth and Officer Ruth Steward, had walked through the jury assembly room on their way to court that morning and two members of the jury were in that room. After hearing arguments from both sides, the trial court stated that the contact with jurors was "inadvertent" as there was no conversation between the officers and the jurors and denied the motion for mistrial. Subsequently, defense counsel requested that the officers tell what happened under oath. The officers stated that they were told to be in the courtroom by 9:15 a.m. to talk with the prosecutor but because the courtroom door was locked, the officers sought access to the courtroom through what they thought was the grand jury room. However, this room, which had previously been used as the grand jury room, was now being used as the jury assembly room; they did not notice the sign indicating that it was the jury assembly room. There was no conversation with jurors and, even though they noticed a woman coming out of the bathroom and another man standing in the room, they did not make eye contact with them and quickly exited

the room. Like the baliff in *Washington*, the officers here said nothing to the jurors, the jurors made no comments to the officers, and the officers did not even make eye contact with the jurors. The contact was inadvertent, brief, and ultimately harmless. Also, we note that unlike *Washington*, in which the contact was made during jury deliberations, here the contact was in the jury assembly room before trial on the second day. Because defendant's arguments point to a "mere suspicion or appearance of irregularity" but the record shows "no actual injury" by the officers' contact with the jurors, *see Washington*, 141 N.C. App. at 376-77, 540 S.E.2d at 403, we will not set aside the verdict and hold that the trial court did not abuse its discretion in denying defendant's motion for a mistrial. We need not address defendant's argument regarding his habitual felon status as that argument is based on errors in his conviction for possession of cocaine. However, we find no error in defendant's trial for possession of cocaine.

For the foregoing reasons, we find no error in defendant's trial.[1]

NO ERROR.

Judges HUNTER, Robert C. and ERVIN concur.

1. On 26 April 2012, defendant filed a *pro se* motion "for appropriate relief from his current sentence." However, as noted above, defendant is represented by appellate counsel in this appeal. Our Supreme Court has stated that "[h]aving elected for representation by appointed defense counsel, defendant cannot also file motions on his own behalf or attempt to represent himself. Defendant has no right to appear both by himself and by counsel." *State v. Grooms*, 353 N.C. 50, 61, 540 S.E.2d 713, 721 (2000) (citations omitted), cert. denied, 534 U.S. 838, 151 L.Ed. 2d 54 (2001); *see State v. Parton*, 303 N.C. 55, 61, 277 S.E.2d 410, 415 (1981) (stating that "a party has the right to appear *in propria persona* or, in the alternative, by counsel" but "[t]here is no right to appear both *in propria persona* and by counsel."), *overruled on other grounds by State v. Freeman*, 314 N.C. 432, 437-38, 333 S.E.2d 743, 746-47 (1985); N.C. Gen. Stat. § 1-11 (2007). As there is no indication in the record that defendant's appellate counsel has withdrawn from his representation of defendant, we dismiss defendant's *pro se* motion.

WAUNETA HOLLOWAY v. CLAYTON HOLLOWAY

No. COA11-1135

(Filed 5 June 2012)

1. Pretrial Proceedings—compulsory counterclaims—res judicata—claim not yet mature

The trial court did not err by denying defendant's motion to dismiss plaintiff's complaint pursuant to Rule 13(a) of the North Carolina Rules of Civil Procedure on the grounds that plaintiff's claims were compulsory counterclaims in defendant's prior action for summary ejectment and therefore barred by *res judicata* principles. Plaintiff's claim was not yet mature at the time of defendant's prior summary ejectment proceedings.

2. Contracts—breach of contract—sufficient allegations—motion to dismiss properly denied

The trial court did not err in failing to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure where the allegations, when liberally construed and taken as true, were sufficient to assert a claim for which relief may be granted.

3. Fiduciary Relationship—son-mother relationship—sufficient evidence

The trial court did not err in finding that a fiduciary relationship existed between defendant and plaintiff based on a son-mother relationship.

Appeal by defendant from order entered 19 April 2011 by Judge Arnold O. Jones, II, in Wayne County Superior Court. Heard in the Court of Appeals 8 February 2012.

Farris A. Duncan for plaintiff-appellee.

Gray, Johnson & Lawson, LLP., by Thomas H. Johnson, Jr., for defendant-appellant.

Bryant, Judge.

Where plaintiff's claim was not mature at the time of defendant's action for summary ejectment and where the allegations in plaintiff's complaint are sufficient on their face to state a claim for which relief can be granted, the trial court did not err in denying defendant's

motions to dismiss. Where competent evidence exists to support the trial court's findings of fact, the trial court did not err in finding a fiduciary relationship between plaintiff and defendant. We affirm the trial court's order.

Facts and Procedural History

Plaintiff Wauneta Holloway filed suit against her son, defendant Clayton Holloway, on 22 December 2009 in Wayne County Superior Court alleging breach of agreement and seeking recovery of forty-thousand dollars ($40,000.00), court costs, attorney's fees, and such other relief as the court deemed proper. Prior to the case being called for trial, defendant filed three motions. Defendant's first two motions, a motion to strike for failure to state a claim upon which relief could be granted (treated as a Rule 12(b)(6) motion by the trial court) and a motion to dismiss pursuant to Rule 13(a) and res judicata, were filed 4 January 2011. Defendant's third motion, a motion for a change of venue, was filed 15 February 2011. After hearings, the court denied all three motions. The case came on for bench trial during the 21 February 2011 session of Wayne County Superior Court, the Honorable Arnold O. Jones II, Judge Presiding.

Evidence presented at trial tended to show that prior to June 2007, plaintiff was living in California. In May 2007, as a result of plaintiff's deteriorating living conditions in California, plaintiff and defendant discussed plaintiff moving to North Carolina so that defendant could help care for plaintiff. At that time, defendant was living with his wife in Wayne County and owned a modular home in Greene County that he was renting to tenants. It was agreed that plaintiff would move back to North Carolina and move into the modular home that defendant owned and rented. In return for living in the modular home, plaintiff was to help pay the mortgage on the modular home, pay back taxes owed to Greene County, and pay rent for the land on which the modular home was situated. The agreement was never reduced to writing.

In June 2007, defendant traveled to California to help plaintiff move to North Carolina. Plaintiff and defendant made the cross-country road-trip to North Carolina together in plaintiff's van, towing behind them a trailer full of plaintiff's belongings, including four dogs and eleven cats.

Upon arriving in North Carolina, plaintiff began living in defendant's modular home. In return, plaintiff made the following payments for defendant: plaintiff paid back taxes owed to Greene County for

the years '04, '05 and '06; plaintiff paid the rent for the land on which the modular home was situated for the years '08 and '09; and plaintiff made a payment of $53,264.92 to pay off the mortgage on the modular home in full. Plaintiff testified that she and defendant agreed she would help pay off the mortgage. Defendant testified that he told plaintiff not to pay the mortgage in full but instead to make monthly payments as they came due. Despite the contradictory testimony, it is clear that plaintiff continued to live in the modular home.

Over two years later, in September 2009, defendant filed an action for summary ejectment in Greene County Small Claims Court seeking to remove plaintiff from the modular home. As a basis for his suit, defendant testified that the land owner and neighbors were complaining about the condition of the property. Defendant stated that he tried to discuss the problems with plaintiff, but plaintiff would not listen. The magistrate judge ruled in favor of plaintiff. Defendant appealed the ruling to Greene County District Court. The case was heard before a jury on 23 November 2009, the Honorable Timothy I. Finan, Judge Presiding. The jury returned a unanimous verdict in favor of plaintiff and the appropriate judgment was entered.

On 4 December 2009, plaintiff received a letter from the landlord of the property on which the modular home was situated. The letter stated that no subleasing was allowed on the property. Plaintiff testified that, at that point, she had had enough and could no longer take the harassment. Plaintiff vacated the modular home by 1 January 2010 and shortly after filed the case *sub judice*.

At the conclusion of evidence and arguments on 22 February 2011, Judge Jones took the case under advisement. On 19 April 2011, Judge Jones entered an order finding in favor of plaintiff in the amount of $29,870.58 plus court costs. Judge Jones found there to be no enforceable contract between the plaintiff and defendant but held that a fiduciary relationship existed between the parties, and that defendant was unjustly enriched when plaintiff paid off the mortgage on his modular home. Defendant appeals.

On appeal, defendant raises the following issues: whether the trial court erred (I) by denying defendant's motion to dismiss plaintiff's complaint as a compulsory counterclaim pursuant to Rule 13(a) barred by res judicata; (II) by denying defendant's motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) when there was no contract between the parties; and (III) in finding that the defendant was a fiduciary for the plaintiff.

I

[1] Defendant contends that the trial court erred in denying his motion to dismiss plaintiff's complaint pursuant to Rule 13(a) of the North Carolina Rules of Civil Procedure on the grounds that plaintiff's claims were compulsory counterclaims in defendant's prior action for summary ejectment and therefore barred by res judicata principles. We disagree.

Rule 13(a) of the North Carolina Rules of Civil Procedure provides that:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

N.C. Gen. Stat. § 1A-1, Rule 13(a) (2011). To determine whether a claim arises out of the same transaction or occurrence as a prior claim, we must consider: " '(1) whether the issues of fact and law raised by the claim and counterclaim are largely the same; (2) whether substantially the same evidence bears on both claims; and (3) whether any logical relationship exists between the two claims.' " *Jonesboro United Methodist Church v. Mullins-Sherman Architects, L.L.P.*, 359 N.C. 593, 599-600, 614 S.E.2d 268, 272 (2005) (quoting *Curlings v. Macemore* 57 N.C. App. 200, 202, 290 S.E.2d 725, 726 (1982)) (brackets omitted). Even then, "the compulsory counterclaim rule applies only to claims that are mature at the time the responsive pleading is filed." *Id.* at 597, 614 S.E.2d at 271.

"The purpose of Rule 13(a), making certain counterclaims compulsory, is to enable one court to resolve 'all related claims in one action, thereby avoiding a wasteful multiplicity of litigation . . . .' " *Gardner v. Gardner*, 294 N.C. 172, 176-177, 240 S.E.2d 399, 403 (1978) (citations omitted). Thus, "Rule 13(a) is a tool designed to further judicial economy. The tool should not be used to combine actions that, despite their origin in a common factual background, have no logical relationship to each other." *Twin City Apartments, Inc. v. Landrum*, 45 N.C. App. 490, 494, 263 S.E.2d 323, 325 (1980).

> Under the doctrine of res judicata: "Where a second action or proceeding is between the same parties as the first action or proceeding, the judgment in the former action or proceeding is con-

> clusive in the latter not only as to all matters actually litigated and determined, but also as to all matters which could properly have been litigated and determined in the former action or proceeding."

Fickley v. Greystone Enterprises, Inc., 140 N.C. App. 258, 260, 536 S.E.2d 331, 333 (2000) (quoting *Young v. Young*, 21 N.C. App. 424, 204 S.E.2d 711 (1974)).

However, despite Rule 13(a) of the North Carolina Rules of Civil Procedure, "[n]o counterclaim, cross claim or third-party claim which would make the amount in controversy exceed [five-thousand dollars ($5,000.00)] is permissible in a small claim action assigned to a magistrate." N.C. Gen. Stat. § 7A-219 (2011) (substituting the jurisdictional amount in controversy maximum established by N.C. Gen. Stat. § 7A-210 (2011)). Therefore, "[n]otwithstanding G.S. 1A-1, Rule 13, failure by a defendant to file a counterclaim in a small claims action assigned to a magistrate . . . shall not bar such claims in a separate action." *Id.* But, "[o]n appeal from the judgment of the magistrate for trial de novo before a district judge, the judge shall allow appropriate counterclaims, cross claims, third party claims, replies, and answers to cross claims, in accordance with G.S. 1A-1, et seq." N.C. Gen. Stat. § 7A-220 (2011).

Prior to the case now before us, defendant initiated two summary ejectment proceedings against plaintiff. Defendant's first complaint for summary ejectment was heard by a magistrate in Greene County Small Claims Court in September 2009. Upon a ruling in favor of plaintiff, defendant appealed the decision to Greene County District Court. The case was heard before a jury on 23 November 2009, the Honorable Timothy I. Finan, Judge Presiding. The jury returned a unanimous verdict in favor of plaintiff, finding that an agreement between the parties had been entered into concerning plaintiff living in defendant's modular home and that the agreement had not been breached. A judgment was entered accordingly on 7 December 2009.

It is clear that N.C. Gen. Stat. § 7A-219 prohibited plaintiff from filing her claim as a counterclaim in the first action for summary ejectment, as plaintiff's forty-thousand dollar ($40,000.00) claim would have far exceeded the five-thousand dollar ($5,000.00) jurisdictional limit for controversies allowed to be heard in a small claims action assigned to a magistrate. However, we must next consider whether plaintiff could have asserted her claim as a counterclaim in defendant's appeal for a trial de novo to Greene County District Court pursuant to N.C. Gen. Stat. §7A-220.

In order to determine if plaintiff's claim was a compulsory counterclaim under Rule 13(a), we must determine if the claims arise out of the same transaction or occurrence and whether plaintiff's claim was mature at the time plaintiff filed her responsive pleading to defendant's action for summary ejectment. *See* N.C. Gen. Stat. § 1A-1, Rule 13(a).

It is clear that plaintiff's claim arises out of the same transaction or occurrence as defendant's prior summary ejectment action. First, the issues of fact and law raised by the two claims both arise out of the purported agreement between plaintiff and defendant for plaintiff to live in defendant's modular home. Second, substantially the same evidence is necessary to prove an agreement and breach of that agreement. Third, there is a logical relationship between the two claims as both claims relate to plaintiff's residency in defendant's modular home.

Yet, as to whether plaintiff's claim was mature at the time of defendant's appeal, plaintiff contends that there are additional factors in the case *sub judice* that could not have been asserted in response to defendant's prior action for summary ejectment. We agree. Specifically, plaintiff was still living in the modular home and the landlord had not yet sent plaintiff the letter stating that subleasing of the property was not allowed. At the time defendant's action for summary ejectment was filed, subleasing the property was not an issue. Evidence presented at trial indicates that plaintiff paid rent to the landlord for two years and the landlord never mentioned that subleasing was not allowed. Furthermore, before plaintiff moved into the modular home, defendant rented the modular home to a friend of the landlord's granddaughter and the issue of subleasing was never brought up.

In the current action, plaintiff specifically claims that defendant breached their agreement "by causing the landlord to give notice of eviction from the space where the home was located so [plaintiff could] no longer occupy the home." This claim could not have been asserted as a counterclaim in defendant's prior summary ejectment action as plaintiff's assertion was premised on her receipt of the landlord's letter which did not occur until 4 December 2009, after the jury returned a unanimous verdict in favor of plaintiff in the summary ejectment action. Thus, plaintiff's claim in the present proceedings was not mature at the time of her responsive pleadings in defendant's summary ejectment action.

Given that plaintiff's claim was not yet mature at the time of defendant's prior summary ejectment proceedings, the lower court did not err in denying defendant's motion to dismiss based on Rule 13(a) of the North Carolina Rules of Civil Procedure and principles of res judicata. Defendant's argument is overruled.

II

[2] Next, defendant contends that the trial court erred in failing to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure because there was no contract between the parties on which to base a breach of contract claim. We disagree.

" 'A Rule 12(b)(6) motion tests the legal sufficiency of the pleading.' " *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (quoting *Sterner v. Penn*, 159 N.C. App. 626, 628, 583 S.E.2d 670, 672 (2003)). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

A Rule 12(b)(6) motion is a motion to dismiss for "[f]ailure to state a claim upon which relief can be granted." N.C. Gen. Stat. § 1A-1, Rule 12. "In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citing *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976)). More specifically, dismissal under Rule 12(b)(6) is proper when: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citing *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985)). "The complaint should be liberally construed and the court should not dismiss the complaint unless it appears that plaintiff is not entitled to relief under any facts that could be proven." *Gregory v. City of Kings Mountain*, 117 N.C. App. 99, 102, 450 S.E.2d 349, 352 (1994) (citing *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. 216, 367 S.E.2d 647 (1988)).

After review of the pleadings, we cannot say that the lower court erred in denying defendant's motion to dismiss under Rule 12(b)(6). Plaintiff's complaint alleges that,

> In telephone conversations prior to June, 2007, the parties agreed that Plaintiff would sell her property in California and relocate to the manufactured home owned by Defendant . . ., that Plaintiff would pay off the mortgage on the home, pay back taxes owed Greene County, pay lot rent for the space where the home was located and would have the right to live in the home as long as she was living or otherwise wanted to live in the home.

Plaintiff further alleges that "Defendant has breached the agreement by attempting to have her evicted and by causing the landlord to give notice of eviction from the space where the home was located so she can no longer occupy the home." These allegations, when liberally construed and taken as true, are sufficient to assert a claim for which relief may be granted.

Defendant argues that the trial court erred in failing to dismiss the complaint because there was no written contract to satisfy North Carolina's Statute of Frauds. North Carolina's Statute of Frauds provides:

> All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, . . .; and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith . . . .

N.C. Gen. Stat. § 22-2 (2011); *see also* N.C. Gen. Stat. § 43-38 (2011) ("All leases or contracts affecting land for a period exceeding three years shall be in writing, duly proved before the clerk of the superior court, recorded in the register's office, and noted upon the registry and upon the owner's certificate."). However, as previously stated, a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is a motion on the pleadings. *Carlisle*, 169 N.C. App. at 681, 614 S.E.2d at 547. Where plaintiff sufficiently alleged an agreement and breach of that agreement, the trial court did not err in denying defendant's motion.

Furthermore, "[i]t has long been the rule in this State that the Statute of Frauds bars only enforcement of the invalid contract; it does not bar other claims which a party might have even though

those claims arise in connection with the voidable lease." *Kent v. Humphries*, 303 N.C. 675, 679, 281 S.E.2d 43, 46 (1981) (citing *Ingram v. Corbit*, 177 N.C. 318, 99 S.E. 18 (1919)). Here, plaintiff is not seeking the enforcement of the agreement with defendant. Instead, plaintiff seeks the return of money used to pay off the mortgage on defendant's modular home.

Looking only at plaintiff's complaint, the facts alleged, when liberally construed and taken as true, are sufficient to state a claim for which relief may be granted. As a result, the trial court did not err when it denied defendant's motion to strike (treated as a Rule 12(b)(6) motion to dismiss). Defendant's argument is overruled.

III

[3] Defendant's final contention is that the trial court erred in finding that a fiduciary relationship existed between defendant and plaintiff based on a son-mother relationship.

When we review an order from a non-jury trial, "we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) ("[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary." (citations and quotations omitted)). " 'Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.' " *Id.* (quoting *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) (citing Humphries v. City of Jacksonville, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980))). " 'Under a de novo review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Id.* at 632-33, 669 S.E.2d at 294 (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002))).

" 'The courts generally have declined to define the term "fiduciary relation" and thereby exclude from this broad term any relation that may exist between two or more persons with respect to the rights of

persons or property of either.' " *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 666, 391 S.E.2d 831, 833 (1990) (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). Yet, our Supreme Court has held a fiduciary relationship exists where " 'there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . .' " *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). "Thus, the relationship can arise in a variety of circumstances and may stem from varied and unpredictable factors." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 588, 403 S.E.2d 483, 489 (1991) (internal citation omitted). "Whether such a relationship exists is generally a question of fact . . . ." *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 178, 684 S.E.2d 41, 53 (2009) (citing *Stamm v. Salomon*, 144 N.C. App. 672, 680, 551 S.E.2d 152, 158 (2001)).

On appeal, defendant contends that a familial relationship between a mother and son, in and of itself, is insufficient to support a finding of a fiduciary relationship. Defendant further argues that plaintiff placed no special confidence in defendant to support a finding of a fiduciary relationship. We agree with defendant's initial argument, as it has long been established that the finding of a familial relationship alone does not create a fiduciary relationship. *See Davis v. Davis*, 236 N.C. 208, 211, 72 S.E.2d 414, 416 (1952) ("Here, we are dealing with a parent and his son and daughter-in-law. It is a family relationship, not a fiduciary one . . . ."); *Hayes v. Cable*, 52 N.C. App. 617, 619, 279 S.E.2d 80, 81 (1981) ("The relationship of a father and son is a family relationship, not a fiduciary one."). We disagree, however, with defendant's contention that there was no competent evidence in the record to support a finding that plaintiff and defendant had a fiduciary relationship based on special confidences.

In the order entered 19 April 2011 in Wayne County Superior Court, Judge Jones found, in relevant part that in June 2007 following discussion between the parties, defendant went to California and helped plaintiff move to North Carolina into defendant's modular home; that plaintiff believed she could live in defendant's modular home for the rest of her life as long as she made payments on said home; that plaintiff paid the defendant's mortgage of $53,264.92 in full; that, although there was no contract, defendant is the son of plaintiff and did encourage, if not induce, her to move to North Carolina; and that a fiduciary relationship existed between plaintiff

and defendant. Based on the testimony at trial, these findings are supported by competent evidence.

Both plaintiff and defendant testified at trial that they discussed plaintiff moving to North Carolina. In addition, both plaintiff and defendant testified that the reason plaintiff moved to North Carolina was for plaintiff to be closer to defendant so that defendant could care for her. Defendant made his modular home available to plaintiff if she helped pay the mortgage on the modular home, paid back taxes owed to Greene County, and paid the rent for the land on which the modular home was situated. Defendant then traveled to California and helped plaintiff move to North Carolina and into the modular home. We find this evidence sufficient to support the trial court's finding that a fiduciary relationship existed. Although a son-mother relationship alone does not create a fiduciary relationship, the evidence provided at trial is more than sufficient to support a determination that plaintiff reposed a special confidence in defendant given that defendant encouraged and then helped plaintiff move to North Carolina so that he could care for her.

Therefore, where our standard of review is whether competent evidence exists to support the trial court's findings of fact and whether the findings support the trial court's conclusions, we hold that sufficient evidence exists to support the conclusion that a fiduciary relationship existed between plaintiff and defendant. Defendant's argument is overruled.

Accordingly, we affirm the judgment of the trial court.

Affirmed.

Judges ELMORE and ERVIN concur.

NICK OCHSNER, PLAINTIFF v. ELON UNIVERSITY AND NORTH CAROLINA ATTORNEY GENERAL ROY COOPER, DEFENDANTS

No. COA11-1571

(Filed 5 June 2012)

1. Public Records—Campus Police Department—Elon University —not subject to North Carolina Public Records Act

The trial court did not err in a case involving a television station's public records request by granting defendant Elon University's motion to dismiss for failure to state a claim upon which relief could be granted. The Campus Police Department at Elon University, which is a private university, is not subject to the North Carolina Public Records Act.

2. Public Records—Attorney General—not custodian of arrest records—Campus Police Department—Elon University

The trial court did not err in a case involving a television station's public records request by granting defendant Attorney General's Rule 12(b)(6) motion to dismiss. The Attorney General is not the custodian of arrest records maintained by the Elon Campus Police Department pursuant to N.C.G.S. § 74G-5.

Appeal by plaintiff from orders entered 1 August 2011 by Judge Michael O'Foghludha in Alamance County Superior Court. Heard in the Court of Appeals 5 April 2012.

Perkinson Law Firm, by Ashley Matlock Perkinson, for the plaintiff.

Womble Carlyle Sandridge & Rice, LLP, by Christopher W. Jones, Beth Tyner Jones, and Amanda G. Ray, for Defendant Elon University, and David L. Elliott and Brian C. Tarr for Defendant Attorney General Roy Cooper.

Smith Moore Leatherwood, LLP, by Fred P. Baggett, for North Carolina Association of Chiefs of Police, Edmond W. Caldwell, Jr., and Julie B Smith, for North Carolina Sheriffs' Association, and Teague Campbell Dennis & Gorham, LLP, by Henry W. Gorham and Leslie Lasher, for North Carolina Association of Campus Law Enforcement Administrators, Amici Curiae.

THIGPEN, Judge.

Nick Ochsner ("Plaintiff") appeals from orders dismissing Plaintiff's complaint on the N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) motions of Elon University ("Defendant Elon University") and the Office of the North Carolina Attorney General ("Defendant Attorney General") (together, "Defendants"), contending the trial court erred as a matter of law. We affirm the orders of the trial court.

The record tends to show the following: In 2010, Plaintiff was a student at Elon University, majoring in broadcast journalism, and a student reporter for Phoenix14News, the University's student television news program. On 5 March 2010, an Elon University student named Stephen Connors ("Connors") was arrested by Elon University Campus Police Department ("the Department"). Plaintiff spoke with the Department about the arrest, and the Department provided to Plaintiff the Arrest Report and the first page of the Incident Report. On 8 March 2010, Plaintiff wrote a letter to the Department requesting the complete Incident Report for Connor's arrest pursuant to the North Carolina Public Records Law. Plaintiff's letter to the Department stated, in pertinent part, the following:

> Chief Gantos,
>
> Thank you for taking the time to talk to me today and provide me with the front pages of the Incident/Investigation Report regarding an arrest made by an officer with the Elon Campus Police Department. . . .
>
> I would like to formally request that Elon Campus Police provide Phoenix14News with a copy of "Incident Report 2010-0017" in its entirety. The document that I am requesting qualifies as a public record under North Carolina law because it reports the following:
>
> 1. "The time; date, location, and nature of a violation or apparent violation of the law reported to a public law enforcement agency."
> 2. "The name, sex, age, address, employment, and alleged violation of law of a person arrested, charged, or indicted."
> 3. "The circumstances surrounding an arrest, including the time and place of the arrest, whether the arrest involved resistance, possession or use of weapons, or pursuit, and a description of any items seized in connection with the arrest."
>
> North Carolina's public records law, Chapter 132 of the General Statutes, provides for public inspection and copying of most records made or received by state or local governments and their

> subdivisions, regardless of the physical form of the record. If you contend that the document I have asked for is not a public record, please advise me of the specific authority for that position.
>
> The Elon Campus Police Department is subject to the Public Records Law because Chapter 132-1.4(b)(3) defines "public law enforcement agencies" as all law enforcement agencies commissioned by the state attorney general. Thus, the law covers police departments at private colleges and universities as well as those at state colleges and universities.
>
> Thank you for your time and attention to this matter. Hopefully we will be able to resolve this matter and find a way to guarantee full access to these public records in the future. I look forward to hearing from you. . . .
>
> Nick Ochsner
> Phoenix 14News

The University's Campus Police Department did not provide Plaintiff with the complete Incident Report 2010-0017.

On 20 December 2010, Plaintiff's attorney, Ashley Perkinson ("Perkinson"), wrote a letter to Defendant Attorney General requesting "all records related to Mr. Connor's arrest in March 2010, including . . . the Incident Report[.]" On 5 January 2010, Defendant Attorney General replied to Perkinson, stating that the Office of the Attorney General was "not in possession of the information that you have requested" and therefore was "unable to assist you with this request." Defendant Attorney General explained:

> The records maintained by the Campus Police Administrator on behalf of the North Carolina Department of Justice—Campus Police Program, pursuant to [N.C. Gen. Stat. §] 74G-5, are campus police agency certification files and campus police officer commission files. These files typically include items related to the commission or certification application process. The type of information that you are requesting is generally not provided to the Campus Police Program. Instead, records of calls for service, arrest reports and reports of investigation are the responsibility of each company or campus police agency.

On 11 February 2011, Perkinson again wrote Defendant Attorney General, stating, "we are hopeful that you can steer Elon Campus Police back into compliance with the Public Records Law[,]" and "we

believe it is appropriate for you to either produce the requested information or to direct authorized campus police departments to comply with the public records law and produce the requested information."

On 13 April 2011, Plaintiff filed a complaint in Alamance County Superior Court alleging that Defendant Elon University and Defendant Attorney General violated the North Carolina Public Records Law by refusing to provide to Plaintiff the documents related to Connor's arrest. Defendants filed N.C. Gen. Stat. 1A-1, Rule 12(b)(6) motions to dismiss Plaintiff's complaint, and on 1 August 2011, the trial court entered orders granting Defendants' motions to dismiss. From these orders, Plaintiff appeals.

I: Standard of Review

"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." *Stunzi v. Medlin Motors, Inc.*, ____ N.C. App. ____, ____, 714 S.E.2d 770, 773 (2011) (quotation omitted). "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." *Id.* (quotation omitted). Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Id.* at ____, 714 S.E.2d at 773-74 (quotation omitted).

In Plaintiff's complaint, he made the following pertinent allegations:

4. On March 5, 2010, Stephen Connors, an Elon University student, was arrested by the University's Campus Police Department.

5. Shortly thereafter, Mr. Ochsner requested police records related to the arrest of Mr. Connors and pursuant to the North Carolina Public Records law. Mr. Ochsner's public records request is attached hereto as Attachment 1.

6. Pursuant to the North Carolina Public Records Law, Mr. Ochsner requested that the following information regarding the Connors arrest be provided:

    1. The time, date, location, and nature of a violation or apparent violation of the law reported to a public law enforcement agency.

    2. The name, sex, age, address, employment, and alleged violation of law of a person arrested, charged, or indicted.

    3. The circumstances surrounding an arrest, including the time and place of the arrest, whether the arrest involved resistance, possession or use of weapons, or pursuit, and a description of any items seized in connection with the arrest.

7. The University's Campus Police Department denied Mr. Ochsner's original request and subsequent requests. The only information provided to Mr. Ochsner about this incident are the documents attached hereto as Attachment 2.[1] These documents provide minimal information.

8. Counsel for Mr. Ochsner made requests to counsel for the University for police records relating to the arrest of Mr. Connors, but those requests were also denied.

9. Counsel for Mr. Ochsner made a public records request to the North Carolina Attorney General's office for the police records pursuant to North Carolina Gen. Stat. § 74G which states "[t]he Attorney General is the legal custodian of all books, papers, documents, or other records and property of the Campus Police Program." The Attorney General's office denied the request on January 5, 2011, and stated that it did not have possession of the information requested. The January 5, 2011 letter is attached as Attachment 3.

10. Mr. Ochsner brings forth this lawsuit on the basis that private university campus police programs must be required to provide certain basic information regarding a criminal incident to the public.

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1. The only documents attached to Plaintiff's complaint in the record on appeal are Plaintiff's 8 March 2010 letter to Chief Gantos, the Arrest Report, the first page of the Incident/Investigation Report, and Perkinson's 5 January 2011 letter to the Office of the North Carolina Attorney General.

First Claim for Relief
Violation of the North Carolina Public
Records Law

1. Paragraphs 1 through 9 are realleged and incorporated herein by reference.

2. Elon University's refusal and the North Carolina Attorney General's refusal to provide police records related to the Connors arrest violate[] the North Carolina Public Records law.

WHEREFORE, plaintiff prays the Court that a judgment be entered as follows:

1. In favor of plaintiff against defendants Elon University and the North Carolina Attorney General for violation of the North Carolina Public Records Law as well as all applicable fees, costs, and attorneys' fees allowed by law.

2. To mandate that Elon University and the North Carolina Attorney General provide plaintiff with documents related to the Connors arrest as described in this Complaint.

3. For such other and further relief as the Court deems just and proper.

In the trial court's order granting Defendant Elon University's Rule 12(b)(6) motion to dismiss, the trial court stated the following:

> the Court finds that the Complaint fails to state a colorable claim for violation of the North Carolina Public Records Act, and that Defendant Elon University did not violate the North Carolina Public Records Act by producing to Plaintiff only the subject arrest report and first page of the investigation/incident report. On that basis, the Court, hereby ORDERS, ADJUDGES and DECREES that Plaintiff's Complaint be DISMISSED, WITH PREJUDICE.

The trial court stated the following in its separate order on Defendant Attorney General's motion to dismiss: "[I]t appears to the Court that, pursuant to N.C.G.S. § 74G-5, the Attorney General is not the custodian of arrest records maintained by the Elon Campus Police Department. IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-entitled action is dismissed."

II: Elon University

[1] In Plaintiff's first argument on appeal, he contends the trial court erred in granting Defendant Elon University's Rule 12(b)(6) motion to dismiss because N.C. Gen. Stat. § 132-1 (2011) requires that Defendant Elon University "produce those records that are deemed public pursuant to the public records law." In considering whether Plaintiff's complaint in this case should have survived Defendant Elon University's Rule 12(b)(6) motion, we believe the preliminary question is whether Defendant Elon University, a private university, is subject to the North Carolina Public Records Act. We conclude Defendant Elon University is not subject to the North Carolina Public Records Act and that the trial court did not err in granting Defendant Elon University's Rule 12(b)(6) motion to dismiss.

"Access to public records in North Carolina is governed generally by our Public Records Act, codified as Chapter 132 of the North Carolina General Statutes. Chapter 132 provides for liberal access to public records." *In re Search Warrants Issued in Connection with the Investigation into the Death of Nancy Cooper*, 200 N.C. App. 180, 186, 683 S.E.2d 418, 423 (2009), *disc. review denied*, 363 N.C. 855, 694 S.E.2d 201 (2010) (quotation omitted). "The Public Records Act permits public access to all public records in an agency's possession *unless* either the agency or the record is specifically exempted from the statute's mandate." *Id.* (quotation omitted) (emphasis in original).

N.C. Gen. Stat. § 132-1 defines "public record":

> [A]ll documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.

Id. N.C. Gen. Stat. § 132-1.4(a) (2011), provides that "[r]ecords of criminal investigations conducted by public law enforcement agencies . . . are not public records as defined by G.S. 132-1." *Id.* N.C. Gen.

Stat. § 132-1.4(b)(1) (2011), defines "[r]ecords of criminal investigations" as "all records or any information that pertains to a person or group of persons that is compiled by public law enforcement agencies for the purpose of attempting to prevent or solve violations of the law, including information derived from witnesses, laboratory tests, surveillance, investigators, confidential informants, photographs, and measurements." *Id.* N.C. Gen. Stat. § 132-1.4(b)(3) (2011), states that "[p]ublic law enforcement agency" means "a municipal police department, a county police department, a sheriff's department, a company police agency commissioned by the Attorney General pursuant to G.S. 74E-1, et seq., and any State or local agency, force, department, or unit responsible for investigating, preventing, or solving violations of the law." *Id.*

In this case, in order to determine whether Plaintiff has alleged a colorable claim, we must interpret the provisions of the Public Records Act. *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (interpreting the Handicapped Persons Act to determine whether the plaintiff's complaint survived a Rule 12(b)(6) motion). Specifically, we must determine whether the Elon University Campus Police Department is a "[p]ublic law enforcement agency" pursuant to N.C. Gen. Stat. § 132-1.4(b)(3).

"Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning[,] . . . [b]ut where a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Burgess*, 326 N.C. at 209, 388 S.E.2d at 136-37 (citations omitted). "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent[;] . . . [t]his intent must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied." *Id.* at 209, 388 S.E.2d at 137 (quotation omitted).

Here, N.C. Gen. Stat. § 132-1.4(b)(3) is clear and unambiguous, and it limits the definition of "[p]ublic law enforcement agency" to the following: "a municipal police department, a county police department, a sheriff's department, a company police agency commissioned by the Attorney General pursuant to G.S. 74E-1, et seq., and any State or local agency, force, department, or unit responsible for investigating, preventing, or solving violations of the law." *Id.* Campus police departments, which are agencies certified pursuant to

the Campus Police Act, N.C. Gen. Stat. § 74G-1 (2011), *et seq.*,[2] are not enumerated in the list of departments and agencies qualifying as a "[p]ublic law enforcement agency[.]" We believe if the legislature had intended for campus police departments to be subject to the Public Records Act, it could have listed campus police departments as public law enforcement agencies. *See In re Foreclosure of a Deed of Trust Executed by Bradburn*, 199 N.C. App. 549, 552, 681 S.E.2d 828, 830 (2009), *disc. review denied*, 363 N.C. 803, 690 S.E.2d 531 (2010) (stating, "had the General Assembly intended to impose the same penalty it did in the CFA, it could have included language in the MLA leading to the same result"); *DOT v. Humphries*, 347 N.C. 649, 656, 496 S.E.2d 563, 567 (1998) (stating, "had the General Assembly intended to make unrecorded DOT right-of-way agreements valid against bona fide purchasers for value, it would have expressly exempted such agreements"). Therefore, we conclude the Campus Police Department at Elon University, which is a private university, is not subject to the North Carolina Public Records Act, and the dismissal of Plaintiff's complaint against Defendant Elon University pursuant to Rule 12(b)(6) was proper, as "the complaint on its face reveals that no law supports the plaintiff's claim" that Defendant Elon University violated the Public Records Act. *Medlin Motors, Inc.*, ____ N.C. App. at ____, 714 S.E.2d at 773-74.

III: Office of the Attorney General

[2] In Defendant's second argument on appeal, he contends the trial court erred in granting Defendant Attorney General's Rule 12(b)(6) motion to dismiss because Defendant Attorney General is the "custodian of arrest records maintained by the Elon Campus Police

2. The Campus Police Act became effective in 2005. Prior to the enactment of the Campus Police Act, campus law enforcement agencies were certified pursuant to the Company Police Act, N.C. Gen. Stat. § 74E-1, *et. seq.* However, 2005 N.C. Sess. Laws, ch. 231, § 12, states that "[w]hen [the Campus Police Act] becomes law, all certificates issued to police agencies at private institutions of higher education and commissions issued to their police officers pursuant to Chapter 74E of the General Statutes shall automatically convert to certification and commissions issued pursuant to this act and shall be administered in conformity with this act. Notwithstanding any of the provisions of Chapter 74G of the General Statutes, as enacted by this act, or the provisions of Chapter 74E of the General Statutes, the board of trustees of any educational institution that, on the effective date of this act, has a company police agency licensed pursuant to Chapter 74E of the General Statutes, may elect to continue to have its officers certified under Chapter 74E of the General Statutes rather than pursuant to Chapter 74G of the General Statutes, as enacted by this act, by making a written request to the Attorney General no later than October 1, 2005." There is no evidence of record or argument by the parties that the board of trustees for Elon University elected to continue its officers' certification pursuant to the Company Police Act.

Department" pursuant to N.C. Gen. Stat. § 74G-5. We find this argument without merit.

N.C. Gen. Stat. § 74G-5, which is part of the Campus Police Act, provides the following:

> (a) The Attorney General is the legal custodian of all books, papers, documents, or other records and property of the Campus Police Program.
>
> (b) Any papers, documents, or other records that become the property of the Campus Police Program and are placed in a campus police officer's personnel file maintained by the Attorney General are subject to the same restrictions concerning disclosure as set forth in Chapters 126, 153A, and 160A of the General Statutes for other personnel records.
>
> (c) Notwithstanding the provisions of subsection (b) of this section, the Attorney General may disclose the contents of any records maintained under the authority of this Chapter to the Criminal Justice Education and Training Standards Commission, the Sheriff's Education and Training Standards Commission, or any other criminal justice agency for certification or employment purposes.

Papers, documents, and records filed with the Office of the Attorney General and fees paid to the Office of the Attorney General pursuant to the Campus Police Act include the following: (1) "either a copy of a liability insurance policy[,] . . . or a certificate of self-insurance designating assets sufficient to satisfy the coverage requirements of this section[,]" N.C. Gen. Stat. § 74G-3(a) (2011); (2) a fee with an application for certification as a campus police agency, N.C. Gen. Stat. § 74G-12 (2011); (3) an annual renewal of certification as a campus police agency, *Id.*; (4) an application for reinstatement of certification as a campus police agency, *Id.*; (5) an application for commission as a campus police officer, *Id.*; (6) an annual renewal of commission as a campus police officer, *Id.*; (7) or an application for reinstatement of commission as a campus police officer, *Id.* There are no provisions of the Campus Police Act referring to arrest reports or incident/investigation reports of the individual campus police departments. Moreover, N.C. Gen. Stat. § 74G-5(b) refers to the "police officer's personnel file[,]" and N.C. Gen. Stat. § 74G-5(c) refers to police officer education, training, certification, and employment. Defendant Attorney General admitted in its answer to Plaintiff's complaint that

"pursuant to N.C. Gen. Stat. § 74G-5, the Attorney General is the legal custodian of all books, papers, documents, or other records and property of the 'Campus Police Program.' " However, in the initial response letter to Perkinson, Defendant Attorney General stated that the records of the Campus Police Program include "campus police agency certification files and campus police officer commission files. These files typically include items related to the commission or certification application process[,]" but do not include arrest or incident/investigation reports. We agree with Defendant Attorney General's assessment of the requirements of N.C. Gen. Stat. § 74G-5(a). N.C. Gen. Stat. § 74G-5(a) requires that "[t]he Attorney General is the legal custodian of all books, papers, documents, or other records and property of the Campus Police Program." *Id.* However, we do not believe the General Assembly intended that the "books, papers, documents, or other records" of the "Campus Police Program" include the arrest or incident/investigation reports of every campus police department. Because Plaintiff relies on N.C. Gen. Stat. § 74G-5(a) in his complaint alleging the North Carolina Attorney General refused to provide police records related to Connors' arrest, and because N.C. Gen. Stat. § 74G-5(a) does not specifically charge the Attorney General with the custodianship of arrest or incident reports of campus police departments, we conclude Plaintiff's complaint on its face reveals that no law supports Plaintiff's claim. As such, we further conclude the trial court did not err in granting Defendant Attorney General's Rule 12(b)(6) motion to dismiss.

AFFIRMED.

Judges HUNTER and GEER concur.

YOUNG & MCQUEEN GRADING COMPANY, INC. PLAINTIFF v. MAR-COMM & ASSOCIATES, INC., METRO FUNDING CORP. AND MFC FUNDING, LLC DEFENDANTS

No. COA11-1450

(Filed 5 June 2012)

1. Liens—real property—contract with owner of property—agency—pleadings impliedly amended

The trial court did not err by concluding that plaintiff was entitled to enforce its claim of lien on the property at issue as the claim of lien did not violate the N.C.G.S. § 44A-8 requirement that the lienor contract with the owner of the real property. The pleadings were impliedly amended to raise the issue of agency and the trial court properly concluded that plaintiff entered into the contract with defendant Mar-Comm's agent.

2. Liens—real property—correct information on claim of lien—contracting party—date of first furnishing

The trial court did not err by concluding that plaintiff was entitled to enforce its claim of lien on the property at issue because the claim of lien accurately stated the information required by N.C.G.S. § 44A-12(c). The entity with which plaintiff contracted for the furnishing of labor and materials was Mar-Comm of NC as the agent of Mar-Comm, the claim of lien properly listed Mar-Comm as such, and the claim of lien did not misstate the date of first furnishing.

3. Liens—real property—accrued interest—pursuant to contract

The trial court did not err by including accrued interest in the amount of plaintiff's claim of lien on the real property at issue. Pursuant to *Paving Equip. of Carolinas, Inc. v. Waters*, 122 N.C. App. 502, plaintiff was entitled to recover accrued interest pursuant to the contract, which allowed plaintiff to recover interest on all past due payments at the rate of 18% per annum.

Appeal by Defendants from order entered 28 April 2011 by Judge Mark E. Powell in Buncombe County Superior Court. Heard in the Court of Appeals 24 April 2012.

Hamilton Stephens Steele & Martin, PLLC, by Bentford E. Martin and Mark R. Kutny, for Plaintiff.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell, Christopher C. Finan, and Andrew D. Irby, for Defendants.

STEPHENS, Judge.

In early 2006, Defendant Mar-Comm & Associates, Inc. ("Mar-Comm"), a Florida corporation owned and controlled by John B. Marino, purchased 50 acres of real property in Buncombe County and began the process of developing the property as a residential subdivision. In the course of development, Plaintiff Young & McQueen Grading Company, Inc. ("Young & McQueen") received a set of engineering plans for the property and, in response, prepared a short-term Proposal and Contract to perform initial work on the property and submitted the Proposal and Contract to Mar-Comm & Associates of North Carolina, LLC ("Mar-Comm of NC"), a Florida company created by Marino in 2006 and, according to the engineering plans, the owner of the property. Despite the facts that the engineering plans listed Mar-Comm of NC as the owner and that the Proposal and Contract was submitted to Mar-Comm of NC, the executed Proposal and Contract was signed by Marino as president of Mar-Comm and listed Mar-Comm as the owner of the property. Property records indicate that at all times relevant, Mar-Comm was the sole owner of the property.

In October 2006, Young & McQueen agreed to perform approximately $900,000 of work on the property by executing an American Institute of Architects Standard Form Agreement between Owner and Contractor ("AIA Contract"). The AIA Contract was signed by Marino as president, but listed Mar-Comm of NC as owner. Following execution, several amendments increasing the scope of Young & McQueen's work were made to the AIA Contract; some amendments were executed in writing by Marino as president on behalf of Mar-Comm of NC as owner and others were authorized verbally by Marino.

Young & McQueen performed work on the property between late 2006 and mid-2008. During that time, Young & McQueen submitted invoices to Mar-Comm of NC and received payments from Mar-Comm.

In August 2007, Mar-Comm received a nearly $2 million loan from Defendant Metro Funding Corp. In connection with this loan, Mar-Comm, through Marino, executed a deed of trust in favor of Metro Funding Corp.; this deed of trust was later assigned to Defendant MFC Funding, LLC ("MFC Funding").

By mid-2008, Young & McQueen had suspended work on the property because it was owed roughly $270,000 for payment of services rendered. In July 2008, Young & McQueen filed a claim of lien on the property in the amount of $274,306.89 plus interest and attorneys' fees. In that claim of lien, Young & McQueen listed Mar-Comm as the owner of the property and as the "person with whom claimant contracted" for the furnishing of services.

In September 2008, Young & McQueen commenced the present action by filing in Buncombe County Superior Court a complaint against Defendants seeking, *inter alia*, damages for breach of contract, enforcement of its claim of lien, and a declaration that its claim of lien had priority over MFC Funding's deed of trust. The matter was tried without a jury by Superior Court Judge Mark E. Powell in January 2011. In a judgment entered 8 March 2011, the trial court concluded that Mar-Comm breached the AIA Contract and was liable to Young & McQueen "in the principal sum of $228,545.83 plus prejudgment interest . . . at the contract rate of 18% per annum, in the sum of $120,210.46." The trial court also concluded that Young & McQueen was entitled to enforce its claim of lien for that amount and that the claim of lien has priority over the deed of trust executed by Metro Funding Corp. and assigned to MFC Funding. MFC Funding and Metro Funding Corp. (the "lender Defendants") appeal.

On appeal from a judgment entered after a non-jury trial, we review the trial court's judgment to determine whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176, *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002). "Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary." *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163, *disc. review denied*, *supersedeas denied*, 354 N.C. 365, 556 S.E.2d 577 (2001). Furthermore, "[w]here no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

[1] The lender Defendants first argue that the trial court erred by concluding that Young & McQueen was entitled to enforce its claim of lien on the property. Specifically, the lender Defendants contend that Young & McQueen should have been precluded from enforcement

because the claim of lien did not meet the applicable statutory requirements.

First, the lender Defendants assert that Young & McQueen's claim of lien does not satisfy N.C. Gen. Stat. § 44A-8 because the AIA Contract was with Mar-Comm of NC and not Mar-Comm, the actual owner of the property. Assuming the lender Defendants are correct that the AIA Contract was between Young & McQueen and Mar-Comm of NC, this argument is, nevertheless, unavailing.

Section 44A-8 provides as follows:

> Any person who performs or furnishes labor . . . pursuant to a contract, either express or implied, *with the owner of real property* for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a right to file a claim of lien on real property on the real property to secure payment of all debts owing for labor done . . . pursuant to the contract.

N.C. Gen. Stat. § 44A-8 (2011) (emphasis added). Further, section 44A-7 provides that "owner" includes "agents of the owner acting within their authority." N.C. Gen. Stat. § 44A-7(3) (2011). In its order, the trial court concluded that "Mar-Comm of NC made and entered into [the AIA Contract] as the agent of [] Mar-Comm" and that "Mar-Comm ratified and accepted the contract as the principal of Mar-Comm of NC by performing the functions and duties of 'Owner' under said contract, including but not limited to the payment of [Young & McQueen's] invoices and payment applications." These conclusions are supported by unchallenged and, thus, binding findings of fact showing that (1) Mar-Comm of NC's role in the development of the property was to provide "liaison, interface, [and] representation" services for Mar-Comm, (2) only Mar-Comm and not Mar-Comm of NC was authorized to do business in North Carolina, and (3) Mar-Comm paid all invoices submitted by Young & McQueen to Mar-Comm of NC.

The lender Defendants, however, do not challenge the conclusion that Mar-Comm of NC entered into the AIA Contract as an agent of Mar-Comm on grounds of insufficient factual support. Rather, they challenge the conclusion on the ground that agency was not properly alleged in the complaint. This challenge is misplaced. Even assuming Young & McQueen was required to allege agency in the complaint, because the lender Defendants raised no objections at trial to evidence regarding agency on the grounds that such evidence was not

within the scope of the pleadings, the issue of agency was tried with the implied consent of the parties and the pleadings are deemed amended by implication and need no formal amendment. *See Wohlfahrt v. Schneider*, 82 N.C. App. 69, 75, 345 S.E.2d 448, 452 (1986) ("Where no objection is raised at trial on the grounds that the proffered evidence is not within the scope of the pleadings no formal amendment is required and the pleadings are deemed amended by implication." (citing *Taylor v. Gillespie*, 66 N.C. App. 302, 311 S.E.2d 362, *disc. review denied*, 310 N.C. 748, 315 S.E.2d 710 (1984))); *see also* N.C. Gen. Stat. § 1A-1, Rule 15(b) (2011) ("When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). Accordingly, because the pleadings were impliedly amended to raise the issue of agency, the lender Defendants' challenge to the trial court's adequately-supported conclusions regarding agency must fail. Enforcement of Young & McQueen's claim of lien does not violate the section 44A-8 requirement that the lienor must contract with the owner of the real property because, as properly concluded by the trial court, Young & McQueen entered into the AIA Contract with Mar-Comm's agent. The lender Defendants' argument is overruled.[1]

[2] The lender Defendants next contend that the claim of lien should not be enforced because it did not accurately state the information required by section 44A-12(c). We disagree.

Section 44A-12(c) provides that "[a]ll claims of lien on real property must be filed using a form" substantially following the template set out in the subsection. N.C. Gen. Stat. § 44A-12(c) (2011). The form template requires the claim of lien to list, *inter alia*, the "[n]ame and address of the record owner of the real property," the "[n]ame and address of the person with whom the claimant contracted for the furnishing of labor or materials," and the "[d]ate upon which labor or materials were first furnished upon said property by the claimant." *Id.*

1. We note that in the alternative to its conclusion that Mar-Comm of NC entered into the AIA Contract as an agent of Mar-Comm, the trial court concluded that Mar-Comm itself entered into the AIA Contract. However, as we have determined that the court correctly concluded that Mar-Comm of NC entered into the AIA Contract as an agent of Mar-Comm, we need not address the trial court's alternative conclusion. *Cf. State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 357, 323 S.E.2d 294, 314 (1984) (where trial court's ruling is based on alternative grounds, court on appeal need not address second alternative ground where appellate court determines that first alternative ground was correct).

First, the lender Defendants argue that the claim of lien "misstate[s] the entity with which [Young & McQueen] contracted" because the claim of lien states that entity as Mar-Comm whereas Young & McQueen actually contracted with Mar-Comm of NC. This argument is meritless. "*Qui facit per alium facit per se*. He who acts through another acts himself—*i.e.*, the acts of an agent are the acts of the principal." *Livingston v. Essex Inv. Co.*, 219 N.C. 416, 425, 14 S.E.2d 489, 494 (1941). Because Young & McQueen contracted with Mar-Comm of NC as the agent of Mar-Comm, Mar-Comm of NC's act of contracting with Young & McQueen was Mar-Comm's act. Thus, the entity with which Young & McQueen contracted "for the furnishing of labor and materials" was Mar-Comm, and the claim of lien properly lists Mar-Comm as such.

Next, the lender Defendants argue that the claim of lien misstates the date of first furnishing because it states that date as 13 November 2006—admittedly, the date of first furnishing of services under the AIA Contract—but that Young & McQueen is also allegedly seeking payment for some services rendered under the Proposal and Contract and that Young & McQueen furnished services under the Proposal and Contract prior to 13 November 2006. This argument is meritless and misapprehends the facts of the case.

Although the lender Defendants are correct that Young & McQueen performed work under the Proposal and Contract before 13 November 2006, that work was "paid in full by Mar-Comm" and Young & McQueen is not seeking payment for those services. Rather, Young & McQueen is seeking payment for some of the work done pursuant to *amendments* to the AIA Contract that was invoiced at the rates from the Proposal and Contract. As found by the trial court: (1) "[s]everal amendments . . . were issued to the AIA Contract increasing the scope of [Young & McQueen's] work"; and (2) the work done pursuant to those amendments was invoiced at the "labor and equipment rates from the Proposal and Contract," which rates "[t]he AIA Contract [] incorporated." Accordingly, Young & McQueen is not seeking payment for any services rendered pursuant to the Proposal and Contract, only payment for services rendered pursuant to the AIA Contract and its later amendments. As such, the proper date of first furnishing is the date of first furnishing under the AIA Contract and not the date of first furnishing under some other contract. *Cf.* N.C. Gen. Stat. § 44A-8 (providing that a person who furnishes labor or materials pursuant to a contract shall have a right to file a claim of lien "to secure payment of all debts owing for labor done or . . . mate-

rial furnished . . . *pursuant to the contract*" (emphasis added)). The lender Defendants' argument is overruled.

The remainder of the lender Defendants' arguments regarding whether Young & McQueen could enforce its claim of lien on the property deal with the trial court's allegedly erroneous application of various equitable doctrines as alternative grounds to support the court's conclusion. However, as the lender Defendants acknowledge, their arguments regarding these doctrines are only relevant "[a]bsent [Young & McQueen's] ability to demonstrate compliance with [the] basic statutory requirement" that "the only manner in which a claimant may obtain a lien upon real property is if the claimant contracts with the record title owner of said real property, or the owner's agent." As we have held that the trial court properly concluded that Young & McQueen contracted with Mar-Comm of NC as an agent of Mar-Comm, we need not address the lender Defendants' remaining arguments, *cf. Tucker*, 312 N.C. at 357, 323 S.E.2d at 314, and we hold that the trial court did not err in concluding that Young & McQueen was entitled to enforce its lien.

[3] Finally, the lender Defendants argue that the trial court erred by including "accrued interest" in the amount of Young & McQueen's lien. As previously held by this Court, while a judgment enforcing a lien may generally be entered only for the principal amount shown to be due, "[i]f [] there is an agreement between the parties with regard to interest, that interest due pursuant to the agreement will be included as part of the principal." *Paving Equip. of the Carolinas, Inc. v. Waters*, 122 N.C. App. 502, 503, 470 S.E.2d 546, 547 (1996) (citing *Dail Plumbing, Inc. v. Roger Baker & Assoc.*, 78 N.C. App. 664, 667, 338 S.E.2d 135, 137, *disc. review denied*, 316 N.C. 731, 345 S.E.2d 398 (1986)). Acknowledging this holding, the lender Defendants contend that interest was improperly included in this case because "there is no contract of any kind between [Young & McQueen] and [the lender Defendants]." This argument is sophistic. Our holding in *Paving Equip. of the Carolinas* was based on an interpretation of section 44A-13(b), which provides that "[a] judgment enforcing a lien *under this Article* may be entered for the principal amount shown to be due." N.C. Gen. Stat. § 44A-13(b) (2011) (emphasis added). To enforce a lien under that Article—Article 2 of Chapter 44A of our General Statutes—the lienor must have performed work "pursuant to a contract, either express or implied, *with the owner of real property.*" N.C. Gen. Stat. § 44A-8 (emphasis added). Read *in pari materia*, the section 44A-13(b) phrase "principal amount shown to be due"

refers to the principal amount due under the contract giving rise to the lien enforcement proceedings pursuant to Chapter 44A, Article 2, *i.e.*, the contract between the lienor and the owner of real property. If the judgment is awarding the lienor the principal amount due under his contract with the property owner, the interest included in that "principal amount" would be the interest due under the contract with the property owner. Clearly, then, the requirement of an agreement on interest between the parties refers to the agreement between the lienor and the owner of the property. As the undisputed findings by the trial court state, "[t]he AIA Contract provides that [Young & McQueen] shall recover interest on all past-due payments at the rate of 18% per annum." According to our holding in *Paving Equip. of the Carolinas*, Young & McQueen may recover accrued interest pursuant to the AIA Contract. The lender Defendants' argument is overruled.

Based on the foregoing, we conclude that the trial court properly entered judgment allowing Young & McQueen to enforce its lien on property owned by Mar-Comm. The order of the trial court is

AFFIRMED.

Judges MCGEE and HUNTER, ROBERT N., JR., concur.

STATE OF NORTH CAROLINA v. TERRANCE JAVARR ROSS

No. COA11-1462

(Filed 5 June 2012)

1. Jurisdiction—subject matter—habitual felon charge—indictment issued before crimes occurred

The trial court lacked jurisdiction over defendant's habitual felon charge and erred by accepting defendant's habitual felon guilty plea. Because defendant was indicted as an habitual felon before the crimes for which he was being tried had even occurred, the habitual felon indictment could not have been ancillary to any offense for which defendant was tried or convicted. Defendant's habitual felon guilty plea was vacated and the matter was remanded for resentencing within appropriate sentencing ranges.

2. Sentencing—attempted bribery of juror—incorrect classification—Class G rather than Class F

The trial court erred by classifying attempted bribery of a juror as a Class F felony rather than a Class G felony. The matter was remanded for reclassification of the offense for which defendant was convicted and imposition of an appropriate sentence.

Appeal by defendant from judgments entered 7 July 2011 by Judge Richard D. Boner in Cleveland County Superior Court. Heard in the Court of Appeals 7 March 2012.

Roy Cooper, *Attorney General*, *by Daniel Snipes Johnson*, *Special Deputy Attorney General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Barbara S. Blackman*, *Assistant Appellate Defender*, *for the defendant.*

THIGPEN, Judge.

Terrance Javarr Ross ("Defendant") appeals from judgments convicting him of attempted bribery of a juror, felony obstruction of justice, solicitation to commit bribery of a juror, and attaining the status of an habitual felon. We must determine whether the trial court lacked jurisdiction to accept Defendant's habitual felon guilty plea because Defendant was indicted as an habitual felon before the crimes tried in the instant case had occurred. Because the habitual felon indictment was not ancillary to any offense for which Defendant was tried or convicted in the instant case, we hold the trial court lacked jurisdiction over the habitual felon charge. Accordingly, we vacate Defendant's habitual felon guilty plea and remand for resentencing within appropriate sentencing ranges. Furthermore, we hold the trial court erred by classifying attempted bribery of a juror as a Class F felony and remand for reclassification of the offense for which Defendant was convicted as a Class G felony and the imposition of an appropriate sentence.

I. Factual and Procedural History

The State's evidence tends to show that Defendant was indicted as an habitual felon on 22 September 2008, and the habitual felon indictment charged that Defendant "did commit the felony of Possession of a Firearm by Felon . . . while being an habitual felon." On 11 May 2009, a superseding habitual felon indictment correcting a file number error was returned. While Defendant was on trial in an

unrelated drug matter on 17 and 18 June 2009, two jurors accused Chastity Burns of approaching them and telling them Defendant wanted to pay them $1,000 each if they would vote not guilty. Ms. Burns knew Defendant, and Defendant had called her from jail to ask her to bribe the two jurors. However, the jurors did not receive any money, and the trial court found the jury's verdict had not been affected by the attempted bribes.

On 20 July 2009, indictments were returned alleging that on 17 and 18 June 2009, Defendant committed bribery of a juror, felony obstruction of justice, and solicitation to commit bribery of a juror ("June 2009 crimes"). On 1 July 2009, the State applied for and was granted a writ of *habeas corpus ad prosequendum* to produce Defendant for trial for the June 2009 crimes. Only the three June 2009 crimes were calendared for trial.

At the start of Defendant's trial, Defendant's attorney moved to dismiss all pending charges that were not calendared for trial, and the prosecutor admitted that the habitual felon indictment "was not calendared[.]" The trial court then declined to try the habitual felon indictment and stated that if Defendant were convicted of the June 2009 crimes, "he'd be sentenced just as a regular felon" because "I don't have any habitual indictments to put before the jury." However, at the beginning of the second day of trial, the trial court reconsidered its position and decided it could properly proceed on the habitual felon indictment because it "is ancillary to the underlying three charges that we're trying now" and because Defendant "had notice that the State was going to seek an enhanced sentence if he were convicted of the underlying felonies[.]"

The jury found Defendant guilty of attempted bribery of a juror, obstruction of justice, and solicitation to commit bribery of a juror. Defendant then renewed his motion to dismiss the habitual felon indictment, which the trial court denied. Defendant subsequently pled guilty to attaining the status of an habitual felon. The trial court sentenced Defendant to three concurrent sentences of 120 to 153 months imprisonment for each of the convictions. Defendant appeals.

On appeal, Defendant contends the trial court (I) lacked jurisdiction to accept his habitual felon guilty plea; (II) erred in permitting the State to proceed on the habitual felon indictment; and (III) erred in denominating attempted bribery of a juror as a Class F felony.

II. Jurisdiction Over Habitual Felon Indictment

[1] Defendant first contends the trial court lacked jurisdiction to accept his habitual felon guilty plea because the habitual felon indictment was returned months before the June 2009 crimes occurred. We agree.

"The issue of subject matter jurisdiction may be raised at any time, and may be raised for the first time on appeal." *State v. Frink*, 177 N.C. App. 144, 147, 627 S.E.2d 472, 473 (2006) (citations omitted). "When an indictment is fatally defective, the trial court acquires no subject matter jurisdiction, and if it assumes jurisdiction a trial and conviction are a nullity." *Id.* at 146, 627 S.E.2d at 473 (quotation and quotation marks omitted). "On appeal, we review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (citation omitted), *appeal dismissed and disc. review denied*, 363 N.C. 586, 683 S.E.2d 215 (2009).

Any person who has been convicted of or pled guilty to three felony offenses is declared by statute to be an habitual felon. *See* N.C. Gen. Stat. § 14-7.1 (2011). N.C. Gen. Stat. § 14-7.3 (2011) sets forth the requirements for an habitual felon indictment and provides in relevant part:

> An indictment which charges a person who is an habitual felon within the meaning of G.S. 14-7.1 with the commission of any felony under the laws of the State of North Carolina must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon. The indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony.

Our Supreme Court has stated the following regarding the Habitual Felons Act:

> Properly construed this act clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a separate bill as being an habitual felon. It is likewise clear that *the proceeding by which the state seeks to establish that defendant is an habitual felon is necessarily ancillary to a pending prosecution for the "principal," or substantive, felony.*

State v. Allen, 292 N.C. 431, 433-34, 233 S.E.2d 585, 587 (1977) (emphasis added). "Being an habitual felon is not a crime but is a sta-

tus the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence." *Id.* at 435, 233 S.E.2d at 588.

Defendant cites *State v. Flint*, 199 N.C. App. 709, 682 S.E.2d 443 (2009) ("*Flint I*"), in support of his argument that the trial court lacked jurisdiction to accept his habitual felon guilty plea, and we find *Flint I* instructive. In *Flint I*, the defendant was indicted for eighty-two felonies and eight misdemeanors between 14 November 2005 and 22 May 2006, and the habitual felon indictment was returned on 28 November 2005. *Id.* at 711-12, 682 S.E.2d at 445. However, the defendant was not indicted on the only charges brought to trial in the case—obtaining property by false pretenses and financial card fraud —until 22 May 2006. *Id.* at 717, 682 S.E.2d at 448. "Furthermore, these crimes did not even occur until 10 March 2006, over three months after the habitual felon indictment was returned." *Id.* Although this Court recognized that "an habitual felon indictment may be returned before, after, or simultaneously with a substantive felony indictment[,]" *id.* at 717-18, 682 S.E.2d at 448 (citing *State v. Blakney*, 156 N.C. App. 671, 675, 577 S.E.2d 387, 390 (2003)), we concluded that "[i]t is difficult to see how the habitual felon indictment could attach as ancillary to felonies that had not yet occurred. Therefore, defendant correctly contends that the habitual felon indictment was not ancillary to the indictments for obtaining property by false pretenses and financial card fraud[.]" *Id.* at 718, 682 S.E.2d at 448. This Court, however, went on to hold that the trial court did not lack jurisdiction to determine the defendant's habitual felon status because "(1) the trial court never proceeded to the habitual felon phase of the trial due to defendant's plea [admitting his habitual felon status and pleading guilty to forty-seven other felonies pending against him], and (2) there were substantive felonies to which the habitual felon indictment was ancillary." *Id.*

In an unpublished opinion, *State v. Flint*, ____ N.C. App. ____, 712 S.E.2d 746, 2011 N.C. App. LEXIS 879, at *4 (N.C. Ct. App. May 3, 2011) ("*Flint II*"), this Court summarized *Flint I* as follows:

> (1) it fashions the rule that a[n] habitual felon indictment cannot be ancillary to a crime that *occurred* after the habitual felon indictment came into existence; (2) it concludes Defendant's habitual felon indictment could not be ancillary to the 10 March 2006 crimes; and (3) it explains that this conclusion did not pre-

> sent a problem in Defendant's first appeal because several of the crimes to which Defendant pled guilty occurred *before* Defendant was indicted for habitual felon status.

(Emphasis in original).

In this case, Defendant was initially indicted as an habitual felon on 22 September 2008, and the habitual felon indictment charged that Defendant "did commit the felony of Possession of a Firearm by Felon . . . while being an habitual felon." A superseding habitual felon indictment correcting a file number error was returned on 11 May 2009. Defendant, however, was not indicted for the June 2009 crimes until 20 July 2009. More importantly, these crimes did not even occur until 17 and 18 June 2009, approximately nine months after the initial habitual felon indictment and one month after the superseding habitual felon indictment. Like *Flint I*, "[i]t is difficult to see how the habitual felon indictment could attach as ancillary to felonies that had not yet occurred." *Flint I*, 199 N.C. App. at 718, 682 S.E.2d at 448; *see also Allen*, 292 N.C. at 433-34, 233 S.E.2d at 587 (stating that "the proceeding by which the state seeks to establish that defendant is an habitual felon is necessarily ancillary to a pending prosecution for the 'principal,' or substantive, felony"). At the time the habitual felon indictments were returned, there was no pending prosecution for the June 2009 crimes "to which the habitual felon proceeding could attach as an ancillary proceeding" because the crimes had not yet happened. *See Allen*, 292 N.C at 436, 233 S.E.2d at 589. Accordingly, we hold that under the specific facts of this case, the habitual felon indictment was not ancillary to the substantive felony indictments for the June 2009 crimes. *See State v. Cheek*, 339 N.C. 725, 727, 453 S.E.2d 862, 863 (1995) (stating that "the habitual felon indictment is necessarily ancillary to the indictment for the substantive felony") (citation omitted).

Although there were other felonies pending against Defendant, including substantive felonies to which the habitual felon indictment was ancillary because the crimes occurred before Defendant was indicted for habitual felon status, the State only brought Defendant to trial for the three June 2009 crimes. The State could have, but did not, bring Defendant to trial for his other pending offenses in the same session of court. Moreover, Defendant was only convicted of the three June 2009 crimes before pleading guilty to habitual felon status. *Compare Flint I*, 199 N.C. App. at 719, 682 S.E.2d at 449 (holding that although the habitual felon indictment was not ancillary to certain indictments, the trial court had jurisdiction to accept the defendant's

habitual felon plea because the habitual felon indictment was ancillary to multiple prior pending substantive indictments to which the defendant pled guilty in addition to pleading guilty to habitual felon status). For the foregoing reasons, we conclude the trial court lacked jurisdiction over the habitual felon charge and erred by accepting Defendant's habitual felon guilty plea. We, therefore, vacate Defendant's habitual felon guilty plea and remand to the trial court for resentencing within appropriate sentencing ranges.[1]

III. Classification of Attempted Bribery of a Juror

[2] In his last argument on appeal, Defendant contends the trial court erred in classifying attempted bribery of a juror as a Class F felony rather than Class G felony. We agree.

"When a defendant assigns error to the sentence imposed by the trial court, our standard of review is whether the sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quotation and quotation marks omitted).

Regarding the classification of an attempt to commit a misdemeanor or a felony, N.C. Gen. Stat. § 14-2.5 (2011) provides that "[u]nless a different classification is expressly stated, an attempt to commit a misdemeanor or a felony is punishable under the next lower classification as the offense which the offender attempted to commit." Defendant was indicted for bribery of a juror pursuant to N.C. Gen. Stat. § 14-220 (2011), which provides:

> If any juror, either directly or indirectly, shall take anything from the plaintiff or defendant in a civil suit, or from any defendant in a State prosecution, or from any other person, to give his verdict, every such juror, and the person who shall give such juror any fee or reward to influence his verdict, or induce or procure him to make any gain or profit by his verdict, shall be punished as a Class F felon.

In this case, the trial court granted Defendant's motion to dismiss the charge of bribery of a juror, ruling that at most Defendant committed attempted bribery of a juror since the jurors did not accept a bribe. The trial court subsequently instructed the jury on attempted bribery of a juror, and the jury found Defendant guilty of attempted

1. Because we hold the trial court lacked jurisdiction over the habitual felon indictment, we will not address Defendant's argument that the trial court erred by permitting the State to proceed on the habitual felon indictment.

bribery of a juror. The trial court then entered judgment classifying attempted bribery of a juror as a Class F felony. However, because Defendant pled guilty to habitual felon status, the trial court sentenced him for attempted bribery of a juror "as a Class C felon pursuant to Article 2A of G.S. Chapter 14."

We conclude the trial court erred by classifying attempted bribery of a juror as a Class F felony. Since our statutes do not provide a specific classification for attempted bribery of a juror, an attempt to commit the felony of bribery of a juror "is punishable under the next lower classification as the offense which the offender attempted to commit." N.C. Gen. Stat. § 14-2.5. Thus, attempted bribery of a juror should have been classified as a Class G felony. *See* N.C. Gen. Stat. § 14-220 (classifying bribery of a juror as a Class F felony). Furthermore, because we vacate Defendant's habitual felon guilty plea, any error in classifying attempted bribery of a juror as a Class F felony is not harmless for purposes of sentencing. Accordingly, we remand for reclassification of attempted bribery of a juror as a Class G felony and the imposition of an appropriate sentence.

In sum, the habitual felon indictment used by the trial court to enhance Defendant's sentences cannot be ancillary to the indictments for the June 2009 crimes because the June 2009 crimes had not yet occurred when the habitual felon indictment was returned. *See Flint I*, 199 N.C. App. at 718, 682 S.E.2d at 448. Although there were other charges pending against Defendant to which the habitual felon indictment could have attached, the habitual felon indictment was not ancillary to any offense for which Defendant was tried or convicted. Thus, the trial court lacked jurisdiction over the habitual felon charge, and we vacate Defendant's habitual felon guilty plea and remand this case to the trial court for resentencing within appropriate sentencing ranges. Additionally, we remand to the trial court for reclassification of attempted bribery of a juror as a Class G felony and the imposition of an appropriate sentence.

VACATED IN PART and REMANDED.

Judges CALABRIA and ERVIN concur.

IN THE MATTER OF T.W.

[221 N.C. App. 193 (2012)]

IN THE MATTER OF T.W.

No. COA11-878

(Filed 5 June 2012)

Juveniles—delinquency—second-degree sexual offense—no evidence of actual force—doctrine of constructive force not applicable

The trial court erred in a juvenile indecent liberties between minors and second-degree sexual offense case by not dismissing the charges of second degree-sexual offense. The State failed to prove the element of force required for that offense as there was no evidence of any threat of force or any special relationship that would justify extension of the doctrine of constructive force.

Appeal by juvenile from orders entered 14 January 2011 by Judge Elizabeth T. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 30 November 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Gail E. Dawson, for the State.

Leslie C. Rawls for defendant-appellant.

GEER, Judge.

Juvenile T.W. was adjudicated delinquent based on his admission that he committed the offense of indecent liberties between minors and the trial court's finding that he committed three counts of second degree sexual offense and three counts of crimes against nature. On appeal, he argues that the trial court should have granted his motion to dismiss as to the three counts of second degree sexual offense because the State failed to prove the element of force required for that offense.

The State, in this case, did not rely on evidence of actual force, but rather argued that the evidence showed constructive force. Because, however, there was no evidence of any threat of force or any special relationship that would justify extension of the doctrine of constructive force to this case, we agree with the juvenile that the trial court erred in not granting the motion to dismiss as to the second degree sexual offense counts. The juvenile makes no argument regarding the crime against nature counts and, therefore, we affirm in part, reverse in part, and remand for entry of a new dispositional order.

Facts

This case arises from a series of sexual encounters between the juvenile, "Greg," and two brothers, "Bill" and "Stan."[1] The juvenile admitted in a separate case to committing indecent liberties between children with another boy, "Tony."

At the adjudication hearing, the State's evidence tended to show the following facts. The juvenile and Greg met at a school for special needs children in Charlotte, North Carolina and subsequently became friends while taking karate at the same martial arts school. While the two of them were at the juvenile's parents' lake house, they had a conversation about secrets, and Greg admitted to the juvenile that he had been sexually abused four or five years earlier.

When the juvenile's father left the house to get pizza, the juvenile pressured Greg into changing out of his bathing suit in the same room as the juvenile. The boys continued to talk about secrets, and the juvenile told Greg that he and his male cousin had been experimenting sexually. The juvenile then convinced Greg to lie on his back with his eyes covered and to perform oral sex on the juvenile. The incident upset Greg.

Sexual encounters continued between Greg and the juvenile at both Greg's home and at the karate school. Greg's parents encouraged Greg to invite the juvenile over for Greg's 14th birthday. After Greg's parents went to bed, Greg performed oral sex on the juvenile without a blindfold.

The juvenile and Greg had more than 10 sexual encounters in the storage room of the karate school they both attended. Sometimes, Greg lay on his stomach, and the juvenile would rub his penis between Greg's crossed legs. Greg testified that he did not participate voluntarily—he did so because the juvenile told Greg that he would tell others about their sexual activities. Greg was also concerned that if his karate teacher learned about the encounters, Greg would lose some of the belts he had earned.

Greg currently attends a school on the west coast for special needs children. A social worker from Greg's new school testified as an expert in autism spectrum disorders. She explained that Greg suffers from a processing disorder that prevents him from understanding social interactions. Although he has a high verbal IQ, he does not

1. The pseudonyms "Greg," "Bill," "Stan," and "Tony" are used throughout this opinion for the privacy of the juveniles and for ease of reading.

always understand what he is saying or comprehend fully what is said to him. The expert testified that one effect of this disability was that once sexual abuse had occurred, Greg "would not know how to stop it, and he wouldn-t have a skill to say no."

The juvenile also attended school with twin brothers, Bill and Stan. The student assistance coordinator testified that the juvenile had a strong influence over both Stan and Bill—the juvenile, who suffered from dyslexia, had above average intelligence and was a leader. Bill and Stan both came across as followers, and the juvenile was both more intelligent and mature than either Stan or Bill. The juvenile and the twin brothers also took karate together.

On one occasion, Stan, Bill, and the juvenile began playing "truth or dare" while at the juvenile's parents' lake house. The boys exchanged secrets. Stan and his brother Bill both admitted that they wet the bed. In return, the juvenile disclosed that when he was younger, he played "doctor" with his cousin, and the two of them touched each another's penises. Later, during that same night, the juvenile asked Stan if he would like to try what the juvenile had done with his cousin. Stan refused at first, but the juvenile told him that everyone did it, so Stan agreed.

The juvenile told Stan to lie down on the floor with his pants off, and the juvenile rubbed his penis on Stan's buttocks. Stan felt awkward and ashamed. Other encounters occurred at the juvenile's home, at Stan's house, and at the karate school. The juvenile performed fellatio on Stan five times.

The sexual encounters between the boys continued for approximately two years. Stan wanted to stop, but continued to participate because the juvenile told Stan he would tell his secret about wetting the bed and make his karate teacher and all his friends turn against him. Stan became progressively more angry and withdrawn because he felt the juvenile was controlling his life. When asked whether the juvenile ever threatened to physically harm him or did in fact physically harm him, Stan said "no."

After the truth or dare session at the lake house, the juvenile also persuaded Bill to have a sexual encounter. As he did with Stan, the juvenile had Bill lie down, and the juvenile rubbed his penis between Bill's crossed legs. When the boys returned home, Bill and the juvenile had additional sexual contact. The juvenile would sometimes perform fellatio on Bill.

During the first couple of sexual encounters, Bill felt as though he had a choice as to whether to participate. As time went on, however, Bill began to feel that what they were doing was not right. When Bill told the juvenile that he did not want to participate anymore, the juvenile threatened to tell the secret Bill had revealed at the lake house. Bill was also afraid that the juvenile would turn his karate teacher and friends against him. The juvenile did not use physical force to get Bill to continue with the sexual activities between them.

Tony also took karate with the juvenile. Tony was both younger and smaller than the juvenile. Sometime near the end of 2008 or in 2009, the juvenile asked Tony if he could share a secret with him. The juvenile indicated that he wanted to share sexual knowledge with Tony. At some point after that conversation, when the juvenile and Tony were taking out the trash at the karate studio, the juvenile told Tony he wanted to show him what sperm looked like. The juvenile then exposed his genitals to Tony and squeezed sperm from his penis. Although Tony thought it was odd, Tony did not tell anyone because the juvenile said it was a secret.

On another occasion, the juvenile pulled down his pants, had Tony do the same, and rubbed his penis against Tony's buttocks. On yet another occasion, the juvenile showed Tony sperm in the storage room of the karate studio. The juvenile touched Tony's penis at least one time out by the trash cans at the karate studio.

When the juvenile told Greg that he had been engaging in sexual acts with Tony, Greg decided that he needed to tell an adult what had been going because Greg thought Tony was too young. The juvenile had also told Greg that he was engaging in similar activities with Bill and Stan, so Greg alerted the brothers that he was going to tell their karate teacher.

The juvenile was adjudicated delinquent on 14 January 2011 based on his admission to the offense of indecent liberties between children and on the court's finding that he committed three counts of second degree sexual offense, and three counts of crimes against nature. The trial court entered a Level 2 disposition imposing 14 days suspended confinement and 12 months probation. The juvenile timely appealed to this Court.

Discussion

The juvenile contends that the trial court erred in denying his motion to dismiss the counts of second degree sexual offense. "We

review a trial court's denial of a [juvenile's] motion to dismiss *de novo*." *In re S.M.S.*, 196 N.C. App. 170, 171, 675 S.E.2d 44, 45 (2009). "Where the juvenile moves to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of [the juvenile's] being the perpetrator of such offense." *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001) (internal quotation marks omitted). "The evidence must be such that, when it is viewed in the light most favorable to the State, it is sufficient to raise more than a suspicion or possibility of the respondent's guilt." *In re Walker*, 83 N.C. App. 46, 48, 348 S.E.2d 823, 824 (1986).

The juvenile was alleged to be delinquent in this case under N.C. Gen. Stat. § 14-27.5 (2011), which provides in relevant part:

> (a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:
>
> (1) By force and against the will of the other person[.]

N.C. Gen. Stat. § 14-27.1(4) (2011) defines " '[s]exual act' " as including fellatio. *See State v. Jacobs*, 128 N.C. App. 559, 563, 495 S.E.2d 757, 760 (1998) ("Fellatio is included as a sexual act within the meaning of the statute.")

The juvenile acknowledges that the State presented evidence of fellatio performed on Greg, Stan, and Bill, but argues that the State failed to prove the element of force. Our Supreme Court had held with respect to second degree sexual offense:

> The phrase "by force and against the will of the other person" means the same as it did at common law when it was used to describe an element of rape. The requisite force may be established either by actual, physical force or by constructive force in the form of fear, fright, or coercion. Constructive force is demonstrated by proof of threats or other actions by the defendant which compel the victim's submission to sexual acts. Threats need not be explicit so long as the totality of circumstances allows a reasonable inference that such compulsion was the unspoken purpose of the threat.

State v. Etheridge, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987) (internal citations and parentheticals omitted).

The State has not argued that evidence exists of actual physical force. Rather, the State contends that constructive force was shown

by (1) the juvenile's threatening Greg, Stan, and Bill with exposure of their innermost secrets and their participation with him in sexual activities, and (2) the power differential between the juvenile and the other boys.

The State has cited no authority holding that threats of exposure as opposed to threats of physical harm are sufficient for constructive force, and we have found none. In *State v. Raines*, 72 N.C. App. 300, 324 S.E.2d 279 (1985), this Court addressed constructive force in the absence of a threat of physical harm and, at least, implicitly held that for constructive force to exist, the threats must be threats of physical harm.

In *Raines*, after noting that the "by force and against the will" language in the sexual offense statute means the same as it did under the common law for rape, this Court then observed that "[a]t common law, fear, fright, or coercion could take the place of actual physical force, or, as stated by our Supreme Court: 'A threat of serious bodily harm, which reasonably induces fear thereof, constitutes the requisite force and negates consent.' " *Id.* at 303-04, 324 S.E.2d at 282 (quoting *State v. Burns*, 287 N.C. 102, 116, 214 S.E.2d 56, 65 (1975)). The Court then pointed to the holding in *State v. Locklear*, 304 N.C. 534, 284 S.E.2d 500 (1981), that " 'actual physical force is not required' " and that " '[*f*]*ear of serious bodily harm reasonably engendered by threats* or other actions of a defendant *and which causes the victim to consent* to the sexual act takes the place of force and negates the consent.' " *Raines*, 72 N.C. App. at 304, 324 S.E.2d at 282 (quoting *Locklear*, 304 N.C. at 540, 284 S.E.2d at 503). The Court referred to the holdings in *Burns* and *Locklear* as a "long-revered definition of constructive force." *Id.*

The Court continued by observing that this definition combined with the lack of evidence of threats of physical harm explained the prosecution's decision in *Raines* not to rely on constructive force, but rather to argue that the sexual touching itself constituted physical force. *Id.* The Court concluded: "The State obviously realized that fear, fright, or coercion must be reasonably induced before it can replace actual physical force. Indeed, in every constructive force case cited by the district attorney at trial, there was, at least, a threat of physical force, and, in most of the cases, there was actual physical force which preceded or constituted the threat that further force would follow if the victim would not succumb." *Id.*

The Court ultimately held that the trial court should have granted the motion to dismiss the sexual offense charges because "there was

neither the threat of physical force nor any actual force preceding or constituting a threat." *Id.* Although this Court was not as explicit in *Raines* as it could have been, we believe that the opinion can only be read as holding that for the concept of constructive force to apply, the threats resulting in fear, fright, or coercion must be threats of physical harm. *See also State v. Scercy*, 159 N.C. App. 344, 352, 583 S.E.2d 339, 344 (2003) (holding that trial court properly denied motion to dismiss when "[u]nder the circumstances, one could reasonably infer that defendant had both the intent and the means to harm [the victim] if she did not submit to his demands, which evidence suffices to show constructive force").

Accordingly, given *Raines* and the lack of any authority otherwise, we hold that the juvenile's threats to Greg, Stan, and Bill were not sufficient to constitute constructive force because they did not place the boys in fear of physical harm. The State, however, argues alternatively that we should extend the reasoning in *Etheridge* and hold that the nature of the relationship between the juvenile and the other boys—with his dominance over them—is sufficient to satisfy the constructive force requirements.

In *Etheridge*, our Supreme Court considered whether the State had presented adequate evidence of force for purposes of second degree sexual offense when a father engaged in sexual acts with his son and daughter. 319 N.C. at 44-45, 352 S.E.2d at 680. The Court held "that constructive force could be reasonably inferred from the circumstances surrounding the parent-child relationship in [that] case." *Id.* at 47, 352 S.E.2d at 681.

The Court pointed out that "[t]he incidents of abuse all occurred while the boy lived as an unemancipated minor in defendant's household, subject to defendant's parental authority and threats of disciplinary action." *Id.* at 47-48, 352 S.E.2d at 681. The Court then observed that explicit threats were unnecessary because

> a father's threat to impose punishment upon a child who refuses to obey his commands need not be stated in so many words. The child's knowledge of his father's power may alone induce fear sufficient to overcome his will to resist, and the child may acquiesce rather than risk his father's wrath. As one commentator observes, force can be understood in some contexts as the power one need not use. Estrich, *Rape*, 95 Yale L.J. 1087, 1115 (1986).

> In such cases the parent wields authority as another assailant might wield a weapon. The authority itself intimidates; the implicit threat to exercise it coerces. Coercion, as stated above, is a form of constructive force. For this reason, we hold that the state presented sufficient evidence from which the jury could reasonably infer that defendant used his position of power to force his son's participation in sexual acts.

Id. at 48, 352 S.E.2d at 681-82.

Our courts have not extended *Etheridge's* constructive force analysis to relationships apart from those resembling the parent-child relationship. *See, e.g.*, *State v. Corbett*, 154 N.C. App. 713, 717, 573 S.E.2d 210, 213 (2002) ("During the dates in question, [the victim] was ages twelve through sixteen and was not emancipated and was subject to defendant's parental authority [as step-father]. From the circumstances of the parental relationship, we find there is sufficient evidence from which a reasonable jury could conclude defendant used his position of power to force his stepdaughter to engage in sexual acts."). While other non-familial relationships might involve a dynamic similar enough to the one in *Etheridge* to warrant a finding of constructive force, the relationships in this case do not.

Here, the perpetrator and the victims are all minors of similar ages who also all suffer from some degree of cognitive difficulties. The relationship of a leader to a follower among children in school simply does not involve the same wielding of authority, disparity of power, and degree of fear that occurs between an abusive parent and a child. We hold *Etheridge* does not apply.

Therefore, the State failed to prove either actual force or constructive force in connection with the second degree sexual offense counts. As the juvenile does not challenge his admission of the offense of indecent liberties between children or the trial court's determination that he committed crimes against nature, we uphold the remainder of the trial court's adjudication order. We remand, however, for entry of a new disposition order.

Affirmed in part; reversed and remanded in part.

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

STATE OF NORTH CAROLINA v. ALBERT JEFFREY MANNING

No. COA11-1448

(Filed 5 June 2012)

1. Satellite-Based Monitoring—notice of hearing date and statutory category—due process rights protected—adequate opportunity to prepare defenses

The trial court did not err by denying defendant's motion to quash a petition for satellite-based monitoring (SBM) and placing him on SBM for life. A letter sent to defendant by the State adequately protected defendant's due process rights by informing him of both the hearing date and the specific category of N.C.G.S. § 14-208.40(a) under which he fell. Further, the State's failure to include in the letter both offenses that qualified him as a recidivist did not deprive him of the opportunity to develop all defenses as he was afforded nearly two months between the date of the letter and the date of the hearing to prepare his defenses.

2. Satellite-Based Monitoring—constitutional right to travel—no evidence of violation

Defendant's argument that the imposition of satellite-based monitoring infringed upon his constitutional right to travel was overruled. The Court of Appeals was unable to find any evidence in the record to show that defendant's right to travel was actually violated.

Appeal by defendant from order entered 2 August 2011 by Judge W. Russell Duke Jr. in Pitt County Superior Court. Heard in the Court of Appeals 5 April 2012.

Attorney General Roy Cooper by Assistant Attorney General Lisa Harper, for the State.

W. Michael Spivey, attorney for defendant.

ELMORE, Judge.

Albert Jeffrey Manning (defendant) appeals from an order denying his motion to quash the State's request for Satellite Based Monitoring (SBM) and placing him on SBM for the term of his natural life. After careful consideration, we affirm.

On 14 June 2010, the Department of Correction (DOC) sent defendant notice that it had made an initial determination that he met the criteria of a recidivist as set out in N.C. Gen. Stat. § 14-208.40(a), which would require him to enroll in SBM. DOC indicated that it had based its determination on defendant's 9 May 2007 conviction for sexual battery. The letter also notified defendant that a final determination hearing would be held in Pitt County Superior Court on 5 August 2010.

At the hearing, the State entered evidence of defendant's criminal record. The State's evidence showed that defendant's first reportable offense was his 9 May 2007 conviction for sexual battery, and his second reportable offense was his 7 October 2008 conviction for taking indecent liberties with a minor. The State then argued that because defendant had two convictions for reportable offenses, he was a recidivist and subject to lifetime enrollment in SBM.

Following the hearing, defendant filed a motion to quash the petition for SBM. On 2 August 2011, the trial court entered an order denying defendant's motion and placing him on SBM for life. Defendant now appeals.

Defendant presents two constitutional arguments on appeal. "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766-67 (2010); *see also Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) ("[D]e novo review is ordinarily appropriate in cases where constitutional rights are implicated." (citations omitted)).

[1] Defendant first argues that the DOC's letter deprived him of due process because it listed only one of the reportable offenses that qualified him as a recidivist and that the State's failure to include both offenses deprived him of the opportunity to develop all defenses that he could have asserted at the hearing. We disagree.

This Court has previously addressed what notice is required under the statute in order to satisfy procedural due process. We held that "[t]he fundamental premise of procedural due process protection is notice and the opportunity to be heard." *State v. Stines*, 200 N.C. App. 193, 198, 683 S.E.2d 411, 414 (2009) (quotations and citations omitted).

> [T]he statute requires that the Department, after making an initial determination that the offender falls into one of the § 14-208.40(a) categories, then notify the individual of that determination and

> the date of the scheduled hearing. Thus, the statute requires notice of two facts: (1) the hearing date and (2) the Department's determination with respect to N.C. Gen. Stat. § 14-208.40(a).

Stines, 200 N.C. App. at 199, 683 S.E.2d at 415.

Here, the letter sent to defendant by the DOC satisfied both requirements. First, the letter stated that "you meet the criteria of **recidivist** as set out in General Statute 14-208.40(a)[.]" Second, the letter informed defendant that "[a] Determination Hearing has been scheduled in Pitt County Superior Court on August 5, 2010 at 9:00 am, at which time the Court will review your case to make a determination concerning your eligibility for Satellite Based Monitoring." Since the letter informed defendant of both the hearing date and the specific category of § 14-208.40(a) under which he fell, we conclude that the letter adequately protected his due process rights.

Furthermore, we find defendant's second assertion, that the State's failure to include both offenses deprived him of the opportunity to develop all defenses, to be without merit. Defendant was afforded nearly two months between the date of the letter and the date of the hearing to prepare his defenses.

[2] Defendant next argues that SBM infringes upon his constitutional right to travel. We overrule this argument.

We have previously decided this precise issue in *State v. Pait*, a recent unpublished opinion of this Court. There, the defendant was ordered to enroll in SBM for the duration of his natural life. On appeal, the defendant argued that SBM violated his right to interstate travel under the Fourteenth Amendment to the United States Constitution. We held that

> [t]he government may only interfere with the exercise of the right to travel if it can show that such interference is necessary to promote a compelling government interest. *Saenz v. Roe*, 526 U.S. 489, 499, 143 L. Ed. 2d 689, 701-02, 119 S. Ct. 1518, 1524 (1999). However, a plaintiff must present evidence that his right to travel has been violated. *See Spencer v. Casavilla*, 839 F.Supp. 1014, 1017 (S.D.N.Y. 1993), aff'd in part and dismissed in part, 44 F.3d 74 (2d Cir. 1994); *see also Bare*, 197 N.C. App. at 475, 677 S.E.2d at 529 ("[D]efendant argues that the [monitoring] device has 'hindered his ability to obtain employment.' However, defendant did

not present any testimony or evidence at his determination hearing as to his inability to obtain employment.").

. . .

Since we are unable to find any evidence in the record showing that defendant's right to travel was violated, defendant's assignment of error is overruled.

State v. Pait, No. COA09-870, 2010 N.C. App. LEXIS 1283, at *6-7 (July 20, 2010).

Although our holding in *Pait* is not binding precedent on this Court, we nonetheless adopt our reasoning in that case and apply it to the case *sub judice*. Accordingly, we overrule defendant's argument, as we are unable to find any evidence in the record to show that defendant's right to travel was actually violated.

Affirmed.

Judges GEER and THIGPEN concur.

STATE OF NORTH CAROLINA v. TRACY SCOTT HERMAN

No. COA11-1291

(Filed 5 June 2012)

Jurisdiction—subject matter—sex offender on unlawful premises—indictment insufficient

The State's appeal from the trial court's order allowing defendant's motion to have certain portions of N.C.G.S. § 14-208.18 declared unconstitutional was dismissed. The indictment charging defendant with being a sex offender on unlawful premises was insufficient and the trial court lacked subject matter jurisdiction over the case.

Appeal by the State from order entered 31 August 2011 by Judge Robert T. Sumner in Superior Court, Catawba County. Heard in the Court of Appeals 25 April 2012.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Laura E. Parker, for the State.

Glenn Gerding, for defendant-appellee.

STROUD, Judge.

This matter is before this Court on the State's appeal from a trial court's order allowing Tracy Scott Herman's ("defendant") motion to have certain portions of N.C. Gen. Stat. § 14-208.18 declared unconstitutional. As the indictment charging defendant was insufficient, we do not have subject matter jurisdiction and dismiss the State's appeal.

I. Background

On 3 January 2011, defendant was indicted for one count of being a sex offender on unlawful premises, pursuant to N.C. Gen. Stat. § 14-208.18(a)(2). On 16 August 2011, defendant filed a motion requesting that the trial court find N.C. Gen. Stat. § 14-208.18(a)(2) and (3) unconstitutional, arguing that these portions of this statute (1) violated defendant's First Amendment right to freedom of association because they are "unconstitutionally overbroad[;]" (2) are unconstitutionally so vague as to not "give notice to a reasonable citizen of whether his conduct is illegal" and to encourage "law enforcement to enforce the law in an arbitrary and discriminatory manner[;]" and (3) violated defendant's First Amendment and State constitutional rights to free exercise of religion and association. Defendant's motion came on for hearing and by order entered 31 August 2011, the trial court, after making findings of fact and conclusions of law, declared N.C. Gen. Stat. § 14-208.18(a)(2) "unconstitutional[,]" and dismissed the pending charges against defendant. On 17 August 2011, the State filed written notice of appeal from the trial court's order. On appeal, the State argues that (1) the trial court erred in determining the constitutionality of N.C. Gen. Stat. § 14-208.18(a)(2) because defendant did not have standing to challenge this statute; and (2) the trial court erred in finding N.C. Gen. Stat. § 14-208.18(a)(2) unconstitutional. Based on our recent holding in *State v. Harris*, _____ N.C. App. _____, _____ S.E.2d _____, 2012 N.C. App. LEXIS 444 (N.C. Ct. App. April 3, 2012) (COA11-1031), the record before us presents a preliminary jurisdictional issue.

II. Jurisdictional issue

In *Harris*, the defendant argued on appeal that "the trial court lacked subject matter jurisdiction over this case because the indict-

ment purporting to charge him with violating N.C. Gen. Stat. § 14-208.18[(a)(1)] failed to allege all the essential elements of the offense defined in that statutory provision." *Id.* at *4. Specifically, the defendant argued that the indictment was insufficient because it failed to allege that (1) the defendant was on the school premises; (2) the defendant was knowingly on the school's premises; or (3) the defend-ant had been "convicted of an offense under Article 7A of Chapter 14 of the North Carolina General Statutes or an offense involving a minor child." *Id.* at *4-5 (emphasis omitted). In explaining the relevant law, this Court stated

> According to N.C. Gen. Stat. § 15A-924(a)(5) an indictment must contain:
>
> 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 defend-ant or defendants of the conduct which is the subject of the accusation.
>
> "As a '[p]rerequisite to its validity, an indictment must allege every essential element of the criminal offense it purports to charge,' " *State v. Billinger*, N.C. App. , , 714 S.E.2d 201, 206 (2011) (quoting *State v. Courtney*, 248 N.C. 447, 451, 103 S.E.2d 861, 864 (1958)), although it "need only allege the ultimate facts constituting each element of the criminal offense." *State v. Rambert*, 341 N.C. 173, 176[,] 459 S.E.2d 510, 512 (1995) (citation omitted). "Our courts have recognized that[,] while an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form." *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006). "The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words." *State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953).
>
> "North Carolina law has long provided that '[t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity.' " *State v. Neville*, 108 N.C. App. 330, 332, 423 S.E.2d 496, 497 (1992) (quoting *McClure v. State*, 267

> N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966)). "[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of [subject matter] jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, cert. denied, 531 U.S. 1018, 148 L.Ed. 2d 498 (2000). This Court "review[s] the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409, *appeal dismissed and disc. review denied*, 363 N.C. 586, 683 S.E.2d 215 (2009). "An arrest of judgment is proper when the indictment 'wholly fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which the defendant is found guilty.' " *State v. Kelso*, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007) (quoting *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943)), *disc. review denied*, 362 N.C. 367, 663 S.E.2d 432 (2008). " 'The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, and the State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment.' " *State v. Marshall*, 188 N.C. App. 744, 752, 656 S.E.2d 709, 715 (quoting *State v. Fowler*, 266 N.C. 528, 531, 146 S.E.2d 418, 420 (1966)), *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008).

Id. at *5-7. The indictment in *Harris* stated the following:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 14th day of January, 2010, in Mecklenburg County, Charles Fitzgerald Harris did unlawfully, willfully and feloniously on the premises of Winget Park Elementary School, located at . . . Charlotte, North Carolina. A place intended primarily for the use, care, or supervision of minors and defendant is a registered sex offender.

Id. at *7-8 (emphasis omitted). After looking at the relevant portions of N.C. Gen. Stat. § 14-208.18, this Court determined that

> the essential elements of the offense defined in N.C. Gen. Stat. § 14-208.18(a) are that the defendant was (1) knowingly on the premises of any place intended primarily for the use, care, or supervision of minors and (2) at a time when he or she was required by North Carolina law to register as a sex offender based upon a conviction for committing an offense enumerated in Article 7A of Chapter 14 of the North Carolina General Statutes or an offense involving a victim who was under the age of 16 at the time of the offense. N.C. Gen. Stat. § 14-208.18.

Id. at *8-9. This Court first overruled the defendant's argument that the indictment failed to clearly allege that he went onto the school premises as the indictment stated that defendant was being charged with being "on the premises[.]" *Id.* at *9-10. This Court also overruled the defendant's second argument that the indictment was invalid because it did not contain the word "knowingly" as the indictment alleged that defendant acted "willfully" which was sufficient "to allege the requisite 'knowing' conduct." *Id.* at *12. In addressing the defendant's third argument, the Court, after looking to the relevant statutes, determined that because

> certain individuals are required to register as sex offenders despite the fact that they did not commit an offense that is listed in Article 7A of Chapter 14 or involved a victim under the age of 16, an allegation that Defendant was a 'registered sex offender' does not suffice to allege all of the elements of the criminal offense enumerated in N.C. Gen. Stat. § 14-208.18.

Id. at *15 (emphasis omitted). The Court vacated the defendant's convictions after concluding that the indictment failed to "allege every essential element of the criminal offense it purports to charge," and therefore, the trial court was deprived of jurisdiction to enter a judgment against defendant for an alleged violation of N.C. Gen. Stat. § 14-208.18(a). *Id.* at *15-16 (citation omitted). The Court went on to address the State's arguments "that the 'specific offense committed would be mere surplusage' and that the allegation that Defendant's conduct was 'unlawful' gave him ample notice that his status as a registered sex offender precluded him from entering the premises of the school in question." *Id.* at *16-17. In concluding that "neither of the State's justifications for upholding the challenged 'prior offense' allegation have merit[,]" this Court explained that

> [a]n allegation that the underlying offense requiring sex offender registration was an offense listed in Article 7A of Chapter 14 of the North Carolina General Statutes or involved a victim under the age of 16 is an essential element for purposes of the offense set out in N.C. Gen. Stat. § 14-208.18(a) and cannot, for that reason, be treated as mere surplusage. In addition, we do not believe an allegation that Defendant's conduct was "unlawful" satisfies the requirement that the indictment allege every essential element of an offense under N.C. Gen. Stat. § 14-208.18(a). *Billinger*, ____ N.C. App. at ____, 714 S.E.2d at 206. Alleging that Defendant was a "registered sex offender" and that his conduct was "unlaw-

> ful" does not, standing alone, provide any notice of the nature of Defendant's allegedly unlawful conduct or the reason that his alleged conduct was unlawful.

Id. at *16-17.

Unlike *Harris*, neither party here has raised an issue on appeal regarding the validity of the indictment and the presence or absence of subject matter jurisdiction. However, "an appellate court has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*." *Xiong v. Marks*, 193 N.C. App. 644, 652, 668 S.E.2d 594, 599 (2008). " 'Jurisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act. Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question.' " *Cunningham v. Selman*, 201 N.C. App. 270, 281, 689 S.E.2d 517, 524 (2009) (quoting *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987)). Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal. *State v. Abbott*, _____ N.C. App. _____, _____, 720 S.E.2d 437, 439 (2011). "A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity[,]" and "in its absence a court has no power to act[.]" *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (citations and quotation marks omitted).

The relevant portions of N.C. Gen. Stat. § 14-208.18 (2009) state the following:

> (a) It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:
>
> (1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.
>
> (2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.

. . . .

> (c) Subsection (a) of this section is applicable only to persons required to register under this Article who have committed any of the following offenses:
>
> (1) Any offense in Article 7A of this Chapter.
>
> (2) Any offense where the victim of the offense was under the age of 16 years at the time of the offense.

The indictment in this case has similar defects as the indictment in *Harris*. The indictment against defendant stated the following:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully, and feloniously was knowingly present at and within 300 feet of a location intended primarily for the use, care, or supervision of minors and that place was located on premises that were not intended primarily for the use, care, or supervision of minors, said property being the Catawba County Fairgrounds, located at 1127 Conover Blvd., Newton, NC, property which is open to the general public. This act was in violation of the law referenced above.

We first note that the defendant in *Harris* was charged with an offense pursuant to N.C. Gen. Stat. § 14-208.18(a)(1) and defendant here is charged pursuant to N.C. Gen. Stat. § 14-208.18(a)(2). Although those charges would have different first "elements" pursuant to N.C. Gen. Stat. § 14-208.18(a)(1) or (2) both indictments charging those offenses would both have to allege that defendants acted with knowledge, pursuant to N.C. Gen. Stat. § 14-208.18(a), and, pursuant to N.C. Gen. Stat. § 14-208.18(c), would still have to allege that:

> at a time when he or she was required by North Carolina law to register as a sex offender based upon a conviction for committing an offense enumerated in Article 7A of Chapter 14 of the North Carolina General Statutes or an offense involving a victim who was under the age of 16 at the time of the offense.

Harris, 2012 N.C. App. LEXIS 444 at *8-9 (emphasis omitted).

Like the *Harris* indictment, the indictment here states that defendant acted "willfully[,]" which as determined in *Harris* satisfies the knowledge requirement. *See id.* at *12. Also, the indictment generally follows the language of N.C. Gen. Stat. § 14-208(a)(2) in describing

the nature of the location of the offense. *See Harris*, 2012 N.C. App. LEXIS 444 at *6; *Greer*, 238 N.C. at 328, 77 S.E.2d at 920. But like the indictment in *Harris*, the indictment before us fails to allege that defendant was convicted of an offense enumerated in Article 7A of Chapter 14 of the North Carolina General Statutes or an offense involving a victim who was under the age of 16 at the time of the offense. *See* N.C. Gen. Stat. § 14-208.18(c). Also, the use of the word "unlawfully" and the sentence, "This act was in violation of the law referenced above[,]" in the indictment, just as in the *Harris* indictment, "does not, standing alone, provide any notice of the nature of Defendant's allegedly unlawful conduct or the reason that his alleged conduct was unlawful." *See Harris*, 2012 N.C. App. LEXIS 444 at *17. As the indictment failed to allege this essential element of the offense, the trial court did not have subject matter jurisdiction to consider a charge against defendant based on N.C. Gen. Stat. § 14-208.18(a) and therefore, the trial court's order is a "nullity." *See In re T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790. Therefore, as the trial court did not have subject matter jurisdiction, we also have "no power to act" on the State's appeal. *See id.* Thus, the State's appeal is dismissed.

DISMISSED.

Judges HUNTER, Robert C. and ERVIN concur.

STATE OF NORTH CAROLINA v. ANTOINE M. MILES

No. COA11-1203

(File 5 June 2012)

1. Appeal and Error—preservation of issues—argument dismissed

Defendant failed to preserve for appellate review his argument that the trial court erred in an assault with a deadly weapon inflicting serious injury and felony possession of a weapon by a prisoner case by requiring defendant to wear prison garb during his trial. Defendant's argument was dismissed.

2. Criminal Law—defendant restrained during trial—statutory requirements met—no abuse of discretion

The trial court did not abuse its discretion in an assault with a deadly weapon inflicting serious injury and felony possession of

a weapon by a prisoner case by requiring defendant to be restrained during trial. The trial judge met the three requirements set out in N.C.G.S. § 15A-1031 before requiring defendant to be restrained.

3. Sentencing—prior record level—one point added—offense committed while serving prison sentence—no Blakely error

The trial court did not err by adding one point to defendant's prior record level worksheet pursuant to N.C.G.S. § 15A-1340.14(b)(7). Defendant himself testified that he was serving a prison sentence for second-degree murder and several other crimes at the time the assault occurred, which allowed the trial court to add one point to his prior record level without submitting this fact to the jury. Accordingly, no *Blakely* error occurred.

Appeal by defendant from judgments entered 2 June 2011 and amended 3 June 2011 by Judge Paul L. Jones in Greene County Superior Court. Heard in the Court of Appeals 22 March 2012.

Attorney General Roy Cooper, by Assistant Attorney General Sueanna P. Sumpter, for the State.

Sue Genrich Berry for defendant.

ELMORE, Judge.

Antoine M. Miles (defendant) was convicted by a jury of assault with a deadly weapon inflicting serious injury and felony possession of a weapon by a prisoner. Defendant argues that he did not receive a fair trial because he was required to wear prison garb and shackles during his trial. He also argues that the trial court erred during sentencing by adding one point to his prior record level. After careful consideration, we conclude that defendant received a trial free from error.

I. Background

On 30 May 2009, defendant was an inmate at the Maury Correctional Institution. The evidence tended to show that defendant attacked Benny Stone, a correctional officer, using a razor blade. Defendant cut Stone's face, head, neck, and ears; Stone required hundreds of stitches to close the lacerations. He also required two surgical procedures to address nerve damage caused by the assault. Because of the assault, Stone is no longer physically able to work as a correctional officer and his speech is impaired.

During the trial, defendant wore prison garb, two wrist irons, two leg irons, a "black box," and a waist chain. Before jury selection and outside the presence of potential jurors, the trial court inquired about defendant's attire:

> The Court: Does he have a jacket or something other than a t-shirt?
>
> [Defense Counsel]: No.
>
> [Prosecutor]: Your Honor, I did buy clothes for him and put them over there at the jail and I was just told by one of the deputies that DOC cannot take him out of his full restraints to let him get dressed in anything other than that because his custody level requires him to be in full restraints.
>
> The Court: Okay. Take a recess until one o'clock.

When the judge and attorneys returned from the recess, defendant moved to have his restraints removed so that the jury would not see them:

> The Court: Mr. Miles is now in the courtroom. The record should reflect that he is secured by double cuffs and also has shackles on his feet.
>
> Mr. Spence, I think you wanted to make a motion?
>
> [Defense Counsel]: Yes, sir, Your Honor. It seems like the double cuffs has a chain around his waist, too.
>
> The Court: It does.
>
> [Defense Counsel]: The motion is that he not be — that the jury not be allowed to see him in these shackles, that the shackles be taken off of him while he's in the presence of the jury—handcuffs and the leg chains. There are actually chains on his legs or around his ankles.
>
> The Court: Okay. The Court has been advised that he is restrained pursuant to his level of custody in the Department of Corrections.
>
> Does the State want to make a showing regarding the matter of restraint?
>
> [Prosecutor]: Yes, Your Honor.

The trial court then heard from the head of the Maury Correctional Institution, Dennis M. Daniels, and the officer who transported defendant to the courthouse, Sergeant Brown. Daniels testified that defendant was under "high security control," which is "for those inmates that have demonstrated assaulting behavior inside of a prison" and is the highest level of security control that the Department of Corrections can provide. After the assault on Stone, defendant had to be moved to another facility because Maury did not house high security control inmates; at the time he assaulted Stone, defendant was at the highest level of security control available at Maury. The requirements of high security control include double handcuffs and leg shackles for the security of staff, other inmates, and the general public. At the trial court's inquiry, Daniels testified that he believed it would be in the "best interest of the jury, the Court, and everybody else that he remain in this level of custody[.]"

Sergeant Brown testified that defendant's restraints could only be removed if the court authorized their removal. He explained that the restraints could be removed temporarily, to allow defendant to change into civilian clothes, but that defendant would then have to wear the restraints over his clothes. Sergeant Brown also testified that he believed that defendant's restraints were "necessary for control in the courtroom."

After hearing from the two witnesses, the trial court denied defendant's motion:

> Okay. Regarding State versus Antoine Miles, the Court finds as a fact that[,] based upon the evidence produced[,] he requires the highest level of security; therefore, the Court will Order that he be restrained pursuant to North Carolina Department of Correction policy with two wrist cuffs, waistband chain, and physical restraints around his legs. That is for the safety of court personnel, jury and staff present. The Court will note that Mr. Miles is presently serving a sentence in the Department of Corrections for second-degree murder. His release date is . . . 2030.

After the jury returned to the courtroom, the trial court explained to the jury why defendant was wearing prison garb:

> Let me explain something to you. Now, the defendant is in the custody of the Department of Corrections, he is a prisoner. That's the reason he is here today dressed as he is. You're not to assume anything by the fact that he's in prison. He's not to be punished

> for anything he's done in the past. This offense that's alleged and his status at the time was that he's been in prison.

From their vantage point, the jurors could not see defendant's manacles, shackles, black box, or waist chain. Later, while the State was presenting a diagram of the part of the prison in which the attack took place, defendant asked to be moved so that he could also view the diagram, which was apparently not visible from the defense table. As a result, defendant's restraints became visible to the jury. The trial court again cautioned the jury:

> Ladies and Gentlemen of the jury, the Court wants to advise you the defendant has restraints to include shackles. You're not to hold that against him, the fact that he is in custody and is in restraints. He's in the Department of Corrections; you're not to hold that against him. Thank you.

The next morning, the trial court made the following explanation for the record:

> The Court wants to put on the record the fact that Mr. Miles, with the consent of his—after discussion with his lawyer, wanted to move his seat to a view where he could view the publication of the video of the cell block, which exposed the shackles of the defendant to the jury, which were otherwise unseen by the jury; and that this was done as an accommodation to the defendant and was not purposeful to allow the jury to view the shackles of the defendant.

At the conclusion of the trial, the jury found defendant guilty of assault with a deadly weapon inflicting serious injury and felony possession of a weapon by a prisoner. The trial court determined that defendant had 15 prior record points, and it sentenced him to a term of 44 to 62 months for the assault conviction and a term of 28 to 34 months for the weapons conviction, to be served consecutively.

II Arguments

A. Prison Garb During Trial

[1] Defendant first argues that the trial court erred by requiring defendant to wear prison garb during his trial. In his brief, defendant acknowledges that counsel made no objection to this decision at trial and recites the plain error standard of review. *See* N.C.R. App. P. 10(a)(4) (2012). However, "plain error review in North Carolina is normally limited to instructional and evidentiary error." *State v.*

Lawrence,____N.C. ____, ____, 723 S.E.2d 326, ____ (2012) (citation omitted). Several months ago, this Court addressed the same issue raised here—whether it was plain error for the trial court to require the defendant to wear prison garb in front of the jury—and held that the issue was not appropriate for plain error review because the alleged error was not instructional or evidentiary. *State v. Woodard*, ____ N.C. App. ____, ____, 709 S.E.2d 430, 433 (2011). We follow *Woodard* and decline to address defendant's first argument because it was not properly preserved for appeal.

B. Prison Restraints Visible to Jury

[2] Defendant next argues that the trial court erred when it "required the Defendant to display multiple restraints to the jury in order to be able to see the evidence being presented to the jury." Defendant alleges that, by allowing defendant to move to a different seat in order to view the State's exhibits, the trial court forced upon defendant an improper Hobson's choice between seeing "a key piece of evidence against him" and "maintaining some semblance of the presumption of innocence" by keeping his restraints from the jury's sight. We disagree.

We review whether the trial court erred by requiring defendant to be restrained during trial for an abuse of discretion. *State v. Holmes*, 355 N.C. 719, 727, 565 S.E.2d 154, 161 (2002). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Woodard*, ____ N.C. App. at ____, 709 S.E.2d at 433 (citation and quotation omitted). As our Supreme Court has explained,

> shackling of the defendant should be avoided because (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.

Holmes, 355 N.C. at 727-28, 565 S.E.2d at 162 (citing *State v. Tolley*, 290 N.C. 349, 366, 226 S.E.2d 353, 367 (1976)). However, "[a] trial judge may order a defendant or witness subjected to physical restraint in the courtroom when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant's

escape, or provide for the safety of persons." N.C. Gen. Stat. § 15A-1031 (2011). Before ordering the defendant restrained, the trial judge must:

> (1) Enter in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for his action; and
>
> (2) Give the restrained person an opportunity to object; and
>
> (3) Unless the defendant or his attorney objects, instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt.

Id. The trial court may consider the following "material circumstances" when conducting this analysis:

> the 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.

Holmes, 355 N.C. at 728, 565 S.E.2d at 162 (2002) (quoting *Tolley*, 290 N.C. at 368, 226 S.E.2d at 368).

Here, the trial judge met the three requirements set out in N.C. Gen. Stat. § 15A-1031: (1) He entered his reasons for ordering defendant restrained into the record, outside the presence of the jury, and in the presence of defendant. (2) He gave defendant an opportunity to object (which defendant did). (3) He instructed the jurors not to consider defendant's restraints when weighing the evidence or determining guilt. The trial court explained his ruling, concluding that restraining defendant was necessary for the safety of the jury, the court personnel, and the staff. It based this decision on several of the *Tolley* factors, including the seriousness of defendant's charge (attacking a prison guard) and defendant's past record (second-degree murder). The trial court also based its decision on the testimony of a prison administrator and prison guard, both of whom opined that it would be in everybody's best interest for defendant to remain restrained during the trial. The trial court's decision was clearly a reasoned one. Accordingly, we cannot conclude that the trial court abused its dis-

cretion by ordering defendant to wear restraints in front of the jury and allowing the jury to view those restraints.

C. Prior Record Level

[3] Defendant argues that the trial court erred by adding one point to defendant's prior record level worksheet, pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7), which permits the court to assign one point to a defendant's prior record level "[i]f the offense was committed . . . while the offender was serving a sentence of imprisonment[.]" N.C. Gen. Stat. § 15A-1340.14(b)(7) (2011). Defendant argues that the trial court committed a *Blakely* error by failing to submit to the jury the question of whether defendant was incarcerated at the time of the offense. *See Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). We disagree.

This Court has previously summarized the applicable law as follows:

> In *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 147 L. Ed. 2d at 455. *In Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, *reh'g denied*, 542 U.S. 961, 125 S. Ct. 21, 159 L. Ed. 2d 851 (2004), the Supreme Court further held:
>
> > [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum [the judge] may impose without any additional findings.
>
> *Id.* at 303-04, 159 L. Ed. 2d at 413-14 (internal citations omitted).

State v. Wissink, 187 N.C. App. 185, 187, 652 S.E.2d 17, 19 (2007).

Here, defendant himself testified that he was serving a prison sentence for second-degree murder and several other crimes at the time the assault occurred. Because defendant admitted this fact, which allowed the trial court to add one point to his prior record level under § 15A-1340.14(b)(7), the trial court did not increase defendant's penalty beyond the statutory maximum. Thus, the trial court was not

required to submit this fact to the jury. Accordingly, no *Blakely* error occurred and the trial court properly assigned one more point to defendant's prior record level.

III. Conclusion

Defendant received a trial free from error.

No error.

Judges STEELMAN and STROUD concur.

KATHLEEN M. KENNEDY, PLAINTIFF v. BARRY C. MORGAN, DEFENDANT

No. COA11-1392

(Filed 5 June 2012)

Domestic Violence—protective order—harassment—finding not supported—no act of domestic violence

The trial court erred in entering a domestic violence protective order against defendant. The trial court's finding of fact that defendant hired a private investigation service for surveillance purposes did not support its finding of "harassment" and did not support its conclusion of law as to an act of domestic violence.

Appeal by defendant from order entered 28 July 2011 by Judge Margaret Sharpe in District Court, Guilford County. Heard in the Court of Appeals 25 April 2012.

Brock, Payne & Meece, P.A., by Barri Hilton Payne, for defendant-appellant.

No plaintiff-appellee brief filed.

STROUD, Judge.

Defendant appeals a domestic violence order of protection. For the following reasons, we reverse.

I. Background

On 17 June 2011, plaintiff filed a "COMPLAINT AND MOTION FOR DOMESTIC VIOLENCE PROTECTIVE ORDER[.]" On 28 July

2011, the trial court held a hearing which was at times a free-for-all which often failed to conform to many of the North Carolina Rules of Evidence. In summary, the actual relevant evidence presented by plaintiff showed that for a few nights in June of 2011, "a black man in a white SUV" was parked on the public street in front of plaintiff's home. Plaintiff believed that defendant, her ex-husband, was responsible for the presence of the man and perhaps, based upon threats he had made to her while married, that defendant had even sent the man to rape her. Defendant presented evidence that he had hired a private investigative service ("PI service") to monitor whether plaintiff was co-habiting because defendant was informed by his attorney that he might be able to terminate alimony payments if he could establish that plaintiff was co-habiting with another individual. Defendant's evidence showed that the PI service was professional, had not broken any laws, and that its investigators had not been on plaintiff's property or approached the individuals residing in the plaintiff's home.

On 29 July 2011, the trial court entered a "DOMESTIC VIOLENCE ORDER OF PROTECTION" ("DVPO") against defendant based entirely upon the following finding of fact:

> On . . . . 6/11-6/15, the defendant
>
> . . . .
>
> placed in fear of continued harassment that rises to such a level as to inflict substantial emotional distress the plaintiff . . .
>
> . . . .
>
> by . . .
>
> [a]fter a long history of abuse plaintiff separated from the defendant and finished counseling through family circumstances, she remains afraid of the defendant who tries to intimidate her—surveillance on her house at late hours, making the plaintiff and her neighbors apprehensive[.]

The trial court concluded that based on its finding of fact "[t]he defendant has committed acts of domestic violence against the plaintiff." Defendant appealed.

II. Standard of Review

When the trial court sits without a jury regarding a DVPO, the standard of review on appeal is whether there was compe-

> tent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal.

Hensey v. Hennessy, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009) (citations and brackets omitted).

III. DVPO

Defendant contends that the trial court erred in entering a DVPO against him.

A. DVPOs Generally

> Any person residing in this State may seek relief under . . . Chapter [50B] by filing a civil action or by filing a motion in any existing action filed under Chapter 50 of the General Statutes alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person.

N.C. Gen. Stat. § 50B-2(a) (2011). "If 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." N.C. Gen. Stat. § 50B-3(a) (2011).

> Domestic violence means the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:
>
> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
>
> (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
>
> (3) Committing any act defined in G.S. 14-27.2 through G.S. 14-27.7.

N.C. Gen. Stat. § 50B-1(a) (2011).

Here, plaintiff did not allege that defendant had attempted to cause or intentionally caused her bodily injury or that he had com-

mitted an act defined in N.C. Gen. Stat. §§ 14-27.2 through 14-27.7. *See id.* The trial court found that defendant had placed plaintiff "in fear of continued harassment that rises to such a level as to inflict substantial emotional distress[.]" *See* N.C. Gen. Stat. § 50B-1(a)(2). Thus, under the facts presented in this situation, under N.C. Gen. Stat. § 50B-1(a)(2), a conclusion of law that an act of domestic violence has occurred required evidence and findings of the following: (1) Defendant "has or has had a personal relationship," as defined by N.C. Gen. Stat. § 50B-1(b), with plaintiff;[1] (2) defendant committed one or more acts upon plaintiff or "a minor child residing with or in the custody of" plaintiff; (3) the act or acts of defendant placed plaintiff "or a member of . . . [her] family or household in fear of imminent serious bodily injury *or* continued harassment, as defined in G.S. 14-277.3A[;]" and (4) the fear "rises to such a level as to inflict substantial emotional distress[.]" *See* N.C. Gen. Stat. § 50B-1 (2011).

Chapter 50B does not define "harassment[,]" but N.C. Gen. Stat. § 50B-1(a)(2) refers to N.C. Gen. Stat. § 14-277.3A which defines "harassment" as "[k]nowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14-277.3A(b)(2) (2011). Thus, to support a conclusion of law that an act of domestic violence has occurred due to "harassment," as in this situation, there must also be evidence and findings of fact that defendant's acts (1) were knowing, (2) were "directed at a specific person[,]" here, plaintiff, (3) tormented, terrorized, or terrified the person, here again, plaintiff, and (4) served no legitimate purpose. *See id.*

B. DVPO Analysis

Defendant argues that "the trial court erred in finding that there was competent evidence to support a finding of fact that defendant placed plaintiff in fear of continued harassment that rises to such a level as to inflict substantial emotional distress[.]" (Original in all caps.) Defendant contends that there was no basis for the finding that he placed plaintiff "in fear of continued harassment[.]" The trial court found as fact that

> [o]n . . . . 6/11-6/15, the defendant
>
> . . . .

1. There was no dispute as to the personal relationship element, as plaintiff and defendant were divorced and had children in common. *See* N.C. Gen. Stat. § 50B-1(b).

> [p]laced in fear of continued harassment that rises to such a level as to inflict substantial emotional distress the plaintiff . . .
>
> . . . .
>
> [b]y . . .
>
> [a]fter a long history of abuse plaintiff separated from the defendant and finished counseling through family circumstances, she remains afraid of the defendant who tries to intimidate her—surveillance on her house at late hours, making the plaintiff and her neighbors apprehensive[.]

Thus, we must determine if the evidence supports the trial court's finding of fact, and then if the finding of fact supports the conclusion of law that defendant committed an act of domestic violence against plaintiff. *See Hensey*, 201 N.C. App. at 59, 685 S.E.2d at 544.

Although the trial court found that plaintiff had suffered "a long history of abuse" from defendant, most of the evidence as to the "history of abuse" appears to have occurred during the parties' marriage. Plaintiff testified regarding a few other acts of "abuse" by defendant since their divorce, arising mostly from disputes surrounding defendant's visitation with the minor children, but the specific facts and dates are unclear as to these allegations; furthermore, it is clear that defendant's recent act of hiring a PI service, and not the "history of abuse[,]" was the basis for the trial court's decision to enter the DVPO, as this was the only "act of domestic violence" found. N.C. Gen. Stat. § 50B-3(a). Although we appreciate that a "history of abuse" may at times be quite relevant to the trial court's determination as to whether a recent act constitutes "domestic violence," a vague finding of a general "history of abuse" is not a finding of an "act of domestic violence" as defined by N.C. Gen. Stat. § 50B-3(a). *Id.*

To support entry of a DVPO, the trial court must make a con clusion of law "that an act of domestic violence has occurred."[2] N.C. Gen. Stat. § 50B-3(a). The conclusion of law must be based upon the findings of fact. *See Hensey*, 201 N.C. App. at 59, 685 S.E.2d at 544.

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2. Although N.C. Gen. Stat. § 50B-3(a) states that the trial court must "find" that an act of domestic violence has occurred, in fact this is a conclusion of law; the trial court must make findings of fact based upon the definition of domestic violence to support this conclusion; form AOC-CV-306, Rev. 8/09 entitled "DOMESTIC VIOLENCE ORDER OF PROTECTION[,]" correctly identifies this as the conclusion of law required under N.C. Gen. Stat. § 50B-3(a), and the trial court made this conclusion of law here by checking the appropriate box on form AOC-CV-306, Rev. 8/09.

While the trial court need not set forth the evidence in detail it does need to make findings of ultimate fact which are supported by the evidence; the findings must identify the basis for the "act of domestic violence." N.C. Gen. Stat. § 50B-3(a); *see In re Estate of Mullins*, 182 N.C. App. 667, 671, 643 S.E.2d 599, 602, *disc. review denied*, 361 N.C. 693, 652 S.E.2d 262 (2007) ("The trial court need not recite in its order every evidentiary fact presented at hearing, but only must make specific findings on the ultimate facts that are determinative of the questions raised in the action and essential to support the conclusions of law reached. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense." (citations, quotation marks, and ellipses omitted)). The trial court found as a fact that defendant hired a PI service to conduct surveillance on plaintiff's house; this was the only "act" of the defendant found by the trial court. N.C. Gen. Stat. § 50B-3(a). The trial court did not find that defendant had hired the "black man in a white SUV" to "stalk[,]" or rape plaintiff or as a pretext to harass plaintiff instead of for actual surveillance services, as plaintiff claimed. Although it is understandable that a person may not appreciate being subjected to surveillance by a PI service, surveillance in and of itself, if properly conducted, in this situation, does not support a finding of "harassment" with no "legitimate purpose." *See* N.C. Gen. Stat. § 14-277.3A(b)(2); *see also* N.C. Gen. Stat. § 50B-1(a)(2).

The finding of fact notes that the surveillance was conducted "at late hours" which also indicates that the trial court found defendant's testimony, in this regard, credible, as defendant claimed he had hired the PI service to see if plaintiff was co-habiting with another individual for alimony purposes, which would normally require overnight surveillance. The finding of fact further notes that plaintiff's "neighbors [were] apprehensive[,]" but this is irrelevant as "the aggrieved party or a member of the aggrieved party's family or household" are the only people the trial court may consider in issuing a DVPO pursuant to N.C. Gen. Stat. § 50B-1(a)(2). N.C. Gen. Stat. § 50B-1(a)(2).

In addition, the "act" of hiring a PI service for surveillance, based upon the finding of the trial court, is not in and of itself enough to support its finding of "substantial emotional distress." N.C. Gen. Stat. §§ 50B-1(a)(2), -3(a); *see* N.C. Gen. Stat. § 14-277.3A(b)(4) (2011). The only statement within the finding of fact at issue which could possibly indicate "substantial emotional distress" on the part of plaintiff is the trial court's description of her as "afraid" and "apprehensive[.]" But the fact that plaintiff may have been "afraid" or "apprehensive"

because of defendant's actions does not necessarily support a determination of domestic violence. *See Smith v. Smith*, 145 N.C. App. 434, 437-38 n.2, 549 S.E.2d 912, 914-15 n.2 (2001) ("[T]he trial court found as fact that Plaintiff testified Defendant's actions made her feel uncomfortable and creepy. The trial court also found as fact that Plaintiff testified Defendant had never physically hurt her, nor was she afraid that he would physically hurt her. These findings of fact which show Defendant's conduct caused Plaintiff to feel uncomfortable but did not place her in fear of bodily injury do not support a conclusion Defendant placed Plaintiff in fear of serious imminent bodily injury." The Court further noted in footnote 2, "We acknowledge the trial court found as fact that Defendant placed Plaintiff in actual fear of imminent serious bodily injury; however, this finding by the trial court was based on actions by Defendant that Plaintiff herself testified did not cause her fear of physical harm. Thus, this finding by the trial court cannot support its conclusion Plaintiff was placed in fear of imminent serious bodily injury." (quotation marks and brackets omitted)).

Based upon the evidence presented and findings of fact made by the trial court, defendant's act of hiring a PI service to conduct surveillance in order to determine if plaintiff was co-habiting is not "[k]nowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14-277.3A(b)(2). As no further evidence was presented by plaintiff of "an act of domestic violence" on the part of defendant, there was no other evidence for the trial court to consider. As there was no "harassment" and thus no "act[,]" the evidence and findings of fact do not support the trial court's conclusion of law that defendant committed an act of domestic violence. *See* N.C. Gen. Stat. §§ 14-277.3A(b)(2), 50B-1(a)(2), 50B-3.

IV. Conclusion

In conclusion, the trial court's finding of fact that defendant hired a PI service for surveillance purposes does not support its finding of "harassment" and does not support its conclusion of law as to an act of domestic violence. As such, the DVPO must be reversed. As we are reversing the DVPO we need not address defendant's other contentions on appeal regarding evidentiary errors during the hearing.

REVERSED.

Judges HUNTER, Robert C. and ERVIN concur.

KENNY RAY FANSLER AND CASSANDRA M. FANSLER, PLAINTIFFS V. CHARLES LEONARD HONEYCUTT, DEFENDANT

No. COA11-1451

(Filed 5 June 2012)

Jurisdiction—subject matter—stalking—complaints not verified

The trial court lacked subject matter jurisdiction over a stalking case where there was no indication that either of plaintiffs' complaints had been properly verified. The trial court's orders requiring defendant to refrain from stalking and harassing plaintiffs were vacated, and both cases were dismissed.

Appeal by defendant from orders entered 15 August 2011 by Judge Mary F. Covington in Davidson County District Court. Heard in the Court of Appeals 25 April 2012.

No brief for plaintiffs-appellees.

Bryan Gates for defendant-appellant.

ERVIN, Judge.

Defendant Charles Leonard Honeycutt appeals from orders requiring him to refrain from stalking and harassing Plaintiffs Kenny Ray Fansler and Cassandra M. Fansler. On appeal, Defendant contends that (1) the trial court's conclusions that Defendant was stalking the Plaintiffs lacked adequate evidentiary support; (2) the trial court's orders failed to contain sufficiently specific findings of fact and separately stated conclusions of law as required by N.C. Gen. Stat. § 1A-1, Rule 52; and (3) Plaintiffs' complaints were not adequately verified as required by N.C. Gen. Stat. § 50C-2. After careful consideration of Defendant's challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's orders should be vacated and Plaintiffs' actions dismissed.

I. Factual Background

On 9 August 2011, Plaintiffs filed complaints alleging that Defendant had "stalked" and "harass[ed]" them and requesting that the trial court order him to refrain from engaging in similar conduct in the future. On the same date, Judge Jimmy L. Myers issued temporary *ex parte* orders providing, among other things, that Defendant cease stalking and threatening Plaintiffs.

The issues raised by Plaintiffs' complaints came on for hearing before the trial court at the 15 August 2011 term of Davidson County District Court. At the hearing, Mr. Fansler testified that Defendant, his former brother-in-law, had physically attacked him and his current wife, Cassandra Fansler. In addition, Mr. Fansler stated that, in the weeks preceding the filing of Plaintiffs' complaints, Defendant had "follow[ed] [him] around[,]" videotaped him while he was working, and been involved in an altercation with Mrs. Fansler at the couples' home. As a result of Defendant's actions, Mr. Fansler "felt very threatened."

Mrs. Fansler testified that Defendant and his family had "continually stalked [her] and [her] family" ever since the beginning of her relationship with Mr. Fansler. On an occasion when the physical custody of the children that Mr. Fansler had had with Defendant's sister was being transferred, Defendant assaulted Mr. Fansler with a pocket knife and then "attacked [Mrs. Fansler] from behind, . . . banged [her] head on the pavement," and threatened her with the pocket knife. Mrs. Fansler also asserted that Defendant had, on a number of occasions, "swerve[d]" his vehicle in an apparent attempt to feign hitting her while she was driving and jogging near the home that she and Mr. Fansler shared and that Defendant would materialize while she and Mr. Fansler were present in various shops and businesses.

Defendant, on the other hand, testified that he merely put out his arms and got between Plaintiffs and one of the children at the time the children were being transferred and that he had videotaped Mr. Fansler at work because Mr. Fansler had failed to pay child support to Defendant's sister on the grounds that he did not "have any work and [could not] pay her." Finally, Defendant denied Plaintiffs' allegations that he had followed them to various shops and business, attempted to hit Mrs. Fansler with his vehicle, or threatened Mrs. Fansler with a knife.

On 15 August 2011, the trial court issued orders requiring that Defendant (1) refrain from visiting, assaulting, molesting, or otherwise interfering with Mrs. Fansler; (2) cease stalking and harassing Plaintiffs; (3) refrain from contacting Plaintiffs by telephone, written communication or electronic means; and (4) refrain from entering or remaining at Plaintiffs' residence or places of employment and at the home of Mr. Fansler's ex-wife, which was located near the Plaintiffs' residence. With respect to the claim advanced by Mr. Fansler, the trial court determined that "[D]efendant ha[d] become overly involved in his sister's custody . . . case [which rose] to the level of stalking, causing fear to [Mr. Fansler]" and that Defendant was "consumed [with

Mr. Fansler's] new life." With respect to the claim advanced by Mrs. Fansler, the trial court determined that "[D]efendant [had] put [Mrs. Fansler] in the hospital [and Defendant] ha[d] continued to follow her and watch her at her residence." Defendant noted an appeal to this Court from the trial court's orders.

II. Legal Analysis

In his brief, Defendant contends that (1) the trial court's conclusion that Defendant had been stalking Plaintiffs lacks adequate evidentiary support and that (2) the trial court's orders lack sufficiently specific findings of fact and separately stated conclusions of law as required by N.C. Gen. Stat. § 1A-1, Rule 52. We need not, however, address these components of Defendant's challenge to the trial court's orders given that Plaintiffs' complaints were not properly verified as required by N.C. Gen. Stat. § 50C-2.

According to N.C. Gen. Stat. § 50C-2:

> (a) An action is commenced under this Chapter by filing a *verified complaint* for a civil no-contact order in district court or by filing a motion in any existing civil action, by any of the following:
>
> (1) A person who is a victim of unlawful conduct that occurs in this State.
>
> (2) A competent adult who resides in this State on behalf of a minor child or an incompetent adult who is a victim of unlawful conduct that occurs in this State.

(emphasis added). "Except when *otherwise specifically provided by rule or statute*, pleadings need not be verified or accompanied by affidavit." N.C. Gen. Stat. § 1A-1, Rule 11(a) (emphasis added). If an action is statutory in nature, "the requirement that pleadings be signed and verified 'is not a matter of form, but substance, and a defect therein is jurisdictional,' " leaving a trial judge confronted with an unverified pleading devoid of subject matter jurisdiction. *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (quoting *Martin v. Martin*, 130 N.C. 27, 28, 40 S.E. 822, 822 (1902)). Put another way, "where it is required by statute that the petition be signed and verified, these essential requisites must be complied with before the petition can be used for legal purposes," since non-compliance renders the petition "incomplete and non[-]operative." *In re Green*, 67 N.C. App. 501, 503, 313 S.E.2d 193, 194-95 (1984) (vacating a trial court's

orders for lack of subject matter jurisdiction given that the juvenile petition at issue in that case had not been signed and verified as required by the controlling statutory provisions). As a result, an unverified complaint does not suffice to afford a trial court jurisdiction over a proceeding ostensibly initiated pursuant to N.C. Gen. Stat. § 50C-2.

Although N.C. Gen. Stat. § 50C-2 requires that a complaint seeking entry of a no-contact order be verified, the relevant statutory language does not delineate the components of a proper verification. For that reason, we look to the relevant provisions of the North Carolina Rules of Civil Procedure, particularly N.C. Gen. Stat. § 1A-1, Rule 11(b), for guidance in determining whether Plaintiffs' complaints were properly verified. *See In re S.D.W. & H.E.W.*, 187 N.C. App. 416, 422, 653 S.E.2d 429, 432 (2007) (recognizing that the extent to which a petition for termination of parental rights had been properly verified should be decided based on an analysis of the applicable provisions of the North Carolina Rules of Civil Procedure given that the applicable statutory provisions requiring the filing of a verified petition did not specify the exact manner in which the petition should be verified).

> [I]f a rule or statute requires that a pleading be verified, [N.C. Gen. Stat. § 1A-1,] Rule 11(b) requires that such a pleading "shall state in substance that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true" and requires that such a verification "shall be by affidavit of the party."

State ex rel. Johnson v. Eason, 198 N.C. App. 138, 141, 679 S.E.2d 151, 153 (2009) (quoting N.C. Gen. Stat. § 1A-1, Rule 11(b)). As a result, in the event that a pleading is statutorily required to be verified, that pleading "must be sworn to before a notary public or other officer of the court authorized to administer oaths." 1 G. Gray Wilson, *North Carolina Civil Procedure §* 11-7, at 196 (2d ed. 1995). "Any officer competent to take the acknowledgment of deeds, and any judge or clerk of the General Court of Justice, notary public, in or out of the State, or magistrate, is competent to take affidavits for the verification of pleadings, in any court or county in the State, and for general purposes." N.C. Gen. Stat. § 1-148.

Form No. AOC-CV-520, which is available for use in connection with the filing of a complaint seeking the entry of a no-contact order,

contains a verification section which provides for the complainant to sign his or her name and to swear that "the matters and things alleged in the Complaint and Motion are true[.]" The verification section of Form AOC-CV-520 contains a subsection in which an officer of the court authorized to administer oaths signs the complaint and indicates that the complainant's verification had been "sworn/affirmed and subscribed to" before that officer. The subsection in question also contains boxes labeled "Deputy CSC," "Assistant CSC," "Clerk of Superior Court," "Designated Magistrate," "District Court Judge," and "Notary," which the officer or notary before whom the verification is executed should check in order to establish that he or she has the authority to administer oaths.

A careful examination of the record in this case indicates that neither complaint was properly verified. Although both complaints were prepared using Form AOC-CV-520, the record contains no indication that either complaint had been verified before an individual authorized to administer oaths. The verification section of Mr. Fansler's complaint contains a date, Mr. Fansler's signature, and a signature in the block intended for the signature of the person before whom Mr. Fansler's verification had been executed. However, none of the boxes in which the title of the officer of the court or notary public before whom Mr. Fansler verified his complaint have been checked, a fact which precludes us from determining that Mr. Fansler's verification had been executed before an individual authorized to administer an oath. Although the verification section of Mrs. Fansler's complaint contains the date and Mrs. Fansler's signature, the signature area and the boxes in which the name and title of the officer or notary before whom Mrs. Fansler verified the complaint should be delineated are completely blank. As a result, we are unable to determine if either of Plaintiffs' complaints had been verified before "a notary public or other officer of the court authorized to administer oaths" as required by N.C. Gen. Stat. § 50C-2 and N.C. Gen. Stat. § 1A-1, Rule 11. 1 G. Gray Wilson, *North Carolina Civil Procedure* § 11-7, at 196 (2d ed. 1995). Thus, given the absence of any indication that either of Plaintiffs' complaints had been properly verified, we hold that the trial court never obtained jurisdiction over the subject matter of these cases, that the trial court's orders should be vacated, and that both cases must be dismissed.

VACATED AND DIMISSED.

Judges ROBERT C. HUNTER and STROUD concur.

THOMAS M. STERN, as Guardian of the Estate of ARMANI WAKEFALL, a Minor, Plaintiff v. MICHAEL IRA CINOMAN, MD, Defendant

No. COA11-1106

(Filed 5 June 2012)

Venue—transfer as of right—guardian of the estate—county of residence

The trial court erred in granting defendant's motion to transfer venue as of right in a case involving alleged negligent medical treatment of a child. As plaintiff brought the action in his capacity as guardian of the estate rather than as a guardian *ad litem*, he was entitled to bring the action in his county of residence.

Appeal by plaintiff from order entered 15 June 2011 by Judge Robert H. Hobgood in Durham County Superior Court. Heard in the Court of Appeals 25 January 2012.

Ferguson, Stein, Chambers, Gresham, & Sumter, P.A., by William G. Simpson, Jr., for plaintiff-appellant.

Walker, Allen, Grice, Ammons & Foy, L.L.P., by O. Drew Grice, Jr., for defendant-appellee.

GEER, Judge.

Plaintiff Thomas M. Stern appeals from an order granting defendant Michael Ira Cinoman's motion to transfer venue as of right. Because Mr. Stern brought the action in his capacity as guardian of the estate rather than as a guardian ad litem, he was entitled to bring the action in his county of residence. Mr. Stern resides in Durham County and, therefore, venue was proper. Accordingly, we reverse.

Facts

Armani Wakefall was born without complications on 24 December 1998. Approximately two months later, allegedly because of negligent medical treatment, she suffered severe brain damage and will be unable ever to earn a living or live independently. Armani currently lives with and is cared for by her mother, Deborah Scott, in Richmond County, North Carolina.

On 21 June 2007, Mr. Stern was appointed guardian ad litem for Armani. Through Mr. Stern, as her guardian ad litem, Armani then sued Dr. Cinoman, three resident physicians at the University of

North Carolina, and two critical care nurses also at the University of North Carolina. Ultimately, settlements were reached with all of the defendants other than Dr. Cinoman. Because some of the settlements occurred during the middle of trial, a voluntary dismissal without prejudice was taken with respect to the claims against Dr. Cinoman.

The proceeds from those settlements were deposited into a special needs trust fund for Armani. Mr. Stern was appointed guardian of the estate on 20 January 2011 and was re-appointed guardian ad litem on 25 January 2011. Mr. Stern filed a second civil action against Dr. Cinoman on 25 January 2011 in Durham County where Mr. Stern resides. Although the caption stated Mr. Stern was suing as guardian of the estate, the complaint also includes an allegation that Mr. Stern is Armani's guardian ad litem.

Dr. Cinoman moved for a change of venue to either Wake County, where Dr. Cinoman resides, or Orange County, where the events at issue took place. The trial court granted the motion transferring the case to Wake County in an order filed 15 June 2011. Mr. Stern has appealed the order changing venue.

Discussion

Mr. Stern contends on appeal that venue was proper in Durham County based on his having brought suit in his capacity as guardian of the estate.[1] N.C. Gen. Stat. § 1-83 (2011) provides that "[t]he court may change the place of trial . . . [w]hen the county designated for that purpose is not the proper one." Despite the use of the word "may," it is well established that "the trial court has no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county." *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 495, 216 S.E.2d 464, 465 (1975).

A determination of venue under N.C. Gen. Stat. § 1-83(1) is, therefore, a question of law that we review *de novo*. *See also Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 743, 71 S.E.2d 54, 55-56 (1952) (finding defendant was entitled to have action removed as a matter of law and holding that " '[i]f the demand for removal is properly made,

1. While this appeal is interlocutory, this Court has jurisdiction because it affects a substantial right. *See Snow v. Yates*, 99 N.C. App. 317, 319, 392 S.E.2d 767, 768 (1990) ("A right to venue established by statute is a substantial right. . . . An appeal of an order disposing of such a motion is interlocutory because it does not dispose of the case. However, grant or denial of a motion asserting a statutory right to venue affects a substantial right and is immediately appealable." (internal citations and quotation marks omitted)).

and it appears that the action has been brought in the wrong county, the court has no discretion as to removal' "(quoting Atwell Campbell McIntosh, *North Carolina Practice and Procedure in Civil Cases*, § 295, at 279 (1929)); *Jenkins v. Hearn Vascular Surgery, P.A.*, ____ N.C. App. ____, ____, 719 S.E.2d 151, 154 (2011) (" 'The provision in N.C.G.S. § 1-83 that the court may change the place of trial when the county designated is not the proper one has been interpreted to mean must change.' " (quoting *Roberts v. Adventure Holdings, LLC*, ____ N.C. App. ____, ____, 703 S.E.2d 784, 786 (2010))).

Defendant contends, and the trial court agreed, that Rule 17 of the North Carolina Rules of Civil Procedure, combined with this Court's holding in *Roberts*, ____ N.C. App. at ____, 703 S.E.2d at 787, is dispositive. Rule 17(b)(1) states that "[i]n actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, whether residents or nonresidents of this State, they must appear by general or testamentary guardian, if they have any within the State or by guardian ad litem appointed as hereinafter provided . . . ."

Defendant argues that because Armani is an infant, Rule 17(b)(1) required that she appear through her guardian ad litem, Mr. Stern. Defendant then points out that this Court held in *Roberts* that "a [guardian ad litem's] county of residence is insufficient, standing alone, to establish venue." ____ N.C. App. at ____, 703 S.E.2d at 787. He concludes that Mr. Stern's residence in Durham County is not, under *Roberts*, sufficient to support venue in Durham County.

Defendant, however, has overlooked the authority granted to Mr. Stern as guardian of the estate to bring suit himself. A "[g]uardian of the estate" is defined as "a guardian appointed solely for the purpose of managing the property, estate, and business affairs of a ward." N.C. Gen. Stat. § 35A-1202(9) (2011). Guardians of the estate have "the powers, and duties provided under G.S. 35A, Article 9 and Subchapter III." N.C. Gen. Stat. § 35A-1215(2) (2011). These duties, for both an incompetent and a minor, include the ability "[t]o maintain any appropriate action or proceeding to recover possession of any of the ward's property, to determine the title thereto, or to recover damages for any injury done to any of the ward's property; also, to compromise, adjust, arbitrate, *sue on or defend, abandon, or otherwise deal with and settle any other claims in favor of or against the ward.*" N.C. Gen. Stat. § 35A-1251(3) (2011) (emphasis added); *see also* N.C. Gen. Stat. § 35A-1252(3) (2011) (granting same powers to guardian administering minor ward's estate). *Compare Clawser v. Campbell*, 184 N.C.

App. 526, 646 S.E.2d 779 (2007) (finding guardian of the person did not have the right to bring suit because he was not given that power by statute).

Thus, Mr. Stern, as guardian of the estate, had the authority to "sue on . . . claims in favor of . . . the ward," Armani Wakefall. N.C. Gen. Stat. § 35A-1251(3). On the other hand, Armani could have sued as the plaintiff, appearing through Mr. Stern as guardian ad litem. Consequently, the dispositive question for purposes of the motion to change venue is: In what capacity did Mr. Stern appear? If Mr. Stern in fact sued on behalf of Armani in his guardian ad litem capacity, *Roberts* controls. If, on the other hand, he brought suit as the actual plaintiff, in his guardian of the estate capacity, then *Roberts* is immaterial.

We note first that the caption identifies the plaintiff as "THOMAS M. STERN, as GUARDIAN OF THE ESTATE OF ARMANI WAKEFALL, a Minor." In the allegations describing the parties, the first paragraph states: "Plaintiff, Thomas M. Stern, is the duly appointed Guardian of the Estate of Armani Wakefall, a minor." The second paragraph, however, alleges as well that "[p]laintiff is also the duly appointed Guardian *Ad Litem* for Armani Wakefall, a minor." A section of the complaint labeled the "Claim for Relief" alleges that "Plaintiff Tom Stern, as Guardian of the Estate of Armani Wakefall and as Guardian *Ad Litem* for Armani Wakefall for purposes of this case, relies upon all of the allegations of this complaint." The Prayer for Relief, however, asks that Mr. Stern "have and recover as Guardian of the Estate for Armani Wakefall a judgment against the defendant in an amount in excess of $10,000."

We note further that in the 2007 litigation, prior to Mr. Stern's being appointed guardian of the estate, the caption identified the plaintiff as "THOMAS M. STERN, Guardian *Ad Litem* for ARMANI WAKEFALL, Minor Child." Likewise, in federal litigation regarding the validity of a lien asserted by the North Carolina Department of Health and Human Services, also filed prior to Mr. Stern's being named guardian of the estate, the caption identified the plaintiffs as "A. W. IRREVOCABLE SPECIAL NEEDS TRUST; A. W., a minor, by and through her guardian ad litem, THOMAS M. STERN."

Given that, in this case, the caption and the prayer for relief both indicate that Mr. Stern has sued in his capacity as guardian of the estate and that when Mr. Stern has chosen to sue in his capacity as guardian ad litem, he has specifically indicated that fact in the caption, we hold that Mr. Stern has brought this action on his own behalf

as guardian of Armani's estate and not as a guardian ad litem. *Cf. Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 724-25 (1998) (holding that in determining capacity in which defendant was sued, it is appropriate to consider course of proceedings and allegations in complaint, including caption, section identifying parties, claim for relief, and prayer for relief). Because Mr. Stern has *not* sued in his capacity as guardian ad litem, *Roberts*, which only addresses venue based on a guardian ad litem's residence, does not control.

Instead, *Lawson v. Langley*, 211 N.C. 526, 528, 191 S.E. 229, 231 (1937), is the dispositive precedent. In *Lawson*, the individual appointed guardian for a person adjudicated incompetent filed suit for personal injuries sustained by his ward. The Supreme Court acknowledged that an incompetent person could appear only through a general or testamentary guardian or, if he or she had no guardian, "by their next friend"—the equivalent of the modern-day guardian ad litem. *Id.* at 529, 191 S.E. at 231. The defendants argued—identically to defendant in this case—that because the incompetent or infant is the real party in interest and not the guardian or next friend, the guardian's residency could not be the basis for venue. *Id.*

In rejecting that argument, the Supreme Court held that "[f]iduciaries are not the real parties in interest, yet they can bring an action for the real beneficiaries" and cited the statutes authorizing guardians to bring suit to assert claims on behalf of the ward's estate. *Id.* at 530, 191 S.E. at 232. The Court pointed out that compensation for the personal injuries belongs to the estate and the statute authorizes a guardian to bring all necessary actions for the estate. *Id.* The Court then held that when a guardian acting under that statute does bring suit for the estate, "he can do this in the county of his personal residence." *Id.* The Court, therefore, reversed the trial court's order transferring venue because "the plaintiff, guardian of an incompetent, [does] have the right to maintain and try the action in the county of his personal residence[.]" *Id.* at 528, 191 S.E. at 231.

This Court in *Roberts* distinguished *Lawson* on the grounds that it addressed a guardian and not a guardian ad litem. *See Roberts*, ___ N.C. App. at ___, 703 S.E.2d at 787 (noting that a general guardian is one who had general care and control of ward's person and estate while guardian ad litem is appointed to appear on behalf of incompetent and minor party only for purposes of that suit). *Lawson* noted this same distinction between guardians authorized to sue and next friends.

Here, like the guardian in *Lawson*, Mr. Stern is not appearing simply as a guardian ad litem for purposes of this action, but rather has sued under the statute authorizing the guardian of the estate to manage Armani's estate, "[t]o maintain any appropriate action," and to "sue on . . . any other claims in favor of . . . the ward." N.C. Gen. Stat. § 35A-1252(3). In accordance with *Lawson*, Mr. Stern had "the right to maintain and try the action in the county of his personal residence." *Lawson*, 211 N.C. at 528, 191 S.E. at 231. We must, therefore, reverse the order granting defendant's motion for change of venue.

Reversed.

Judges STEELMAN and ROBERT N. HUNTER, JR. concur.

STATE OF NORTH CAROLINA V. CHRIS ALAN JONES, DEFENDANT

No. COA10-475-2

(Filed: 5 June 2012)

1. Evidence—chemical analysis report—adequate notice of report given to defendant—no objection

The trial court did not err in a drugs case by admitting into evidence an SBI crime lab report detailing the results of a chemical analysis without testimony of the analyst. The State sent a copy of the lab report to defendant more than fifteen days before trial and provided defendant with notice that they intended to use it at trial. Defendant never objected.

2. Constitutional Law—effective assistance of counsel—no motion to suppress filed—search lawful—no prejudice

Defendant did not receive ineffective assistance of counsel in a drug case where his attorney did not file a motion to suppress the evidence found pursuant to the search of his jacket made incident to arrest. Because the search incident to defendant's arrest was lawful, defense counsel's failure to file a motion to suppress was not prejudicial.

3. Constitutional Law—effective assistance of counsel—no objection to evidence—evidence admissible—no prejudice

Defendant did not receive ineffective assistance of counsel in a drug case where his attorney did not object to a police officer's testimony identifying the controlled substance found in defendant's jacket as crack cocaine and reciting the results of an SBI lab report, and to the lab report itself. The lab report itself was admissible under N.C.G.S. § 90-95(g) and even if it was error to admit the officer's testimony, any such error could not have been prejudicial.

On remand from the North Carolina Supreme Court by order filed 9 March 2012 vacating the 21 December 2010 decision of the Court of Appeals and remanding the matter with instructions to reconsider in light of the amended record.

Roy Cooper, Attorney General, by Catherine F. Jordan, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for defendant-appellee.

MARTIN, Chief Judge.

Our recitation of the facts is limited to those events deemed relevant to the issues before us on remand. Details regarding the underlying facts of this case can be found in *State v. Jones*, ____ N.C. App. ____, 703 S.E.2d 772 (2010).

On 21 December 2010, this Court issued an opinion awarding defendant a new trial, finding that the trial court committed plain error when it admitted a State Bureau of Investigation ("SBI") crime lab report into evidence without testimony by the analyst and allowed the arresting officer to testify that the substance seized pursuant to arrest was crack cocaine. This Court reasoned that the report was testimonial in nature and thus subject to Sixth Amendment protection, and that the officer's testimony alone was not sufficient to identify the substance beyond a reasonable doubt. Because this Court awarded a new trial on these grounds, it declined to address defendant's argument that he received ineffective assistance of counsel.

Thereafter, the State filed petitions for writ of supersedeas and discretionary review with the North Carolina Supreme Court, arguing

that the Court of Appeals erred in ordering a new trial. The Court granted these petitions and both parties submitted briefs. The State then filed a motion to amend the record on appeal to include a copy of the crime lab report showing the substance to be cocaine and a copy of the N.C.G.S. § 90-95(g)-notice provided to defense counsel by the District Attorney's Office on 8 September 2009, indicating an intent to introduce the report into evidence. These documents were omitted from the record which had been filed in the Court of Appeals and the State did not argue in its original brief that the N.C.G.S. § 90-95(g)-notice had been given. The Court granted the motion to amend the record and remanded the case for reconsideration in light of the amended record.

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[1] The State contends the SBI crime lab report was admissible without testimony of the analyst. We agree.

Under N.C.G.S. § 90-95(g),

> [w]henever matter is submitted to the North Carolina State Crime Laboratory . . . for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis *shall be admissible without further authentication and without the testimony of the analyst* in all proceedings in the district court and superior court divisions of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed. Provided, however, the provisions of this subsection may be utilized by the State only if:
>
> (1) The State notifies the defendant at least 15 business days before the proceeding at which the report would be used of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and
>
> (2) The defendant fails to file a written objection with the court, with a copy to the State, at least five business days before the proceeding that the defendant objects to the introduction of the report into evidence.

N.C. Gen. Stat. § 90-95(g) (2011) (emphasis added). Here the State sent a copy of the lab report to defendant's counsel more than fifteen days before trial, during discovery, and provided him with notice that they intended to use it at trial. Defendant never objected. The notice

of intent was not originally included in the record on appeal, according to the State, because defendant did not list the issue of "whether the trial court committed plain error when it permitted non-expert Officer Tucker to testify to the result of the chemical analysis performed by a SBI analyst that didn't testify" as a proposed issue, but later included it in his brief after the record on appeal was settled.

Thus, the lab report should have been admitted into evidence without testimony from the SBI analyst, and would be sufficient in itself to identify the substance as cocaine. *See State v. Carr*, 145 N.C. App. 335, 340-41, 549 S.E.2d 897, 901 (2001). The State, therefore, would not need to rely on the testimony of Officer Tucker to identify the substance, which, on its own, would have been insufficient. For this reason, the grounds on which this Court previously awarded a new trial are no longer applicable.

[2] Accordingly, we now address defendant's claim of ineffective assistance of counsel. Defendant contends he received ineffective assistance of counsel because his attorney failed to file a motion to suppress the evidence found pursuant to the search of his jacket made incident to arrest. Defendant contends that had his counsel filed a motion to suppress the crack cocaine found in his jacket pocket, it would have succeeded because Officer Tucker exceeded the scope of the search incident to arrest. After careful consideration, we disagree.

"To prevail on a claim of ineffective assistance of counsel, 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, *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985). "[T]o 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Allen*, 360 N.C. at 316, 626 S.E.2d at 286 (citations and internal quotation marks omitted).

Although searches conducted without search warrants are generally unreasonable under the Fourth Amendment, there are specific exceptions. *State v. Cherry*, 298 N.C. 86, 92, 257 S.E.2d 551, 556 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980). One such exception is a search incident to lawful arrest. *Id.* Search incident to lawful arrest is justified by the need to ensure officer safety and preserve evidence. *Chimel v. California*, 395 U.S. 752, 763, 23 L. Ed. 2d 685, 694 (1969). A search incident to lawful arrest is limited in scope to the area from which the arrested person might have obtained a weapon or some item that could have been used as evidence against him. *Id.* at 768, 23 L. Ed. 2d at 697. The parameters of search incident to arrest in a given case depend upon the particular facts and circumstances. *State v. Parker*, 315 N.C. 222, 226, 337 S.E.2d 487, 489 (1985) (citing *Chimel*, 395 U.S. at 765, 23 L. Ed. 2d at 695). "The effect of putting handcuffs on the person under arrest has not been held to negate the existing circumstances surrounding a search but is considered to be only one factor in determining the necessity of the search." *Cherry*, 298 N.C. at 95, 257 S.E.2d at 557. For this reason, a "defendant in custody need not be physically able to move about in order to justify a search within a limited area once an arrest has been made." *Id.* at 95, 257 S.E.2d at 558.

The North Carolina Supreme Court has upheld the legality of the search of a defendant's jacket, which was three or four feet away, incident to his arrest when the defendant, upon being confronted by police, made a motion towards his jacket, creating a belief in the officer that he was armed. *Parker*, 315 N.C. at 226-27, 337 S.E.2d at 489-90. Based on the totality of the circumstances, and bearing in mind the need to ensure officer safety, the Court determined that the search was reasonable in this scenario. *Id.* at 227, 337 S.E.2d at 490.

Here, when Officer Tucker grabbed defendant by the wrists, he ran. While attempting to evade capture, defendant tried to punch Officer Tucker in the face while keeping his right hand inside his jacket. Defendant refused to remove his hand from his jacket pocket despite being ordered to do so. The jacket eventually came off during the struggle. Like the defendant's motion toward his jacket in *Parker*, this behavior led Officer Tucker to believe that defendant may be armed. After defendant was subdued, handcuffed, and placed in Officer Tucker's patrol vehicle, Officer Tucker walked about ten feet and retrieved the jacket from the ground. He then searched the jacket and retrieved a bag containing crack cocaine.

Accordingly, we find that defendant's counsel's failure to file a motion to suppress the crack cocaine found pursuant to the search of the jacket was not prejudicial, because the search incident to defendant's arrest was lawful. This assignment of error is overruled.

[3] Defendant further contends that his counsel provided ineffective assistance by failing to object to Officer Tucker's testimony identifying the controlled substance as crack cocaine and reciting the results of the lab report, and to the lab report itself. We disagree.

As discussed above, the lab report itself was admissible under N.C.G.S. § 90-95(g). Because the lab report identifying the substance as crack cocaine was properly admitted, even if it was error to admit Officer Tucker's testimony, any such error could not have been prejudicial. Therefore, this argument is without merit and we decline to address it further.

No error.

Judges STEPHENS and STROUD concur.

STATE OF NORTH CAROLINA v. RODNEY LAVON LINEBERGER

No. COA11-1098

(Filed 5 June 2012)

1. Appeal and Error—satellite-based monitoring—oral notice of appeal insufficient—certiorari granted

The Court of Appeals granted *certiorari* to hear defendant's appeal from the trial court's order to enroll in satellite-based monitoring for the remainder of his life where defendant's oral notice of appeal was insufficient.

2. Satellite-Based Monitoring—review of the record—no prejudicial error

The Court of Appeals' review of the record for possible prejudicial error in a satellite-based monitoring case in accordance with *Anders* and *Kinch* revealed no error.

Appeal by defendant from order entered 29 April 2011 by Judge Anderson Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 25 April 2012.

Attorney General Roy Cooper, by Assistant Attorney General Yvonne B. Ricci, for the State.

Guy J. Loranger for defendant-appellant.

HUNTER, Robert C., Judge.

On 6 August 2007, defendant entered an *Alford* plea to two counts of taking indecent liberties with a child and one count of possession of a firearm by a felon. The charges were consolidated for judgment and the trial court sentenced defendant to 39 to 47 months imprisonment.

On 4 November 2010, the North Carolina Department of Correction wrote defendant a letter informing him that he was to appear for a satellite-based monitoring ("SBM") determination hearing on 24 January 2011 in Forsyth County Superior Court. Thereafter, the trial court appointed counsel to represent defendant. On 29 April 2011, the trial court found defendant to be a recidivist and ordered him to enroll in a SBM program for the remainder of his natural life. Defendant gave oral notice of appeal in open court.

[1] First, defendant has not properly appealed this case. This Court has held that "oral notice pursuant to N.C.R. App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court" when a defendant appeals from a trial court's order requiring him to enroll in SBM. *State v. Brooks*, 204 N.C. App. 193, 194, 693 S.E.2d 204, 206 (2010). Instead, defendant must give written notice of appeal in accordance with N.C.R. App. P. 3(a) (2012). *Brooks*, 204 N.C. App. at 194, 693 S.E.2d at 206. Since defendant only gave oral notice of appeal, his appeal is not properly before this Court and is subject to dismissal. Recognizing that he failed to provide proper notice of appeal, defendant filed a petition for writ of *certiorari* with this Court seeking review of the SBM order. A writ of *certiorari* may be issued to permit review of the judgments and orders of trial tribunals "when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C.R. App. P. 21(a)(1) (2012). This Court has, in the interest of justice, granted *certiorari* where the defendant failed to properly appeal pursuant to Rule 3(a). *State v. Clark*, ____ N.C. App. ____, ____, 714 S.E.2d 754, 762 (2011), *disc. review denied*, ____ N.C. ____, 722 S.E.2d 595 (2012); *State v. Stokes*, ____ N.C. App. ____, ____, 718 S.E.2d 174, 180 (2011). In our discretion, we grant *certiorari* to hear defendant's appeal in this case.

[2] Second, counsel appointed to represent defendant on appeal has filed an *Anders* brief indicating he "has been unable to identify any non-frivolous issue that could be raised in this appeal." He asks this Court to conduct its own review of the record for possible prejudicial error in accordance with *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). "Our Court has held that SBM hearings and proceedings are not criminal actions, but are instead a 'civil regulatory scheme[.]' " *Brooks*, 204 N.C. App. at 194, 693 S.E.2d at 206 (quoting *State v. Bare*, 197 N.C. App. 461, 472, 677 S.E.2d 518, 527 (2009) (alteration in original)). "[T]his jurisdiction has not extended the procedures and protections afforded in *Anders* and *Kinch* to civil cases." *In re Harrison*, 136 N.C. App. 831, 832, 526 S.E.2d 502, 502 (2000). Nevertheless, in the exercise of our discretion pursuant to N.C. R. App. P. Rule 2 (2012), we have reviewed the record and found no error. Consequently, we affirm the trial court's SBM order.

Affirmed.

Judges STROUD and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 JUNE 2012)

ADKINS v. STILWELL No. 11-1468	Rockingham (10CVS2405)	Affirmed
BUTLER v. CHARLOTTE-MECKLENBURG BD. OF EDUC. No. 11-1312	Mecklenburg (10CVS25692)	Affirmed
CK-S. ASSOCS. v. CHARLOTTE N.C.HOTEL CORP. No. 11-725	Mecklenburg (09CVS347)	No Error
HARRELL v. EDGECOMBE CNTY. SCH. No. 11-1332	Ind. Comm. (298817)	Affirmed
HEDGEPETH v. BELL No. 11-1493	Currituck (11CVS64)	Dismissed
IN RE A.A. No. 12-17	Wake (10JA224-225)	Affirmed
IN RE FORECLOSURE OF VOGLER No. 11-1226	Surry (11SP20)	Affirmed
IN RE G.M. No. 12-138	Mecklenburg (11JA267-269)	Affirmed
IN RE J.P. No. 12-8	Wayne (09JA74-75)	Affirmed in Part; Reversed and Remanded in Part
IN RE M.C. No. 11-1594	Cumberland (10JA486) (10JA487)	Affirmed in Part; Reversed in Part
IN RE M.F.L. No. 11-1426	Wilkes (11JA50-51)	Affirmed
IN RE M.Z.C. No. 12-51	New Hanover (10JT138-139)	Affirmed
IN RE H.N. No. 12-39	Durham (09J291)	Affirmed

IN RE J.H. No. 11-1194	Wake (11JB467)	Affirmed in part; reversed and remanded for findings and conclusions and for corrections.
IN RE N.R.R.W. No. 11-1407	Caldwell (09J158)	Affirmed
KENNEDY v. MINUTEMAN POWERBOSS No. 11-1248	Ind. Comm. (673731) (W04978)	Affirmed
LEVEAUX-QUIGLESS v. PILGRIM No. 11-1456	Wake (08CVS21217)	Vacated and Remanded
MCFALLS v. INGLES MKTS., INC. No. 11-1185	Ind. Comm. (890142)	Affirmed
MILLER v. ORCUTT No. 11-1128	Wake (08CVS20745)	Affirmed
STATE v. FLOYD No. 11-1597	Wayne (10CRS1733-36)	No error at trial; remanded for resentencing
STATE v. HALL No. 11-1316	Caldwell (07CRS4733) (07CRS52349)	Affirmed
STATE v. KIRK No. 11-1285	Mecklenburg (07CRS231089) (08CRS34203)	No error at trial; Remanded for resentencing
STATE v. MERCER No. 11-1532	Brunswick (10CRS4869) (10CRS55767)	No Error
STATE v. MILLS No. 11-1560	Lenoir (10CRS51973)	No Error
STATE v. MOODY No. 11-1435	Randolph (10CRS53370)	No Error
STATE v. MOORE No. 11-1434	Duplin (06CRS52377-78) (11CRS82)	No prejudicial error.

STATE v. PARKER No. 11-1525	Forsyth (08CRS50576) (08CRS50993) (09CRS22538)	Dismissed
STATE v. RHODES No. 11-1347	Cumberland (07CRS56127)	No Error
STATE v. SMITH No. 11-1252	Guilford (10CVS9383)	No Error
STATE v. SPECIALE No. 12-34	Craven (07CRS55650)	Vacated and Remanded
STATE v. STEMPLINGER No. 11-1510	Mecklenburg (09CRS24366)	Dismissed
STATE v. STEPHENS No. 11-1341	Gaston (11CRS145)	No Prejudicial Error
STATE v. THOMAS No. 11-1047	Durham (05CRS50722-24)	No Error
STATE v. WEBB No. 12-88	Wake (10CRS217524)	No Error
STATE v. WOOD No. 11-1360	Mecklenburg (09CRS204140)	Affirmed in part; Reversed and Remanded in part
SWINGLE v. ALLENDER No. 11-1008	Buncombe (09CVS3299)	No Error
THOMAS v. UNION CNTY. BD. OF EDUC. No. 11-726	Ind. Comm. (TA-20518)	Affirmed
TURNER v. TURNER No. 11-1492	Moore (09CVD261)	Affirmed
WILLIS v. WILLIS No. 11-1211	Carteret (05CVD1329)	Affirmed

STATE OF NORTH CAROLINA v. LAWRENCE DONELL FLOOD, SR.

No. COA11-856

(Filed 19 June 2012)

1. Evidence—prior crimes or bad acts—homicide—admission prejudicial error—knowledge—intent—victim's state of mind—Confrontation Clause

The trial court erred in a first-degree murder, first-degree kidnapping, and possession of a firearm by a felon case by allowing the admission of evidence of facts surrounding a prior homicide committed by defendant. With respect to knowledge and intent, the probative value of the facts surrounding the prior shooting was outweighed by the danger of undue prejudice. Further, whether a victim was fearful and pled for his life showed the victim's state of mind and did not reflect on the perpetrator. Finally, the testimony that defendant objected to on Confrontation Clause grounds involved facts of the prior shooting that were not sufficiently similar to this shooting.

2. Evidence—prior crimes or bad acts—improper admission of prior homicide—new trial

It was for the jury to decide the weight and credibility of all the evidence in a first-degree murder, first-degree kidnapping, and possession of a firearm by a felon case, and it could not be said that absent the improper admission of the facts surrounding a prior homicide committed by defendant that there was no reasonable possibility that a different result would have been reached at trial. The case was reversed and remanded for a new trial.

Appeal by Defendant from judgments entered 16 December 2009 by Judge J.B. Allen, Jr. in Superior Court, Alamance County. Heard in the Court of Appeals 10 January 2012.

Attorney General Roy Cooper, by Assistant Attorney General Mary Carla Hollis, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for Defendant.

McGEE, Judge.

Jerrod Watlington (Watlington) was shot and killed on 11 August 2007 (the 2007 shooting). Evidence presented at trial showed that Watlington had spent the previous night of 10 August 2011 with Lester Slade (Slade) and Jennifer Small (Small) at their house (the house). Watlington, Slade, and Small all occasionally sold illegal drugs. Evidence at trial suggested that someone came by the house on the morning of 11 August 2007 to buy crack cocaine. There was no crack at the house to sell, so Watlington offered to try to find some. Watlington called Lawrence Donell Flood, Sr. (Defendant) and left to purchase crack from Defendant. Watlington returned, saying that Defendant did not have the amount of crack needed, but that Defendant would have more later in the day.

Around lunchtime that day, Paul Lloyd (Lloyd) drove his uncle to the house to purchase crack. Watlington called Defendant several times and asked if he could purchase more crack from Defendant. Lloyd drove Watlington to Defendant's apartment at the Crescent Arms apartment complex (Crescent Arms) in Graham, in order to procure the crack. Lloyd parked five parking spaces to the right of Defendant's front door. Lloyd remained in the car while Watlington went to purchase crack from Defendant. Watlington knocked on Defendant's front door, but nobody answered, so Watlington went around to the rear of the building. Defendant's apartment was on the end of the building, the farthest to the left when looking at the front of Defendant's apartment.

At approximately 2:30 p.m., a man identified as "Rock," approached Lloyd's car and shot Lloyd twice through the driver's side window. Rock was apparently living at Defendant's apartment, though Rock's relationship to Defendant was unclear from the testimony at trial. Someone called 911 at 2:32 p.m. to report the shooting. Lloyd survived his wounds.

The two key witnesses who testified at trial were Rasheem Currie (Currie), who said he witnessed Defendant shoot and kill Watlington inside Defendant's apartment sometime between 2:00 p.m. and 3:00 p.m. that same day; and Lloyd, who placed Watlington outside Defendant's apartment and alive at a time incompatible with the theory that Defendant killed Watlington in Defendant's apartment. For the jury to convict Defendant, it had to believe Currie and disbelieve Lloyd. The only forensic evidence linking Watlington to Defendant's apartment was a small amount of Watlington's blood recovered from the outside doorframe of the rear door to Defendant's apartment, and a small amount of blood recovered from the adjoining patio area that

could possibly have come from Watlington and/or Defendant, or some unknown third party.

The State offered evidence of a shooting committed by Defendant in 1994, which Defendant moved to suppress. Defendant's motion to suppress was denied. The jury found Defendant guilty of first-degree murder on 9 December 2009, pursuant to the theory of malice, premeditation and deliberation, and pursuant to the felony murder rule. The jury also found Defendant guilty of first-degree kidnapping, and possessing a firearm after having been convicted of a felony. The jury recommended Defendant be sentenced to "life imprisonment without parole." Defendant appeals.

The dispositive issues in this case are whether the trial court erred in denying Defendant's motion to suppress and, if so, whether Defendant was prejudiced by this error. Additional relevant evidence will be discussed in the body of the opinion.

I.

[1] Defendant contends in his first argument that the trial court erred by allowing the admission of evidence of facts surrounding a prior homicide committed by Defendant. We agree.

Defendant filed a motion to exclude certain evidence relating to a 1994 homicide (the 1994 shooting) committed in New Jersey, in which Lorenzo Rue (Rue) was shot twice in the head and killed. The State sought to admit this evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b). Defendant pleaded guilty in 1994 to two New Jersey felonies: "First degree, aggravated manslaughter and unlawful possession of a weapon." The fact that Defendant had been convicted of these felonies was properly admitted in support of the charge of possession of a firearm by a felon. Defendant, however, challenged the admissibility of the underlying facts of the 1994 shooting. Defendant claimed there was not sufficient admissible evidence for the jury to find that the facts underlying the 1994 shooting were sufficiently similar to the facts in the present case.

Applicable Law

In *State v. Carpenter*, 361 N.C. 382, 646 S.E.2d 105 (2007), our Supreme Court reviewed the law governing the admission of evidence of prior crimes or bad acts pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b):

North Carolina Rule of Evidence 404(b) provides:

> (b) *Other crimes, wrongs, or acts.*—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.

We have characterized Rule 404(b) as a "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." *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990). However, we have also observed that Rule 404(b) is "consistent with North Carolina practice prior to [the Rule's] enactment." *State v. DeLeonardo*, 315 N.C. 762, 770, 340 S.E.2d 350, 356 (1986); *accord State v. McKoy*, 317 N.C. 519, 525, 347 S.E.2d 374, 378 (1986). Before the enactment of Rule 404(b), North Carolina courts followed "[t]he general rule . . . that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. This is true even though the other offense is of the same nature as the crime charged." *State v. McClain*, 240 N.C. 171, 173, 81 S.E.2d 364, 365 (1954) (citations omitted); *see also DeLeonardo*, 315 N.C. at 769, 340 S.E.2d at 355 ("Since *State v. McClain* . . . it has been accepted as an established principle in North Carolina that 'the State may not offer proof of another crime independent of and distinct from the crime for which defendant is being prosecuted even though the separate offense is of the same nature as the charged crime.' "). As we explained in *McClain*, the general rule "rests on these cogent reasons":

> (1) Logically, the commission of an independent offense is not proof in itself of the commission of another crime.
>
> (2) Evidence of the commission by the accused of crimes unconnected with that for which he is being tried, when offered by the State in chief, violates the rule which forbids the State initially to attack the character of the accused, and also the rule that bad character may not be proved by particular acts, and is, therefore, inadmissible for that purpose.

> (3) Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence.
>
> (4) Furthermore, it is clear that evidence of other crimes compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the charge immediately before it. The rule may be said to be an application of the principle that the evidence must be confined to the point in issue in the case on trial.

240 N.C. at 173–74, 81 S.E.2d at 365–66 (citations and quotation marks omitted); *see also McKoy*, 317 N.C. at 526, 347 S.E.2d at 378. Thus, while we have interpreted Rule 404(b) broadly, we have also long acknowledged that evidence of prior convictions must be carefully evaluated by the trial court.

Accordingly, we have observed that evidence admitted under Rule 404(b) "should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused." *State v. Al–Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002). When evidence of a prior crime is introduced, the " 'natural and inevitable tendency' " for a judge or jury " 'is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge.' " *Id.* at 154, 567 S.E.2d at 122–23 (quoting IA John Henry Wigmore, Evidence § 58.2, at 1212 (Peter Tillers ed., 1983)). Indeed, "[t]he dangerous tendency of [Rule 404(b)] evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subjected to strict scrutiny by the courts." *State v. Johnson*, 317 N.C. 417, 430, 347 S.E.2d 7, 15 (1986).

In light of the perils inherent in introducing prior crimes under Rule 404(b), several constraints have been placed on the admission of such evidence. Our Rules of Evidence require that in order for the prior crime to be admissible, it must be relevant to the currently alleged crime. N.C.G.S. § 8C–1, Rule 401 (2005). . . . In addition, "the rule of inclusion described in *Coffey* is constrained

> by the requirements of similarity and temporal proximity." *Al–Bayyinah*, 356 N.C. at 154, 567 S.E.2d at 123. . . . Moreover, as to the "similarity" component, evidence of a prior bad act must constitute " 'substantial evidence tending to support a reasonable finding by the jury that the defendant committed [a] *similar* act.' " *Al–Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123. "Under Rule 404(b) a prior act or crime is 'similar' if there are 'some unusual facts present in both crimes . . . . ' " Finally, if the proponder of the evidence is able to establish that a prior bad act is both relevant and meets the requirements of Rule 404(b), the trial court must balance the danger of undue prejudice against the probative value of the evidence, pursuant to Rule 403.

Carpenter, 361 N.C. at 386–89, 646 S.E.2d at 109–10 (some citations omitted).

The 1994 Shooting

At Defendant's suppression hearing, Jack Eutsey (Eutsey), a detective for the Newark, New Jersey Police Department in 1994 (now retired), testified that he investigated the 1994 shooting for which Defendant pleaded guilty. Eutsey testified that, at the time of the 1994 shooting, Rue was twenty-two years old, and Defendant was nineteen. Rue was having a sexual relationship with Yesenia Perez (Perez), Defendant's girlfriend. However, Defendant and Rue did not know each other. Eutsey testified that he did not "think [Defendant] had knowledge of [Rue] dealing with [Perez][,]" but that Defendant "suspected Ms. Perez of some other activities, and as a result, [Defendant] broke into the apartment when Mr. Rue . . . was in bed with her." Rue was unclothed at that time because he was in bed with Perez. Eutsey testified that he knew Rue was in bed with Perez only because Perez told him. Rue was discovered "nude, laying face down on the bed." He had died from two gunshot wounds to the back of the head. Eutsey testified that Perez had indicated to him that "she was in fear from" Defendant. Perez was the sole eyewitness to the events surrounding the 1994 shooting.

Perez's initial story concerning the 1994 shooting did not involve Defendant. Perez first stated to police that "three black males, unknown black males had broke in." Perez eventually told police that Defendant had killed Rue. There was no indication the 1994 shooting had anything to do with drugs or any drug transaction, or any robbery attempt. Rue was killed by two shots fired from a .22 caliber handgun. Eutsey testified that, to his best recollection, the shots that killed Rue

were fired from close range, but he could not remember if Rue's wounds were contact wounds—meaning that the barrel of the gun was touching Rue's head when the trigger was pulled. Perez told Eutsey that Rue pleaded for his life before Defendant shot him. The .22 caliber handgun used in the 1994 shooting was never recovered.

State's evidence in the 2007 Shooting

In the case before us, Currie testified that Defendant shot Watlington one time in the back of the head. Timothy Myers (Myers), who had been in jail with Defendant, testified that Defendant had told him Watlington was crying and pleading for his life before Defendant shot him. Currie testified that he was afraid of Defendant because of the killing of Watlington. There was no evidence that Watlington was armed. The .38 caliber handgun used in the 2007 shooting was never recovered.

The Trial Court's Ruling

The trial court ruled that evidence surrounding the 1994 shooting could be admitted pursuant to Rule 404(b) for the purposes of showing identity, intent, and knowledge. The trial court seemed to particularly rely on the *voir dire* testimony of Eutsey, and on the testimony of Myers, that indicated both Watlington and Rue were crying and begging for their lives before being shot. The trial court also stated that it found as similarities between the 1994 shooting and the 2007 shooting that neither handgun was ever recovered; that the two eyewitnesses, Perez and Currie, were both fearful of Defendant; that in both instances Defendant was armed but the victims were not; and that "it appear[ed] that Mr. Watlington had met [Defendant] on one occasion, and on the day of his death, was attempting . . . a drug deal with [Defendant]. The evidence tend[ed] to show that [Defendant's] relationship with Mr. Rue was that Mr. Rue was having sexual relations with [Defendant's] girlfriend." The trial court further found that both victims were killed with a handgun; one shot to the back of Watlington's head, and two shots to Rue's head; and that Rue was twenty-two years old when he was killed, and Watlington was sixteen years old when he was killed.

Knowledge and Intent

We hold that the facts surrounding the 1994 shooting were not admissible to prove intent or knowledge in the 2007 shooting. The State argues that the facts surrounding the 1994 shooting were relevant to prove that Defendant had "knowledge that the weapon used

was lethal" and to prove that Defendant had the intent to kill—specifically that Watlington did not die as the result of an accident. Watlington was killed when a .38 caliber handgun was placed against the back of his head and fired. Clearly the person who committed that act knew it was lethal, and was intended to kill. Whatever slight relevance the 1994 shooting may have had with respect to knowledge and intent in the 2007 shooting, the probative value of this evidence was minimal at best, and the potential for prejudice was great. With respect to knowledge and intent, the probative value of the facts surrounding the 1994 shooting was outweighed by the danger of undue prejudice. N.C.R. Evid. 403. Whether evidence from the 1994 shooting was admissible pursuant to Rule 404(b) for the purposes of proving identity requires more detailed analysis.

Lack of Similarity

Certain findings of the trial court did not support the requirement of similarity. In 1994, both Defendant and Rue were young men. Defendant was nineteen, and Rue was twenty-two, making Defendant a few years younger than Rue. In 2007, Defendant was thirty-two and Watlington was sixteen. Defendant was a grown man and Watlington was still a youth. We find no similarities with regard to the ages of Rue and Watlington at the time they were killed. Age becomes even less of a similarity when Defendant's age, relative to the ages of Rue and Watlington, is considered.

We also find no relevant similarity in the trial court's recitation of how Rue and Watlington were linked to Defendant. According to evidence presented at trial, Defendant and Watlington had met before to transact drug business and, on the day he was killed, Watlington had talked to Defendant on the phone several times. The State's evidence tended to show that there was a drug-related relationship between Defendant and Watlington. There was no evidence of any relationship between Defendant and Rue prior to the 1994 shooting. Eutsey testified that his evidence showed Defendant and Rue were strangers. The fact that Rue and Perez had a sexual relationship, if true, had no bearing on the issue. The only connection between Defendant and Rue suggested by the evidence was that, when Defendant broke into Perez's apartment, Defendant found Rue (a stranger) in bed with his girlfriend and that Defendant killed him. We find more differences than similarities with this evidence. *Carpenter*, 361 N.C. at 389, 646 S.E.2d at 110. This "evidence" of similarity lacks probative value. *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L.Ed.2d 604 (1990).

Other "similarities" found by the trial court fail to rise above mere generic behavior associated with crimes of this nature. *Carpenter*, 361 N.C. at 390, 646 S.E.2d at 111. Because they are easily carried and concealed, handguns are all too frequently used in shootings of the kind that occurred in 1994 and 2007. The handgun used in 1994 was a different caliber than the one used in 2007.

In the present case, the fact that neither Rue nor Watlington was armed, if true, is of little import. There is no reason to expect that Rue would have armed himself to engage in a romantic interlude with Perez. Further, all evidence suggests that Defendant could not have known whether there was anyone armed in Perez's apartment when he broke in. In other words, Defendant broke into the apartment without knowing, and apparently without caring, whether there might be an armed person inside.

We also give no weight to the fact, if true, that Perez and Currie were both frightened of Defendant. Primarily, the states of mind of Perez and Currie are irrelevant because Defendant had no control over their states of mind. Secondarily, assuming the facts as presented to be true, it would be more unusual in this kind of situation for eyewitnesses not to have been frightened. Perez and Currie were both, according to the State's evidence, in close proximity to what can fairly be termed executions. It is hard to imagine anything more generic than a feeling of fear in that situation—including the fear that the shooter might try to harm them if they discussed what they had seen.

The same applies to the State's evidence concerning the behavior of Rue and Watlington prior to being shot. We expect it is the rule, rather than the exception, that individuals who have guns placed to the backs of their heads are fearful and will plead for their lives. Whether such a victim is fearful or not, and whether a victim pleads or not, is again a product of the state of mind of the victim and does not reflect on the perpetrator.

Evidence that a defendant *made* victims plead for their lives, for example, would be considered in a different light. That kind of evidence would reflect on the character and, potentially, the *modus operandi* of the perpetrator, not just the states of mind of the victims. Such are not the facts in this case.

We are left with evidence that both Rue and Watlington were killed from shots fired at close range to their heads. Evidence also suggests both victims were lying face down at the time the shots were

fired. From the evidence presented, both killings may reasonably be called "execution style."

Right to Confront Witness at Hearing

Defendant argues that much of Eutsey's testimony violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. Specifically, Eutsey was allowed to testify on *voir dire* concerning statements Perez had made to him and other police officers in 1994. This testimony was allowed even though the State had apparently been in contact with Perez before the trial and could have subpoenaed her. Defendant's counsel argued:

> Ms. Perez, Your Honor, is available. She is alive, well and can come here and testify. Our information is that the State has been in contact with her. We have, too. And they more recently told her they didn't need her. They want a secondhand witness to describe an investigation that he can't testify about.

Defendant argued that he had not had any opportunity to cross-examine Perez, and that the State had made no showing that she was unavailable. Defendant argued: "In fact she is available. The State . . . actually had an order, material witness order that I think is still good to have her come from New Jersey."

The State, and the trial court, apparently agreed with Defendant, at least as a general proposition:

> COURT: All right. I've sent the jury back. Detective [Eutsey], if you'd come on back around. Mr. Johnson and Mr. Boone [the attorneys for the State], I'm assuming counsel for [D]efendant is saying that a lot of this testimony that [Detective Eutsey's] testifying to is not admissible.
>
> Mr. Boone: Your Honor, they're asking questions about facts that would be hearsay. But the questions that I've asked [Detective Eutsey] about what he personally observed and circumstances surrounding the crime scene and the crime are such that they would be admissible, and we would contend would be of a type of evidence that would allow for a, a comparison between the two killings.

The State then argued to the trial court that "there are many similarities here that don't even have to bring into account hearsay or Crawford." The State further stated that, if the trial court wanted "to go into the hearsay part of it," there was the testimony that both Rue and Watlington were begging for their lives.

The trial court appeared to state that it would not allow Eutsey to testify concerning statements Perez made, though this is not entirely clear from the transcript: Eutsey "has testified that the [c]ourt will not allow him to testify completely what Ms. Perez has testified, but he's testified to Ms. Perez was a witness to the killing."

While we find that Defendant raises a valid issue: whether the trial court can consider testimony that violates the Confrontation Clause in making its ruling on the admissibility of Rule 404(b) evidence, we need not answer that question here. This is because we hold that the testimony to which Defendant objects on Confrontation Clause grounds involved facts of the 1994 shooting that were not sufficiently similar to the 2007 shooting.

Analysis

Facts surrounding the 1994 shooting will only be relevant, and thus admissible, if there are " 'some unusual facts present' " in both the 1994 shooting and the 2007 shooting which would allow a " 'reasonable inference that the same person committed both the earlier and the later crimes.' " *State v. Haskins*, 104 N.C. App. 675, 681, 411 S.E.2d 376, 381 (1991) (citations omitted). The unusual facts need not rise to the level of bizarre or unique signature elements. *Id.* In *Haskins*, this Court held that the State failed to provide sufficient unusual facts to support a reasonable inference that the defendant committed both an earlier robbery and the robbery for which he was on trial. *Id.* The State introduced evidence that in both robberies neither perpetrator wore a mask, and in both robberies the perpetrators yelled a demand for money. *Id.* at 682, 411 S.E.2d at 382. These "similarities" were too generic to constitute unusual facts. Furthermore, there were numerous dissimilarities between the two robberies. The crimes occurred in different towns, one "occurred on the deserted premises of a bank which was closed, involved gratuitous violence, and was committed by only one perpetrator." *Id.* at 682, 411 S.E.2d at 381-82. The other robbery was at a convenience store which was open for business, customers were present, "no shooting took place, and two perpetrators were involved." *Id.* at 682, 411 S.E.2d at 382.

In the present case, considering all the evidence presented on *voir dire*, we find many dissimilarities between the 1994 shooting and the 2007 shooting. In 1994, Defendant was nineteen and Rue was twenty-two. In 2007, Defendant was thirty-two and Watlington was sixteen. The 1994 shooting occurred in New Jersey, while the 2007 shooting occurred in North Carolina. The 1994 shooting was a crime

of passion. Defendant suspected Perez of being unfaithful, broke into her apartment while she was engaged in sexual activity with Rue, and shot Rue, a man Defendant had never met before, *because* Rue was being sexually intimate with Perez. Rue was shot in Perez's bed. Defendant initiated the contact with Rue in the 1994 shooting.

Watlington (according to the State's evidence) was shot in Defendant's apartment. Currie testified that Watlington was shot in Defendant's kitchen. Watlington had initiated contact with Defendant for the purposes of obtaining drugs, and Watlington had contacted Defendant for drugs in the past. There is certainly no evidence Watlington was involved with any girlfriend of Defendant's, and there is no evidence that the shooting of Watlington was a crime of passion. There was testimony that, while Defendant was in jail awaiting trial, he told someone that he killed Watlington for the purpose of robbing Watlington. There was no evidence that the shooting of Rue was for the purpose of robbing Rue.

Defendant made Perez leave the room so she would not witness the killing of Rue. Currie testified that Defendant called Jimmy Downey (Downey) and asked him to come to Defendant's apartment. Defendant invited Currie and Downey into his apartment and allowed them to witness him shooting Watlington and, in fact, left them alone with Watlington both before and after the shooting. Defendant used a .22 caliber handgun to shoot Rue twice in the head, while Watlington was shot once in the head with a .38 caliber handgun. There was no evidence that Defendant physically assaulted Rue before shooting him, but Currie testified that Defendant kicked Watlington in the head three times before shooting him. Defendant left Rue's body in Perez's apartment. Currie testified that Defendant told Downey to get Downey's car, and Defendant asked Currie to help him carry Watlington's body to the trunk of Downey's car. Defendant then instructed Currie and Downey to dispose of Watlington's body.

Against these dissimilarities, we have the similarity in the manner in which, according to the State's evidence, both Rue and Watlington were killed—shots to the back of the head while they were prone. Though the execution-style nature of the killings of both Rue and Watlington was an appropriate factor to consider when making the 404(b) determination, in light of the myriad dissimilarities between the two shootings, we do not find that this single similarity constitutes " 'substantial evidence tending to support a reasonable finding by the jury that [D]efendant committed [a] *similar* act.' " *Al–Bayyinah*,

356 N.C. at 155, 567 S.E.2d at 123. The primary impact of the evidence surrounding the 1994 shooting was that Defendant was shown to be the kind of person capable of shooting someone in the head because he had done it before in 1994. This is precisely the inference that Rules 403 and 404(b) were enacted to prevent. *McClain*, 240 N.C. at 173–74, 81 S.E.2d at 365–66. The trial court erred by allowing facts surrounding the 1994 shooting to be admitted at trial.

II.

[2] Due to the highly inflammatory nature of the evidence surrounding Defendant's killing of Rue, and the contradictory evidence presented at Defendant's trial for the killing of Watlington, we cannot say that there is no reasonable possibility that, absent this error, a different result would have been reached at trial.

Because we have to determine the prejudice of the admission of the facts surrounding the 1994 shooting, we must examine the strengths and weaknesses of the State's case at trial. In doing so, we are not assuming the role of fact finder. We point out weaknesses in the State's case solely in support of our decision to grant a new trial. If this case is retried, it will be the sole province of the jury to determine weight and credibility with respect to the evidence.

The evidence presented at trial was replete with contradictions and internal inconsistencies, and so the prejudicial nature of the facts surrounding the 1994 shooting had a much greater potential to influence the jury's verdict. There were two narratives presented by the facts at trial. In the State's narrative, Defendant killed Watlington in Defendant's apartment—a killing that was witnessed, and testified to, by Currie. In Defendant's narrative, Watlington was alive and outside Defendant's apartment at a time inconsistent with Currie's narrative. Defendant's evidence suggested that Watlington was still alive when driven away from the Crescent Arms—possibly by Rock. Defendant's evidence suggested that Downey and, most importantly, Currie, were possibly involved in Watlington's murder.

Currie was fourteen on 11 August 2007. Currie testified that he was with his friend Downey, who was driving a silver Ford Taurus owned by Downey's friend Jennifer Evans, when Defendant called Downey several times and asked Downey and Currie to come to Defendant's apartment.

According to Currie, when they arrived at Defendant's apartment, Defendant was holding a handgun and had Watlington lying on the

kitchen floor. At one point, Defendant went upstairs, leaving Watlington alone with Currie and Downey before returning to the kitchen. There was no explanation as to why Currie did not attempt to leave the apartment when Defendant went upstairs. There was no evidence suggesting reasons Downey, or Watlington, who was not bound, did not attempt to leave the apartment. While Currie and Downey stood in the kitchen with Defendant and Watlington, Defendant stomped on Watlington's head two or three times, then shot him once in the head. Defendant went upstairs and Currie heard Defendant talking to a man; then Defendant returned with some black cloth which he wrapped around Watlington's head. Defendant still had the gun with him, and Currie was afraid to run away. Defendant and Currie carried Watlington's body out the back door, as Downey pulled the Taurus around to the side of the apartment building. They put Watlington's body in the trunk of the Taurus, and Defendant told Currie and Downey to dispose of the body. Downey and Currie drove around to the front of the apartment building, where Currie saw broken glass beside a car parked in front of Defendant's apartment building. Currie saw some Hispanic women standing near the area of the broken glass, and heard people saying to call the police. Downey drove on, and they exited the parking lot. At trial, Currie identified a photograph of Lloyd's car, taken after the shooting, as the vehicle he had seen next to the broken glass as he left the apartment complex. The first officer on the scene testified that the only glass in front of Defendant's apartment was glass beside Lloyd's car from the driver's side window that had been shot out.

The State's expert testified that Lloyd and Watlington were shot by the same gun. This evidence, combined with Currie's testimony, suggests that Lloyd was shot before Watlington, though Currie did not notice Lloyd or Lloyd's shot-up car when he first approached Defendant's apartment; and Currie did not hear any gunshots other than the one that he says killed Watlington. Defendant was in possession of the same gun that was used to shoot Lloyd at the time Currie and Downey entered Defendant's apartment. If Watlington was in Defendant's apartment, then Lloyd had to have been parked in front of Defendant's apartment building at the time Downey and Currie arrived. This is also inconsistent with the statement of Crescent Arms resident Indigo Lee (Lee) that Downey's car was parked in front of Defendant's apartment an hour and a half before Lloyd was shot.

Other witness testimony makes it clear that immediately after Lloyd was shot, assistance was given to Lloyd, authorities were

called, and police arrived. If the police were there when Downey and Currie arrived, they almost certainly would have noticed. If Lloyd had just been shot when Downey and Currie arrived, and the police had not yet arrived, the police would have arrived by the time Currie testified he and Downey drove off with Watlington's body. Currie, however, testified that people were shouting for someone to call 911 as he and Downey left with Watlington's body.

Lloyd's testimony was very clear that Rock was the man who shot him. Other witness testimony supports Lloyd's testimony in this regard. The State's theory of the case was that the shooting of Watlington "had occurred immediately prior to the shooting of . . . Lloyd[.]" Currie's testimony contradicts this theory as well, because the single handgun used to shoot both Lloyd and Watlington could not have been with Defendant and Rock simultaneously. Watlington could not have been with Defendant and Rock simultaneously, either. In brief, in order for the jury to have believed Currie's testimony, it had to disregard Lloyd's testimony as false.

According to Currie, the only gunshot he heard was the one that killed Watlington, though according to the State's evidence, Lloyd was shot while Currie was only yards away. Currie testified that Downey drove to a house that he and Currie believed was unoccupied, removed Watlington's body from the trunk, and dumped it in a drainage ditch. Watlington's blood was found on the driveway of the house. Currie testified that Downey drove to two different self-service car wash businesses, where they used high pressure water hoses to wash blood out of the trunk of the car. Items recovered from the trunk, however, did not show signs of having been exposed to water.

According to the State, Lloyd was shot after Watlington. The State's ballistics expert testified that Lloyd and Watlington were shot with the same gun. According to Currie's testimony, however, Defendant still had the gun with him as Defendant and Currie carried Watlington's body out of the apartment and placed it into the trunk of the car. According to Currie's testimony, Lloyd had already been shot at the time they drove off with Watlington's body.

The primary witness for Defendant was Lloyd, the other shooting victim that day. Lloyd's account was incompatible with the account given by Currie. Lloyd testified that he saw Watlington with Rock and another man (not Defendant) just before Rock shot Lloyd. Lloyd further testified that he believed Rock forced Watlington into a black SUV and then drove off in the SUV with Watlington. If Lloyd saw

Watlington outside Defendant's apartment immediately prior to Lloyd's being shot, then Currie's account of the events could not have been correct.

Other witnesses at Defendant's apartment complex gave testimony that supported Lloyd's testimony. Currie testified that the shot that killed Watlington was "loud." Witnesses only reported two shots fired, not three. Lloyd was shot twice. Lee testified that she saw Rock approaching Lloyd's car and then heard two gunshots. Lee told Graham Police Detective Crystal Sharpe (Detective Sharpe) that she saw Rock get into the rear driver's side seat of a black SUV. Detective Sharpe testified:

> [Lee] said that [Downey] sped off behind the Expedition. The vehicles went past her apartment and exited the parking lot onto Larry Avenue. She said she previously seen [Downey]'s car parked in the end parking spot in front of [Defendant's apartment] at about one o'clock that day.
>
> And she said at the time of the incident, [Downey] was driving the car she identified as his, a silver car with plain windows and four doors. She said that the silver car left the parking lot and went in the same direction as the Expedition.

Lee and a friend went to help Lloyd while they waited for the authorities to arrive. A few minutes after the police arrived, Lee saw Defendant and Defendant's sister walking away from the apartment building. Defendant told Detective Sharpe that he was at his sister's apartment at the time of the shooting. The first officer arrived on the scene approximately three minutes after someone called and reported the shooting of Lloyd.

Currie testified that there was "a lot" of blood collected in the spot where Watlington had been shot. When asked if he saw "anything other than blood" like "any [other] kind of tissue," Currie answered that he saw "some gray stuff, some gray looking material." However, no confirmed blood or other DNA evidence associated with Watlington was recovered from Defendant's kitchen. Lee's testimony, if believed, would not have given Defendant sufficient time to clean up the kitchen before he was seen leaving the apartment complex. Further, according to Detective Sharpe, Lee had seen Downey's car at the apartment *an hour and a half before* the time of the shooting, which conflicts with the time frame set out in Currie's testimony, and would have put Currie and Downey at Defendant's apartment before Watlington and Lloyd arrived.

At 4:17 p.m., Detective Sharpe called and left a message with Defendant's wife for Defendant to contact Detective Sharpe. Defendant called Detective Sharpe shortly thereafter, and agreed to come to the police station to speak with Detective Sharpe. Defendant, along with his girlfriend, arrived at the station shortly before 7:00 p.m., approximately four and a half hours after Watlington was killed. Defendant told Detective Sharpe that he and his girlfriend had been at his sister's apartment, and had not been in his apartment, since that morning. Detective Sharpe asked Defendant to submit to a gunshot residue test, and Defendant consented. The test was never submitted for analysis. Detective Sharpe testified that it is recommended that a gunshot residue test be administered within four hours of the firing of the weapon. It had been approximately four and one half hours since the shooting. Defendant then allowed police to come into his apartment and look around. Police saw no signs of foul play or clean-up, and did not smell bleach. Though the State presented some evidence of cleaning in Defendant's kitchen, there was no evidence presented concerning when this cleaning took place and, more importantly, none of the areas showing signs of having been cleaned were where Currie testified to having seen blood and brain matter. The State presented no evidence of blood, DNA, or cleaning from the spot in the kitchen where Currie testified he saw Defendant shoot Watlington in the head. There was no evidence presented that the areas that did show signs of cleaning were in any manner suspicious or out of the ordinary for normal kitchen cleaning.

Further, Currie testified that

> [Defendant] stomped [Watlington] in the back of the head and told him to lay his head down. And then [Defendant] had went upstairs, and when he came back, [Watlington] had lifted his head again. And then [Defendant] stomped, he hit him, he kicked him in the back of the head again. Then he just got over top of him, and he shot him.

The coroner testified that Watlington did not have any bruising to his head. Currie did not explain what Watlington was doing when Defendant went upstairs with the gun, leaving Watlington alone with Currie and Downey. Police received an anonymous tip that there had been a body in the trunk of "the car that [Defendant] was in." Police searched the trunk of Defendant's girlfriend's car, but found nothing. Apparently, the police were receiving multiple anonymous tips concerning Watlington.

The first officer arrived on the scene at 2:35 p.m. Jayson Prutzman (Prutzman), an EMS technician, was responding to a call at an apartment complex across the street from Defendant's apartment at approximately 2:25 p.m. that day. Prutzman testified that he heard what he thought were two gunshots coming from the area of Defendant's apartment, and used both his radio and his phone to call and immediately report the suspected shots. He testified he made these calls at approximately 2:28 p.m. or 2:30 p.m. At least three residents of the Crescent Arms also heard two shots.

Crime scene tape was put up around the scene of Lloyd's shooting shortly after the first officer arrived, and this tape blocked off access to Defendant's front door. There still a police presence at Defendant's apartment at the time Defendant allowed Detective Sharpe to walk around in his apartment at about 8:30 p.m. No one reported seeing Defendant enter his apartment, or reported any activity at the apartment, between the time Defendant was seen leaving the area and the time Defendant allowed Detective Sharpe to walk around in the apartment. Lee had informed Detective Sharpe shortly after Lloyd's shooting that Rock was staying in Defendant's apartment. The police did not tape off or monitor the rear of Defendant's apartment building, and did not procure a warrant that day to search the apartment in which they had reason to believe Lloyd's shooter was staying.

The State's theory of the case was that Watlington was shot before Lloyd. For the State's theory to be correct, Defendant would have had to somehow have handed the gun over to Rock while Defendant was directing the disposal of Watlington's body. Currie, however, testified that Defendant retained the gun as Currie and Defendant carried Watlington's body out to Downey's vehicle. Currie testified that he never saw Rock. Currie's testimony tends to undermine this aspect of the State's theory of the case. However, parts of Currie's testimony are also incompatible with a scenario in which Lloyd was shot before Watlington.

The State argues that Lloyd's testimony is unreliable because Lloyd had a long history of prior convictions, and Lloyd had initially told police a different story concerning the events of that day. Currie also had a number of prior convictions, and Currie's account of what happened that day also changed over time. Currie admitted to disposing of Watlington's body. A jury certainly could decide that Currie had ample incentive to lie at trial. Currie was not charged with any crime, though his testimony was an admission to, *inter alia*, acces-

sory after the fact to murder. The jury could conclude that Currie received favorable treatment by the State because he testified in a manner that was helpful to the State's case against Defendant. Downey refused to testify, invoking the Fifth Amendment. Defendant's request that Downey be granted limited immunity was denied. We cannot say that Currie's credibility was so unimpeachable, and that Lloyd's credibility was so suspect, that the credibility issue could be removed from the hands of the jury.

According to the State's theory, Lloyd had not been shot when Downey and Currie backed into a space in front of Defendant's apartment, but Lloyd was waiting in his vehicle in front of Defendant's apartment. However, Lee testified that the car Downey was driving was at Defendant's apartment about an hour and a half before Lloyd was shot. If true, this testimony places Currie and Downey at the apartment long before Lloyd's shooting and, therefore, places them at the apartment long before Lloyd and Watlington arrived. Further, Defendant was in possession of the gun that was used to shoot Lloyd while Defendant, Currie and Downey were in Defendant's apartment, and Defendant did not leave the apartment until they were removing Watlington's body. According to the State's own evidence, Lloyd had been shot before Downey and Currie drove off with Watlington's body.

Lloyd, however, claims he saw Watlington alive in front of Defendant's apartment just before Rock shot Lloyd, and believes Watlington was forced into the black SUV. Lloyd was asked at trial if the prosecutors had asked him "if [Defendant] shot Jerrod Watlington?" Lloyd responded: "I said couldn't have, because I seen the boy alive being pulled away to the SUV and taken off." Lee testified that she saw Rock near Lloyd's car, heard two shots, then saw Rock get into a black SUV. Lee then saw the SUV speed away, followed by Downey's silver car. Lee knew Defendant, Rock, Lloyd, and Downey. Lee was also familiar with Lloyd's and Downey's vehicles. According to Lee's testimony, assuming that Downey and Currie did leave the apartment complex in the silver car, they followed the black SUV out of the complex, or at least left at the same time. If Lee's testimony is believed, Downey and Currie left at the same time as Rock, which was immediately after Rock shot Lloyd. It is not at all clear how the handgun that killed both Watlington and Lloyd could have been passed between Defendant and Rock, and both shootings accomplished, in the timeframe established by the testimony. There was evidence presented at trial supporting a theory that Watlington was driven off alive from the Crescent Arms and killed elsewhere.

There was not overwhelming evidence of Defendant's guilt presented at trial unless Currie's testimony was believed. There was ample contradictory testimony, and a fair amount of evidence challenging Currie's testimony. It was for the jury to decide the weight and credibility of all the evidence, and we cannot say that, absent the improper admission of the facts surrounding the 1994 killing of Rue, there was no "reasonable possibility that . . . a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A–1443(a) (2011). We therefore reverse and remand for a new trial.

Because of our holding above, we do not address Defendant's other arguments on appeal.

New trial.

Chief Judge MARTIN and Judge CALABRIA concur.

STATE OF NORTH CAROLINA v. JEROME ROBINSON, JR.

No. COA11-1163

(Filed 19 June 2012)

1. Search and Seizure—motion to suppress drugs—single pat-down search conducted in fluid manner

The trial court did not err in a felonious possession of cocaine case by denying defendant's motion to suppress even though defendant contended the detective conducted two separate searches of his person with the second search allegedly violating his rights. The detective's testimony described a single pat-down search conducted in a fluid manner following defendant's removal from the car.

2. Search and Seizure—probable cause—possession of drugs—hiding evidence between buttocks—suspicious behavior

The trial court did not err in a felonious possession of cocaine case by concluding that probable cause arose when the detective felt something hard between the defendant's buttocks outside of defendant's clothing. The circumstances surrounding the detective's encounter with the suspicious behaving defendant would warrant a man of reasonable caution to believe that defend-

ant was in possession of drugs and was hiding evidence which would incriminate him.

3. Search and Seizure—search of defendant's buttocks—not a strip search—exigent circumstances not required—steps to protect privacy

The trial court did not err in a felonious possession of cocaine case by concluding that the search of defendant's buttocks was not a strip search and that exigent circumstances were not required. The detective had ample basis for believing that contraband would be discovered beneath defendant's underclothing, and the detective took certain steps to protect defendant's privacy.

Judge ELMORE dissenting.

Appeal by defendant from judgment entered 14 February 2011 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 February 2012.

Attorney General Roy Cooper, by Associate Attorney General Erica Garner, for the State.

Unti & Lumsden LLP, by Sharon L. Smith, for Defendant-appellant.

ERVIN, Judge.

Defendant Jerome Robinson, Jr., appeals from a judgment imposing a four to five month suspended sentence upon Defendant and placing Defendant on supervised probation for a period of twenty-four months based on Defendant's plea of guilty to one count of felonious possession of cocaine. On appeal, Defendant challenges the denial of his motion to suppress evidence seized at the time of his arrest. After careful consideration of Defendant's challenge to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should remain undisturbed.

I. Factual Background

A. Substantive Facts

Shortly after midnight on 5 March 2009, Detective Brad Tisdale and Officer M.D. Pittman of the Charlotte-Mecklenburg Police Department were on patrol in a marked vehicle in the Lakewood community in Charlotte. At that time, the officers noticed three men

sitting in a car parked in a parking lot on Grant Street, a two-way road that ran through the parking lot of an apartment complex. After the officers stopped the patrol vehicle and approached the car to talk with the men, Detective Tisdale went to the driver's side window while Officer Pittman moved towards the passenger side.

As he spoke with the driver, Detective Tisdale noticed that Defendant, who was located in the rear seat behind the driver, held a large number of bills of varying denominations. At the same time, Officer Pittman told Detective Tisdale that there was a machete in the front seat between the driver and the front seat passenger and asked the latter to get out of the car. While Detective Tisdale continued speaking with the driver, Defendant dropped the money that he was holding onto the floor of the car and "suddenly move[d] back, lift[ed] up his waist area, and place[d] his hands behind his back."

After the front seat passenger left the car, Officer Pittman observed crack cocaine "in plain view" in the front right passenger seat and placed the front right passenger "into custody for drug related offenses." At that point, Detective Tisdale "ordered [Defendant] to exit the vehicle" and "immediately conducted a pat-down" while Defendant stood "next to the vehicle." Detective Tisdale performed a complete pat-down, "from the top to bottom," including reaching "down to the waistline . . . . all the way down past [Defendant's] knees to [his] ankles" and moving his hands "in a forward motion between [his] crotch and buttocks area." When Detective Tisdale "move[d] to [Defendant's] crotch area," he placed his "hand, flat hand, between his crotch area and his buttocks, [and] felt a hard-like substance between [Defendant's] buttocks." Based on his training and experience in "encountering numerous subjects that concealed illegal narcotics in the buttocks area," Detective Tisdale "immediately placed [Defendant] in cuffs and escorted him over to [his] vehicle, to a secure area" in order to "conduct a more thorough search."

Detective Tisdale's vehicle was located about twenty feet away from the point at which the pat-down had occurred. Upon reaching that location, Detective Tisdale opened the rear door of the car and positioned Defendant between that door and the passenger seat. Detective Tisdale testified that:

> I asked [Defendant] to lean forward by the waist. As he leaned forward by the waist, I had my flashlight. I looked down the rear of his pants where I [had] felt the hard-like substance. I saw a clear plastic bagg[ie] protruding out from his buttocks. I immedi-

> ately asked [Defendant] to spread his buttocks apart so the item could fall out. He complied. The crack cocaine was packaged in a clear plastic bagg[ie]. It fell out of his pants. He was able to shake it down. It went down his pants leg and down to the ground. I then secured the cocaine.

Although Detective Tisdale did not insert his hands or the flashlight into Defendant's pants or pull Defendant's pants down, he did have "[Defendant] lean forward by the waist and spread [his] butt cheeks far" and pulled the waistband of Defendant's pants back "maybe half a foot at most" so he "was able to see down inside the rear of his pants." According to Detective Tisdale, no one else was present at the time that he searched Defendant and discovered the crack cocaine.

B. Procedural History

On 5 March 2009, a Magistrate's Order charging Defendant with felonious possession of cocaine was issued. On 22 March 2010, the Mecklenburg County grand jury returned a bill of indictment charging Defendant with felonious possession of cocaine. On 27 September 2010, Defendant filed a motion seeking to have the evidence seized at the time of his arrest suppressed on the grounds that it had been obtained as the result of an "illegal and unconstitutional stop and seizure." On 10 February 2011, Judge Kevin M. Bridges entered an order denying Defendant's suppression motion.

On 14 February 2011, Defendant filed a notice reserving the right to seek appellate review of the order denying his suppression motion in the event that he entered a plea of guilty. On the same date, Defendant entered a plea of guilty to felonious possession of cocaine pursuant to a plea agreement in which the State agreed, in return for Defendant's plea, to recommend that Defendant be sentenced to a term of four to five months imprisonment, with this sentence to be suspended and with Defendant to be placed on supervised probation. The trial court accepted the parties' plea arrangement and entered judgment accordingly. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Standard of Review

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclu-

sions of law. However, when, as here, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed *de novo* and are subject to full review. 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal. *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994); *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984); and *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993), *cert. denied*, 512 U.S. 1254, 114 S. Ct. 2784, 129 L. Ed. 2d 895 (1994), and quoting *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal citation omitted) (other citation omitted).

B. "Second Search" of Defendant

[1] In his initial challenge to the denial of his suppression motion, Defendant argues that Detective Tisdale conducted two separate searches of his person, that the "second" search violated his right to be free from unreasonable searches and seizures, and that, since Detective Tisdale found the hard object between his buttocks during this "second" search, the evidence seized on that occasion should be suppressed. We do not find Defendant's argument persuasive.

The Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 20 of the North Carolina Constitution protect citizens from unlawful searches and seizures conducted by State officials. U.S. Const. amend. IV, XIV; N.C. Const. art. 1, § 20. In *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), "the United States Supreme Court recognized the right of a law enforcement officer to detain a person for investigation of a crime without probable cause to arrest him if the officer can point to specific and articulable facts, which with inferences from those facts create a reasonable suspicion that the person has committed a crime. Any investigation that results must be reasonable in light of the surrounding circumstances." *State v. Lovin*, 339 N.C. 695, 703-04, 454 S.E.2d 229, 234 (1995).

In his brief, Defendant concedes that "the totality of the circumstances in the present case, including the presence of an unconcealed weapon and what appeared to be drugs in the front seat," provided ample justification for Detective Tisdale's decision to request that Defendant exit the car and to pat Defendant down for weapons. Defendant argues, however, that "the manner and scope of the search

that was conducted unquestionably went beyond the limited search allowed by *Terry*." In essence, Defendant asserts that Detective Tisdale initially performed a complete pat-down of Defendant's person for the purpose of determining if Defendant had any weapons and then, having ascertained that Defendant was not armed, undertook an entirely new search of Defendant's person for the purpose of discovering unlawful drugs and found the "hard substance" only "after the weapons search had already revealed that [Defendant] was not carrying a weapon."

Although Defendant claims that his characterization of the record is supported by evidence elicited on cross-examination, we conclude that Detective Tisdale's testimony described a single pat-down search conducted in a fluid manner following Defendant's removal from the car:

> [PROSECUTOR] Can you describe how you patted the defendant down?
>
> [OFFICER] I patted the defendant down starting from the top to bottom, beginning with the shoulders. I then asked him to place his arms in the air or spread them out, starting with shoulders. I did a search, pat-down of the arms, going underneath the armpit come down to the waistline. After I go down to the waistline, I go all the way down past their knees to the ankles. Then I come in a forward motion between their crotch and buttocks area. I conducted a thorough pat-down moving my hand upward and come down to the next side, to the left side, and go all the way down past their knees and ankles.
>
> [PROSECUTOR] Is that what you did with [Defendant] on this date?
>
> [OFFICER] Yes, sir, I did.
>
> [PROSECUTOR] Did you note anything from your pat-down?
>
> [OFFICER] Yes, sir. During my pat-down and based on the sudden movements that I observed the defendant do, I suspected that he may have been concealing a weapon. During the search of the waist area, I did not feel a weapon. That is when my search began to move to his crotch area. As I placed my hand, flat hand, between his crotch area and his buttocks, I felt a hard-like substance between his buttocks.

Although Detective Tisdale did testify that, "[a]s I am searching him and I am not finding any weapons, that is when I went for the drug

search," Detective Tisdale's testimony, viewed in context, does not support Defendant's assertion that two separate searches occurred.

> [COUNSEL] You then conducted a search of his person for weapons; true?
>
> [OFFICER] That's correct.
>
> [COUNSEL] Based on your report, it appears as though you did a second search. This is when you felt something inside [Defendant's] crotch?
>
> [OFFICER] I am trying to see where I did a second search. It doesn't say a second search. If I can elaborate on it.
>
> [COUNSEL] Sure. Please.
>
> [OFFICER] My statement says he was ordered out of the car. Based on that he was handcuffed and he was patted down for weapons, no weapons were located. Based on his movement [inside the car] and my training and experience, I then suspected that he was placing drugs inside his pants. As I am searching him and I am not finding any weapons, that is when I went for the drug search.

The fact that Detective Tisdale was concerned that Defendant possessed either a weapon or drugs and the fact that Detective Tisdale developed certain suspicions based on his training and experience does not transform what was clearly a single, brief, protective search into two separate events. As a result, after carefully reviewing the record, we conclude, consistently with Judge Bridges' findings of fact, that the essence of Detective Tisdale's testimony is that, during the course of a valid pat-down for weapons, he discovered a hard object between Defendant's buttocks. Thus, Defendant's argument in reliance upon this "two search" theory lacks merit.

C. Probable Cause

[2] Secondly, Defendant argues that Judge Bridges erred by "concluding that probable cause arose" "when [Detective Tisdale] felt something hard between the defendant's buttocks." We disagree.

> The law of probable cause is well established. An officer may make a warrantless arrest of any person the officer has probable cause to believe has committed a criminal offense. *See* N.C. [Gen. Stat.] § 15A-401(b) [(2011)]. "Probable cause" is defined as "those facts and circumstances within an officer's knowledge . . . which

> are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." The Supreme Court has explained that probable cause "does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required." A probability of illegal activity, rather than a *prima facie* showing of illegal activity or proof of guilt, is sufficient.

Biber, 365 N.C. at 168-69, 712 S.E.2d at 879 (quoting *State v. Williams*, 314 N.C. 337, 343, 333 S.E.2d 708, 713 (1985), and *Texas v. Brown*, 460 U.S. 730, 742, 103 S. Ct. 1535, 1543, 75 L. Ed. 2d 502, 514 (1983), and citing *Illinois v. Gates*, 462 U.S. 213, 235, 103 S. Ct. 2317, 2230, 76 L. Ed. 2d 527, 546 (1983) (other citations omitted).

In its order, the trial court found as a fact that:

7. . . . Detective Tisdale and Officer Pittman made voluntary contact with three individuals that were seated in a parked vehicle in the parking lot of 3317 Grant Street, Charlotte, NC.

8. That Detective Tisdale, based on his training and experience, is familiar with this area and knows the area to have high drug and high crime activity.

9. That at the time voluntary contact was made it was late at night, approximately 12:15 am.

10. That the defendant was seated in the back seat directly behind the driver of the vehicle.

11. That as Detective Tisdale was speaking with the driver of the vehicle, he observed the defendant holding a large amount of money in different denominations and that he observed the money fall onto the floorboard of the vehicle.

12. That Detective Tisdale next observed the defendant make a quick movement by placing his right hand behind his back to his pants.

13. That Officer Pittman notified Detective Tisdale that he observed a machete on the seat between the driver and the front passenger.

14. That for officer safety Officer Pittman asked the front right passenger, Jeffrey Hairston, to exit the vehicle.

15. That at this time Officer Pittman observed what he believed to be crack cocaine in plain view on the seat where Hairston had been seated.

16. That Officer Pittman notified Detective Tisdale of the suspected crack cocaine in plain view.

17. That Detective Tisdale then ordered the defendant to step out of the vehicle and then detained the defendant in handcuffs for officer safety.

18. That Detective Tisdale then conducted a pat down of the defendant for weapons. No weapons were found on the defendant's person.

19. That based on the totality of the circumstances and based on Detective Tisdale's training and experience, he believed the defendant may have been concealing illegal narcotics inside his pants.

20. That Detective Tisdale then conducted a pat down search between the legs of the defendant and felt a hard like substance between the defendant's buttocks.

Based on these and other findings, Judge Bridges concluded that "[t]he Detective had probable cause to believe evidence of criminal activity was located on the defendant's person when he felt something hard between the defendant's buttocks outside of the defendant's clothing." We conclude that Judge Bridges did not err in reaching this conclusion.

At the hearing held with respect to Defendant's suppression motion, Detective Tisdale testified that:

> [OFFICER] . . . As I placed my hand, flat hand, between his crotch area and his buttocks, I felt a hard-like substance between his buttocks.
>
> [PROSECUTOR] Based on your training and experience, what did you expect that might be?
>
> . . . .
>
> [OFFICER] From my training and experience and in encountering numerous subjects that concealed illegal narcotics in the buttocks area, I immediately placed the defendant in cuffs and escorted him over to my vehicle, to a secure area, so I could conduct a more thorough search.

Thus, Judge Bridges found that Detective Tisdale immediately inferred, based on his training and experience, that Defendant may have been hiding drugs after encountering a hard substance between his buttocks. The fact that "the substance was hidden in the cleft of the defendant's buttocks" was significant, since that is "an unlikely place for carrying a legal substance." *State v. Singleton*, 274 Conn. 426, 441, 876 A.2d 1, 9 (2005). In addition, according to Judge Bridges' findings of fact, Detective Tisdale also knew that: (1) Defendant was sitting in a car parked in a high crime area; (2) a large machete was observed between the front passenger's seat and the driver's seat; (3) the front seat passenger possessed what appeared to be cocaine; (4) when law enforcement officers began speaking with the occupants of the car, Defendant dropped a large sum of cash onto the floor; and, (5) after dropping money on the floor, Defendant immediately made a quick movement behind his back. As a result, given Defendant's "suspicious behavior during the traffic stop and [Detective Tisdale's] subsequent discovery of what he believed to be narcotics in [Defendant's] buttocks," Detective Tisdale had "probable cause to arrest" Defendant. *U.S. v. Davis*, 457 F.3d 817, 823 (8th Cir. 2006), *cert. denied*, 549 U.S. 1258, 127 S. Ct. 1386, 167 L. Ed. 2d 169 (2007) (citations omitted). Thus, Judge Bridges did not err by concluding that Detective Tisdale had probable cause to arrest Defendant, since the circumstances surrounding Detective Tisdale's encounter with Defendant "clearly would warrant a man of reasonable caution in believing that the defendant was in the possession of drugs and was hiding evidence which would incriminate him." *State v. Peck*, 305 N.C. 734, 742, 291 S.E.2d 637, 642 (1982).[1]

D. "Strip Search"

[3] Finally, Defendant contends that Judge Bridges erred by concluding that the search of Defendant's buttocks "was not a strip search, [and] that exigent circumstances were not required." More specifically, Defendant asserts that Detective Tisdale's search of his person constituted a "strip search," making it necessary for Judge Bridges to find the existence of "exigent circumstances" as a precondition for upholding the challenged search. The State, on the other hand, argues that Detective Tisdale's search of Defendant was "not tantamount to a strip search" and did not, for that reason, "requir[e]

1. In light of our determination that Detective Tisdale had probable cause to arrest and search Defendant, we need not address Defendant's argument that the "plain feel" doctrine did not provide an alternative basis for upholding the search of Defendant's person.

additional circumstances of exigency." After carefully examining the reported decisions of this Court and the Supreme Court, we conclude that Judge Bridges did not err by denying Defendant's suppression motion.

"An officer may conduct a warrantless search incident to a lawful arrest. A search is considered incident to arrest even if conducted prior to formal arrest if probable cause to arrest exists prior to the search and the evidence seized is not necessary to establish that probable cause." *State v. Mills*, 104 N.C. App. 724, 728, 411 S.E.2d 193, 195 (1991) (citing *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949), *State v. Wooten*, 34 N.C. App. 85, 89, 237 S.E.2d 301, 304-05 (1977), and *State v. Hardy*, 299 N.C. 445, 455, 263 S.E.2d 711, 718 (1980)). " 'The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable.' " *State v. Battle*, 202 N.C. App. 376, 383, 688 S.E.2d 805, 812 (quoting *Florida v. Jimeno*, 500 U.S. 248, 250, 111 S. Ct. 1801, 1803, 114 L. Ed. 2d 297, 302 (1991)), *disc. review denied*, 364 N.C. 327, 700 S.E.2d 926 (2010). "'What is reasonable, of course, depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself. As a result, the permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' " *Battle*, 202 N.C. App. at 383, 688 S.E.2d at 812 (quoting *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 619, 109 S. Ct. 1402, 1415, 103 L. Ed. 2d 639, 661 (1989) (internal citations omitted).

> "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."

Battle, 202 N.C. App. at 383, 688 S.E.2d at 812 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447, 481 (1979)).

"Courts across the country are uniform in their condemnation of intrusive searches performed in public." *Campbell v. Miller*, 499 F.3d 711, 719 (7th Cir. 2007). Thus, "[i]n order for a roadside strip search to pass constitutional muster, there must be both probable cause and exigent circumstances that show some significant government or

public interest would be endangered were the police to wait until they could conduct the search in a more discreet location—usually at a private location within a police facility." *Battle*, 202 N.C. App. at 388, 688 S.E.2d at 815. However, we "note that neither the United States Supreme Court nor the appellate courts of this State have clearly defined the term 'strip search.' " *Battle* at 381, 688 S.E.2d at 811. As the United States Supreme Court recently stated:

> The opinions in earlier proceedings, the briefs on file, and some cases of this Court refer to a "strip search." The term is imprecise. It may refer simply to the instruction to remove clothing while an officer observes from a distance of, say, five feet or more; it may mean a visual inspection from a closer, more uncomfortable distance; it may include directing detainees to shake their heads or to run their hands through their hair to dislodge what might be hidden there; or it may involve instructions to raise arms, to display foot insteps, to expose the back of the ears, to move or spread the buttocks or genital areas, or to cough in a squatting position.

Florence v. Bd. of Chosen Freeholders, ___ U.S. ___, ___, 132 S. Ct. 1510, 1515, 182 L. Ed. 2d 566, 574 (2012). For that reason, there is no precise definition of what a "strip search" actually is. Moreover, the United States Supreme Court has specifically stated that "we would not define strip search and its Fourth Amendment consequences in a way that would guarantee litigation about who was looking and how much was seen." *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, ___, 129 S. Ct. 2633, 2641, 174 L. Ed. 2d 354, 364 (2009). However:

> "[a] valid search incident to arrest . . . will not normally permit a law enforcement officer to conduct a roadside strip search." Rather, "[i]n order for a roadside strip search to pass constitutional muster, there must be both probable cause and exigent circumstances that show some significant government or public interest would be endangered were the police to wait until they could conduct the search in a more discreet location[.]"

State v. Fowler, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (1 May 2012) (quoting *Battle*, 202 N.C. App. at 387-88, 688 S.E.2d at 815).

In light of these general principles, we note that this Court and the Supreme Court have addressed the lawfulness of searches of a defendant's underwear or his or her anal or genital regions on at least three separate occasions in reported decisions. In the first of these decisions, an investigating officer "received a call from a source he

had used [successfully] two times in the past" to the effect that the defendant, who had $2,000 in his possession and was operating a red Ford Escort, "was going to an unknown location to purchase cocaine" and that, after purchasing the cocaine, the defendant would return to a specific apartment to package the cocaine in aluminum foil before delivering it to a third location, at which the cocaine would be sold. *State v. Smith*, 118 N.C. App. 106, 108, 454 S.E.2d 680, 681-82, *reversed*, 342 N.C. 407, 464 S.E.2d 45 (1995). According to the informant, the defendant " 'would have the cocaine concealed in his crotch, or under his crotch' " at the time that he left the apartment at which he planned to package the cocaine. *Smith*, 118 N.C. App. at 108, 454 S.E.2d at 682. After the defendant left the apartment at which the cocaine was to be packaged, investigating officers stopped the Ford Escort that he was driving, conducted a pat-down of the defendant's person, and then conducted a more thorough search, during which the officer asked the defendant to open his trousers and then pulled down his underwear, resulting in the discovery of a paper towel containing crack cocaine underneath the defendant's scrotum. *Smith*, 118 N.C. App. at 108-09, 454 S.E.2d at 682. Although a majority of this Court held that the "the search of the defendant was intolerable in its intensity and scope and therefore unreasonable under the Fourth Amendment," *Smith*, 118 N.C. App. at 116, 454 S.E.2d at 686, the Supreme Court reversed that decision and upheld the denial of the defendant's suppression motion on the grounds that the officer took adequate steps to avoid exposing the defendant's private areas and that "the availability of . . . less intrusive means does not automatically transform an otherwise unreasonable search into a Fourth Amendment violation." *Smith*, 118 N.C. App. at 118, 454 S.E.2d at 687.

In *Battle*, 202 N.C. App. at 376, 688 S.E.2d at 805,[2] investigating officers received a tip from a reliable informant that a vehicle operated by the defendant's boyfriend and containing the defendant and another passenger would be utilized in connection with the purchase of an ounce to an ounce and a half of cocaine. Based upon this information and the fact that a substance seized from the defendant's boyfriend on a prior occasion had tested positive for cocaine, investigating officers stopped the vehicle driven by the defendant's boyfriend. Although a search of the car revealed the presence of drug

2. Although the decision to reverse the denial of the defendant's suppression motion was a unanimous one, only one of the three members of the panel joined the opinion discussed in the text. In subsequent decisions, however, the opinion discussed in the text has been treated as an opinion by the Court rather than an opinion by a single judge.

paraphernalia, no drugs were found on either the defendant's boyfriend or the third occupant of the vehicle. As a result, a female officer took the defendant to a spot between the open doors of a police vehicle, asked her to "pull the bottom of her bra away from her body and shake the bra," and then "conducted a pat-down search of Defendant." *Battle*, 202 N.C. App. at 379, 688 S.E.2d at 809-10. After feeling "nothing that suggested [that the defendant] was carrying a weapon or contraband pursuant to this search," the officer pulled the defendant's pants open while a male colleague stood nearby with a Taser, pulled the defendant's underwear back, and discovered a five dollar bill, a crack pipe, and a plastic baggie containing a tan powder beneath the defendant's underwear. *Battle*, 202 N.C. App. at 379, 688 S.E.2d at 810. On appeal, this Court reversed the trial court's denial of the defendant's suppression motion on the grounds that the defendant "was strip searched on the side of a street in broad daylight" and that the "State presented *no* evidence of exigent circumstances" justifying that action. *Battle*, 202 N.C. App. at 393, 396, 688 S.E.2d at 818, 820. The Court distinguished *Smith* on the grounds that "the confidential informant specifically stated that the *defendant* would be hiding the cocaine *in the defendant's underpants*, and perhaps underneath the defendant's scrotum;" that the officer had "multiple sources indicating that the defendant was a serious drug dealer" and "operated out of multiple locations;" and that "[t]he search took place in the early morning hours" without any indication "that there were other people in the immediate vicinity other than the officers." *Battle*, 202 N.C. App. at 401, 688 S.E.2d at 823 (emphasis in the original).

Recently, in *Fowler*, ___ N.C. App. at ___, ___ S.E.2d at ___, the record tended to show that an officer had received information that the defendant planned to meet an informant to complete a drug transaction. After the informant failed to appear at the specified location, the defendant drove away. Subsequently, the officer stopped the defendant's vehicle for speeding, ascertained that the defendant's license had been permanently suspended, and placed him under arrest. Upon locating a small quantity of marijuana in the defendant's vehicle, the officer decided to search the defendant's person for the presence of drugs. After failing to locate any contraband in the defendant's pockets and waistband area, the officer "undid defendant's belt and looked down into defendant's pants while asking defendant to sway back and forth in an attempt to 'loosen up anything that may have been hidden on his person." *Fowler*, ___ N.C. App at ___, ___ S.E.2d at ___. Upon failing to find any contraband, the officer drove the defendant to a secluded spot, where he "dropped defendant's

pants down and searched defendant's pants down and searched defendant's boxer briefs with his hand," ultimately "discover[ing] an object containing three grams of crack cocaine in the 'kangaroo pouch' of defendant's boxer briefs, or the 'fly area . . . where the two pieces of fabric overlap. *Fowler*, ___ N.C. App. at ___, ___ S.E.2d at ___. On appeal, this Court held that "the search[] of defendant's person constituted [a] strip search," noting that, "[d]uring [the] search[], defendant's private areas were observed by [the law enforcement officer]." *Fowler*, ___ N.C. App. at ___, ___ S.E.2d ___. However, we also held that there was ample reason to believe that the defendant would be carrying drugs, that the second "strip search" took place at a "discreet" location, and that exigent circumstances (consisting of the defendant's familiarity with processing procedures at the jail and his repeated requests not to be taken there) justified a strip search of the defendant. *Fowler*, ___ N.C. App. at ___, ___ S.E.2d at ___.

As should be obvious, the search at issue in *Fowler* was upheld on the basis that the record showed the existence of exigent circumstances justifying an immediate examination of the defendant's underwear and his anal and genital areas. In *Battle*, on the other hand, a similar search of the area beneath the defendant's underwear was invalidated given the absence of exigent circumstances of the type present in *Fowler*. *Smith*, on the other hand, upheld a search underneath the defendant's underwear despite the absence of any exigent circumstances of the sort found in *Fowler*. According to well-established principles of North Carolina law, we are bound by each of these decisions. *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (holding that the Court of Appeals lacks the authority to overrule decisions of the Supreme Court of North Carolina and has a "responsibility to follow those decisions, until otherwise ordered by the Supreme Court"); *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that "a panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court"). A helpful manner in which to give content to each of these decisions without impermissibly rendering any of them a nullity is suggested by the fact that the Court in *Battle* distinguished *Smith*, in large part, on the grounds that the record was devoid of any indication that the defendant might be concealing weapons or contraband in her underclothing.[3] As a result, we

3. Our dissenting colleague argues that the form of analysis adopted in *Battle* is identical to that employed by both the majority opinion and the dissent (which was ultimately adopted by the Supreme Court) in *Smith*. However, neither the excerpt from

conclude that the mode of analysis outlined in *Battle* and adopted in *Fowler*[4] only applies in the event that the investigating officers lack a specific basis for believing that a weapon or contraband is present beneath the defendant's underclothing. Unless we adopt such an understanding of the relevant cases, we will have effectively overruled *Smith*, an action that we lack the authority to take.[5]

The undisputed evidence in the present record, as reflected in Judge Bridges' findings, indicates that various items of drug-related evidence were observed in the vehicle in which Defendant was riding, that Defendant made furtive movements towards his pants, and that Detective Tisdale felt a hard object between Defendant's buttocks. For that reason, it is clear that Detective Tisdale had ample basis for believing that contraband would be discovered beneath Defendant's underclothing. In addition, Judge Bridges' unchallenged findings of fact establish that Detective Tisdale took certain steps to protect Defendant's privacy. More specifically, Judge Bridges found as a fact:

> 21. That Detective Tisdale then escorted the defendant over to his patrol vehicle to complete the search.
>
> 22. That during the search the lights of the patrol vehicle were not turned on.
>
> 23. That during the search there were no other individuals in the immediate area.

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the *Smith* majority opinion nor the excerpt from the *Smith* dissent quoted in the dissent in this case make any reference, as the dissent seems to suggest, to any issue relating to the lawfulness of a "strip search." Instead, the words "warrantless search" appear where the dissent inserts the words "strip search" in both of the quotations from *Smith* upon which the dissent relies. The appropriateness of the officer's decision to conduct a warrantless search of the defendant in *Smith* and the appropriateness of the manner in which the defendant in *Smith* was searched were two separate and distinct issues. Simply put, there is no discussion of the necessity for a showing that "exigent circumstances" exist in the discussion of the defendant's challenge to the manner in which he was searched in either the majority or dissenting opinion in *Smith*, a fact which we believe undermines our dissenting colleague's challenge to the result we have reached in this case.

4. *Fowler* was devoid of any specific basis for believing that contraband would be located underneath the defendant's underclothing or in the defendant's genital or anal area.

5. For this reason, we disagree with our dissenting colleague's argument that we have erred by failing to determine whether a "strip search" did or did not occur in this instance.

24. That during the search Detective Tisdale shielded the defendant from public viewing by opening the rear door of the patrol vehicle and by standing directly behind the defendant.

25. That during the search Detective Tisdale did not undo any buttons or zippers on the defendant's pants, nor did he put his hands or his flashlight down the defendant's pants.

26. That the defendant was wearing bagg[y] clothes and Detective Tisdale pulled back the pants of the defendant but did not pull his pants down.

27. That Detective Tisdale instructed the defendant to bend forward at the waist and then shined his flashlight inside the defendant's pants from behind and observed a clear plastic baggie between the defendant's buttocks.

28. That Detective Tisdale asked the defendant to separate his buttocks and after doing so the plastic baggie feel out.

29. That Detective Tisdale then collected the baggie and believed it to contain crack cocaine.

30. That Detective Tisdale's flashlight was the only source of illumination in the immediate vicinity of the search of the defendant.

As a result, given that Detective Tisdale had ample basis for believing that Defendant had contraband beneath his underwear and given that Detective Tisdale took reasonable steps to protect Defendant's privacy, we conclude that this case is controlled by *Smith*, necessitating the conclusion that any failure on Judge Bridges' part to utilize the method of analysis outlined in *Battle* in reaching his decision was irrelevant. In view of the fact that Defendant's only challenge to the scope of the search of his person conducted by Detective Tisdale assumed the applicability of the approach adopted in *Battle* and in view of the fact that *Battle* is not controlling in this case, we necessarily determine that Defendant's final challenge to Judge Bridges' order lacks merit.

III. Conclusion

Thus, for the reasons discussed above, we conclude that Judge Bridges did not err by denying Defendant's suppression motion. As a result, the trial court's judgment should, and hereby does, remain undisturbed.

NO ERROR.

Judge BRYANT concurs.

Judge ELMORE dissents by separate opinion.

ELMORE, Judge dissenting.

I respectfully disagree with the holding of the majority that this Court's ruling in *Battle* is not controlling in the present case. Accordingly, I believe that the trial court erred in denying defendant's motion to suppress the evidence obtained as a result of the roadside "strip search."

Defendant presented two arguments on appeal with regards to this issue: 1) that the search of his person constituted a "strip search" and 2) that it was necessary for the trial court to find the existence of "exigent circumstances" as a precondition for upholding the challenged search. I agree with defendant on both points, and I will address each argument in turn.

Regarding defendant's first argument, I feel as though the majority has failed to properly address whether the search of defendant constituted a "strip search." The majority simply concludes that "there is no precise definition of what a 'strip search' actually is" and then proceeds to address defendant's second argument. While it is true that our Courts have never precisely defined the term "strip search," there is nevertheless sufficient authority to properly classify the search at issue here as a "strip search."

Our Supreme Court has held that "people have a reasonable expectation not to be unclothed involuntarily, to be observed unclothed or *to have their private parts observed or touched by others.*" *State v. Stone*, 362 N.C. 50, 55, 653 S.E.2d 414, 418 (2007) (emphasis added). In *Smith* we found the search of defendant to be "akin to a strip search." 118 N.C. App. at 116, 454 S.E.2d at 686. There, the officer pulled the defendant's pants down far enough that he could see a small corner of paper towel under defendant's scrotum. Likewise, in *Fowler* we concluded that "the searches of [the] defendant's person constituted strip searches" because "[the] defendant's private areas were observed by [the officer]." ___ N.C. App. at ___, ___ S.E.2d at ___. Here, defendant was instructed to bend forward at the waist, to pull the back of his pants outward six inches, and to spread his buttocks apart. Detective Tisdale then inspected the area

near defendant's buttocks. Thus, I believe that the search of defendant here is properly classified as a "strip search."

Defendant's second argument is that that it was necessary for the trial court to find the existence of "exigent circumstances" as a precondition for upholding the challenged search. Again, I agree with defendant.

In *Battle* we noted that "[s]trip searches . . . are not a matter of course for searches incident either to arrest or detention" and that "[p]ublic intrusive searches of the body should never be commonplace but reserved for only the most unusual cases." 202 N.C. App. 376, 403, 688 S.E.2d 805, 824 (2010) (quotations and citations omitted). We then very clearly held that "[f]or a [strip] search to comply with the requirements of Fourth Amendment jurisprudence, there must be sufficient supporting facts and ***exigent circumstances*** prior to initiating a strip search to justify this heightened intrusion into a suspect's right to privacy." *Id.* at 392, 688 S.E.2d at 817 (emphasis added).

Here, the finding of facts section of the trial court's order denying defendant's motion to suppress makes no mention of exigent circumstances as required by *Battle*. As such, I believe that the trial court erred in denying defendant's motion to suppress.

The majority concludes that *Battle* is not controlling in the present case because the analysis outlined in *Battle* contradicts the analysis outlined in *Smith*. By this logic, the majority determined that the only way to give content to both decisions without impermissibly rendering either of them a nullity is to conclude that *Battle* "only applies in the event that the investigating officers lack a specific basis for believing that a weapon or contraband is present beneath the defendant's clothing." I disagree with this conclusion, and I find that the majority has misapplied the precedent established by *Smith*.

In *Smith*, this Court held that if "probable cause to search exists and *the exigencies* of the situation make [the] search necessary, it is lawful to conduct" a "strip search." 118 N.C. App. at 111, 454 S.E.2d at 684 (citation omitted) (emphasis added). But we then reversed the trial court's denial of the defendant's suppression motion because we concluded that "the search of defendant was intolerable in its intensity and scope and therefore unreasonable under the Fourth Amendment." 118 N.C. App. 106, 116, 454 S.E.2d 680, 686. Our Supreme Court then reversed our decision in that case "for the rea-

sons stated in the dissenting opinion." *State v. Smith*, 342 N.C. 407, 464 S.E.2d 45 (1995). The reasons were that "the availability of those less intrusive means does not automatically transform an otherwise reasonable search into a Fourth Amendment violation." *Smith*, 118 N.C. App. at 118, 454 S.E.2d at 687. However, even in that dissent, Judge Walker affirmed that "probable cause and an exigency for [the] search" must exist for the strip search to be valid. *Smith*, 118 N.C. App. at 116, 454 S.E.2d at 687.

Thus, I believe that this Court has clearly articulated in both *Battle* and *Smith* that for a roadside "strip search" to be valid the officer must have 1) probable cause and 2) exigent circumstances to conduct the search. Since the trial court here failed to make the necessary findings regarding exigent circumstances, I would reverse the trial court's order denying defendant's suppression motion.

STATE OF NORTH CAROLINA v. ABDULLAH EL-AMIN SHAREEF

No. COA11-822

(Filed 19 June 2012)

1. Homicide—first-degree murder—attempted first-degree murder—felony assault—felony murder—motion to dismiss—sufficiency of evidence—specific intent—diminished capacity—mental illness—harmless error

The trial court did not err by denying defendant's motion to dismiss the charges based on the State's alleged failure to present sufficient evidence that defendant had the necessary specific intent for premeditated murder, attempted first-degree murder, and felony assault. Although defendant presented substantial evidence of diminished capacity, the fact that death was a natural consequence of repeatedly running over a person with a van or truck and the circumstances surrounding the assaults and murder were such that a jury could reasonably find that defendant, despite his mental illness, intended to kill his victims. Any error in the submission of felony murder to the jury was harmless when the first-degree murder conviction based on premeditation and deliberation was upheld.

2. Evidence—failure to admit testimony—defendant's behavior five years later—probative value outweighed by undue prejudice

The trial court did not abuse its discretion by refusing to admit testimony from two county detention center employees describing defendant's behavior in 2009. Defendant presented voluminous expert and family testimony, as well as the testimony of a judge, relating to the actual time frame at issue. Given that evidence, the trial court could have reasonably determined that the probative value of evidence from lay witnesses regarding behaviors in 2009, five years after the events in this case, was substantially outweighed by the potential for jury confusion and undue prejudice.

Appeal by defendant from judgments entered 23 March 2010 by Judge James F. Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 14 December 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General G. Patrick Murphy, for the State.

Glenn Gerding for defendant-appellant.

GEER, Judge.

Defendant Abdullah El-Amin Shareef appeals from his convictions of first degree murder, two counts of attempted first degree murder, two counts of assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), misdemeanor assault with a deadly weapon, and two counts of felony larceny. Defendant primarily argues on appeal that his motion to dismiss should have been granted as to the specific intent crimes based on his diminished capacity. Because we find the State presented sufficient evidence from which a reasonable juror could find defendant had the specific intent to kill, defendant's motion to dismiss was properly denied.

Facts

The State's evidence at trial tended to show the following facts. On the morning of 14 April 2004 at about 7:45 a.m., defendant stole a white City of Fayetteville work van. David McCaskill was walking his dogs and noticed a white van proceeding in the opposite direction. The driver turned around and accelerated straight at Mr. McCaskill. Although Mr. McCaskill tried to get out of the way, defendant hit Mr. McCaskill with the left side of the van and, as he fell, the back tire of the van ran over his right foot.

Defendant then slammed on the brakes and backed up toward Mr. McCaskill. Mr. McCaskill pulled himself up a small hill to avoid being run over again. When defendant could not drive up the hill, he got out of the van and began stabbing Mr. McCaskill in the head and face with what appeared to be pencils. After defendant returned to the van and appeared to be looking for something to beat him with, Mr. McCaskill screamed for help. Defendant drove off when he saw a man come out of a house across the street. The resident confirmed that the van was a City of Fayetteville vehicle and gave the license plate number to police. Mr. McCaskill was stabbed eight to 10 times, and the bones in his lower right leg were crushed.

Defendant drove a short distance to the corner of Ramsey Street and Summerchase Drive. Gary Weller, a retired head football coach for Pine Forest High School, had dropped his car off at an auto repair shop and decided to jog home. When Mr. Weller paused on the corner of Summerchase Drive, he saw a city van making a three point turn so that it was going in the same direction Mr. Weller was headed. Mr. Weller started to cross the road, but was struck by defendant from behind and was dragged under the van.

Mr. Weller did not know how far he was dragged before the van stopped and went into reverse, flipping Mr. Weller over underneath the van. He had tire marks across his clothing in the chest area. The van then took off, leaving Mr. Weller where he could hear but not see. Mr. Weller lost consciousness and remained unconscious for the next 35 days in the ICU. Mr. Weller suffered a broken sternum, a collapsed lung, had all his ribs fractured, and had significant trauma to his head. His hip joints were knocked through the back of his pelvis, his pelvis was shattered, and he had a double compound fracture of his right tibia and fibula.

At approximately 8:20 a.m., defendant drove north into another neighborhood. He pulled into the driveway of Stacia Bill and Robert Fortier. Mr. Fortier told Ms. Bill that he would talk to the driver of the City of Fayetteville van, and Ms. Bill went inside to retrieve Mr. Fortier's lunch. When she came back outside, Mr. Fortier told her that he had been run over and asked her to call for help. The van accelerated toward the front porch where Mr. Fortier was waiting for emergency personnel. When Ms. Bill went to assist him, the van diverted to the street. As the van left, it hit a tree and a mail box.

Defendant next drove up behind Lonel Bass, who had pulled up to the gate of a "fox pen" that he and other men used for hunting.

Defendant asked Mr. Bass how to get to Fayetteville. As Mr. Bass walked toward the van, defendant ran over him, pinning Mr. Bass underneath the van with his abdominal area up against the stump of a large tree. When the van became stuck on the stump and would not move, defendant drove off in Mr. Bass' white truck.

Just down the road from the fox pen, Seth Thompson was waiting at the home of his in-laws to supervise workers who were scheduled to bury a gas tank. Mr. Thompson was exercising dogs when he saw a white pickup truck come into the driveway. At that point, the truck was approximately 200 yards away. Mr. Thompson then heard a honk and saw that the truck had moved 40 yards closer. He put the dogs back in the kennel, and turned around to find the truck only 50 to 60 feet from him.

Mr. Thompson walked toward the truck to see what was going on. When he was in front of the truck, defendant "floored it," hitting Mr. Thompson and dragging him 40 to 45 feet. The right front truck tire pinned Mr. Thompson's left arm under the vehicle. When Mr. Thompson was able to free his arm and confronted defendant, defendant reached for something. Mr. Thompson, believing defendant might have a weapon or was attempting to put the truck in gear, ran for his own truck.

Mr. Thompson drove away from the residence with defendant following him. Because he recognized the truck defendant was driving as belonging to Mr. Bass, Mr. Thompson notified the authorities. After a brief stop, Mr. Thompson chased defendant for about four minutes while also on the phone with a 911 operator. During the chase, Mr. Thompson was driving as fast as 90 miles per hour in order to keep up with defendant. After losing sight of defendant, Mr. Thompson went to the Erwin Police Department and reported the incident. Mr. Thompson was then taken to the hospital. He suffered abrasions covering essentially his whole face, a tire burn on his left arm, a cut on his leg just below the knee which required stitches, and back injuries.

As a result of Mr. Thompson's call, Mr. Bass was found by officers. They attempted to get the van off of Mr. Bass but were unable to do so. Mr. Bass was obviously in severe pain. It took approximately 30 minutes from the time they found Mr. Bass until rescue personnel arrived with equipment to remove him from under the van. Mr. Bass died before reaching the hospital.

In the meantime, defendant continued north in Mr. Bass' truck until he slammed into the rear of another vehicle outside Fuquay-

Varina. Defendant abandoned the truck and attempted unsuccessfully to enter two other cars, but the drivers kept him from doing so. Defendant then continued running down the middle of the road wearing only socks, a T-shirt, and boxer shorts. Emergency personnel cornered defendant, but when they attempted to arrest him, he ran into a wooded area where he was eventually captured.

Defendant was indicted for one count of first degree murder, three counts of attempted first degree murder, two counts of assault with a deadly weapon with intent to kill inflicting serious injury, one count of assault with a deadly weapon with intent to kill, two counts of felony larceny, and two counts of possession of a stolen motor vehicle. Defendant was tried capitally.

Defendant asserted an insanity defense and argued diminished capacity. Defendant's evidence tended to show that he had been severely stressed financially, ultimately losing his home in foreclosure. Beginning in August 2002, his family noticed a change in his personality. He became confrontational and physically abusive, even hitting his wife and choking his son. Defendant also spent hours smoking marijuana in his garage.

After his father had a heart attack, defendant refused to visit him in the hospital. Defendant cut off all his hair, became very sarcastic, changed the way he dressed, and acted agitated and mean all the time. He refused to take his wife to the doctor when she was sick, and she ultimately was hospitalized for seven days with pneumonia. Defendant acted strangely when visiting his wife in the hospital, including crawling in bed with her, dancing around the room, and acting like a baby. He ate bacon in the hospital cafeteria, which was against his faith as a Muslim. His sister also saw him eating steak and mashed potatoes with his hands in the cafeteria. He would not respond when addressed, and his eyes were bulging and glazed.

On 14 December 2003, while still in the hospital, defendant's wife was told that defendant was being considered for involuntary commitment because of his behavior. Defendant's wife told the hospital authorities that she did not want him committed, explaining that the behavior was because of multiple stressful events going on in his life.

That night, defendant's parents' home was consumed by fire to the point of uninhabitability. Defendant's family believed he intentionally set the fire although he denied it. While escaping the fire, defendant's mother-in-law, who was staying there, turned around and saw defendant holding an oxygen tank as if he was about to hit her in

the back of the head. She attempted to run, but defendant chased her and grabbed her arm. The officer on the scene stopped defendant from hurting his mother-in-law. Defendant's mother, however, was hospitalized due to smoke inhalation during the fire. Defendant's family was told that it was uncertain whether defendant's mother would survive.

Defendant's sister had defendant involuntarily committed on 14 December 2003. He was released on 17 December 2003. Shortly afterward, he appeared unexpectedly at his mother-in-law's house in Roanoke, Virginia where his wife and children were staying. His wife panicked, and her mother called the police. Defendant was charged with trespassing and remained in the Roanoke jail until 9 January 2004. After being released, defendant told his wife that someone from the FBI was following him and that someone was trying to poison him.

Defendant called his father who described the phone call as "an absolutely bizarre conversation." Defendant never asked about his mother's condition. Defendant's mother died of smoke inhalation on 11 January 2004, and defendant did not attend the funeral.

Defendant subsequently was arrested for shoplifting and resisting arrest. At that point, his beard and hair were unkempt, he talked to himself, and he did not always respond when others spoke to him. Defendant told his wife that there had been an earthquake recently in Richmond, and he had caused it. He also claimed he could control the weather, make clouds disappear, and cause it to snow. The house where defendant had been staying had marijuana everywhere, broken glass in the sink, and moldy food in the refrigerator.

When released from jail in March 2004, defendant smelled horrible, got upset that his furniture had been moved into storage, and fled in his wife's car. When his wife regained control of the car, he grabbed her purse and struggled with her. Defendant's wife sought police assistance, and defendant was told to "find another way home."

In mid-March 2004, defendant was found in Wendell lying next to a road. When defendant's father went to get him, defendant was wandering around with bulging eyes and a blank look on his face. His father checked him into two different motels, each of which asked him to leave because of strange behaviors.

A family friend found defendant at this time to be acting paranoid, aggressive, and confrontational and believed he had no rational thought pattern. Defendant's eyes bulged, and it was as if he stared

through people. The family friend and defendant's father took defendant to the Salvation Army to live on 5 April 2004.

When defendant went to register at the Employment Security Commission on 13 April 2004, he had difficulties with his memory and withdrew from the conversation. The next morning, on 14 April 2004, employees of the Salvation Army asked defendant if he was all right because he was acting distant, was not responding to questions, and was looking through people. Shortly thereafter, defendant stole the City of Fayetteville van, and the events giving rise to the prosecution occurred.

Chief District Court Judge Elizabeth Keever presided over defendant's first appearance. She testified that defendant mumbled and looked "scary" with big, unfocused eyes that did not blink. She ordered defendant committed for a mental health evaluation. Defendant was diagnosed as psychotic and tested positive for marijuana. He was admitted to Dorathea Dix Hospital, where he was considered "grossly impaired." Defendant continued to make no eye contact and to mumble; he was nearly catatonic; and he could not follow commands.

Defendant had two expert witnesses testify regarding his diminished capacity and his insanity defense. The first, Dr. Thomas Harbin, was tendered as an expert in the fields of forensic psychology, neuropsychology, and clinical psychology. The second, Dr. George Patrick Corvin, was tendered as an expert in psychiatry and forensic psychiatry. Dr. Harbin first evaluated defendant on 15 April 2004, while Dr. Corvin first evaluated him on 16 April 2004 and again saw him 22 April 2004. Defendant was determined to be incompetent to stand trial and was involuntarily committed.

Dr. Harbin saw defendant again on 7 May 2004 and 31 August 2005. At that point, defendant was medicated, and he was rational and coherent. After administering testing, Dr. Harbin diagnosed defendant with paranoid schizophrenia and concluded that defendant suffered from this condition on 14 April 2004.

Dr. Corvin saw defendant again on 22 September 2005. In that meeting, Dr. Corvin described defendant as "cognitively intact and capable of cooperating." Defendant told Dr. Corvin that he heard God's voice and that he considered this more of a gift than an illness. The medication helped defendant not hear voices, but sometimes he still did. Defendant was on Risperdal and Cogentin at this time. Defendant indicated that he had started hearing the voices shortly after his father had the heart attack. Dr. Corvin visited defendant

again in June 2006. Defendant continued to be "remarkably improved as compared to 2004."

After defendant was found competent to stand trial, he returned to the Cumberland County Detention Center. When Dr. Harbin visited defendant there in June 2009, defendant had detached again from reality, was overly talkative and illogical, had a wide-eyed stare, believed he was God, believed he owned companies such as McDonald's and Reebok, thought that he was telepathing and teleporting, claimed he originated hip hop music and managed the weather, and had a plan to fix the national debt. Dr. Harbin diagnosed defendant as psychotic based on this interaction. Defendant was recommitted to Dorothea Dix Hospital on 15 June 2009.

Dr. Corvin next saw defendant on 5 October 2009 after, as Dr. Corvin testified, defendant had "bargained or came up with a compromise with Doctor Vance to sort of prove that he could be competent and not mentally ill without taking medications; and, so, there was a period of time where he wasn't taking medications, which . . . didn't work out well." While defendant was off his medication, defendant was extremely suspicious, to the point of being belligerent. Dr. Corvin also reported that defendant was "saying bizarre things" with "a lot of religious overtones, grandiosity, having powers that, you know, he didn't have, things of that nature." By 11 January 2010, however, defendant was on a new medication, Zyprexa. While defendant said that he didn't think he needed the medication, he took it "because his doctors felt better when he was taking it." Dr. Corvin saw defendant again on 18 January 2010 and 28 June 2010, but did not note anything in particular.

At trial, Dr. Harbin testified that, in his opinion, on 14 April 2004, defendant "was not able to appreciate the nature of his behavior," and defendant did not know his acts were wrong because of his schizophrenia. Dr. Harbin also had concluded that defendant's ability to "reason, think, plan or carry out a plan or consider the consequences of his actions" was impaired.

Dr. Covin testified that he had diagnosed defendant with paranoid schizophrenia with a second diagnosis of a history of cannabis or marijuana abuse. Dr. Corvin also diagnosed defendant with a personality disorder not otherwise specified with narcissistic features. In his opinion, on 14 April 2004, defendant was suffering from "an acute psychotic episode stemming from an underlying diagnosis of schizophrenia." Dr. Corvin also testified that "on the date in question,

[defendant] was so psychotically impaired that he met the M'Naughton test; and, that, for the acts, which are not in question that he committed, he could not have known that—the nature, quality or, more specifically, the wrongfulness of those behaviors."

The jury convicted defendant of first degree murder based on premeditation and deliberation and felony murder. The jury also convicted defendant of two counts of attempted first degree murder, two counts of assault with a deadly weapon with intent to kill inflicting serious injury, misdemeanor assault with a deadly weapon, two counts of felony larceny, and two counts of possession of a stolen motor vehicle.

During the death penalty sentencing phase of the trial, the jurors unanimously found beyond a reasonable doubt the existence of the aggravating factor that "[t]he murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons."

The trial court also submitted 31 possible mitigating circumstances to the jury. One or more members of the jury found the following mitigating circumstances by a preponderance of the evidence:

1. The capital felony was committed while [defendant] was under the influence of a mental or emotional disturbance.

   . . . .

2. The capacity of [defendant] to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

   . . . .

4. [Defendant] has no significant history of prior criminal activity.

   . . . .

5. [Defendant] graduated from high school and went to college.

   . . . .

9. [Defendant] worked for Sears, in the flea market business with his father and in the real estate business with his wife.

   . . . .

10. [Defendant] and his wife Talethia struggled financially.

. . . .

15. [Defendant's] father, mother and wife were in the hospital at the same time in December 2003.

. . . .

16. [Defendant's] father had a heart attack at Thanksgiving 2003, followed by heart by-pass surgery and now is a diabetic and is on dialysis.

. . . .

17. [Defendant's] mother, Pauline Shareef, was hospitalized in November 2003 and later died of complications from smoke inhalation from the fire at the family home.

. . . .

18. [Defendant] expressed shame and guilt over his mother's death from the fire.

. . . .

23. At the time of the offense, [defendant] was separated from his wife and children.

. . . .

24. [Defendant] has been diagnosed with schizophrenia, which is a permanent mental illness requiring lifelong treatment.

. . . .

25. [Defendant] was homeless at the time of the offense and was staying at the Salvation Army Shelter.

. . . .

26. While at Dix Hospital, [defendant] was part of the Quality Council, organized family day, and was part of the Advocacy Group for other patients.

. . . .

27. [Defendant] participated in programs at Dix Hospital to gain a better understanding of his condition and engage in recovery.

. . . .

29. [Defendant] showed symptoms of schizophrenia for some period of time prior to the offense.

. . . .

30. At the time of the offense, [defendant's] life was in shambles.

The jury, however, found beyond a reasonable doubt that the mitigating circumstances were not sufficient to outweigh the aggravating circumstance. Nonetheless, the jury ultimately found the aggravating circumstance insufficient to call for the imposition of the death penalty. The jury, therefore, unanimously recommended that defendant be sentenced to life imprisonment without parole.

The trial court sentenced defendant to (1) life in prison without parole for the first degree murder of Mr. Bass, (2) two consecutive sentences of 189 to 236 months imprisonment each for the two attempted first degree murders of Mr. Weller and Mr. McCaskill, (3) two consecutive sentences of 100 to 129 months imprisonment each for the two assault with a deadly weapon with intent to kill inflicting serious injury convictions relating to Mr. Weller and Mr. McCaskill, (4) two consecutive sentences of eight to 10 months for the two larcenies of motor vehicles (the City of Fayetteville van and Mr. Bass' truck), and (5) a consecutive 75-day sentence for the misdemeanor assault with a deadly weapon of Mr. Fortier. The trial court arrested judgment with respect to the charges of possession of stolen motor vehicles because possession was an element of the crime of felonious larceny. Defendant timely appealed to this Court.

I

[1] Defendant first contends that the trial court should have granted his motion to dismiss because the State failed to present sufficient evidence that defendant had the necessary specific intent for premeditated murder, attempted first degree murder, and felony assault. Defendant also argues that the trial court erred in denying the motion to dismiss the felony murder charge when the State failed to show that the felonies underlying the charge were part of a continuous chain of events leading up to Mr. Bass' homicide.

"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). " '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.' " *State v. Lowry*, 198 N.C. App. 457, 465, 679 S.E.2d 865, 870 (2009) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002). "When reviewing a motion to dismiss based on insufficiency of the evidence, this Court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Bullock*, 178 N.C. App. 460, 466, 631 S.E.2d 868, 873 (2006).

There is no question in this case about defendant's being the perpetrator. Instead, defendant argues that because of his diminished capacity, the State could not prove the specific intent element. As our Supreme Court recently explained, "[t]he diminished capacity defense to first-degree murder on the basis of premeditation and deliberation requires proof of an inability to form the specific intent to kill." *State v. Phillips*, 365 N.C. 103, 140, 711 S.E.2d 122, 148 (2011), *cert. denied*, ___ U.S. ___, 182 L. Ed. 2d 176, 132 S. Ct. 1541 (2012).

However, when a defendant pleads the defense of diminished capacity, "defendant has only the burden of production." *State v. Hamilton*, 338 N.C. 193, 204, 449 S.E.2d 402, 409 (1994). Once a defend-ant comes forward with evidence of diminished capacity, "the jury must decide whether the defendant was able to form the required specific intent." *Phillips*, 365 N.C. at 141, 711 S.E.2d at 149. The burden of persuasion remains on the State to prove defendant's specific intent. *State v. Mash*, 323 N.C. 339, 345, 372 S.E.2d 532, 536 (1988).

In order for the State to meet its burden of proving specific intent, it "must show not only an intentional act by the defendant that caused death, but also that the defendant intended for his action to result in the victim's death." *Phillips*, 365 N.C. at 141, 711 S.E.2d at 149 (internal quotation marks omitted). Our Supreme Court has held that because intent is seldom provable by direct evidence, "the State may rebut a claim of diminished capacity by pointing to actions by a defendant before, during, and after a crime that indicate the existence of, or are consistent with, specific intent." *Id.* It is well established that "[t]he nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred. Moreover, an assailant must be held to intend the natural consequences of his deliberate act." *State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000) (internal citations and quotation marks omitted).

Here, defendant met his burden of production through multiple witnesses, including Drs. Harbin and Corvin. The burden then shifted to the State to prove defendant's specific intent to kill. The State did not present any expert testimony, but instead, as set forth in *Phillips*, pointed to defendant's acts before, during, and after the crime as showing that defendant had the specific intent to kill necessary for first degree murder based on premeditation and deliberation and the other felony assaults.

The State points out that defendant did not only strike the victims with his vehicle, but also that a jury could conclude that he specifically targeted the victims. He drove slowly ahead of Mr. McCaskill as he walked on the road and then turned around and drove on the wrong side of the street directly towards Mr. McCaskill. Similarly, defendant saw Mr. Weller running down the street and turned around so that he could drive directly at Mr. Weller. With respect to Mr. Bass, after defendant lured him to the front of the van by pretending to need directions to Fayetteville, defendant drove directly at him.

In addition, defendant did not simply hit the victims one time and drive on. After Mr. McCaskill was in effect side-swiped by the van rather than being run over, defendant slammed on the brakes, put the van in reverse, and tried to back over Mr. McCaskill. When Mr. McCaskill pulled himself up a small hill to avoid the van, defendant tried unsuccessfully to drive up the hill and then stabbed Mr. McCaskill, as the victim pleaded, "Why are you trying to kill me?" Likewise, after running over Mr. Weller with the van and dragging him, defendant then put the van in reverse and backed up, further injuring Mr. Weller.

With Mr. Bass, after defendant struck him and drove over him with the van, the van ended up on top of Mr. Bass, pinning him against a large tree stump. The van was then stuck, preventing defendant from reversing, so defendant left it on top of Mr. Bass and drove away in Mr. Bass' truck.

Defendant's actions toward Mr. Fortier and Mr. Thompson provided further evidence of defendant's intent while assaulting his victims with the vehicles. Defendant targeted Mr. Fortier by pulling into his driveway and when Mr. Fortier approached, defendant ran over him. Then, as Mr. Fortier tried to climb onto his front porch, defendant accelerated the van towards the porch, turning aside only when Mr. Fortier's girlfriend came out. With Mr. Thompson, defendant honked the truck to attract Mr. Thompson's attention and, as Mr.

Thompson walked towards him, "floored" the accelerator, running over Mr. Thompson.

A reasonable juror could find from this evidence that defendant picked particular men to run over; drove directly at them or lured them into the direct path of his vehicle; and then tried to run over them not once, but in a manner designed to maximize the damage. With Mr. Weller and Mr. Bass, defendant successfully crushed them, but when defendant's victims were able to evade him to some extent—including Mr. McCaskill, Mr. Fortier, and Mr. Thompson—defendant continued to try to assault the victim until witnesses arrived or, in the case of Mr. Thompson, he was able to escape to his own truck. Defendant sped away from each scene, driving until, as a reasonable juror could find, he identified his next victim.

Although defendant presented substantial evidence of diminished capacity, the fact that death is a natural consequence of repeatedly running over a person with a van or truck and the circumstances surrounding the assaults and murder were such that a jury could reasonably find that defendant, despite his mental illness, intended to kill his victims. *See State v. Morganherring*, 350 N.C. 701, 732-33, 517 S.E.2d 622, 640 (1999) (holding that State, despite diminished capacity defense, presented sufficient evidence of specific intent to kill when after choking and repeatedly stabbing first victim, defendant saw a second woman shortly thereafter, decided to " 'get her,' " tricked her into entering apartment, and then choked her to death); *State v. Lane*, 344 N.C. 618, 621, 476 S.E.2d 325, 327 (1996) (holding that State presented sufficient evidence of premeditated and deliberate intent to kill when defendant, who had a gun, rode bicycle toward victim, saying, " 'Let's go shoot up the project boys' "; victim had not provoked, spoken to, or threatened defendant; and, after defendant shot victim two times and victim begged for his life, defendant shot victim three times more with two wounds to the head); *State v. Brewer*, 328 N.C. 515, 523, 402 S.E.2d 380, 386 (1991) (finding sufficient evidence of specific intent to kill when defendant centered her car, containing her 16-year-old handicapped child in the front seat, on train tracks and then exited vehicle immediately before train struck car).

Defendant also contends, with respect to the felony murder charge, that the State failed to present substantial evidence that Mr. Bass' murder was part of a continuous transaction with the alleged felonies. However, because we have upheld the first degree murder conviction based on premeditation and deliberation, any error in the

submission of felony murder to the jury would be harmless. *See State v. Mays*, 158 N.C. App. 563, 577, 582 S.E.2d 360, 369 (2003) (holding that "any error in allowing a jury to consider felony murder does not require a new trial if the jury also found the defendant guilty based on premeditation and deliberation").

II

[2] Defendant next contends that the trial court erred in refusing to admit testimony from two Cumberland County Detention Center employees describing defendant's behavior in 2009. The trial court excluded the testimony under Rule 401 of the Rules of Evidence as irrelevant and under Rule 403 as more prejudicial than probative.

This Court reviews questions of relevancy de novo, but accords deference to the trial court's ruling. *See State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 ("A trial court's rulings on relevancy are technically not discretionary, though we accord them great deference on appeal."), *cert. denied*, ___ U.S. ___, 181 L. Ed. 2d 529, 132 S. Ct. 816 (2011). We hold that the trial court erred in concluding that this evidence was irrelevant.

Here, the two officers—Ms. Mary Hines and Mr. Timothy Crawford—would have testified that they worked at the Cumberland County Detention Center. Ms. Hines' job duties included handing out medications to the inmates and recording when they refused to take them. Between April 2009 and July 2009, the logs showed defendant refused to take his "psych meds." Ms. Hines also would have testified that after defendant stopped taking his medications, he became erratic, even "wild."

Mr. Crawford would have testified that when defendant first arrived, there was no indication that he had any kind of mental problem. After defendant stopped taking his medication, however, Mr. Crawford described his behavior as "basically spaced out," with defendant keeping more to himself, pacing, and "tak[ing] his clothes off and stand[ing] there staring at the wall." Defendant also hoarded his food. Mr. Crawford would have further testified that inmates do not have access to illegal drugs.

In *State v. Boone*, 302 N.C. 561, 276 S.E.2d 354 (1981), the defendant, like defendant in this case, claimed that he was not guilty by reason of insanity. The trial court excluded testimony from a deputy sheriff that when the defendant, after being arrested, set fire to his cell mattress, the defendant " 'was totally unaware of what he was

doing.' " *Id.* at 565, 276 S.E.2d at 357. In holding that the trial court erred in excluding that testimony, the Supreme Court pointed out that "[o]pinion evidence by lay witnesses and lay testimony reciting irrational acts prior or subsequent to the alleged offense is allowed in this State." *Id.* Therefore, the Court held, the deputy sheriff should have been allowed "to give his opinion of defendant's mental state as well as relate the irrational act he observed." *Id.* The Court found the exclusion not prejudicial, however, as other testimony "placed before the jury a complete history and description of defendant's mental condition." *Id.*

Under *Boone*, the testimony of the detention officers, in this case, was relevant to whether defendant suffered from a mental illness, as he claimed for purposes of his insanity and diminished capacity defenses. This testimony would have allowed the jury to infer that the mental health condition was due to mental illness rather than substance abuse and supported defendant's contention that his behavior was the result of not being medicated for his mental illness. *See State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000) ("In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." (internal quotation marks omitted)).

However, in addition to ruling the testimony irrelevant under Rule 401 of the Rules of Evidence, the trial court also found, under Rule 403, that "the danger of confusion or undue prejudice to the [S]tate exists in that it may confuse the jury as to what the standard is or the time period that we're talking about." *See* N.C.R. Evid. 403 ("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."). "We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008).

At trial, the State did not significantly dispute that defendant was mentally ill, but rather contended that defendant knew right from wrong despite any mental illness. Although defendant claims on appeal that the excluded testimony was important to rebut the State's contention that defendant's actions were due to substance abuse and not the result of mental illness, we believe defendant has mistaken the State's trial argument. In order to rebut defendant's claims that

the death and injuries occurred because the mental health system failed defendant, the State pointed out that defendant's family refused to seek mental health treatment for defendant because they believed his issues were due to substance abuse.

Because of the State's contentions at trial, we cannot find that the trial court abused its discretion in excluding the testimony. Defendant presented voluminous expert and family testimony and the testimony of Judge Keever relating to the actual time frame at issue. Given that evidence, the trial court could reasonably have determined that the probative value of evidence from lay witnesses regarding behaviors in 2009—five years after the events at issue—was substantially outweighed by the potential for jury confusion and undue prejudice.

Moreover, "[t]o establish prejudice based on evidentiary rulings, defendant bears the burden of showing that a reasonable possibility exists that, absent the error, a different result would have been reached." *State v. Lynch*, 340 N.C. 435, 458, 459 S.E.2d 679, 689 (1995). *See also* N.C. Gen. Stat. § 15A-1443(a) (2011). After reviewing the admitted evidence, the State's contentions at trial, and the jury's findings during the capital sentencing portion of the trial, we do not believe that defendant has shown that there is a reasonable possibility that had the evidence been admitted, the jury would have reached a different verdict.

No error.

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

NEW BAR PARTNERSHIP, PLAINTIFF v. W.D. MARTIN, JR., W.D. MARTIN, III, TRUSTEE OF THE WILLIAM D. MARTIN, JR. LIVING TRUST, MMP, LLC AND FMW AT HILLSBOROUGH & MORGAN, LLC, DEFENDANTS

No. COA12-64

(Filed 19 June 2012)

1. Declaratory Judgments—no subject matter jurisdiction—lack of actual controversy—anticipated future actions—premature claim

The trial court did not abuse its discretion by dismissing under N.C.G.S. 1A-1, Rule 12(b)(6) plaintiff's claim for declaratory judgment unrelated to the right of first refusal against the Martin defendants. The lack of an actual controversy between the parties deprived the trial court of subject matter jurisdiction. Plaintiff merely anticipated future actions that might damage it.

2. Conspiracy—civil conspiracy—fraud—dismissal—underlying claims failed—no separate civil action in North Carolina

The trial court did not abuse its discretion by dismissing under N.C.G.S. 1A-1, Rule 12(b)(6) plaintiff's claim for civil conspiracy and fraud unrelated to the right of first refusal against the Martin defendants. Plaintiff's complaint did not allege it was deceived by either the Martin defendants' alleged misrepresentations that the lease had expired or by the alleged shell transfers. There is no separate civil action for civil conspiracy in North Carolina where a plaintiff's underlying claims fail.

3. Unfair Trade Practices—premature claim—no damages

The trial court did not abuse its discretion by dismissing under N.C.G.S. 1A-1, Rule 12(b)(6) plaintiff's claim for unfair and deceptive trade practices against the Martin defendants. Plaintiff had not yet suffered damages due to any actions or inactions by the Martin defendants, and accordingly, its claims for unfair and deceptive trade practices were properly dismissed as premature.

4. Contracts—commercial lease—right of first refusal—violation of common law rule against perpetuities

The trial court did not err to the extent it dismissed claims based upon the right of first refusal to purchase property against FMW and the Martin defendants for violation of the common law rule against perpetuities.

5. Fraud—false representations that commercial lease expired—failure to comply with registration requirements—shell transfers of property—Connor Act

The trial court did not err by dismissing plaintiff's claims against FMW under the Connor Act. While the complaint did allege fraud by FMW, all of the alleged fraudulent actions including false representations that the commercial lease had expired, failure to comply with the registration requirement in the first amended lease, and shell transfers of the property were taken by the Martin defendants. None of these actions constituted fraud under the Connor Act.

Appeal by Plaintiff from orders entered 25 October and 7 November 2011 by Judge Shannon R. Joseph in Wake County Superior Court. Heard in the Court of Appeals 8 May 2012.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., and Ledolaw, by Michele A. Ledo, for Plaintiff.

Brown & Bunch, PLLC, by Charles Gordon Brown, for Defendants W.D. Martin, Jr., W.D. Martin, III, as Trustee of the William D. Martin, Jr. Living Trust, and MMP, LLC.

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot and Sinèad N. O'Doherty, for Defendant FMW at Hillsborough & Morgan, LLC.

STEPHENS, Judge.

Procedural History and Factual Background

This appeal concerns a dispute over a parcel of real property in downtown Raleigh. On 23 May 2011, Plaintiff New Bar Partnership ("New Bar") filed a *lis pendens* in Wake County Superior Court providing notice of the existence of claims potentially affecting title to the property at issue. New Bar then filed a complaint against Defendants W.D. Martin, Jr. ("Martin"), W.D. Martin, III, as Trustee of the William D. Martin, Jr. Living Trust ("the Martin Trustee"), MMP, LLC ("MMP"), and FMW at Hillsborough & Morgan, LLC ("FMW") (collectively, "Defendants"). New Bar alleged that Defendants had conspired to deprive it of its right of first refusal to purchase real property ("the property") owned by Martin and his successors. The complaint included a request for declaratory judgment and an action to quiet title, as well as claims for specific performance, breach of lease, civil conspiracy, fraud, and unfair and deceptive trade practices.

On 22 July 2011, FMW moved to dismiss the complaint pursuant to Rule 12(b)(6), asserting that New Bar's right of first refusal was invalid under the Connor Act, N.C. Gen Stat. § 47-18, and, in the alternative, had expired in 2009 under the common law rule against perpetuities ("the common law RAP"). On 27 July 2011, Martin, the Martin Trustee, and MMP (collectively, "the Martin Defendants") answered the complaint, asserting the common law RAP as a defense. On 15 September 2011, the Martin Defendants moved to dismiss pursuant to Rule 12(b)(6), and in the alternative, for judgment on the pleadings based on violation of the common law RAP, estoppel, lack of consideration, and other defenses. On 27 September 2011, New Bar filed a motion for a preliminary injunction preventing transfer of the property pending the outcome of the legal proceedings.

Following a hearing on the various motions, by order entered 25 October 2011, the trial court dismissed New Bar's claims against FMW pursuant to Rule 12(b)(6) ("the FMW order"). On 7 November 2011, the court (1) dismissed without prejudice New Bar's claims against the Martin Defendants (other than those related to the purported right of first refusal) pursuant to Rule 12(b)(6) and as premature, and (2) dismissed with prejudice New Bar's claims related to its alleged right of first refusal for failure to state a claim upon which relief could be granted and, in the alternative, granted summary judgment to the Martin Defendants on such claims ("the Martin order"). The court also dismissed as moot New Bar's motion for a preliminary injunction. New Bar appeals from the trial court's orders of dismissal. As discussed below, we affirm.

The origins of this legal dispute date to 15 October 1988, when Charlie Goodnight's, Inc. ("CGI") leased the property from Martin and his wife (since deceased) ("the Martins") pursuant to a written agreement ("the initial lease"). The initial lease term was from 15 December 1988 through 14 December 1993. At the end of the initial term, CGI had an option to renew the lease for three additional five-year terms. Thus, the option to renew was created in 1988 and ran from 15 December 1993 through 14 December 2008. The lease also provided CGI an option to purchase the property during the first five-year term of the lease and a right of first refusal to purchase the property during any subsequent five-year term of the lease should the option to renew be invoked. The right of first refusal also ran from 15 December 1993 through 14 December 2008.

In 1989, CGI and the Martins executed an amendment to the initial lease, adding the following paragraph:

> The parties agree to execute in recordable form a memorandum of this Lease, and the Option to Purchase and Right of First Refusal contained herein, for recording in the Wake County registry. The cost of preparation and recording of the Memorandum will be borne by the Lessee.

However, neither a memorandum, the initial lease, the first amendment, nor any of the subsequent amendments to the lease were recorded.

On 1 March 1990, with the Martins' consent, CGI assigned all of its rights and interests in the initial lease to New Bar. On 1 December 1999, the Martins and New Bar executed a second amendment to the initial lease, extending New Bar's option to renew by two additional five-year terms, which purported to give New Bar a right to renew the lease through 14 December 2018. The amendment made the renewal automatic at the conclusion of each term unless New Bar provided notice otherwise. Because the right of first refusal in the initial lease exists during any renewal period, the right of first refusal was likewise purportedly extended until 14 December 2018. On 1 November 2002, Martin (his wife having died, leaving Martin as the sole lessor) executed a third amendment to the initial lease, purporting to extend the right to renew by another two five-year terms, to run through 14 December 2028.

On 27 May 2004, Martin transferred the property to the Martin Trust, with his son serving as the trustee. No consideration was given for the property, and New Bar was not advised of the transfer. At some point before 29 June 2010, the Martin Trust began negotiating the sale of the property to FMW, again without advising New Bar. On 29 June 2010, MMP was formed with Martin's son (also the Martin Trustee) as managing member. One day later, the Martin Trust transferred the property by deed to MMP for $10.00. On 15 July 2010, Martin's son, acting as manager of MMP, entered into an agreement to sell the property to FMW, with a closing date on or before 31 December 2011.

On 13 September 2010, Martin's son sent a letter on his father's behalf to New Bar stating that the 1999 and 2002 amendments to the initial lease were made without any consideration, and therefore, were invalid and did not extend the lease. In addition, Martin's son asserted that FMW was a purchaser for valuable consideration which could "take title and possession of the [p]roperty free and clear of any property interest" of New Bar, FMW having recorded a memorandum of its contract to purchase the property from MMP and New Bar hav-

ing failed to fulfill the recording obligation of the first amendment. Martin's son also asserted that New Bar had only a year-to-year tenancy based on an oral agreement which could be terminated by the property owner with one month's notice. New Bar then initiated this legal proceeding.

Discussion

On appeal, New Bar argues that (1) its complaint stated claims against the Martin Defendants upon which relief could be granted and that were not premature; (2) its right of first refusal is not void under the common law or statutory RAP; and (3) FMW was not entitled to the protections of N.C. Gen. Stat. § 47-18 ("the Connor Act"). For the reasons discussed herein, we disagree.

I. Standard of Review

We review a trial court's order allowing a Rule 12(b)(6) motion to dismiss *de novo*. *Locklear v. Lanuti*, 176 N.C. App. 380, 384, 626 S.E.2d 711, 714 (2006).

> Our standard of review of an order allowing a motion to dismiss 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, whether properly labeled or not. In ruling upon such a motion, the complaint is to be liberally construed, and the court should not dismiss the complaint unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief.
>
> A complaint may be properly dismissed for absence of law to support a claim, absence of facts sufficient to make a good claim, or the disclosure of some fact that necessarily defeats the claim. If the complaint discloses an unconditional affirmative defense which defeats the claim asserted or pleads facts which deny the right to any relief on the alleged claim[,] it will be dismissed.

Id. at 383-84, 626 S.E.2d at 714 (citations, quotation marks, and brackets omitted).

"[A] motion for judgment on the pleadings pursuant to Rule 12(c) should only be granted when the movant clearly establishes that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law." *Cash v. State Farm Mut. Auto. Ins. Co.*, 137 N.C. App. 192, 201-02, 528 S.E.2d 372, 378 (cita-

tions and quotation marks omitted), *affirmed per curiam*, 353 N.C. 257, 538 S.E.2d 569 (2000). We review such decisions *de novo*. *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, 764 (2008).

II. Effect of the Martin Order

All of New Bar's claims are ultimately based upon two purported property interests: a right to renew its lease for additional terms through 2028 and a right of first refusal for purchase of the property. In its complaint, New Bar alleged the following claims against the Martin Defendants: breach of lease (based on the purported right of first refusal), civil conspiracy (based on both the right of first refusal and the assertion by the Martin Defendants that the lease had expired leaving New Bar no right to renew it for future terms), fraud (same), and unfair and deceptive trade practices.[1] New Bar also sought specific enforcement of the purported requirement in the first amendment to the lease that Martin (or his successors in interest) execute a memorandum of the lease for recordation in order to "reflect[] New Bar's right of first refusal[.]" In addition, in count I of its complaint, New Bar sought a declaration that, *inter alia*, (1) "[t]he lease [and its amendments] are valid and binding as to Martin[,]" (2) "[t]ransfers from Martin to the Martin Trust, and then to MMP, were not for value and that MMP . . . is fully subject to the lease[,]" (3) "FMW [] is not a 'purchaser for value,' such that FMW . . . is subject to New Bar's rights under the lease[,]" (4) "the FMW option is not valid and [should] be stricken from the record as a cloud upon New Bar's interest in the [] property[,]" and (5) New Bar is entitled to renewable terms under the lease to extend its tenancy through 2028.[2]

In addition to specifically dismissing all of New Bar's claims related to its purported right of first refusal pursuant to Rules 12(b)(6) and 12(c), the Martin order also dismisses "claims seeking enforcement of the lease covenant against the Martin Defendants, [for] failure to state a claim upon which relief can be granted and, [because] no material issue of fact exists that those claims have been asserted prematurely[.]"

1. The tort commonly referred to as "unfair and deceptive trade practices" in our case law is actually "unfair or deceptive acts or practices in or affecting commerce" in our General Statutes. *See* N.C. Gen. Stat. § 75-1.1(a) (2012). However, for ease of reading, we continue to use the term "unfair and deceptive trade practices" in this opinion.

2. Count I also seeks a declaration regarding the right of first refusal which we address separately below.

III. Claims Against the Martin Defendants Dismissed for Failure to State a Claim and/or as Premature

[1] New Bar argues that the trial court erred in dismissing pursuant to Rule 12(b)(6) and/or as premature its claims for declaratory judgment (unrelated to the right of first refusal), civil conspiracy and fraud (unrelated to the right of first refusal), and unfair and deceptive trade practices against the Martin Defendants. We disagree.

A. Declaratory judgment

> The Superior Court has jurisdiction to render a declaratory judgment only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance, or franchise. When jurisdiction exists, a contract may be construed either before or after there has been a breach of it. The purpose of the Declaratory Judgment Act is, to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations. . . . It is to be liberally construed and administered.

Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 287, 134 S.E.2d 654, 656-57 (1964). However, the Declaratory Judgment Act explicitly grants trial courts the discretion to determine whether entry of a declaratory judgment is appropriate: "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding[.]" N.C. Gen. Stat. § 1-257 (2011). "The trial court's decision to grant or deny such relief will be reversed only upon a showing of abuse of discretion." *Farber v. N.C. Psychology Bd.*, 153 N.C. App. 1, 17, 569 S.E.2d 287, 299, *cert. denied*, 356 N.C. 612, 574 S.E.2d 679 (2002). A matter left to the trial court's discretion "will not be disturbed unless it is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision. A trial judge's decision only amounts to an abuse of discretion if there is no rational basis for it." *State v. Mutakbbic*, 317 N.C. 264, 273-74, 345 S.E.2d 154, 158-59 (1986) (citations and quotation marks omitted).

Here, we see no abuse of discretion in the trial court's dismissal because the lack of an actual controversy between the parties deprived the trial court of subject matter jurisdiction.

> Although not expressly provided by statute, courts have jurisdiction to render declaratory judgments only when the complaint demonstrates the existence of an actual controversy. To satisfy the jurisdictional requirement of an actual controversy, it must be shown in the complaint that litigation appears unavoidable. Mere apprehension or the mere threat of an action or suit is not enough.

Wendell v. Long, 107 N.C. App. 80, 82-83, 418 S.E.2d 825, 826 (1992). In *Wendell*, residential property owners brought a declaratory judgment action asking for a declaration that restrictive covenants in the deeds of their neighbors were valid and would prohibit a proposed construction project. *Id.* We held there was no actual controversy between the parties that would satisfy the jurisdictional requirement because the complaint alleged not "that [the] defendants ha[d] acted in violation of [] covenants, but [rather] that they anticipate[d] some future action to be taken by [the] defendants which would result in a violation." *Id.* at 83, 418 S.E.2d at 826.

Our review of the pleadings reveals a strikingly similar situation here. At the time New Bar's complaint was filed and the motions to dismiss were heard by the trial court, New Bar remained in possession of the property through the lease and no party had taken any action to interfere with its rights thereunder. Instead, New Bar only anticipated future actions that might damage it. As a result, the trial court lacked jurisdiction to render what would be an advisory opinion. "It is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008). Accordingly, New Bar's arguments regarding its declaratory judgment claims are overruled.

B. Civil conspiracy and fraud

[2] New Bar's claims for civil conspiracy and fraud are based in part on its purported right of first refusal (discussed in section IV below) and in part upon alleged misrepresentations that the lease had expired (leaving New Bar with only a tenancy from year-to-year subject to termination by MMP with notice at least one month prior to the current term of tenancy) and alleged shell transfers among the Martin Defendants for the purpose of shielding themselves from liability.

The essential elements of fraud are: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Ragsdale v. Kennedy*,

286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974). New Bar's complaint does not allege it was deceived by either the Martin Defendants' alleged misrepresentations that the lease had expired nor by the alleged shell transfers. As to the civil conspiracy claim, "[i]t 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." *Piraino Bros., LLC v. Atl. Fin. Group, Inc.*, ___ N.C. App. ___, ___, 712 S.E.2d 328, 333 (2011) (citations and quotation marks omitted). Thus, where a plaintiff's underlying claims fail, its "claim for civil conspiracy must also fail." *Id.* at ___, 712 S.E.2d at 334. Accordingly, because New Bar plainly failed to state claims upon which relief could be granted, the court's dismissal was proper.

C. Unfair and deceptive trade practices

[3] The elements of an unfair or deceptive trade practice are: "(1) an unfair or deceptive act or practice by [the] defendant, (2) in or affecting commerce, (3) which proximately caused actual injury to [the] plaintiff." *Wilson v. Blue Ridge Elec. Membership Corp.*, 157 N.C. App. 355, 357, 578 S.E.2d 692, 694 (2003) (citations omitted). As noted in subsection A *supra*, at the date of the hearing on Defendant's motions to dismiss, New Bar remained in possession of the property under terms of the lease. Further, as discussed below, New Bar's purported right of first refusal was void under the common law RAP, and as a result, specific enforcement of the recordation requirement would have had no effect on New Bar's rights under the lease. Thus, New Bar had not yet suffered damages due to any actions or inactions by the Martin Defendants, and accordingly, its claims for unfair and deceptive trade practices claims were properly dismissed as premature.

IV. Claims Related to the Right of First Refusal

[4] New Bar also argues that the trial court erred to the extent it dismissed claims based upon the right of first refusal[3] against FMW and the Martin Defendants for violation of the common law RAP. We disagree.

Resolution of this aspect of the appeal requires consideration of two areas of our State's jurisprudence: (1) our case law on rights of first refusal, also known as preemptive rights; and (2) the effect of the

3. Those claims include breach of lease, specific enforcement of recordation requirement (sought solely to "reflect[] New Bar's right of first refusal"), and, to the extent they were based upon the purported right of first refusal, unfair and deceptive trade practices, civil conspiracy, and fraud.

1995 enactment of the Uniform Statutory Rule Against Perpetuities, N.C. Gen. Stat. § 41-15, *et seq.* ("the USRAP"), on the common law RAP doctrine in our State.

A. Preemptive rights/rights of first refusal

> A preemptive right requires that, before the property conveyed may be sold to another party, it must first be offered to the conveyor or his heirs, or to some specially designated person. . . . A preemptive provision . . . creates in its holder only the right to buy land before other parties if the seller decides to convey it. Preemptive provisions may be contained in leases, in contracts, or . . . in restrictive covenants contained in deeds or recorded in chains of title.

Smith v. Mitchell, 301 N.C. 58, 61, 269 S.E.2d 608, 610-11 (1980). The Court in *Smith* established the rule that "preemptive provisions which are unreasonable are void as imposing impermissible restraints on alienation[,]" and noted that "two primary considerations dictate the reasonableness or unreasonableness of a preemptive right: the duration of the right and the provisions it makes for determining the price of exercising the right." *Id.* at 65, 269 S.E.2d at 613. "The general rule is that as long as the price provision in a preemptive right provides that the price shall be determined either by the marketplace or by the seller's desire to sell, a preemptive right is reasonable *if its duration does not violate the rule against perpetuities.*" *Id.* at 66, 269 S.E.2d at 613 (emphasis added). After discussing various possible approaches to time-limiting preemptive rights, the Court resolved that "the better rule is to limit the duration of the right to a period within the rule against perpetuities and thus avoid lengthy litigation over what is or is not a reasonable time within the facts of any given case." *Id.*

B. The common law RAP and the USRAP

At the time of the *Smith* opinion, our State relied solely upon the common law RAP. *Id.* For property interests established without reference to any measuring life (like the lease at issue here), the common law RAP voids any interest not certain to terminate or vest within 21 years. *Mizell v. Greensboro Jaycees-Greensboro Junior Chamber of Commerce, Inc.*, 105 N.C. App. 284, 287, 412 S.E.2d 904, 906-07 (1992). However, effective 1 October 1995, the General Assembly enacted the USRAP which, among other actions, added a 90-year "wait and see" alternative to the common law RAP. N.C. Gen. Stat. § 41-15(a)(2) (2011). Under this section, certain nonvested prop-

erty interests that violate the common law RAP can survive if the interest actually "vests or terminates within 90 years after its creation." *Id.*

As all parties acknowledge, section 41-18 makes clear that the USRAP does not apply to nonvested property rights arising from nondonative transfers[4] such as the commercial lease between New Bar and Martin and his successors. *See* N.C. Gen. Stat. § 41-18 (2011) (titled "Exclusions from statutory rule against perpetuities."). Despite this acknowledgment, New Bar asserts that section 41-22 of the USRAP *is* applicable to commercial leases: "This Article supersedes the rule of the common law known as the rule against perpetuities." N.C. Gen. Stat. § 41-22 (2011). New Bar contends that the result of this language from section 41-22 and the explicit exclusion of nonvested property rights arising from commercial leases in section 41-18 is that the right of first refusal here is not subject to *any* rule against perpetuities, whether common law or statutory. In other words, New Bar contends that the USRAP *replaced* the common law RAP as to donative transfers, but *abolished* the common law RAP as to nondonative transfers. We are not persuaded.

The plain language of section 41-18 excludes the right of first refusal at issue here from the statutory rule against perpetuities and section 41-22 states that the USRAP "supercedes" the common law RAP. "Supersede"[5] means "to annul, make void, or repeal by taking the place of[.]" Black's Law Dictionary 1479 (8th ed. 2004). In contrast, "abolish" means "to annul, eliminate or destroy[.]". *Id.* at 5. Hence, the General Assembly's use of the word "supercede" in section 41-22 indicates its intention to *replace* the common law RAP with the statutory provisions as to the types of transfers not excluded from the USRAP. In turn, because the USRAP specifically excludes the nondonative transfer here from its provisions, there is nothing to "supercede" the common law RAP as to New Bar's right of first refusal. Thus, we conclude that the USRAP did not replace the common law RAP as to preemptive rights arising from nondonative transfers such as that at issue here. As such, the USRAP is inapplicable to this appeal.

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4. This section includes exceptions for certain nondonative transfers, none of which are applicable here. *See* N.C. Gen. Stat. § 41-18. For ease of reading, we use the phrase "nondonative transfers" to mean "nondonative transfers not covered by statutory exceptions" in this opinion.

5. Unlike our General Statutes, Black's Law Dictionary uses the traditional British spelling.

C. Applicability of the common law RAP to New Bar's right of first refusal

New Bar contends that, even if the common law RAP remains in effect for some nondonative transfers, its right of first refusal is not void under the doctrine because its preemptive right "does not violate the underlying policies of the rule [against perpetuities.]" In support of this contention, New Bar cites *Rich v. Carolina Constr. Corp.*, 355 N.C. 190, 193, 558 S.E.2d 77, 79 (2002), in which our Supreme Court considered "whether the [common law] rule against perpetuities prevents [a] plaintiff from enforcing against [a] defendant the contractual rights . . . [to] collect[] its deferred payments or the availability fee. . . . and conclude[d] that the rule d[id] not prevent enforcement of the contractual rights . . . ." New Bar draws our attention to the following language from *Rich*:

> [O]ur common law rule against perpetuities does not exclude commercial interests from its application. However, the rule under the common law does not apply in all cases involving commercial transactions. Commercial transactions that do not violate the underlying policies behind the rule against perpetuities, as well as those involving mere contract provisions or present vested interests, do not fit under the umbrella of the common law rule.

Id. at 194, 558 S.E.2d at 80 (citation omitted). New Bar asserts that, relying on *Rich*, we should evaluate the policy behind the common law RAP as applied to its right of first refusal. We decline to do so in light of the Supreme Court's clear guidance in *Smith* (which, unlike *Rich*, specifically addressed a right of first refusal) that "the better rule is to limit the duration of the right to a period within the rule against perpetuities and thus avoid lengthy litigation over what is or is not a reasonable time within the facts of any given case." *Smith*, 301 N.C. at 66, 269 S.E.2d at 613. Our Supreme Court reaffirmed this holding in *Pinehurst v. Regional Inv. of Moore, Inc.*, 330 N.C. 725, 728-29, 412 S.E.2d 645, 646-47 (1992):

> The Court of Appeals held that summary judgment was properly entered for the defendants because the right of first refusal was not limited in time and this duration violated the rule against perpetuities. We hold that we are bound by *Smith v. Mitchell*, 301 N.C. 58, 269 S.E.2d 608 (1980), to affirm the Court of Appeals. In *Smith*, we held that a preemptive right was not void because it terminated within the period of the rule against perpetuities. We said that a preemptive right or a right of first refusal to be valid must not extend beyond the period of the rule against perpetu-

> ities. It is true, as the plaintiff argues, that this part of our opinion in Smith could be considered dictum. It is clear, however, that in *Smith* it was this Court's intention to make the rule against perpetuities applicable to preemptive rights. We would have to overrule *Smith* to say the rule does not apply, which we decline to do.
>
> The plaintiff, relying on cases from other jurisdictions, . . . argues that there should be an exception to the application of the rule against perpetuities in this case because the preemptive right is for the purchase of a business. . . .
>
> We do not believe we should make an exception to the rule because the real property which the plaintiff desires to purchase is used in the operation of a business. If a restraint on alienation is bad, we see no reason why it is made good because it is part of a commercial transaction or the property is used for business purposes. We note that in *Smith* the restriction was put on the lot in connection with the development of a tract of land as a real estate development. This made it part of a commercial transaction.

Being bound by the decisions of our Supreme Court, we also hold that "a preemptive right or a right of first refusal to be valid must not extend beyond the period of the [common law RAP]." *Id.* at 728, 412 S.E.2d at 646.

Here, the initial lease (executed 15 December 1988) was for a five-year term with the option to renew for up to three additional five-year terms.[6] The initial lease also provided a right of first refusal for purchase of the property during any subsequent five-year term of the lease should the option to renew the lease be invoked. This preemptive right was created at the "expiration of the initial five[-]year lease term[,]" specifically defined in the initial lease as "12:00 midnight on the 15th day of December, 1993." Thus, the right of first refusal was created on 15 December 1993 when the lease was renewed and continued for 15 years. However, the second and third amendments to the initial lease explicitly extended the renewal terms of the initial lease, and by extension, New Bar's right of first refusal, until 15 December 2028, some 35 years after the December 1993 creation of the right. As such, New Bar's right of first refusal violates the common law RAP and, pursuant to *Smith*, is void. Having held the right of first refusal void for violating the common law RAP, we need not address New Bar's contentions regarding the validity of the right

6. During the initial five-year term of the lease, CGI also had an option to purchase the property for $450,000.00 in cash.

based on the second prong in *Smith*, the reasonableness of the defining price provision. Thus, we affirm both the Martin and FMW orders to the extent they dismissed New Bar's claims related to its purported right of first refusal.

V. Applicability of the Connor Act to Claims Against FMW

[5] New Bar also argues that the court erred in dismissing its claims against FMW under the Connor Act. We disagree.

Our review of the pleadings reveals that New Bar's complaint adequately alleged its various claims against FMW. Thus, the trial court's dismissal of all claims against FMW pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted can only have been based upon FMW's assertion of various defenses thereto. As noted *supra*, all claims arising directly from New Bar's purported right of first refusal were properly dismissed based upon a common law RAP defense. *See Locklear*, 176 N.C. App. at 384, 626 S.E.2d at 714. However, New Bar also sought a declaration that its lease was valid and that, as a result, it retained the right to renew the lease through 2028. In the trial court and on appeal, FMW asserted that, because the lease was unrecorded, the Connor Act invalidated the lease as to FMW.

Under the Connor Act,

> [n]o . . . lease of land for more than three years shall be valid to pass any property interest as against . . . purchasers for a valuable consideration . . . but from the time of registration thereof in the county where the land lies. . . . [I]nstruments registered in the office of the register of deeds shall have priority based on the order of registration as determined by the time of registration[.]

N.C. Gen. Stat. § 47-18(a) (2011).

> Our decisions applying the Connor Act establish these legal results:
>
> (1) The registration of a deed conveying an interest in land is essential to its validity as against a purchaser for a valuable consideration from the grantor.
>
> (2) A lease for more than three years must, to be enforceable, be in writing, and to protect it against creditors or subsequent purchasers for value, the lease must be recorded.

> (3) As between two purchasers for value of the same interest in land, the one whose deed is first registered acquires title.
>
> (4) Actual knowledge, however full and formal, of a grantee in a registered deed of a prior unregistered deed or lease will not defeat his title as a purchaser for value *in the absence of fraud or matters creating estoppel.*

Bourne v. Lay & Co., 264 N.C. 33, 35, 140 S.E.2d 769, 771 (1965) (emphasis added) (citations omitted). Thus, under the Connor Act, "until such [a] contract is registered, third parties may deal with the property to which it relates as if no contract existed." *Eller v. Arnold*, 230 N.C. 418, 421, 53 S.E.2d 266, 269 (1949). As a result, negotiations regarding such a property cannot constitute fraud or conspiracy simply because the parties negotiating are aware of an unrecorded lease. *See id.* ("If these acts are not wrongful or illegal, no agreement to commit them can properly be called an illegal and wrongful conspiracy.") (citation and quotation marks omitted).

Here, the initial lease was for more than three years and was never recorded, while FMW recorded its option to purchase the property on 20 July 2010. Thus, as New Bar concedes, "FMW 'won the race to the courthouse.' " However, New Bar contends that it adequately pled fraud as a bar to FMW's invocation of the Connor Act.

Having carefully reviewed the factual allegations of New Bar's complaint, we are not persuaded. While the complaint does allege fraud by FMW, all of the allegedly fraudulent actions, to wit, false representations that the lease had expired, failure to comply with the registration requirement in the first amended lease, and shell transfers of the property, were taken by the Martin Defendants, not by FMW. Further, we conclude that none of these actions constitute "fraud" under the Connor Act. Even if FMW had "full and formal" actual knowledge of New Bar's lease, the registration requirement therein, and the chain of transfers of the property among the Martin Defendants, the fact remains that the lease was for more than three years and had remained unrecorded for more than two decades. As such, FMW, like the defendant in *Eller*, "had the legal right to deal with the property . . . as if no contract existed. Hence, no cause of action is stated against them." *Id.* at 422, 53 S.E.2d at 269. Accordingly, the trial court did not err in dismissing New Bar's claims against FMW. This argument is overruled.

The Martin and FMW orders are

AFFIRMED.

Judges MCGEE and HUNTER, JR., ROBERT N., concur.

TIMOTHY L. HARDIN, ADMINISTRATOR OF THE ESTATE OF VERNA CATHEY HARDIN, DENNIS C. HARDIN, TAMMY F. HARDIN, RANDALL M. HARDIN AND TIMOTHY L. HARDIN, THE NEXT OF KIN, PLAINTIFFS v. YORK MEMORIAL PARK, AND ALDERWOODS GROUP, INC., SERVICE CORPORATION INTERNATIONAL A/K/A SCI, DEFENDANTS

No. COA11-80

(Filed 19 June 2012)

1. Pleadings—motion to amend complaint improperly denied—requested before any responsive pleading filed

The trial court erred as a matter of law in a case arising from the sale of family burial plots to third parties by dismissing plaintiffs' amended complaint before defendants filed a motion to dismiss, responsive pleading, or otherwise answered the complaint. Plaintiffs were entitled to amend their complaint as a matter of right before a responsive pleading was filed.

2. Jurisdiction—personal—long-arm statute

The trial court did not have personal jurisdiction over SCI and did not err by granting defendants' N.C.G.S. § 1A-1, Rule 12(b)(2) motion in a case arising from the sale of family burial plots to third parties. Plaintiffs failed to allege facts that permitted the inference of jurisdiction under the long-arm statute.

3. Statutes of Limitation and Repose—breach of contract—erroneous dismissal

The trial court erred when it dismissed plaintiffs' claim for breach of contract arising from the sale of family burial plots to third parties. Although the statute of limitations under N.C.G.S. § 1-52 barred the claim for the second burial plot that was resold in 1993, the allegations in the complaint did not establish that the breach of contract for the third burial plot was barred.

4. Contracts—breach of contract—third party beneficiary—burial plot

The trial court erred by dismissing plaintiffs' breach of contract claim arising from the sale of family burial plots to third parties

based on third party beneficiary contract doctrine. The allegations were sufficient to allege that plaintiffs were the intended direct beneficiaries of the third burial plot.

5. Negligence—failure to allege common law duty—bare assertion of contractual obligation

The trial court did not err by dismissing plaintiffs' claims of negligence for failure to state a valid claim for relief in an action arising from the sale of family burial plots to third parties. Plaintiffs did not allege that defendants owed them a common law duty. Plaintiff's bare assertion was grounded solely on contractual obligation to plaintiffs' deceased mother.

6. Cemeteries—negligence per se—sale of family plots to third parties—not a public safety statute

The trial court did not err by dismissing plaintiffs' claim for negligence *per se* based on N.C.G.S. § 65-60 in an action arising from the sale of family burial plots to third parties. Instead of being a public safety statute, it was designed to ensure that cemeteries kept proper records and gave the North Carolina Cemetery Commission authority to enforce the record keeping requirement and other regulations.

7. Cemeteries—sale of family plots to third party—res ipsa loquitor not an independent basis for liability

The trial court did not err by dismissing plaintiffs' *res ipsa loquitor* claim arising from the sale of family burial plots to third parties. *Res ipsa loquitur* is not an independent basis for imposing liability.

8. Emotional Distress—intentional infliction of emotional distress—negligent infliction of emotional distress—sale of family burial plots to third parties

The trial court did not err by dismissing plaintiffs' claims of intentional and negligent infliction of emotional distress arising from the sale of family burial plots to third parties. Plaintiffs' allegations did not rise to a level of conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. Further, plaintiffs only alleged the foreseeability of pain and suffering.

9. Unfair Trade Practices—sale of family burial plots to third parties—failure to allege aggravating circumstances

The trial court did not err by dismissing plaintiffs' claim of unfair and deceptive trade practices arising from the sale of family burial plots to third parties. The Estate failed to allege any aggravating circumstances related to the breach of contract.

10. Fraud—fraud in inducement—sale of family burial plots to third parties—vague and general allegations

The trial court did not err by dismissing plaintiffs' claims for fraud and fraud in the inducement arising from the sale of family burial plots to third parties. Plaintiffs' allegations regarding fraud were too vague and general.

11. Fraud—upon public—not recognized theory in North Carolina

The trial court did not err by dismissing plaintiffs' claim for fraud upon the public arising from the sale of family burial plots to third parties. Fraud upon the public is not a recognized theory of recovery under North Carolina law.

Appeal by Plaintiffs from order entered 29 July 2010 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 August 2011.

Pamela A. Hunter, for Plaintiff-Appellants.

Moore & Van Allen, PLLC, by M. Cabell Clay, Anthony T. Lathrop and Alton L. Gwaltney, III, for Defendant-Appellees.

BEASLEY, Judge

Plaintiffs appeal from final judgment pursuant to N.C. Gen. Stat. §7A-27(b). For the following reasons, we affirm in part and reverse in part.

In August 1993 at the death of her husband, Verna Cathey Hardin (Verna) purchased three burial plots from York Memorial Park. One plot was purchased for the burial of her deceased husband, and the other two plots were to be used as family plots. On 15 August 2004, Verna died, survived by her children: Timothy L. Hardin, Dennis C. Hardin, Tammy F. Hardin, and Randall M. Hardin, and the Estate of Verna Cathey Hardin (Plaintiffs). At her death, Plaintiffs contacted York Memorial Park (York) to make arrangements for Verna's burial.

York informed Plaintiffs that both family plots had been sold to third parties. The plot beside Plaintiffs' deceased father was resold to a third party and had been in use for over ten years. The second plot was also sold to a third party. Subsequently, Plaintiffs' parents were not buried together and Plaintiffs commenced a civil action on 9 November 2006 based on breach of contract. On 2 August 2007, Plaintiffs voluntarily dismissed claims against York and Alderwoods Group, Inc. (Alderwoods) pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure.

On 30 July 2008, Plaintiffs commenced a new action against both York and Alderwoods and added an additional Defendant, Service Corporation International (SCI). Defendants moved to dismiss the complaint pursuant to 12(b)(2) and 12(b)(6) of the North Carolina Rules of Civil Procedure. The trial court heard Defendants' motions on 21 September 2009. During the hearing, Plaintiff submitted an amendment to the complaint. On 9 July 2010, the trial court dismissed the Plaintiffs' complaint with prejudice.[1] Plaintiffs filed a Motion for a New Trial on 12 August 2010, and Notice of Appeal on 27 August 2010. Because the trial court did not rule on the Motion for a New Trial, jurisdiction is proper with this Court.

[1] Plaintiffs contend that "the trial court err[ed] as a matter of law when it dismissed the plaintiffs' amended complaint before the defendants filed a motion to dismiss, responsive pleading or otherwise answered the amended complaint[.]" We agree.

Pursuant to Rule 15(a) of the North Carolina Rules of Civil Procedure, "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted . . . he may so amend it at any time within 30 days after it is served." N.C. Gen. Stat. § 1A–1, Rule 15(a)(2011). "For purposes of this rule, a Rule 12(b)(6) motion to dismiss is not a responsive pleading and thus does not itself terminate plaintiff's unconditional right to amend a complaint under Rule 15(a)." *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 134 N.C. App. 65, 68, 516 S.E.2d 911, 913 (1999)(internal quotation marks omitted).

In the case *sub judice*, Defendants filed both a 12(b)(2) and a 12(b)(6) motion, but did not file a responsive pleading. Plaintiffs are

1. While it appears that the trial court dismissed the entire complaint against all of the Defendants, Defendant SCI filed a motion to dismiss pursuant to North Carolina Rules of Civil Procedure 12(b)(2) and 12(b)(6) and Defendant Alderwoods filed a motion to dismiss pursuant to the North Carolina Rules of Civil Procedure 12(b)(6).

correct in their assertion that they were entitled to amend their complaint as a matter of right before a responsive pleading is filed. Plaintiffs further argue that the record reveals that the trial court did not consider the amendment to the complaint in its 29 July 2010 Order of Dismissal because in Finding of Fact Number 2, it found that Plaintiffs did not properly allege Timothy Hardin's capacity to sue as Administrator of the Estate, though Plaintiffs did in fact allege as much in the amended complaint. Since the amended complaint does not affect our review of the Rule 12 (b)(2) motion and since we review a Rule 12 (b)(6) dismissal *de novo*, our review will incorporate the amended complaint.

[2] Next, Plaintiffs contend that the trial court had personal jurisdiction over SCI and erred by granting Defendants' 12(b)(2) motion. We disagree.

Our Court has previously held that when reviewing the grant or denial of a 12(b)(2) motion

> [t]he standard of review to be applied by a trial court . . . depends upon the procedural context confronting the court.
>
> . . . .
>
> [I]f the defendant supplements his motion to dismiss with an affidavit or other supporting evidence, the allegations in the complaint can no longer be taken as true or controlling and plaintiff cannot rest on the allegations of the complaint. In order to determine whether there is evidence to support an exercise of personal jurisdiction, the court then considers (1) any allegations in the complaint that are not controverted by the defendant's affidavit and (2) all facts in the affidavit (which are uncontroverted because of the plaintiff's failure to offer evidence).
>
> . . . .
>
> When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court. Under Rule 52(a)(2) of the Rules of Civil Procedure, however, the trial court is not required to make specific findings of fact unless requested by a party. When the record contains no findings of fact, it is presumed that the court on proper evidence found facts to support its judgment.

Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc., 169 N.C. App. 690, 693-94, 611 S.E.2d 179, 182-83 (2005) (internal citations, internal quotation marks, ellipses, and brackets omitted).

In order to determine whether our Court may exercise personal jurisdiction over a non-resident defendant, we apply a two part test: "(1) Does a statutory basis for personal jurisdiction exist, and (2) If so, does the exercise of this jurisdiction violate constitutional due process?" *Golds v. Central Express, Inc.*, 142 N.C. App. 664, 665, 544 S.E.2d 23, 25 (2001). "The assertion of personal jurisdiction over a defendant comports with due process if defendant is found to have sufficient minimum contacts with the forum state to confer jurisdiction." *Id.* at 665-66, 544 S.E.2d at 25. The long-arm statute is "liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process." *Id.* at 666, 544 S.E.2d at 26. "The burden is on [the] plaintiff to establish itself within some ground for the exercise of personal jurisdiction over defendant." *Public Relations, Inc. v. Enterprises, Inc.*, 36 N.C. App. 673, 677, 245 S.E.2d 782, 784 (1978). "The failure to plead the particulars of jurisdiction is not fatal to the claim so long as the facts alleged permit the inference of jurisdiction under the statute." *Williams v. Institute for Computational Studies*, 85 N.C. App. 421, 428, 355 S.E.2d 177, 182 (1987).

In the present case, Plaintiffs contend that N.C. Gen. Stat. § 1-75.4(1) confers jurisdiction because SCI acquired and retains all shares in Alderwoods, a co-defendant. Defendant SCI submitted an affidavit in support of its 12(b)(2) motion. Plaintiffs did not present any affidavits, but instead relied on verified responses by Defendants. Defendants' responses do nothing more than re-state an issue that is uncontroverted; SCI acquired and retains all shares of Alderwoods. Rather, the issue is whether or not SCI, by virtue of its position as sole shareholder in Alderwoods, falls within the purview of the long-arm statute.

In *Golds*, our Court held that the plaintiff did not meet its burden of presenting a prima facie statutory basis for personal jurisdiction where "the complaint [did] not state the section of this statute under which jurisdiction [was] obtained nor [did] it allege any facts as to activity being conducted in this State". *Golds*, 142 N.C. App. at 667, 544 S.E.2d at 26. Similarly, Plaintiffs asserted the section of the long-arm statute in their brief, but failed to state any grounds for personal jurisdiction in their complaint. Further, the complaint did not allege facts as to activity being conducted within the state by SCI. Moreover, Defendant submitted an affidavit in support of its contention that the

court lacked personal jurisdiction, which this court accepts as fact, where Plaintiffs presented no additional support to their bare assertion of statutory jurisdiction. Based on the foregoing, we hold that Plaintiffs failed to allege facts that permitted the inference of jurisdiction under the long-arm statute. Therefore, Plaintiffs' argument is overruled.

[3] Next, Plaintiffs argue that the trial court erred when it dismissed their claim for breach of contract. We disagree.

Our Court reviews the grant of a motion to dismiss pursuant to 12(b)(6) to determine

> 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. On a motion to dismiss, the complaint's material factual allegations are taken as true. 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. On appeal of a 12(b)(6) motion to dismiss, this Court conducts a de novo review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Burgin v. Owen, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428–29 (2007) (citations and internal quotation marks omitted).

Plaintiffs argue that they properly alleged a breach of the burial contract entered into by their deceased mother. Defendants argue, and we agree, that the statute of limitations bars the breach of contract claim.

Pursuant to N.C. Gen. Stat. § 1-52, the applicable statute of limitations for a breach of contract claim is three years. This action was not commenced until 2006. Defendants allege that if a breach occurred, it would have occurred in 1993, when Defendants resold one of the two family burial plots. Plaintiffs argue that the statute of limitations should have begun to run in 2004 when Plaintiffs' mother died. We note that Plaintiffs cite no authority for this argument. As we have previously stated, "appellant bears the burden to show error in the trial court's ruling[.]" *Stott v. Nationwide Mut. Ins. Co.*, 183 N.C.

App. 46, 50, 643 S.E.2d 653, 656 (2007) (citation omitted). Because the trial court found that the breach of contract claim was barred by the statute of limitations, and Plaintiffs' argument is unsupported by authority, we affirm the trial court's determination that the breach of contract claim for the burial plot resold in 1993 is barred by the statute of limitations. With respect to the other family burial plot, the complaint alleges that "the plaintiffs are unaware of the date the last family burial plot was sold." The allegations in the complaint do not, therefore, establish that the breach of contract claim for the last plot is barred by the statute of limitations. Therefore, we hold that the trial court erred in dismissing it on the basis of the statute of limitations. Since neither the trial court nor Defendants assert any other basis for dismissing the breach of contract claim, we reverse the trial court's dismissal of the breach of contract claim with respect to the third burial plot.

[4] Plaintiffs also argue that the trial court erred by dismissing their breach of contract claim based on third party beneficiary. In order "[t]o establish a claim based on the third party beneficiary contract doctrine, a complaint's allegations must show: (1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was entered into for his direct, and not incidental, benefit." *LSB Financial Services, Inc. v. Harrison*, 144 N.C. App. 542, 548, 548 S.E.2d 574, 578 (2001) (citation omitted).

The complaint alleges the existence of a valid enforceable contract between Verna and Defendants. A paragraph of the amended complaint alleges that Plaintiffs are "the children of the decedent [and] are the direct beneficiaries of the contract between [Verna] and the [D]efendants." The original complaint also alleged that Verna's "purpose in purchasing family plots was to insure that family members would be buried next to each other." These allegations are sufficient to allege, for the purposes of Rule 12(b)(6), that Plaintiffs were the intended direct beneficiaries as to the third plot. Verna intended to occupy the second plot, so the third plot must have been intended for another family member, such as one of Verna's children. Therefore, we hold that Plaintiffs have sufficiently alleged a third-party beneficiary breach of contract claim as to the third plot.

[5] Plaintiffs contend that the trial court erred by dismissing their claims of negligence for failure to state a valid claim for relief. We disagree.

"[A] plaintiff's [negligence] complaint must set out allegations indicating that: (1) defendant owed plaintiff a duty of reasonable care; (2) defendant breached that duty; (3) said breach was an actual and proximate cause of plaintiff's injury; and (4) plaintiff suffered damages as a result thereof." *Davis v. Messer*, 119 N.C. App. 44, 51, 457 S.E.2d 902, 907 (1995) *overruled on other grounds by Willis v. Town of Beaufort*, 143 N.C. App. 106, 544 S.E.2d 600 (2001). "Under general principles of the law of torts, a breach of contract does not in and of itself provide the basis for liability in tort." *Asheville Contracting Co. v. Wilson*, 62 N.C. App. 329, 342, 303 S.E.2d 365, 373 (1983). "Ordinarily, an action in tort must be grounded on a violation of a duty imposed by operation of law, and the right invaded must be one that the law provides without regard to the contractual relationship of the parties, rather than one based on an agreement between the parties." *Id.* "A failure to perform a contractual obligation is never a tort unless such nonperformance is also the omission of a legal duty." *Toone v. Adams*, 262 N.C. 403, 407, 137 S.E.2d 132, 135 (1964). " 'The duty owed by a defendant to a plaintiff may have sprung from a contractual promise made to another; however, the duty sued on in a negligence action is not the contractual promise but the duty to use reasonable care in affirmatively performing that promise.' " *Oates v. Jag, Inc.*, 314 N.C. 276, 279, 333 S.E.2d 222, 225 (1985) (quoting *Navajo Circle, Inc. v. Dev. Concepts Corp.*, 373 So.2d 689, 691 (Fla. 2nd Dist. Ct. App. 1979)).

We held *supra* that the breach of contract claims concerning the burial plot resold in 1993 are barred by the statute of limitations. We also hold that with respect to the negligent misrepresentation claim and a separate negligence claim asserted by the Verna Hardin Estate and claims for *res ipsa loquitur* and negligence *per se* asserted jointly by Plaintiffs, as they relate to the plot adjacent to Plaintiff's children's father's plot are also barred by the statute of limitations for the reasons set out above with respect to the breach of contract claim and, as to the discovery rule, for the reasons set forth in *Birtha v. Stonemor*, ___ N.C. App. ___, ___ S.E.2d ___ (COA11-79, filed 1 May 2012). In the case *sub judice*, Plaintiffs argue that they have alleged all of the elements of negligence and the trial court's dismissal was premature. A review of the complaint shows that Plaintiffs alleged "[t]hat the defendants owed the plaintiffs' deceased mother a duty of care not to resell the burial plots after a valid contract had been executed with plaintiffs' deceased mother for the purchase of the plots." Plaintiffs assert that Defendants owed a duty of care imposed by the burial contract. We acknowledge that "[a] duty of care may arise out

of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract[,]" *Olympic Prods. Co. v. Roof Sys., Inc.*, 88 N.C. App. 315, 322, 363 S.E.2d 367, 371 (1998) (internal quotation marks omitted). We note that Plaintiffs did not allege that Defendants owed them a common law duty. Essentially, Plaintiffs allege that Defendants breached their duty not to breach their contract. Here, Plaintiff's bare assertion grounded solely on contractual obligation to Plaintiffs' deceased mother was properly dismissed by the trial court.

[6] Plaintiffs also contend that the trial court erred by dismissing their claim for negligence *per se* based on N.C. Gen. Stat. § 65-60. In order to prevail on a claim of negligence *per se*, plaintiff must show,

> (1) a duty created by a statute or ordinance; (2) that the statute or ordinance was enacted to protect a class of persons which includes the plaintiff; (3) a breach of the statutory duty; (4) that the injury sustained was suffered by an interest which the statute protected; (5) that the injury was of the nature contemplated in the statute; and, (6) that the violation of the statute proximately caused the injury.

Rudd v. Electrolux Corp., 982 F. Supp. 355, 365 (1997) (citing *Baldwin v. GTE South, Inc.*, 335 N.C. 544, 439 S.E.2d 108 (1994)).

Our Supreme Court has emphasized that negligence *per se* applies only when the statute violated is a public safety statute. *See Stein v. Asheville City Bd. Of Educ.*, 360 N.C. 321, 326, 626, S.E.2d 263, 266 (2006) (" '[T]he general rule in North Carolina is that the violation of a [public safety statute] constitutes negligence per se.' " (quoting *Byers v. Standard Concrete Prods. Co.*, 268 N.C. 518, 521, 151 S.E.2d 38, 40 (1966)); *Hart v. Ivey*, 332 N.C. 299, 303, 420 S.E.2d 174, 177 (1992) ("A member of a class protected by a public safety statute has a claim against anyone who violates such a statute when the violation is a proximate cause of injury to the claimant.") A plain reading of the N.C. Gen. Stat. § 65-60 (2011) shows that the statute was designed to ensure that cemeteries keep proper records and to give the North Carolina Cemetery Commission authority to enforce the record keeping requirement and other regulations. It is not a public safety statute, and, therefore, the trial court also properly dismissed the negligence *per se* claim as to the third plot.

[7] Plaintiffs also argue that the trial court erred by dismissing their *res ipsa loquitor* claim. "*Res ipsa loquitur* is not an independent basis for imposing liability. It imposes no duties on the defendant. *Res ipsa* is merely a method by which the plaintiff proves defendant's violation of the duty the law imposes." *Johnson v. City of Winston-Salem*, 315 N.C. 384, 338 S.E.2d 105 (1986). Because *res ipsa loquitor* is not a claim and we have already dismissed Plaintiffs' negligence claim, Plaintiffs argument is without merit.

[8] Next, Plaintiffs argue that the trial court erred by dismissing their claim of intentional infliction of emotional distress. We agree with both the trial court and Defendants that Plaintiffs' allegations, although certainly disturbing, do not, as required for an intentional infliction claim, arise to the level of conduct " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Foster v. Crandell*, 181 N.C. App. 152, 168, 638 S.E.2d 526, 537 (2007) (citation omitted).

With respect to Plaintiffs' claim for negligent infliction of emotional distress ("NIED"), it is well established that "[a]n action for NIED has three elements: (1) defendant engaged in negligent conduct; (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress; and (3) defendant's conduct, in fact, caused plaintiff severe emotional distress." *Id.* Plaintiffs alleged that defendants engaged in negligent conduct, and the complaint, as amended, alleged as to the second element that "it was reasonably foreseeable by the defendants that the failure to be able to provide the decedent with the cemetery plots which she purchased would cause pain and suffering on the part of the decedent's heirs."

The amendment, therefore, alleged only the foreseeability of "pain and suffering" which is not the same as severe emotional distress. As this Court has explained: "Regarding the third element, our courts have defined 'severe emotional distress' to 'mean[] any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.' " *Id.* at 170, 638 S.E.2d at 538 (quoting *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990)). Phrased differently, "a plaintiff must 'present[] evidence . . . of diagnosable mental health conditions.' " *Id.* (quoting *Fox-Kirk v. Hannon*, 142 N.C. App. 267, 274, 542 S.E.2d 346, 352 (2001)).

"Pain and suffering" does not rise to the level of severe emotional distress. *See also Iadanza v. Harper*, 169 N.C. App. 776, 780, 611 S.E.2d 217, 221-22 (2005) (distinguishing between "the 'severe emotional distress' that is an essential element of a claim for negligent or intentional infliction of emotional distress" from "a claim seeking damages for general 'pain and suffering' "). Since the Plaintiffs only alleged the foreseeability of pain and suffering, the trial court properly concluded that Plaintiffs failed to allege all the elements of a claim for NIED.

[9] Plaintiffs argue that the trial court erroneously dismissed their claim of unfair and deceptive trade practices (UDTP). We disagree.

"To state a claim for unfair and/or deceptive trade practices, the plaintiffs must allege that (1) the defendants 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 plaintiffs or to the plaintiffs' business." *Walker v. Sloan*, 137 N.C. App. 387, 395 529 S.E.2d 236, 243 (2000). "It is well recognized . . . that actions for unfair or deceptive trade practices are distinct from actions for breach of contract . . . and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1." *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 42, 626 S.E.2d 315, 323 (2006) (citation omitted). "To recover for unfair and deceptive trade practices, a party must show substantial aggravating circumstances attending the breach of contract." *Id.*

Plaintiffs allege two separate bases for the UDTP claim. With respect to Verna Hardin's Estate (the Estate) claim, the complaint alleges that Defendants violated the UDTP Act, N.C. Gen. Stat. § 75-1.1., "when they resold two (2) of the three (3) adjoining burial plots purchased by the plaintiffs['] deceased mother, Verna Cathy Hardin, in 1993." The Estate has, therefore, identified only the breach of contract as the UDTP. As the trial court pointed out, this Court has held that "[a] mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1."

Since the Estate failed to allege any aggravating circumstances related to the breach of contract, they failed to properly allege a UDTP claim. Although, on appeal, Plaintiffs point to other conduct of Defendants, they failed to make that conduct the basis for the Estate's UDTP claim as set out in the complaint and, therefore, the conduct cannot be considered.

Verna's children's UDTP claim alleges other circumstances, apart from the breach of contract, which it contends are aggravating: (1) Defendants failed to place stakes at gravesites to establish proper boundaries, and (2) Defendants failed to keep proper records to determine where decedents are buried. Verna's children do not, however, cite any authority that would establish that these acts are sufficient in addition to the breach of contract to support a claim for UDTP. Even after Defendants pointed out the lack of authority contained in their brief, Plaintiffs still—in their reply brief—failed to remedy the omission. "It is not the role of the appellate courts, however, to create an appeal for an appellant." *Viar v. North Carolina Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). "The burden is on the appellant not only to show error but to enable the court to see that he was prejudiced. . . ." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App 377, 380, 444 S.E.2d 252, 254 (1994) (internal quotation marks omitted). Given the complexity of UDTP claims and Plaintiffs' failure to properly plead their allegations, the trial court properly dismissed the UDTP claim.

[10] Plaintiffs also argue that the trial court erred by dismissing its claims for fraud and fraud in the inducement. Rule 9 of the Rules of Civil Procedure requires that fraud be pled with particularity. Our Supreme Court has held "that in pleading actual fraud, the particularity requirement is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations." *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981).

A trial court properly dismisses a claim for failure to plead fraud with particularity "where there are 'no facts whatsoever setting forth the time, place, or specific individuals who purportedly made the misrepresentations.' " *Bob Timberlake*, 176 N.C. App. at 39, 626 S.E.2d at 321 (quoting *Coley v. N.C. Nat'l Bank*, 41 N.C. App. 121, 125, 254 S.E.2d 217, 220 (1979)). In *Bob Timberlake*, this Court affirmed the trial court's dismissal of a counterclaim for fraud when the counterclaim "pleaded fraud in vague and general terms, alleging that representatives of [the plaintiff] gave him information" but "did not identify which representatives gave him false information, nor did he specifically allege where or when he received the information." *Id.*

Here, just as in *Bob Timberlake*, Plaintiffs' allegations regarding fraud are vague and general—they essentially parrot the elements of a fraud claim without providing any specifics. The complaint alleges

that "defendants made fraudulent and false statements," but does not identify the specific individuals who made the statements. Under *Terry* and *Bob Timberlake*, the allegations are inadequate and, therefore, the trial court properly dismissed the claims for fraud and fraud in the inducement.

[11] Finally, Plaintiffs contend that the trial court erred by dismissing their claim for fraud upon the public. As the trial court stated, fraud upon the public is not a recognized theory of recovery under North Carolina law. *See Gilmore v. Smathers*, 167 N.C. 440, 83 S.E. 823 (1914). Therefore, Plaintiffs' final argument is meritless.

Reversed in part; Affirmed in part.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA v. RICHARD J. GORMAN, JR.

No. COA11-840

(Filed 19 June 2012)

1. Appeal and Error—preservation of issues—notice requirements—other issues dispositive

Although defendant contended that the trial court's orders entered 28 July 2008 in Onslow County Superior Court were invalid based on the court's failure to adhere to applicable notice requirements under N.C.G.S. § 15A-1342(d), this argument was not addressed based on the other issues in the case being dispositive.

2. Probation and Parole—improper extension of probationary period—lack of statutory authority

The trial court's orders entered 28 July 2008 that extended defendant's original sixty-month probation period for a period of thirty-six months lacked statutory authority and were therefore void.

3. Probation and Parole—revocation of parole—activation of suspended sentences—jurisdiction

The trial court's orders revoking defendant's probation and activating defendant's suspended sentences were remanded for consideration of whether the trial court had jurisdiction to

revoke defendant's probation for violations occurring on or after 27 November 2010.

Judge ERVIN concurring in separate opinion.

Appeal by defendant from judgments entered 8 February 2011 by Judge Theodore S. Royster in Davidson County Superior Court. Heard in the Court of Appeals 8 February 2012.

Attorney General Roy Cooper, by Associate Attorney General Christina S. Hayes, for the State.

Bushnaq Law Office, PLLC, by Faith S. Bushnaq, for defendant-appellant.

BRYANT, Judge.

Where the record is insufficient to determine when defendant's probation commenced and whether defendant's probation period was tolled during the resolution of unrelated charges against defendant in another jurisdiction but where defendant's reported probation violation may have occurred after the original period of probation expired, we reverse the orders activating defendant's sentences and remand the matter for further consideration.

On 3 June 2005, in Onslow County Superior Court, defendant Richard Gorman pled guilty to two counts of felony worthless check and five counts of obtaining property by false pretenses. The trial court entered judgment that same day. Consolidating the two counts of felony worthless check, the trial court sentenced defendant to a term of 6 to 8 months. On the charges of obtaining property by false pretenses, the trial court entered three judgments; each judgment sentenced defendant to a term of 8 to 10 months. All sentences were to be served consecutively; however, the trial court suspended all sentences and placed defendant on supervised probation. Finding that "a longer period of probation is necessary than that which was specified in N.C. Gen. Stat. § 15A-1343.2(d)[,]" the trial court imposed supervised probation for a period of sixty months.

The record indicates that subsequent to the trial court's entry of judgments imposing probation, defendant was extradited to New Jersey for offenses which took place prior to his 3 June 2005 plea agreement. The record also indicates that from 2005 to 2010 defendant served a five year active sentence in a New Jersey correctional facility.

On 28 July 2008, the Onslow County Superior Court reviewed the 2005 judgments and commitments. The Superior Court entered four orders modifying the terms of defendant's probation, extending the probation period by thirty-six months from 2 June 2010 to 1 June 2013.

Upon his release from the New Jersey correctional facility, defendant returned to Onslow County. Defendant then moved to Davidson County after making appropriate arrangements with the Davidson County probation office.

On 6 December 2010, defendant's probation officer filed a violation report in Davidson County Superior Court stating that defendant had failed to be at his designated residence since 27 November 2010; that defendant had left his approved residence and failed to make his whereabouts known; and that defendant had failed to report, failed to return phone calls, and failed to be at his residence during curfew hours. On 9 December 2010, two orders for arrest were issued for defendant for felony probation violations. Defendant turned himself in to law enforcement in Pennsylvania and was extradited back to North Carolina.

Following a probation violation hearing held on 8 February 2011, the trial court found that defendant had willfully violated his probation and entered judgment and commitment orders upon revocation of probation activating defendant's suspended sentences. In accordance with the judgments entered on 3 June 2005 in Onslow County Superior Court, the Davidson County Superior Court activated one sentence of 6 to 8 months and three sentences of 8 to 10 months, all to be served consecutively. Defendant appeals.

On appeal, defendant questions whether the Davidson County Superior Court had jurisdiction to revoke his probation. Defendant contends that (A) the 28 July 2008 Onslow County Superior Court orders extending his probation were invalid as no reasonable notice of the proceedings to review the terms of his probation was provided, (B) the 28 July 2008 orders were invalid because they exceeded the court's statutory authority by imposing a probation period longer than five years, and, (C) because the original sixty-month probation period expired prior to the reported conduct that resulted in a revocation of defendant's probation, the Davidson County Superior Court lacked jurisdiction to revoke his probation and activate his sentence. We agree in part and remand in part for further consideration.

Grounds for Appeal

"When a superior court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, either in the first instance or upon a de novo hearing after appeal from a district court, the defendant may appeal under G.S. 7A-27." N.C. Gen. Stat. § 15A-1347 (2011).

Standard of Review

"[T]he issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008) (citation omitted). "It is well settled that a court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute." *State v. Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27 (2007) (citation omitted). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *Allred v. Tucci*, 85 N.C. App. 138, 143, 354 S.E.2d 291, 295 (1987) (citation omitted). "If the court was without authority, its judgment . . . is void and of no effect." *Id.* (citations omitted).

"[A]n appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review." *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citing *State v. Bryant*, 361 N.C. 100, 637 S.E.2d 532 (2006)).

A

[1] Defendant first contends that the orders entered 28 July 2008 in Onslow County Superior Court were invalid because the court failed to adhere to applicable notice requirements under N.C. Gen. Stat. § 15A-1342(d).

While defendant presents strong arguments on the issues of whether his 3 June 2005 probation orders were properly reviewed in Onslow County Superior Court on 28 July 2008 pursuant to N.C.G.S. § 15A-1342(d) and whether reasonable notice of the review proceeding was provided to him as mandated by the statute, because we find the issue addressed in subsection B dispositive, we do not further address arguments defendant presented in subsection A.

B

[2] Assuming without deciding that reasonable notice of the 2008 probation review hearing was provided, defendant contends that the orders entered 28 July 2008, extending his probation beyond the original sixty-month period, were entered without statutory authority. We agree.

Under General Statutes, section 15A-1343.2(d), the length of the original period of probation for felons sentenced under Article 81B—Structured Sentencing of Persons Convicted of Crimes—to intermediate punishment is "not less than 18 nor more than 36 months." N.C. Gen. Stat. § 15A-1343.2(d)(4) (2011).

> If the court finds at the time of sentencing that a longer period of probation is necessary, *that period may not exceed a maximum of five years*, as specified in G.S. 15A-1342 and G.S. 15A-1351.[1]
>
> Extension.—The court may *with the consent of the offender* extend the original period of the probation if necessary to complete a program of restitution or to complete medical or psychiatric treatment ordered as a condition of probation. This extension may be for no more than three years, and *may only be ordered in the last six months of the original period of probation.*

N.C.G.S. § 15A-1343.2(d) (2011) (emphasis added).

Defendant's original probation period was imposed on 3 June 2005. In the judgments entered 3 June 2005, defendant's active sentences were suspended and an intermediate punishment imposed. At that time, the trial court found that "a longer period of probation [was] necessary than that which was specified in N.C. Gen. Stat. § 15A-1343.2(d)." The Onslow County Superior Court imposed a probation period of sixty months. On 28 July 2010, the Onslow County Superior Court entered four orders modifying defendant's probation period: "[t]he defendant's term of probation is extended for a period of 36 months from 06-02-2010 to 06-01-2013." The trial court orders were not entered in the last six months of the original sixty-month probation period nor is there any indication defendant consented to the thirty-six month probation period extension. Therefore, the orders extending defendant's probation beyond five years were not entered pursuant to N.C.G.S. § 15A-1343.2(d).

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1. Pursuant to N.C. Gen. Stat. § 15A-1351(a), imposing conditions of special probation, "[t]he original period of probation, including the period of imprisonment required for special probation . . . may not exceed a maximum of five years, except as provided by G.S. 15A-1342(a)." N.C. Gen. Stat. § 15A-1351(a) (2011).

Pursuant to General Statutes, section 15A-1344(d), "Extension and Modification; Response to Violations,"

> [a]t any time prior to the expiration or termination of the probation period or in accordance with subsection (f) [(Extension, Modification, or Revocation after Period of Probation)] of this section, the court may after notice and hearing and for good cause shown extend the period of probation *up to the maximum allowed under G.S. 15A-1342(a)* and may modify the conditions of probation.

N.C. Gen. Stat. § 15A-1344(d) (2011) (emphasis added). Pursuant to N.C. Gen. Stat. § 15A-1342(a), "[t]he court may place a convicted offender on probation for the appropriate period as specified in G.S. 15A-1343.2(d), *not to exceed a maximum of five years*." N.C. Gen. Stat. 15A-1342(a) (2011) (emphasis added).

The orders modifying defendant's probation period resulted in a term imposed on 3 June 2005 and extended to 1 June 2013—eight years. Such a probation period clearly exceeds the statutory five year probation period maximum set out under N.C.G.S. § 15A-1342(a). The State provides no authority for such an extension, and we find none. We hold that the orders entered 28 July 2008, extending defendant's sixty-month probation period for a period of 36 months, lack statutory authority and are, therefore, void. *See Tucci*, 85 N.C. App. at 143, 354 S.E.2d at 295 ("If the court was without authority, its judgment . . . is void and of no effect."). Accordingly, these orders are vacated.

However, this is not the end of the inquiry. While the orders extending defendant's probation period beyond the original sixty-month probation term lack statutory authority, there remains the issue of whether defendant's original sixty-month probation term was tolled pending the resolution of the charges brought against defendant in New Jersey.

C

[3] Defendant contends that because the conduct deemed to violate the terms of his probation occurred after the expiration of the probationary period, the trial court lacked jurisdiction to revoke his probation.

On appeal, the State argues that defendant's original probation period was from 3 June 2005 to 2 June 2010, and the probationary period was tolled when defendant was arrested in New Jersey. The State cites General Statutes, section § 15A-1344(g) (2009), which pro-

vides that "[i]f there are pending criminal charges against the probationer in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against the probationer for violation of the terms of this probation, the probation period shall be tolled until all pending criminal charges are resolved." N.C. Gen. Stat. § 15A-1344(g) (2009) (repealed effective 1 December 2009). *Compare State v. Henderson*, 179 N.C. App. 191, 195, 632 S.E.2d 818, 821 (2006) (holding "the trial court had jurisdiction . . . to revoke or modify [the] defendant's [] probation up to [the remainder of the probation period] after the [criminal charge for an offense occurring during the probation term] was no longer pending. [The] [d]efendant's charge was resolved by entry of [the] defendant's plea and subsequent judgment . . . ."), *with State v. Patterson*, 190 N.C. App. 193, 660 S.E.2d 155 (2008) (holding the term of the defendant's probation remained tolled when the defendant pled guilty to criminal offenses occurring during his probation term but appealed and the appeal from those judgments was still pending).

However, the record is not clear as to whether the proceedings leading to defendant's incarceration in a New Jersey correctional facility could have resulted in a revocation of defendant's probation in North Carolina. *See State v. Surratt*, 177 N.C. App. 551, 629 S.E.2d 341 (2006) (holding that defendant's probation period ran concurrent with an active sentence on an unrelated matter imposed prior to the commencement of the probation period). *See also* N.C.G.S. § 15A-1346(b) (2011) ("If a period of probation is being imposed at the same time a period of imprisonment is being imposed or if it is being imposed on a person already subject to an undischarged term of imprisonment, the period of probation may run either concurrently or consecutively with the term of imprisonment, as determined by the court. If not specified, it runs concurrently.").

Here, the record discloses little about the legal proceedings that led to defendant's incarceration in New Jersey and fails to give this Court a basis for determining whether defendant's sixty-month probation period imposed on 3 June 2005 was tolled while charges brought against defendant in New Jersey were resolved. *See* N.C.G.S. § 15A-1346(b); *Surratt*, 177 N.C. App. 551, 629 S.E.2d 341. Moreover, despite the State's assertion that defendant's probation commenced on 3 June 2005 and was to end on 2 June 2010, the judgments entered 3 June 2005 suspending defendant's active sentences and imposing a sixty-month probation period indicate that defendant's probation was to commence at the expiration of the sentence in Onslow County case

file number 04 CRS 52908, offense 52. The record contains no indication as to when the sentence imposed in 04 CRS 52908 was served and, correspondingly, when defendant's probation commenced.

We reverse the trial court's orders revoking defendant's probation and activating defendant's suspended sentences and remand this matter for consideration of whether the trial court had jurisdiction to revoke defendant's probation for violations occurring on or after 27 November 2010.

Vacated in part; reversed in part; and remanded.

Judge ELMORE concurs.

Judge ERVIN concurs by separate opinion.

ERVIN, Judge, concurring in separate opinion.

Although I concur in the Court's ultimate decision and in almost all of its reasoning, I write separately for the purpose of discussing an appealability issue raised in the State's brief which the Court has not explicitly addressed and to express my concern about a small portion of the Court's discussion of the tolling issue. Subject to these two caveats, I concur in the Court's opinion.

Appealability

In its brief, the State argues that we are precluded from examining the lawfulness of the 28 July 2008 Onslow County orders extending Defendant's probation in light of Defendant's failure to note an appeal from those orders given our decision in *State v. Mauck*, 204 N.C. App. 583, 585-86, 694 S.E.2d 481, 483-84 (2010). Although the Court has implicitly rejected the contention that the State has advanced in reliance upon *Mauck*, I believe that we should expressly address this aspect of the State's argument for the purpose of clarifying the manner in which the principle enunciated in *Mauck* should be applied.

In *Mauck*, the defendant pled guilty to two drug-related charges in Haywood County and was placed on probation. 204 N.C. App. at 584, 694 S.E.2d at 482. Subsequently, the terms and conditions of the defendant's probation were modified in Buncombe County in 2007. *Id.* After the defendant's probation was revoked in Buncombe County in 2009 based on violations of the terms and conditions imposed upon

him in the 2007 modification order, the defendant noted an appeal to this Court from the 2009 revocation order and argued that the Buncombe County Superior Court lacked the authority to revoke his probation given the absence of any evidence tending to show that the probationary judgment had been entered in Buncombe County, that he had violated the terms and conditions of his probation in Buncombe County, or that he lived in Buncombe County. *Id.* at 584, 694 S.E.2d at 483. In refusing to grant the defendant's request for relief on the basis of this contention, we noted that the defendant's argument was, in essence, a challenge to the 2007 Buncombe County modification order, from which the defendant had not noted an appeal. *Id.* at 586, 694 S.E.2d 483. Given that the defendant had appealed from the order revoking his probation and not from the modification order, we held that we lacked jurisdiction to hear his appeal in light of his failure to properly " 'designate the judgment or order from which [his] appeal [was] taken[.]' " *Id.* (quoting N.C. R. App. P. 4(b)).

In seeking to persuade us to refrain from disturbing the trial court's revocation orders in this case, the State contends that, as in *Mauck*, Defendant's challenge to the Davidson County revocation order is "really based upon [a challenge to] the [28 July] 2008 Onslow County [m]odification [o]rder[s,]" from which Defendant failed to note an appeal. As a result, the State argues that "the scope of the instant appeal is limited to the Davidson County trial court's decision to revoke Defendant's probation," rendering "Defendant's contention that the [m]odification [o]rder[s] [are] invalid [] outside the scope of the applicable issues in the case[.]" I do not find the State's argument persuasive.

Aside from the fact that, as the Court notes, the record strongly suggests that Defendant was not notified about and had no opportunity to appeal the 28 July 2008 Onslow County orders,[1] Defendant's challenge to those orders differs substantially from the challenge to the 2007 order at issue in *Mauck*. The only basis upon which the defendant appeared to have challenged the 2007 order at issue in *Mauck* was that the record did not reflect that his probation had been properly transferred from Haywood County to Buncombe County. 204 N.C. App. at 584, 694 S.E.2d at 483. As a result of the fact that N.C. Gen. Stat. § 15A-1343(b)(2) contemplates the transfer of probation from one county to another in appropriate instances, such as when

1. As an aside, I believe that adopting the State's argument, which would effectively require Defendant to appeal an order of which he appears to have had no notice, would raise serious due process issues.

the probationer wishes to change residences, and the fact that the record in *Mauck* provided no basis for believing that there had been any "impropriety in the transfer of the defendant's case from Haywood County to Buncombe County prior to the entry of the modification order in 2007," *Id.* at 586, 694 S.E.2d at 483, the clear implication of *Mauck* is that a defendant is not entitled to attack a probation revocation order on the basis of a possible procedural defect in an earlier order that the trial judge did, as a general proposition, have the authority to enter and which does not, based on an examination of the face of the record, appear to have been entered in error in the event that the defendant failed to note an appeal from that earlier order.

In this case, on the other hand, as the Court clearly demonstrates, the trial judge had absolutely no authority to enter the 28 July 2008 Onslow County orders. Simply put, the face of the record clearly establishes that the trial court extended Defendant's probationary period from five to eight years without having had any authority to act in that manner. Given that set of circumstances, the trial court's orders were void, as compared to merely voidable. *Hamilton v. Freeman*, 147 N.C. App. 195, 204, 554 S.E.2d 856, 861 (2001) (stating that, " '[w]here a court has authority to hear and determine the questions in dispute and has control over the parties to the controversy, a judgment issued by the court is not void, even if contrary to law' " (quoting *Allred v. Tucci*, 85 N.C. App. 138, 142, 354 S.E.2d 291, 294, *disc. review denied*, 320 N.C. 166, 358 S.E.2d 47 (1987)), *disc. review denied*, 355 N.C. 285, 560 S.E.2d 803 (2002); *State v. Wilson*, 154 N.C. App. 127, 131, 571 S.E.2d 631, 633 (2002) (stating that "[t]he fact that the original sentencing in this case was in error does not render the judgment void" (citing *Hamilton*, 147 N.C. App. at 204, 554 S.E.2d at 861)), *aff'd*, 357 N.C. 498, 586 S.E.2d 89 (2003). I do not believe that *Mauck*, contrary to well-established North Carolina law, holds that a criminal defendant attempting to resist the revocation of his or her probation is precluded from attacking the validity of a void order in a subsequent revocation proceeding despite the defendant's failure to appeal that order at the time that it was entered. *Allred*, 85 N.C. App. at 144, 354 S.E.2d at 295, (stating that "[a] void judgment . . . order binds no one"); *see also Casey v. Barker*, 219 N.C. 465, 467-68, 14 S.E.2d 429, 431 (1941) (stating that "[a] void judgment may be treated as a nullity, disregarded, vacated on motion, [or] attacked directly or collaterally"). Such an interpretation of *Mauck*, which involves an order that was, at most, voidable, would run counter to numerous decisions of this Court and the Supreme Court. As a result,

I cannot agree with the State's contention that Defendant should be prevented from attacking the revocation of his probation in this case because he failed to note an appeal from an order extending the length of his probationary period which the trial judge, based on an examination of the face of the record, had absolutely no authority to enter under any set of circumstances.

Tolling

Secondly, although the Court has correctly determined that this case should be remanded to the trial court for the purpose of determining the extent, if any, to which the running of Defendant's probationary period should be tolled during the period required to resolve the charges that had been lodged against Defendant in New Jersey, I am concerned that the Court's treatment of our prior decisions in *State v. Henderson*, 179 N.C. App. 191, 195, 632 S.E.2d 818, 821 (2006) and *State v. Patterson*, 190 N.C. App. 193, 197-98, 660 S.E.2d 155, 158 (2008), could be read to suggest that those decisions were not consistent with each other. On the other hand, I believe that both decisions stand for the proposition that the running of Defendant's probationary period would be tolled until any unrelated charges had been fully resolved, with that interval including the time required for any necessary appellate review. As a result, I believe that both of the decisions mentioned by the Court suggest that the trial court's focus on remand in this case should be whether the charges brought against Defendant in New Jersey would, if proven true, have been sufficient to justify the revocation of Defendant's probation and, if so, how much time elapsed between the date upon which Defendant was charged with committing these offenses and the date upon which the proceedings necessary to resolve those charges, including any proceedings on appeal, had been concluded.

Conclusion

Thus, for the reasons set forth above, I believe that the Court should address the State's appealability argument and am concerned that the Court's treatment of the tolling issue suggests the existence of some inconsistency in the law where I do not believe that any exists. Subject to those exceptions, however, I concur in the result reached by the Court and almost all of its reasoning.

NICHOLAS R. BURNHAM, PLAINTIFF v. MCGEE BROTHERS COMPANY, INC., EMPLOYER, AND ZURICH AMERICAN INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA11-1359

(Filed 19 June 2012)

1. Workers' Compensation—denial of attorney fees—valid basis to resist request for assistance of rental expenses

The Industrial Commission did not err in a workers' compensation case by denying plaintiff's motion for attorney fees under N.C.G.S. § 97-88.1 even though plaintiff contended that defendants had no valid legal basis for resisting his request for assistance with his rental expenses. Defendant had a valid basis since there were only two published cases in this jurisdiction addressing an employer's responsibility for providing handicapped-accessible housing for a totally disabled employee, and neither of those decisions addressed an issue involving ongoing rent payments as compared to the initial cost of rendering the employee's housing handicapped-accessible.

2. Workers' Compensation—denial of attorney fees—proration of rent

The Industrial Commission did not err in a workers' compensation case by denying plaintiff's motion for attorney fees under N.C.G.S. § 97-88.1 based on plaintiff challenging the Commission's finding that defendants raised a legitimate issue as to how the rent should be prorated between defendants and plaintiff. Even if plaintiff was correct that the proration issue was a relatively minor one, that fact did not support invalidation of the Commission's decision.

3. Workers' Compensation—denial of attorney fees—sufficiency of finding of fact

The Industrial Commission did not err in a workers' compensation case by denying plaintiff's motion for attorney fees under N.C.G.S. § 97-88.1 even though plaintiff contended that that the trial court erred by making finding of fact number 17. The Commission did not err by listing certain actions taken by plaintiff's employer rather than by the insurance carrier.

Appeal by plaintiff from Opinion and Award entered 9 May 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 March 2012.

Seth M. Bernanke for plaintiff-appellant.

Stiles, Byrum & Horne, L.L.P., by Henry C. Byrum, Jr., for defendants-appellees.

ERVIN, Judge.

Plaintiff Nicholas R. Burnham appeals from a decision by the North Carolina Industrial Commission denying his motion for attorney's fees. On appeal, Plaintiff argues that the Commission erroneously determined that Defendants McGee Brothers and Zurich American had a valid basis for defending his claim for the cost of a second bedroom in his apartment and based its decision to that effect on impermissible considerations. After careful consideration of Plaintiff's challenges to the Commission's decision in light of the record and the applicable law, we conclude that the Commission's decision should be affirmed.

I. Factual Background

A. Substantive Facts

On 3 April 2008, Plaintiff was working for Defendant as a dump truck driver and an assistant equipment operator in connection with a project that involved clearing a lot that was to be used for a new home. As part of his work-related responsibilities, Plaintiff drove a dump truck filled with logs from the site at which the land-clearing project was being conducted to a saw mill. After Plaintiff released the straps securing the load of logs to the truck at the saw mill, a log rolled off of the truck and landed on him, causing him to sustain severe injuries that left him paralyzed below the waist.

Before sustaining his injury, Plaintiff shared a third-floor apartment, for which he paid half of the $829.00 monthly rent, which could only be accessed by mounting a staircase. After his accident, Plaintiff could not climb stairs, a fact which precluded him from living in this apartment. After undergoing rehabilitation, Plaintiff obtained interim housing with Brad and Patty Wright, who were friends of Plaintiff's girlfriend and had offered to help Plaintiff during his period of recovery because Mr. Wright had once sustained a similar injury. Don McGee, one of the owners of Defendant McGee Brothers, paid for modifications to the Wright's living room so that Plaintiff could live there despite his condition.

Although Plaintiff lived in the Wright's living room for several months, he had recovered sufficiently to be able to live independently by October or November, 2008. At that time, Plaintiff found a handicapped-accessible, two-bedroom apartment in Huntersville for $779.00 per month. As a result of the fact that he intended to use the second bedroom to store the equipment, medical supplies, and mobility assistance devices that he needed as a result of his condition, Plaintiff did not seek to identify a roommate who could help pay the monthly rent for the apartment. Among other things, Plaintiff had a three-wheel hand cycle or "trainer," which he used to exercise; a walker; a power scooter; multiple sets of braces; forearm crutches; and a wheelchair that he could use to play tennis. Sheila Faeth, Defendants' adjuster, requested that Jennifer Burton, a registered nurse and certified case manager, inspect the apartment for the purpose of determining whether it met Plaintiff's needs. At the conclusion of her inspection, Ms. Burton answered that question in the affirmative.

At or about the end of the lease term for the Huntersville apartment, Plaintiff found a handicapped-accessible, two bedroom apartment in Gastonia, which was larger and cost $80.00 less than the Huntersville apartment. According to Fran Parker, a registered nurse and certified case manager hired by Defendants, Plaintiff needed a second bedroom for the purpose of storing his equipment, supplies, and other mobility-related devices. In addition, Ms. Parker concluded that having clear pathways and living space would play an important role in preventing Plaintiff from falling, help to increase Plaintiff's independence, and facilitate Plaintiff's ability to navigate around the apartment. Similarly, Ms. Burton agreed that it was reasonable for Plaintiff to have a second bedroom to store his equipment, supplies, and mobility-related devices. Finally, Dr. William Michael Scelza, a specialist in physical medicine and rehabilitation with a sub-specialty in treating spinal cord injuries who served as Plaintiff's treating physician, testified that having adequate space to store and use equipment, supplies, and devices would serve both a medical and rehabilitative function for Plaintiff. Although the parties appear to agree that Plaintiff's injuries are compensable, they did not agree about the extent, if any, to which Defendants should contribute to the ongoing rental cost of a two-bedroom handicapped-accessible apartment for Plaintiff and litigated that issue in this case.

B. Procedural History

After Plaintiff suffered an admittedly compensable injury on 3 April 2008, Defendants accepted his claim by filing Form 63 on 16

April 2008. On 11 December 2009, Plaintiff filed a Form 33 in which he requested a hearing concerning his claim for "payment of medical expenses/treatment," including a "medically necessary accessible apartment." In an accompanying letter, Plaintiff specified that he sought compensation for "the additional cost of housing due to [his] injury." In response, Defendants asserted that they had no obligation to contribute to Plaintiff's ongoing rental expenses because applicable "case law establishes that rent is an ordinary expense of life."

After a hearing held on 24 March 2010, Deputy Commissioner Bradley W. Houser issued an Opinion and Award on 7 October 2010 in which he granted Plaintiff's request for housing assistance; found that Defendants' conduct was "indicative of stubborn, unfounded litigiousness;" and awarded Plaintiff attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1. On 10 December 2010, Defendants sought review by the Commission. On 9 May 2011, the Commission filed an Opinion and Award in which it affirmed Deputy Commissioner Houser's decision subject to certain modifications. In its order, the Commission found that, "for rehabilitation, safety and good health purposes, it is reasonably necessary for Plaintiff to have a place to store his medical equipment, supplies, and devices close enough for him to have easy access;" that "a two-bedroom apartment which allows Plaintiff to have a separate bedroom from his general living quarters to store and have easy access to his medical equipment, supplies, and devices is reasonably required to lessen his disability;" and that "the additional cost Plaintiff incurs to rent a handicapped-accessible, two-bedroom apartment to store his medically necessary equipment, supplies, and devices is the direct and natura1 result of and causally related to his April 3, 2008 admittedly compensable work injury that rendered him a paraplegic." In addition, the Commission found that Plaintiff's "need for an additional bedroom to store his various equipment, supplies, and devices separate from his general living quarters is medical compensation under [N.C. Gen. Stat. §] 97-25" and that "it would be reasonable under the circumstances for Defendants to pay for half of Plaintiff's cost in renting a handicapped-accessible, two-bedroom apartment." On the other hand, the Commission denied Plaintiff's claim for attorney's fees based on a determination that "Defendants had reasonable grounds to defend this claim, as some of the medical and other evidence was in dispute."

On 13 May 2011, Plaintiff requested the Commission to reconsider its decision with respect to the attorney's fees issue based on a contention that the Commission had relied upon an incorrect legal

standard in making that determination. On 31 August 2011, the Commission entered an amended order in which it inserted a new Finding No. 16 in lieu of the Finding of Fact No. 16 set out in the original order. Finding of Fact No. 16, as modified, provided that:

> 16. There was a valid legal issue regarding Defendants' obligation, if any, to contribute to Plaintiff's rent for accessible housing. In support of their contention that the expense of Plaintiff's housing is an ordinary expense of life for which Plaintiff was obligated to pay from his workers' compensation benefits, Defendants presented uncontested evidence through Ms. Delilah Freeman, the manager of Mill Creek Apartments where Plaintiff was living at the time of hearing, showing that there is no difference in the rent charged for handicapped accessible apartments and non-handicapped accessible apartments of the same size. Ms. Freeman further testified that it would be a violation of the State Fair Housing Act to charge a handicapped individual more for an apartment than a non-handicapped person. Defendants also raised a legitimate issue as to how the rent should be prorated between Defendants and Plaintiff, even if they were required to pay a portion of the rent.

In addition, the Commission added a new Finding of Fact No. 17, which provided that:

> 17. The Full Commission further finds that Defendants' conduct has been reasonable from the time of Plaintiff's injury. Defendant-Employer spent $15,000-$20,000 remodeling the home where Plaintiff chose to live following his release from a rehabilitation facility after his injury. Defendants then assisted Plaintiff in his move to an apartment after he moved from the home of Mr. and Ms. Wright that Defendant-Employer had renovated for him after living there for approximately six months. Defendant-Employer purchased and gave Plaintiff the title to a new vehicle which was modified to accommodate his needs. Defendant-Employer also gave Plaintiff's mother and father $5,000 for expenses when they came from Pennsylvania to visit him. Defendants also provided Plaintiff an advance payment to assist with the rent on his apartment for the first year after he moved to his own apartment. Defendants agreed to take a credit in the future in the amount of the advance payment if Plaintiff's case was resolved. Considering all of the evidence, Defendants' conduct and defense in this case did not constitute stubborn unfounded litigiousness.

Plaintiff noted an appeal to this Court from the Commission's revised decision.

II. Legal Analysis

A. Standard of Review

The ultimate issue raised by Plaintiff's appeal is whether the Commission erred in the course of denying his motion for the imposition of attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1, which provides that, "[i]f the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." "[N.C. Gen. Stat. §] 97-88.1 places the award of attorneys' fees in the discretion of the Commission by providing that, 'the Industrial Commission . . . may assess . . . reasonable fees for defendant's attorney or plaintiff's attorney.' " *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 398, 298 S.E.2d 681, 685 (1983). "The decision of whether to make such an award, and the amount of the award, is in the discretion of the Commission, and its award or denial of an award will not be disturbed absent an abuse of discretion." *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54-55, 464 S.E.2d 481, 486 (1995) (citing *Taylor*, 307 N.C. at 394, 298 S.E.2d at 685), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996)).

> "Review of an award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 . . . required a two-part analysis. First, [w]hether the [party] had a reasonable ground to bring a hearing is reviewable by this court *de novo*." . . . If this Court agrees that the party lacked reasonable grounds, then we review the Commission's decision whether to award attorney's fees and the amount awarded for abuse of discretion.

Clayton v. Mini Data Forms, Inc., 199 N.C. App. 410, 424, 681 S.E.2d 545, 553 (2009). "The abuse of discretion standard of review is applied to those decisions which necessarily require the exercise of judgment. The test for abuse of discretion is whether a decision 'is manifestly unsupported by reason,' or 'so arbitrary that it could not have been the result of a reasoned decision.' . . . Because the reviewing court does not in the first instance make the judgment, the purpose of the reviewing court is not to substitute its judgment in place of the decision maker. Rather, the reviewing court sits only to insure that the decision could, in light of the factual context in which it is made,

be the product of reason." *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E. 2d 829, 833 (1985), and citing *State v. Wilson*, 313 N.C. 516, 538, 330 S.E. 2d 450, 465 (1985)).

B. Denial of Attorney's Fees Claim

[1] In challenging the Commission's decision to refrain from awarding attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1, Plaintiff argues that Defendants had no valid legal basis for resisting his request for assistance with his rental expenses given that an employer's "responsibility to pay for proper accommodative housing has been part of North Carolina law for many years." However, our review of the pertinent decisions in this area indicates that the exact point at issue in this case has not been specifically addressed. More particularly, we note that there are only two published decisions in this jurisdiction addressing an employer's responsibility for providing handicapped-accessible housing for a totally disabled employee and that neither of these decisions addressed an issue involving ongoing rent payments as compared to the initial cost of rendering the employee's housing handicapped-accessible. As a result, we conclude that the Commission did not err by determining that Defendants had a valid basis for resisting Plaintiff's claim.

The first appellate decision in North Carolina addressing the extent to which workers' compensation benefits included the cost of handicapped-accessible housing was *Derebery v. Pitt County Fire Marshall*, 76 N.C. App. 67, 332 S.E.2d 94 (1985), *rev'd*, 318 N.C. 192, 347 S.E.2d 814 (1986). The plaintiff in *Derebery* was, like Plaintiff, permanently disabled and confined to a wheelchair. After the Commission "ordered defendant to furnish plaintiff 'with an appropriate place to live in view of his disabled condition,' " *Derebery*, 76 N.C. App at 68, 332 S.E.2d at 95, this Court reversed, holding that "neither the provision requiring payment for 'other treatment or care' nor the provision requiring payment for 'rehabilitative services' can be reasonably interpreted to extend the employer's liability to provide a residence for an injured employee." *Derebery* at 72, 332 S.E.2d at 97. The Supreme Court, however, reversed this Court's decision, holding that:

> an employer must furnish alternate, wheelchair accessible housing to an injured employee where the employee's existing quarters are not satisfactory and for some exceptional reason structural modification is not practicable. We conclude on the basis of the legislative history surrounding N.C. [Gen. Stat.] § 97-29, this

> Court's prior interpretation of that statute and the persuasive authority of other courts interpreting similar statutes that the employer's obligation to furnish "other treatment or care" may include the duty to furnish alternate, wheelchair accessible housing.

Derebery, 318 N.C. at 203-04, 347 S.E.2d at 821.

The other North Carolina appellate decision addressing the general subject before us in this case is *Timmons v. N.C. Dept. of Transportation*, 123 N.C. App. 456, 473 S.E.2d 356 (1996), *aff'd per curiam*, 346 N.C. 173, 484 S.E.2d 551 (1997). After suffering an injury that rendered him a paraplegic, the plaintiff in *Timmons* bought land and sought financial assistance from the defendant in order to construct a handicapped-accessible home. After the Commission ruled that the plaintiff "was entitled to financial assistance in constructing a handicapped accessible residence" and "ordered defendant to pay, pursuant to [N.C. Gen. Stat.] § 97-25, the expense of rendering the home which plaintiff plans to build accessible to his disabilities," *Timmons*, 123 N.C. App at 459, 347 S.E.2d at 358, both parties appealed. In its opinion, this Court noted that:

> Defendant argues that it should not be required to bear any of the expense of making the residence accessible to plaintiff's handicap; by cross-assignment of error, plaintiff contends defendant should bear the entire cost of construction of a residence which would accommodate his disabilities.

Timmons at 460, 347 S.E.2d at 358. However, this Court upheld the Commission's decision, stating that:

> [T]he expense of housing is an ordinary necessity of life, to be paid from the statutory substitute for wages provided by the Workers' Compensation Act. The costs of modifying such housing, however, to accommodate one with extraordinary needs occasioned by a workplace injury, such as the plaintiff in this case, is not an ordinary expense of life[.] . . . Such extraordinary and unusual expenses are, in our view, properly embraced in the "other treatment" language of [N.C. Gen. Stat.] § 97-25, while the basic cost of acquisition or construction of the housing is not.

Timmons at 461-62, 347 S.E.2d at 359. As a result, both *Derebery* and *Timmons* draw a distinction between the ordinary expenses of life and the extraordinary expenses associated with modifying or constructing housing for the purpose of rendering it handicapped-accessible. However, neither decision addresses an employer's

obligation to pay ongoing rental expenses that are attributable to a plaintiff's disability such as the cost of an additional bedroom used to store the equipment, supplies, and mobility-related devices needed to accommodate Plaintiff's paraplegia. As we have previously noted, the extent to which "specially adaptive vehicles and wheelchair-accessible housing are compensable under the statute are debatable issues, as the four dissents in *Derebery* and *McDonald* [*v. Brunswick Elec. Membership Corp.*, 77 N.C. App. 753, 336 S.E.2d 407 (1985)] indicate." *Grantham v. Cherry Hospital*, 98 N.C. App. 34, 40, 389 S.E.2d 822, 825, *disc. review denied*, 327 N.C. 138, 394 S.E.2d 454 (1990). Although the Commission ultimately determined that Defendants should pay half the rental cost associated with Plaintiff's apartment, a result which neither party has challenged on appeal, the paucity of published cases addressing the extent to which an employer or insurance carrier is liable for the additional costs associated with housing for handicapped individuals and the complete absence of any decision addressing the extent to which employers and their carriers are liable for ongoing increased rental payments stemming from needs like those present here causes us to conclude that the Commission did not err by determining that Defendants did not act unreasonably in defending against Plaintiff's claim for rental payments.

In seeking to persuade us to reach a different result, Plaintiff argues that Defendant's evidence, as summarized in the Commission's order, does not demonstrate the existence of a valid legal issue. Assuming, without in any way deciding, that Plaintiff's contention is well-founded, we conclude that "the Commission's decision was unaffected by any prejudicial error in its use of different reasoning." *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 133, 468 S.E.2d 283, 288, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 18 (1996) (citations omitted). "[W]here a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision." *Eways v. Governor's Island*, 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990) (citations omitted). Thus, given that Defendants had a legitimate justification for resisting Plaintiff's claim, the fact that Defendants' evidence may not have been directly on point does not justify a reversal of the Commission's decision.

[2] In addition, Plaintiff challenges the Commission's finding that Defendants "raised a legitimate issue as to how the rent should be prorated between Defendants and Plaintiff, even if they were required to pay a portion of the rent." Plaintiff asserts that, if this issue "were to be considered a legitimate defense, it was certainly a

very minor part of the litigation and in no way was a defense to the primary issue of whether the rent subsidy should be paid by the carrier in the first place." The validity of this aspect of Plaintiff's argument assumes that the issue of proration, which Plaintiff characterizes as minor, was the only basis upon which the Commission might conclude that Defendant's defense to Plaintiff's claim was reasonable. However, as we have already concluded, the Commission did not err by finding that Defendants did not act unreasonably by resisting Plaintiff's claim for the payment of ongoing rental expenses. For that reason, even if Plaintiff is correct in contending the proration issue was a relatively minor one, that fact does not support invalidation of the Commission's decision.

[3] Finally, Plaintiff argues that the trial court erred by making Finding of Fact No. 17, in which the Commission found that "Defendants' conduct has been reasonable from the time of Plaintiff's injury" and that, "[c]onsidering all of the evidence, Defendants' conduct and defense in this case did not constitute stubborn unfounded litigiousness." In this finding of fact, the Commission enumerated instances in which Plaintiff's employer and "Defendants" generally took action for the purpose of assisting Plaintiff. Although Plaintiff objects to this finding on the grounds that it implicitly allows one of the two defendants, the insurance carrier from which Defendant McGee Brothers purchased workers' compensation coverage, to "piggyback" on the generous actions of Defendant McGee Brothers and suggests that, because Defendant McGee Brothers and Defendant Zurich American are "separate defendants in this action," the Commission was required to evaluate the validity of each defendant's conduct separately, we do not find this argument persuasive.

Admittedly, several of the statements contained in Finding No. 17 do refer to the "Defendants" rather than specifically referring to one defendant or the other. For example, the Commission found that "Defendants . . . assisted Plaintiff in his move to an apartment after he moved from the home of Mr. and Ms. Wright that Defendant-Employer had renovated for him after living there for approximately six months;" that "Defendants . . . provided Plaintiff an advance payment to assist with the rent on his apartment for the first year after he moved to his own apartment;" and that "Defendants agreed to take a credit in the future in the amount of the advance payment if Plaintiff's case was resolved." However, acceptance of Plaintiff's contention that Defendant Zurich American is improperly getting credit for actions taken by Defendant McGee Brothers would require us to

speculate concerning the extent, if any, to which the two defendants communicated about Plaintiff's claim, agreed on a defense strategy, or worked together in other ways. In addition, the fact that the Commission mentioned several actions by Plaintiff's employer in its order does not establish that, in making its ultimate decision to deny Plaintiff's motion for attorney's fees, the Commission could not or did not separate the respective actions taken by the two defendants. Thus, we conclude that the Commission did not err by listing certain actions taken by Plaintiff's employer, rather than by the insurance carrier in Finding of Fact No. 17 and that Plaintiff's final challenge to the trial court's decision lacks merit.

III. Conclusion

As a result, for the reasons set forth above, we conclude that the Commission did not commit any error in denying Plaintiff's motion for attorney's fees. Thus, the Commission's order should be, and hereby is, affirmed.

AFFIRMED.

Judges CALABRIA and THIGPEN concur.

JOSE CLEMENTE HERNANDEZ GONZALEZ, EMPLOYEE, PLAINTIFF v. JIMMY WORRELL D/B/A WORRELL CONSTRUCTION, NONINSURED, AND PATRICK LAMM AND CO., LLC, EMPLOYER, AND TRAVELERS INDEMNITY CO., BUILDERS MUTUAL INSURANCE CO., SCOTT INSURANCE AGENCY, SWISS REINSURANCE COMPANY, CINCINNATI INSURANCE CO., CARRIERS, DEFENDANTS

No. COA11-1405

(Filed 19 June 2012)

1. Workers' Compensation—improper cancellation of policy—failure to show statutory procedure completed

The Industrial Commission did not err in a workers' compensation case by concluding that defendant Cincinnati had not properly cancelled a policy that Worrell held with it, thus making the policy still in effect on the date of plaintiff's accident. Cincinnati was unable to produce evidence showing that it completed, not just began, the cancellation process described in N.C.G.S. § 58-36-105(b).

2. Workers' Compensation—policy did not lapse—failure to send notice of nonrenewal

The Industrial Commission did not err in a workers' compensation case by concluding that Worrell's policy with Cincinnati did not lapse and was still effective once Worrell paid for the renewal. Cincinnati did not contend that it sent a notice of nonrenewal to Worrell 45 days prior to the 6 September 2008 expiration date of his policy.

3. Workers' Compensation—temporary total disability benefits—renewal of policy—acceptance of premiums

The Industrial Commission did not err in a workers' compensation case by concluding that Worrell's policy with Cincinnati was renewed when Scott accepted the premium payment and thus that policy was in effect on the date of plaintiff's accident. Under the circumstances, Worrell was justified in believing that Cincinnati had conferred on Scott the power to accept renewal payments on its behalf since Cincinnati permitted Scott to sell its policies to Worrell for years. Accordingly, Cincinnati was liable to plaintiff for his temporary disability benefits.

4. Workers' Compensation—statutory employer—failure to get certificate of insurance for project

The Industrial Commission did not err in a workers' compensation case by addressing the issue of plaintiff's statutory employer under N.C.G.S. § 97-19 or by finding that Builders Mutual would be liable in the event that Cincinnati defaulted on payments to plaintiff. Lamm did not get a certificate of insurance from Worrell specifically for this project in compliance with the statute. The statute explicitly held Lamm liable to the same extent as Cincinnati due to its failure to comply with N.C.G.S. § 97-19.

Judge STEELMAN concurring in part and dissenting in part.

Appeal by Defendant Cincinnati Insurance Company and cross-appeal by Defendants Patrick Lamm and Co., LLC and Builders Mutual Insurance Co. from opinion and award entered 5 August 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 April 2012.

Thomas and Farris, P.A., by Albert S. Thomas, Jr. and Allen G. Thomas; Blake Law Firm, P.L.L.C., by Paul N. Blake, III; and Morrison Law Firm, PLLC, by B. Perry Morrison, Jr., for Plaintiff.

Lewis & Roberts, PLLC, by Jeffrey A. Misenheimer, Sarah C. Blair, and Melissa K. Walker, for Defendant Patrick Lamm and Co., LLC and Builders Mutual Insurance Co.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Shelley W. Coleman and M. Duane Jones, for Defendant Travelers Indemnity Co.

Womble Carlyle Sandridge & Rice, by Philip J. Mohr, for Defendant Cincinnati Insurance Co.

BEASLEY, Judge.

Defendant Cincinnati Insurance Co. (Cincinnati) appeals from a 5 August 2011 opinion and award of the North Carolina Industrial Commission (the Commission). Defendants Patrick Lamm and Co., LLC (Lamm) and Builders Mutual Insurance (Builders Mutual) cross-appeal from the same decision. For the following reasons, we affirm.

Jose Clemente Hernandez Gonzalez (Plaintiff) began to work for Jimmy Worrell d/b/a Worrell Construction (Worrell) in 1999. Plaintiff initially worked as a carpenter's helper, but over time learned the skills needed for a promotion first to carpenter, and then to crew leader. On the morning of 24 March 2009, Plaintiff rode as a passenger in Worrell's vehicle, along with several other employees of Worrell's, to a job site at Lake Gaston in Virginia. Lamm was the general contractor for this work assignment. On the way home at the end of the work day, another employee drove Worrell's vehicle off the road and into a tree. Plaintiff was seated in the front passenger seat at the time of the accident. Plaintiff was severely injured in the accident and is now a quadriplegic, totally dependent on others for all daily functions. Plaintiff has been completely disabled from work of any kind since the accident.

On 22 May 2009, Plaintiff filed a Form 18 with the Commission reporting his injury and a Form 33 requesting that his claim be assigned for hearing. The matter was heard before Deputy Commissioner Adrian Phillips on 6, 7 and 8 April and 26 July 2010. Deputy Commissioner Phillips filed an opinion and award on 13

December 2010 finding Cincinnati and Lamm jointly and severally liable to Plaintiff for his injury, and ordering, *inter alia*, that Cincinnati and Builders Mutual (Lamm's insurance carrier) pay Plaintiff temporary disability benefits beginning 24 March 2009 and continuing until further order of the Commission.

Lamm and Builders Mutual filed a motion for reconsideration on 14 December 2010, requesting that Deputy Commissioner Phillips modify the award. Cincinnati filed a motion for reconsideration as well, arguing that Cincinnati should not be liable because it had cancelled its policy with Worrell and that Lamm should remain liable for Plaintiff's injuries so his motion should be denied. Deputy Commissioner Phillips filed an order on 7 January 2011 stating that the 13 December 2010 opinion and award would stand as entered. On 9 January 2011, Lamm and Builders Mutual appealed to the Full Commission. Cincinnati also filed a notice of appeal on 14 January 2011. The matter was reviewed by the Commission on 2 June 2011. In an opinion and award filed 5 August 2011, the Commission affirmed Deputy Commissioner Phillips' decision with minor modifications. The Commission ordered that Cincinnati pay Plaintiff disability benefits, and that Builders Mutual would only become liable for these payments in the event that Cincinnati defaults. Cincinnati filed a notice of appeal of the Commission's decision with this Court on 24 August 2011. Lamm and Builders Mutual filed a cross-appeal on 30 August 2011.

I. Standard of Review

While reviewing decisions of the Commission, "appellate courts must examine whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law. The Commission's findings of fact are conclusive on appeal when supported by such competent evidence, even though there is evidence that would support findings to the contrary." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.3d 695, 700 (2004) (citations, quotations, and brackets omitted). The Commission's conclusions of law are reviewed *de novo*. *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000).

II. Cincinnati's Appeal

[1] We first address the issues raised by Cincinnati's appeal of the Commission's decision. Cincinnati argues that the Commission erred in concluding that it had not properly cancelled the policy that

Worrell held with it and so the policy was still in effect on the date of Plaintiff's accident.[1] We disagree.

The Commission concluded that Cincinnati's policy was still in effect at the time of Plaintiff's accident and thus Cincinnati was the carrier on the risk for Worrell's employees, including Plaintiff. In so concluding, the Commission relied on N.C. Gen. Stat. § 58-36-105(b) (2011), which provides that any cancellation of workers' compensation insurance "is not effective unless written notice of cancellation has been given by registered or certified mail, return receipt requested, to the insured not less than 15 days before the proposed effective date of cancellation . . . no cancellation by the insurer shall be effective unless and until such method is employed and *completed*." (emphasis added).

Cincinnati asserts that it sent Worrell a notice of cancellation which stated the policy would be cancelled as of 21 November 2007. Although Cincinnati contends that it complied with the statute by sending the notice of cancellation by certified mail with return receipt, it could not produce evidence that the process was ever completed. Cincinnati was unable to produce the "green card" that would have been attached to the envelope and returned with the signature of Worrell, or whoever received the letter, providing proof of service. An employee of the United States Postal Service stated, through deposition testimony, that she ran a search of the tracking number of this mailing and saw that it was delivered on 5 November 2007, but could not retrieve a "green card" to verify a signature of acceptance. Further, the employee stated that if a person sent certified mail with a return receipt they would get a "green card" back.

Based on the foregoing, we find that the Commission did not err in concluding that Worrell's policy with Cincinnati was not properly cancelled because Cincinnati was unable to produce evidence showing that it *completed*, not just began, the cancellation process described in N.C. Gen. Stat. § 58-36-105(b).

[2] Cincinnati also argues that even if the policy was not properly cancelled on 21 November 2007, it expired on its own terms on 6 September 2008 and so was not in effect when Plaintiff was injured. The Commission concluded that Worrell's policy with Cincinnati was renewed because Cincinnati did not send a non-renewal notice to

1. The Commission also found that Plaintiff was covered under Worrell's insurance policy on the date of the accident. Cincinnati does not appeal that finding so we need not address it here.

Worrell 45 days prior to renewal as required by N.C. Gen. Stat. § 58-36-110(b) and Worrell paid the premium for renewal to the Scott Insurance Agency (Scott) to renew his policy for the 2008-09 period, as he had done for the years prior.

N.C. Gen. Stat. § 58-36-110 provides guidelines for how an insurer may give notice to its insured of nonrenewal of a policy. The statute states that "any nonrenewal attempted or made that is not in compliance with this section is not effective." N.C. Gen. Stat. § 58-36-110(a) (2011). For a policy such as Worrell's, that has been written for a term of one year or less, notice may be given "at the policy's expiration date by mailing written notice of nonrenewal to the insured not less than 45 days prior to the expiration date of the policy." N.C. Gen. Stat. § 58-36-110(b) (2011). Cincinnati argues that § 58-36-110(b) does not apply here because the policy lacks a provision that compels renewal unless a notice of nonrenewal is sent. *See Lingerfelt v. Advance Transportation, Inc.*, (COA11-983, February 7, 2012) (unpublished decision) (declining to apply § 58-36-100(b) where "the parties have not manifested a mutual assent to a term or condition specifically regarding renewal in the negotiated policy.")

However, a close reading of Worrell's 2007-08 policy with Cincinnati shows that it contains a provision almost identical to the statute. In the North Carolina Amended Coverage Endorsement, section D(3)(a), it states that Cincinnati may refuse to renew the policy and "[i]f this policy is for a term of one year or less, [Cincinnati] must provide [the insured] with notice of nonrenewal at least 45 days prior to the expiration date of the policy." Cincinnati does not contend that it sent a notice of nonrenewal to Worrell 45 days prior to the 6 September 2008 expiration date of his policy. Therefore we uphold the Commission's conclusion that Worrell's policy with Cincinnati did not lapse and so was still effective once Worrell paid for the renewal.

[3] Cincinnati further argues that the payment from Worrell to Scott had "no effect on Cincinnati" because Scott was not Cincinnati's agent. The record shows that Scott acted as producer for the insurance policies between Worrell and Cincinnati from 2005-08. Worrell purchased all of these policies from Scott, and went through Scott to comply with Cincinnati's audit requests. Thus, Scott had apparent authority to bind Cincinnati to an insurance agreement with Worrell.

> An agent's apparent authority is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses. . . . A principal's liability

> in any particular case must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances, conferred upon his agent.

Ward v. Durham Life Ins. Co., 325 N.C. 202, 212, 381 S.E.2d 698, 703 (1989) (internal citations, brackets, and quotations omitted). Cincinnati permitted Scott to sell its policies to Worrell for years, and to bind Cincinnati based on those sales. Under the circumstances, Worrell was justified in believing that Cincinnati had conferred on Scott the power to accept renewal payments on its behalf. Thus, we affirm the Commission's conclusion that Worrell's policy with Cincinnati was renewed when Scott accepted the premium payment and thus that policy was in effect on the date of Plaintiff's accident. Accordingly, Cincinnati is liable to Plaintiff for his temporary disability benefits.

III. Lamm's Appeal

[4] We now address the issues raised by Lamm's appeal of the Commission's decision. Lamm argues that the Commission improperly addressed the issue of Plaintiff's statutory employer under N.C. Gen. Stat. § 97-19 and erred by finding that Builders Mutual would be liable in the event that Cincinnati defaulted on payments to Plaintiff. We disagree.

Pursuant to N.C. Gen. Stat. § 97-19 (2011),

> [a]ny principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by a workers' compensation insurance carrier, or a certificate of compliance issued by the Department of Insurance to a self-insured subcontractor, stating that such subcontractor has complied with G.S. 97-93 hereof, shall be liable . . . to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract.

The Commission found that Lamm was the general contractor for the job that Plaintiff was working on when injured on 24 March 2009. Lamm did not get a certificate of insurance from Worrell specifically

for this project in compliance with the statute. Instead, Lamm relied on a certificate of insurance that Worrell had produced for an earlier job. Based on these factual findings, the Commission concluded Lamm became liable to the same extent as the subcontractor under § 97-19 when it failed to obtain the certificate of insurance for the project.

Lamm first contends that the Commission should not have addressed this issue because Worrell, the subcontractor, was found to have workers' compensation insurance covering Plaintiff. For this assertion, Lamm relies on *Patterson v. Markham & Assocs.*, 123 N.C. App. 448, 474 S.E.2d 400 (1996). In *Patterson*, this Court held that for a principal contractor to become a statutory employer under § 97-19, (i) the injured employee must be working for a subcontractor that is doing work for a principal contractor, and (ii) the subcontractor must not have workers' compensation insurance which covers the injured employee. *Id.* at 452, 474 S.E.2d at 402. Because the subcontractor in *Patterson* had insurance that covered the injured employee, we held that the principal contractor could not be held liable as a statutory employer. *Id.* at 453-54, 474 S.E.2d at 403.

Patterson is easily distinguishable from the case *sub judice*. In *Patterson* there was evidence that when the injured employee began work on the principal contractor's project, the principal contractor received a certificate of insurance covering that employee from the subcontractor. *Id.* Thus, the principal contractor in *Patterson* fully complied with § 97-19. Here, it is undisputed that Lamm did not receive a certificate of insurance from Worrell for the project that Plaintiff was working on when injured, and consequently Lamm did not comply with § 97-19. Accordingly, *Patterson* is not applicable here.

Lamm also argues that holding Builders Mutual liable in the event that Cincinnati defaults on its payments to Plaintiff is contrary to both the legislative intent of the Workmen's Compensation Act and public policy. This argument is unavailing. The statute explicitly holds Lamm liable to the same extent as Cincinnati due to its failure to comply with § 97-19. The application of the terms of a statute cannot be said to be contrary to legislative intent. Further, Lamm contends that the Commission's award could entice Cincinnati to intentionally default to transfer its liability to Builders Mutual. This argument is similarly meritless, as Lamm—and thus by extension its insurance carrier Builders Mutual—is liable to the same extent as Cincinnati under the statute. Having to compensate Plaintiff due to that liability would not be contrary to public policy.

Affirmed.

Judge CALABRIA concurs.

Judge STEELMAN concurs in part and dissents in part.

STEELMAN, Judge, concurring in part and dissenting in part.

I fully concur with the first portion of the majority opinion holding that plaintiff's employer had worker's compensation insurance through Cincinnati Insurance Company on the date of the accident. I must respectfully dissent from the portion of the majority opinion affirming the holding of the Industrial Commission that Lamm was a statutory employer pursuant to N.C. Gen. Stat. § 97-19, and that its worker's compensation carrier, Builders Mutual Insurance Company is secondarily liable.

The purpose of N.C. Gen. Stat. § 97-19 was described in the case of *Greene v. Spivey*, 236 N.C. 435, 73 S.E.2d 488 (1952):

> The manifest purpose of this statute, enacted as an amendment to the original Workmen's Compensation Act, is to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on principal contractors, intermediate contractors, or subcontractors, who, presumably being financially responsible, have it within their power, in choosing subcontractors, to pass upon their financial responsibility and insist upon appropriate compensation protection for their workers.

Id. at 443, 73 S.E.2d at 494.

Thus, the purpose of N.C. Gen. Stat. § 97-19 is to make sure that the statutorily mandated worker's compensation insurance is in effect for all workers, by placing the burden upon the principal contractor to make sure that its subcontractors have the required insurance. The mechanism by which a principal contractor can protect itself from becoming a statutory employer is by obtaining a certificate of insurance.

The issue presented in the instant case is whether the certificate of insurance or the fact that the subcontractor actually had insurance that covered the plaintiff's injury is controlling in determining whether Lamm is liable as a statutory employer. Clearly, Lamm failed to obtain the certificate of insurance for the particular job upon which the plaintiff was injured. *Robertson v. Hagood Homes, Inc.*,

160 N.C. App. 137, 147, 584 S.E.2d 871, 877 (2003) ("Nor was the defendant's act of requiring a certificate for the first contract that they sublet to [the subcontractor] sufficient to demonstrate compliance with G.S. § 97-19 as regards the later contract."). However, this does not end our inquiry.

> G.S. 97-19 applies only when two conditions are met. First, the injured employee must be working for a subcontractor doing work which has been contracted to it by a principal contractor. Second, the subcontractor does not have workers' compensation insurance coverage covering the injured employee. When these two conditions are met, the principal contractor becomes liable to the subcontractor's employee for payment of workers' compensation benefits.

Rich v. R. L. Casey, Inc., 118 N.C. App. 156, 159, 454 S.E.2d 666, 667 (1995) (citation omitted); *accord Patterson v. Markham & Assocs.*, 123 N.C. App. 448, 452, 474 S.E.2d 400, 402 (1996).

These cases clearly hold that for a principal contractor to be liable as a statutory employer under N.C. Gen. Stat. § 97-19, the subcontractor must have no worker's compensation insurance. The certificate of insurance discussed in the statute is simply a means by which a principal contractor may protect itself from liability as a statutory employer, but is not in and of itself determinative of liability. Unless the subcontractor is not insured, there is no liability.

Rich and *Patterson* clearly state the applicable principles in their two-part test. This court is bound by these holdings. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36–37 (1989). These cases enunciate specific principles of law, which are not dependent upon the facts of those cases.

I would reverse the holding of the Industrial Commission, imposing liability upon Lamm and Builders Mutual.

IN RE J.E.M.

[221 N.C. App. 361 (2012)]

IN THE MATTER OF: J.E.M., JR.

No. COA12-72

(Filed 19 June 2012)

Termination of Parental Rights—grounds—repetition of neglect—failure to pay child support—best interests of child

The trial court did not err by finding that grounds existed to terminate respondent father's parental rights. The trial court's finding as to the probability of repetition of neglect was supported by substantial evidence. Further, the trial court's finding as to the father's ability to pay for the child was sufficiently specific when the father paid no child support. Termination of parental rights was in the best interest of the child.

Judge BEASLEY dissenting.

Appeal by father from orders entered 3 November 2011 by Judge William F. Southern, III in Surry County District Court. Heard in the Court of Appeals 14 May 2012.

H. Lee Merritt, Jr. for petitioner-appellee Surry County Department of Social Services.

Peter Wood for respondent-appellant father.

Parker Poe Adams & Bernstein LLP by Ashley A. Edwards for guardian ad litem.

STEELMAN, Judge.

The trial court's finding as to the probability of the repetition of neglect was supported by substantial evidence in the record. The trial court's finding as to father's ability to pay support for the child was sufficiently specific, when father paid no child support. Father does not contest that termination of parental rights was in the best interest of the child.

I. Factual and Procedural Background

On 17 September 2010, the Surry County Department of Social Services (DSS) filed a petition alleging that J.E.M., Jr. was a neglected and dependent juvenile. The petition alleged that: (1) the juvenile's paternal grandmother, who had been his caretaker since birth, was no longer able to take care of him due to her health; (2) the father's home

was cluttered, in need of repair, and lacked power; (3) father tested positive for drugs for which he did not have a prescription; (4) the parents failed to comply with a case services plan; (5) mother suffered from physical and psychological health problems resulting from a car accident; and (6) both of the juvenile's parents indicated they were unable to provide proper care for the juvenile and there were no alternative caregivers. DSS took J.E.M., Jr. into nonsecure custody on the same day. On 19 November 2010, the trial court entered an order adjudicating the juvenile neglected and dependent. The trial court entered a separate disposition order in which it kept the juvenile in the custody of DSS.

On 19 August 2011, DSS filed a motion to terminate parental rights. DSS alleged that grounds existed to terminate father's parental rights due to: (1) neglect; (2) dependency; (3) willfully leaving the juvenile in foster care without showing reasonable progress to correct the conditions that led to removal; and (4) willful failure to pay a reasonable portion of the cost of care for the juvenile. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (6) (2011).

The trial court conducted a hearing on 5 October 2011. Prior to the hearing, mother relinquished her parental rights and consented to an adoption. DSS advised the court that father did not wish to contest the allegations in the motion, and his counsel concurred.

DSS then called Andrea Bradshaw, a DSS social worker, to be sworn "that the allegations set forth in the Petition . . . are true and correct." DSS relied on the allegations in the motion and did not present additional evidence. Neither the guardian ad litem (GAL) nor father presented any evidence at the adjudication hearing.

The trial court then proceeded to the disposition phase of the hearing. DSS did not present further evidence. The GAL submitted a written disposition report, but did not testify. Father called three witnesses to testify.

On 3 November 2011, the trial court entered an order, finding the following grounds for termination: (1) neglect; and (2) willful failure to pay a reasonable portion of the cost of care for the juvenile. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (3). In a separate disposition order, the trial court concluded that termination of father's parental rights was in the juvenile's best interest.

Father appeals.

II. Analysis

In his only argument on appeal, father contends that the trial court erred in finding grounds to terminate parental rights. We disagree.

"The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent." N.C. Gen. Stat. § 7B-1109(e) (2011). The burden is on the petitioner to prove the allegations of the termination petition by clear, cogent, and convincing evidence. N.C. Gen. Stat. § 7B-1109(f) (2011).

A. Neglect

Father argues that there was no evidence before the court about the father's current conditions to support a finding of neglect.[1]

"In deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child at the time of the termination proceeding." *In re L.O.K., J.K.W., T.L.W., & T.W.L.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (internal quotation marks omitted). Termination may not be based solely upon past conditions that no longer exist. *Id.*

Nevertheless, where a child has not been in the custody of the parents for a significant period of time prior to the termination hearing, requiring the petitioner to show that the child is currently neglected would make termination of parental rights impossible. *Id.* "In those circumstances, a trial court may find that grounds for termination exist upon a showing of a history of neglect by the parent and the probability of a repetition of neglect." *Id.* (internal quotation marks omitted).

In the instant case, DSS's evidence consisted of the testimony of a social worker who was sworn to the facts set out in the petition. This evidence showed past neglect, which father does not challenge.

As to the probability of a repetition of neglect, the trial court found that "[i]t is likely that the neglect would be repeated if the juve-

1. The dissent argues that the trial court erred in relying on oral verification of written reports and on DSS's motion. The dissent also concludes that the trial court failed to conduct a proper hearing. We note that father does not make these arguments on appeal. "It is not the role of the appellate courts . . . to create an appeal for an appellant." *In re J.D.S.*, 170 N.C. App. 244, 252, 612 S.E.2d 350, 355 (2005). An appellate court cannot be both an advocate for one of the parties, and at the same time be an impartial arbiter of the case.

nile was returned to the father." This finding is supported by evidence that father made no effort to visit his son in the five months prior to the hearing. Father met with a parenting class instructor only once, even though parenting classes were a part of his case plan. Father testified to doing odd jobs that constituted only part-time employment.

We have previously upheld findings that there is a probability of repetition of neglect where the respondent failed to obtain counseling, maintain a stable home and employment, and attend parenting classes. *In re Davis*, 116 N.C. App. 409, 413-14, 448 S.E.2d 303, 306 (1994).

The trial court's findings of fact as to the probability of a repetition of neglect were supported by clear, cogent, and convincing evidence.

B. Failure to Pay Child Support

Father argues that the evidence was not specific enough to support a finding that father failed to pay child support.

The trial court may terminate parental rights if the juvenile has been placed in the custody of a county department of social services, and the parent "has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so." N.C. Gen. Stat. § 7B-1111(a)(3). The trial court must examine the child's reasonable needs and the parent's ability to pay. *In re Anderson*, 151 N.C. App. 94, 99, 564 S.E.2d 599, 603 (2002).

We have held that the trial court may not simply recite allegations from the petition as its findings of fact. *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004). "[T]he trial court must, through processes of logical reasoning, based on the evidentiary facts before it, find the ultimate facts essential to support the conclusions of law." *Id.* (internal quotation marks omitted).

However, "there is no requirement that the trial court make a finding as to what specific amount of support would have constituted a reasonable portion under the circumstances." *In re Huff*, 140 N.C. App. 288, 293, 536 S.E.2d 838, 842 (2000) (internal quotation marks omitted). In *Huff*, the trial court found that the parents failed to pay any portion of the child care cost. *Id.* We held that "zero is not a reasonable portion under the circumstances here." *Id.*

In the instant case, the trial court found that father made no child support payments since the child was placed in DSS custody. It fur-

ther found that father "has been gainfully employed from time to time." Finally, it found that father has been physically and financially able to make some payment, but has not done so.

On appeal, father did not argue that the trial court erred in determining that termination of parental rights was in the best interest of the child. The trial court did not err in finding that father willfully failed to pay child support.

AFFIRMED.

Judge CALABRIA concurs.

Judge BEASLEY dissents in separate opinion.

BEASLEY, Judge, dissenting.

After a careful review of the record, I believe that the trial court failed to meet the statutory requirement in N.C. Gen. Stat. § 7B-1109(e). Accordingly, I would reverse the orders of the trial court and remand the case for a new hearing.

In the one issue raised on appeal, Respondent specifically argues that "the trial court erred when it found grounds to terminate parental rights when those grounds were not supported by clear, cogent and convincing evidence." The majority opinion is correct that Respondent does not contest that termination of parental rights was in the best interest of the child. However, Respondent does contest the inadequacy of the trial court's findings of fact for the trial court to ultimately determine whether termination of parental rights is in the child's best interest. Respondent specifically argues that "there was no evidence before the court about [Respondent's] current conditions" to support a finding of neglect or that Respondent failed to pay child support. Assuming *arguendo* that such evidence was presented, the trial court did not make sufficient findings of fact.

Our juvenile code mandates that "[t]he burden is on the petitioner to prove the allegations of the termination petition by clear, cogent, and convincing evidence." *In re R.B.B.*, 187 N.C. App. 639, 643, 654 S.E.2d 514, 518 (2007) (citing N.C. Gen. Stat. § 7B-1109(f)). Our juvenile code, in turn, also places a duty on the trial court as the adjudicator of the evidence. It mandates that "[t]he court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which

authorize the termination of parental rights of the respondent." N.C. Gen. Stat. § 7B-1109(e) (2011). Thus, this Court has held that a trial court must make an independent determination of whether grounds authorizing termination of parental rights existed at the time of the hearing. *See In re A.M.*, 192 N.C. App. 538, 541-542, 665 S.E.2d 534, 536 (2008) ("The key to a valid termination of parental rights on neglect grounds where a prior adjudication of neglect is considered is that the court must make an *independent* determination of whether neglect authorizing the termination of parental rights existed at the time of the hearing.") (internal quotation marks omitted); *see also In re N.B.*, 195 N.C. App. 113, 117-18, 670 S.E.2d 923, 926 (2009) (extending the analysis in *A.M.* to other grounds for termination). As part of this duty, the trial court must hear oral testimony presented by the petitioner and may not rely solely on written reports, prior court orders, and the attorneys' oral arguments in rendering its decision. *In re A.M.*, 192 N.C. App. at 542, 665 S.E.2d at 536. Our review in termination of parental rights cases is "whether the court's findings of fact are based upon clear, cogent and convincing evidence and whether the findings support the conclusions of law." *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000) (internal quotations and citation omitted).

In the instant case, DSS's only evidence consisted of a social worker who was "sworn to the facts set out in the Petition."[1] The social worker's statement was nearly identical to her verification of the motion to terminate parental rights, which she had already completed on 15 August 2011, and it bore little resemblance to oral testimony proffered by the petitioner. Therefore, I would conclude that the social worker's verification was not sufficient to discharge the trial court's duty to make an independent determination of the facts before it.

Additionally, this Court has held that as part of the trial court's duty to make an independent determination, "the trial court may not simply recite allegations from the petition as its findings of fact." *In re S.C.R.*, ___ N.C. App. ___, ___, 718 S.E.2d 709, 712 (2011). "[T]he trial court must, through 'processes of logical reasoning,' based on the evidentiary facts before it, 'find the ultimate facts essential to support the conclusions of law. *In re O.W.*, 164 N.C. App. 699, 702, 596

1. Even more problematic is the fact that the social worker's statement does not appear on the face of the transcript. Rather, the transcript contains the following parenthetical notation: "(WHEREUPON: Ms. Andrea Bradshaw was duly sworn to the facts set out in the Petition.)"

S.E.2d 851, 853 (2004). (quoting *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003)). The findings "must be the 'specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence.' " *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (internal quotations and citation omitted).

Here, the trial court's ultimate findings of fact are contained in Finding of Fact Number 8, subparts a through f. The findings purport to demonstrate that (1) the juvenile was neglected because Respondent failed to complete various aspects of the family services case plan with DSS and (2) Respondent was physically and financially able to make some child support payments but failed to do so. As expected, several of the findings are verbatim recitations of the allegations contained in DSS's motion to terminate Respondent's parental rights. Even more problematic are Findings of Fact Numbers 8(a), 8(c), and 8(f) contain factual findings which do not appear in DSS's termination motion. Given that DSS failed to present any oral testimony, it would appear that these new findings of fact were based solely on documentary evidence, which runs afoul of *A.M.*, or were based on dispositional testimony presented by Respondent. Although Respondent presented three witnesses at the hearing, including himself, all of his evidence was presented during the dispositional stage of the proceedings. We have held that the trial court need not conduct a separate hearing for adjudication and disposition, so long as it applies to the appropriate standard of proof at each stage. *In re White*, 81 N.C. App. 82, 85, 344 S.E.2d 36, 38 (1986). However, here it is clear that none of the parties presented any evidence at adjudication beyond the allegations contained in the petition and that Respondent's evidence was offered solely for the dispositional stage of the proceedings. Given the different standards of proof applicable to the two stages, as well as DSS's decision to rest solely on the allegations contained in its termination motion, any evidence offered by Respondent could not be used by the trial court in rendering its decision that DSS established grounds for termination by clear, cogent, and convincing evidence.

Furthermore, this Court has held that our juvenile code does not authorize default type orders terminating parental rights or summary dispositions. *In re J.N.S.*, 165 N.C. App. 536, 539, 598 S.E.2d 649, 650-51 (2004); *In re Tyner*, 106 N.C. App. 480, 483-84, 417 S.E.2d 260, 261-62 (1992). In *In re J.N.S.*, we reasoned that

> Chapter 7B of the North Carolina General Statutes contains absolutely no provision allowing for the use of a summary judgment motion in a juvenile proceeding. In fact, the provisions of Chapter 7B implicitly prohibit such use by imposing on the trial court the duty to hear the evidence and make findings of fact on the allegations contained in the juvenile petition. . . . This duty is incompatible with the law on summary judgment, which rests on the non-existence of genuine issues of fact *prior to a hearing on the merits*. . . . Summary judgment on the existence of grounds for termination of parental rights listed in N.C. Gen. Stat. § 7B–1111 is therefore contrary to the procedural mandate set forth in our juvenile code.

J.N.S., 165 N.C. App. at 539, 598 S.E.2d at 650-51 (internal citations omitted).

Although Respondent did not contest DSS's case-in-chief, the instant case was not, strictly speaking, a default or summary proceeding. Nevertheless, I find the analysis in *J.N.S.* and *Tyner* instructive. Therefore, I would find that Respondent's decision not to contest DSS's case does not obviate the trial court's duty to conduct a hearing, hear oral testimony, and make an independent determination of the facts at issue. Nor does it obviate DSS's duty to meet its burden of proving the existence of grounds for termination by clear, cogent, and convincing evidence. Therefore, I would conclude that the trial court failed to meet the statutory requirement that it "take evidence, find the facts, and shall adjudicate the existence or nonexistence of [grounds for termination]." N.C. Gen. Stat. § 7B-1109(e).

SHANNON FATTA, PLAINTIFF v. M & M PROPERTIES MANAGEMENT, INC., DEFENDANT

No. COA11-1397

(Filed 19 June 2012)

Employer and Employee—Retaliatory Employment Discrimination Act—wrongful termination

The trial court did not err in a Retaliatory Employment Discrimination Act and wrongful termination case by granting summary judgment in favor of defendant. Although plaintiff contended that the paperwork related to plaintiff's poor performance was generated subsequent to plaintiff's report of an injury and threat to file a workers' compensation claim, plaintiff was unable to overcome defendant's evidence that it was plaintiff's poor job performance noted at the very beginning of his training and throughout his employment that led to his termination.

Appeal by plaintiff from order entered 10 March 2011 by Judge Christopher M. Collier in Iredell County Superior Court. Heard in the Court of Appeals 21 March 2012.

Shannon Fatta, pro se plaintiff-appellant.

Fisher & Phillips, LLP, by Margaret M. Kingston, for defendant-appellee.

BRYANT, Judge.

Where the trial court did not err in granting defendant's motion for summary judgment as to plaintiff's Retaliatory Employment Discrimination Act and wrongful discharge claims, we affirm the order of the trial court.

Facts and Procedural History

Plaintiff Shannon Fatta was employed by defendant M & M Properties Management, Inc., from 18 January 2010 through 7 February 2010 as a property manager of Value Place Hotel in Shelby, North Carolina. Plaintiff alleged the following: on 21 January 2010, he was injured while cleaning a room as a part of his training; on 2 February 2010, he notified defendant of his injury; on 3 February 2010, defendant issued plaintiff a first and final written disciplinary documentation; on 7 February 2010, defendant terminated plaintiff's

employment; on 12 February 2010, plaintiff was diagnosed with having a hernia by a doctor in Statesville, North Carolina; and that same day—12 February 2010, five days after his termination, plaintiff filed a worker's compensation claim, Form 18, with the North Carolina Industrial Commission. Shortly thereafter, plaintiff filed a REDA complaint with the North Carolina Department of Labor ("NCDOL"). On 4 May 2010, plaintiff received a right-to-sue letter from the NCDOL.

On 6 July 2010, plaintiff filed a complaint against defendant alleging several causes of action relating to the Retaliatory Employment Discrimination Act ("REDA") and wrongful termination in violation of North Carolina public policy. On 18 February 2011, defendant filed a motion for summary judgment as to all claims. Following a hearing held on 28 February 2011, the trial court granted defendant's motion for summary judgment and dismissed plaintiff's claims with prejudice. From this order, plaintiff appeals.

Plaintiff presents the following issues on appeal: whether the trial court erred by granting defendant's motion for summary judgment where there were genuine issues of material fact regarding (I) plaintiff's REDA claim for his work injury; and (II) plaintiff's corresponding wrongful discharge claim. Because these arguments are closely related, we will address them together.

Standard of Review

"Summary judgment when sought 'shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Majestic Cinema Holdings, LLC v. High Point Cinema, LLC*, 191 N.C. App. 163, 165, 662 S.E.2d 20, 22 (2008) (citation omitted).

"[T]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true. . . ." *Rose v. Guilford County*, 60 N.C. App. 170, 173, 298 S.E.2d 200, 202 (1982) (citation omitted). However,

> the movant has the burden of establishing that there are no genuine issues of material fact. The movant can meet the burden by either: 1) Proving that an essential element of the opposing party's claim is nonexistent; or 2) Showing through discovery that

> the opposing party cannot produce evidence sufficient to support an essential element of his claim nor [evidence] sufficient to surmount an affirmative defense to his claim.

Noblot v. Timmons, 177 N.C. App. 258, 261, 628 S.E.2d 413, 414 (2006) (citation omitted). "On appeal, an order allowing summary judgment is reviewed *de novo*." *Carson v. Grassmann*, 182 N.C. App. 521, 523, 642 S.E.2d 537, 539 (2007) (citation omitted).

I and II

Plaintiff argues that the trial court erred by granting summary judgment in favor of defendant where there were genuine issues of material fact surrounding his REDA claim and corresponding wrongful discharge claim.

"The North Carolina [REDA] prohibits discrimination or retaliation against an employee for filing a worker's compensation claim." *Wiley v. UPS, Inc.*, 164 N.C. App. 183, 186, 594 S.E.2d 809, 811 (2004) (citation omitted). North Carolina General Statutes, section 95-241(a)(1)(a), provides that

> [n]o person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do any of the following: (1) File a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to any of the following: a. Chapter 97 of the General Statutes [(Workers' Compensation Act)].

N.C. Gen. Stat. § 95-241(a)(1)(a) (2011) (emphasis added). "[A] plaintiff may pursue both a statutory claim under REDA and a common law wrongful discharge claim based on a violation of REDA." *White v. Cochran*, ––– N.C. App. –––, –––, 716 S.E.2d 420, 426 (2011).

In bringing a REDA claim, a plaintiff "may either proceed using direct evidence or may rely on inferential proof" under a burden-shifting scheme. *Lilly v. Mastec N. Am., Inc.*, 302 F. Supp. 2d 471, 481 (M.D.N.C. 2004). "Under the burden-shifting model, plaintiff must first establish a *prima facie case*." *Id.* To accomplish this, plaintiff must show: "(1) that he exercised his rights as listed under N.C. Gen. Stat. § 95-241(a), (2) that he suffered an adverse employment action, and (3) that the alleged retaliatory action was taken because the employee exercised his rights under N.C. Gen. Stat. § 95-241(a)." *Wiley*, 164 N.C. App. at 186, 594 S.E.2d at 811. If plaintiff presents a *prima facie* case, the burden shifts to the defendant to "show that

there was a valid reason for any actions it took regarding him." *Lilly*, 302 F. Supp. 2d at 481 (citations omitted). Once defendant meets this burden, "plaintiff then has to demonstrate that the apparently valid reason was actually a pretext for discrimination." *Id.*

Plaintiff contends he was clearly engaged in a protected activity pursuant to N.C.G.S. § 95-241(a) when he notified Tony Cuomo, defendant's director of operations who oversaw plaintiff's training, that "he may intend to file a claim for workers' compensation."

Defendant, on the other hand, relying on *Whitings v. Wolfson Casing Corp.*, 173 N.C. App. 218, 618 S.E.2d 750 (2005), asserts that the action of *filing* a workers' compensation claim is the activity that triggers REDA protection. Defendant argues that plaintiff's statements do no more than forecast a potential action and do not by themselves warrant REDA protection. Defendant's reliance is misplaced. In *Whitings*, our Court held that the plaintiff's request that her employer pay for a medical evaluation of a work-related injury did not constitute a protected activity under REDA. We also concluded that because the plaintiff failed "to allege the filing of a workers' compensation claim *at any time* either prior or subsequent to her discharge, [the] plaintiff ha[d] failed to plead that she engaged in a legally protected activity." *Id.* at 223, 618 S.E.2d at 754.

In the instant case, plaintiff stated in his affidavit that he notified Cuomo of his work-related injury on 2 February 2010; told Cuomo that "before reporting the injury to workers' compensation I wanted to make sure it was not simply a pulled muscle that would go away[;]" and informed Cuomo that he would "file the appropriate paperwork to initiate a claim once I confirm the nature of the injury." On 3 February 2010, plaintiff received a first and final written warning from defendant; and on 7 February 2010, defendant terminated plaintiff stating "Lack of Demonstrated Leadership" as the reason. Five days after being terminated by defendant, plaintiff filed a worker's compensation claim.

Viewing the evidence in the light most favorable to plaintiff and taking all of his factual allegations as true, we hold the allegations are sufficient to support the first two elements of a *prima facie* case: that plaintiff engaged in a protected activity pursuant to N.C.G.S. § 95-241(a) by threatening to file a workers' compensation claim; and that he suffered from the adverse employment action of termination.

To satisfy the third prong in establishing a *prima facie* case, "a plaintiff may present evidence of close temporal proximity between

the protected activity and the adverse employment action, or a pattern of conduct." *Smith v. Computer Task Group, Inc.*, 568 F. Supp. 2d 603, 614 (M.D.N.C. 2008) (citation omitted); *see also Johnson v. Trustees of Durham Tech. Cmty. Coll.*, 139 N.C. App. 676, 682, 535 S.E.2d 357, 361 (2000). "[M]erely a closeness in time between the filing of a discrimination charge and an employer's firing an employee is sufficient to make a *prima facie* case of causality." *Shoaf v. Kimberly-Clark Corp*, 294 F. Supp. 2d 746, 756 (M.D.N.C. 2003). Here, plaintiff demonstrated that he was terminated from employment five days after informing defendant of his work-related injury and of his intention to file a worker's compensation claim, thereby fulfilling the last element of his *prima facie* case.

"The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *N.C. Dept. of Correction v. Gibson*, 308 N.C. 131, 138, 301 S.E.2d 78, 83 (1983) (citation omitted). Once a plaintiff establishes a *prima facie* case of discrimination, "the employer's burden is satisfied if he simply explains what he has done or produces evidence of legitimate nondiscriminatory reasons." *Id.* (citation omitted).

Defendant's President and Chief Operating Officer Glenn McFarland, stated in his affidavit that shortly after plaintiff began training on 18 January 2010, McFarland observed plaintiff's poor job performance. During the week of 25 January 2010, McFarland, defendant's district manager—Jenny Meyer, and defendant's regional operations manager—Mark Caney, all communicated about plaintiff's performance deficiencies. Specifically, they addressed "his fatigue and constant yawning throughout training[,]" and poor phone answering skills. Meyer stated in her affidavit that during training, defendant was difficult to train, appeared tired and fatigued throughout training, was not assertive at the front desk, and failed to understand cleanliness standards taught during training. Meyer stated that her concerns about defendant's performance began on the first day he trained with her, 25 January 2010. During the first week of training, Meyer, McFarland, and Caney agreed to issue defendant a written Corrective Action and planned on issuing it on 3 February 2010.

Defendant's written warning to plaintiff explained that plaintiff had been late for work on several occasions, had been taking an excessive number of breaks from work each day, failed to demonstrate that he had learned defendant's workplace standards, and that plaintiff's lack of leadership was a concern to defendant. In plaintiff's

termination letter, defendant stated that plaintiff's lack of demonstrated leadership, reflected through his tardiness during training, lack of demonstrated initiative, dealings with challenging customers, phone skills, and inability to embrace defendant's concepts versus trying to incorporate aspects of full service hotels, were the reason supporting plaintiff's termination.

Based on the foregoing, defendant has demonstrated several legitimate, non-retaliatory grounds for plaintiff's termination. This is sufficient to successfully rebut plaintiff's *prima facie* case. "Plaintiff now bears the burden of proving that [d]efendant's proffered reason was mere pretext for retaliation by showing 'both that the reason was false and that discrimination was the real reason' for the challenged conduct." *Shoaf*, 294 F. Supp. 2d at 757-58 (citation omitted) (stating that plaintiff "cannot rely on temporal proximity alone to establish pretext.").

In determining the suitability of summary judgment in this type of case, our United States Supreme Court has stated the following:

> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148-49, 147 L. Ed. 2d 105, 120-21 (2000). "[I]t is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Enoch v. Alamance County Dep't of Soc. Servs.*, 164 N.C. App. 233, 242, 595 S.E.2d 744, 752 (2004) (citing *Reeves*, 530 U.S. at 147, 147 L. Ed. 2d at 119).

In the present case, plaintiff asserts that he can establish pretext through circumstantial evidence and temporal proximity. Plaintiff was terminated five days after reporting his work-related injury to Cuomo. Plaintiff argues he was given a first and final written warning on 3 February 2010, one day after he informed defendant of his injury; that he was given permission to sit down, but was terminated in part for sitting down; that on 3 February 2010, after speaking with another manager-in-training, plaintiff believed his paycheck was withheld while other managers were paid; that defendant did not offer to provide treatment for plaintiff's injury; and that after plaintiff's termina-

tion, defendant posted online an open position for property manager that had an additional job requirement of the ability to perform housekeeping functions. Moreover, plaintiff argues that all the paperwork relating to plaintiff's poor performance was generated after plaintiff reported his injury and made a threat to file a workers' compensation claim. Plaintiff contends that the foregoing evidence creates genuine issues of material fact regarding pretext.

With the exception of plaintiff's argument that all paperwork relating to plaintiff's poor performance was generated subsequent to plaintiff's report of his injury and threat to file a workers' compensation claim, none of plaintiff's circumstantial evidence establishes that defendant's stated grounds for plaintiff's termination were false. Further, plaintiff does not address defendant's explanation for why defendant fired him. As to plaintiff's evidence concerning the absence of documented evidence predating his injury report, affidavits from defendant's employees indicate their observations of and discussions surrounding plaintiff's poor job performance, which poor performance was noted at the very beginning of his training and throughout his employment.

We note that "a plaintiff's own assertions of discrimination in and of themselves are insufficient to counter substantial evidence of legitimate nondiscriminatory reasons for an adverse employment action. It is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff." *Shoaf*, 294 F. Supp. 2d at 758 (quotations and citations omitted). "Even in discrimination cases where motive and intent are critical to the analysis, summary judgment may be appropriate if the non-moving party rests merely upon conclusory allegations, improbable inferences and unsupported speculation." *Id.* at 759 (citation and internal quotations omitted).

Here, plaintiff relies on weak inferences and unsupported speculation; plaintiff is unable to overcome defendant's evidence that it was plaintiff's poor, deficient job performance that led to his termination. While plaintiff attempts to meet his burden with conclusory allegations, he does not establish that defendant's stated reason for termination was false or a pretext for illegal discrimination.

Viewing the evidence in the light most favorable to plaintiff, there is no genuine issue of material fact with respect to the pretext issue. *See Enoch*, 164 N.C. App. at 243, 595 S.E.2d at 752 ("[I]t is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." (citation omitted)).

Accordingly, we affirm the trial court's order granting summary judgment in favor of defendant

Affirmed.

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

JOHN BAKER WARREN, PETITIONER v. NORTH CAROLINA DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY; NORTH CAROLINA HIGHWAY PATROL, RESPONDENT

No. COA11-884

(Filed 19 June 2012)

Police Officers—administrative law—dismissal for unacceptable personal conduct—failure to make necessary findings of fact—analytical approach

The trial court erred by reversing the North Carolina State Highway Patrol's decision to terminate petitioner sergeant's employment based on its failure to make findings of fact required by N.C.G.S. § 150B-51(c). The proper analytical approach to be used after making the required findings of fact is to first determine whether the employee engaged in the conduct the employer alleged, and second to determine whether the employee's conduct fell within one of the categories of unacceptable personal conduct provided by the Administrative Code.

Appeal by respondent from order entered 20 April 2011 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 25 January 2012.

The McGuinness Law Firm, by J. Michael McGuinness, for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Tamara S. Zmuda, for respondent.

Richard C. Hendrix for Amicus Curiae North Carolina Troopers Association.

Richard E. Mulvaney for Amicus Curiae National Troopers Coalition.

STEELMAN, Judge.

The trial court's order is vacated and remanded for entry of findings of fact and conclusions of law reconciling conflicts in the order. In order to discharge, suspend, or demote a career state employee for disciplinary reasons based on unacceptable personal conduct, the specific misconduct must constitute just cause for the specific disciplinary sanction imposed.

I. Factual and Procedural Background

On 7 October 2007, the North Carolina State Highway Patrol (the "Patrol"), a division of the North Carolina Department of Crime Control and Public Safety ("respondent"), dismissed Sergeant John Baker Warren ("petitioner"). The dismissal was based on the Patrol's determination that petitioner had engaged in unacceptable personal conduct in an alcohol-related incident.

Shortly after midnight on 9 September 2007, petitioner stowed an open bottle of vodka in the trunk of his Patrol-issued vehicle and drove to a party. He could have used his personal vehicle, but he elected not to because he was concerned that he would wake his aunt (with whom he was residing at the time) in an effort to get the keys to his personal vehicle. After petitioner arrived at the party, deputies of the Nash County Sheriff's Office were called because of an altercation between two women. The deputies arrested petitioner, who had consumed a significant amount of alcohol at some point that evening, because they believed he was already impaired before driving to the party.

After an investigation by Internal Affairs, the Patrol dismissed Petitioner for violating the Patrol's written policies on "conformance to laws" and "unbecoming conduct." Petitioner filed a contested case petition challenging his termination. The administrative law judge ("ALJ") found that the Patrol failed to prove just cause for termination but acknowledged that some discipline was appropriate. The State Personnel Commission ("SPC") adopted the ALJ's findings of fact but rejected the ALJ's conclusion of law that termination was inappropriate. Petitioner appealed to Wake County Superior Court.

The trial court reversed the SPC, concluding Petitioner's conduct did not justify termination. The trial court concluded that petitioner violated the Patrol's written conduct unbecoming policy by operating a state-owned vehicle after consuming "some quantity of alcohol." The trial court also concluded that petitioner did not violate the Patrol's written conformance to laws policy because there was insuf-

ficient evidence to establish that he was appreciably impaired at the time he operated a motor vehicle upon the highways of this state. The court held as a matter of law that petitioner's conduct did not justify dismissal. The case was remanded to the SPC for imposition of discipline "consistent with the lesser misconduct proven."

Respondent appeals.

II. Termination

In its only argument on appeal, respondent contends that the trial court erred in reversing the Patrol's decision to terminate petitioner's employment. We agree that the trial court did not make adequate findings of fact and conclusions of law.

A. Standard of Review

When reviewing a superior court order concerning an agency decision, we examine the order for errors of law. ACT-UP *Triangle v. Comm'n for Health Servs. of N.C.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). "The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.* (quoting *Amanini v. N. C. Dep't of Human Res.*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118–19 (1994)) (internal quotation mark omitted). When an administrative agency rejects an ALJ's decision in a contested case and a party appeals to the superior court, the superior court is required to review the record *de novo* and make findings of fact and conclusions of law. N.C. Gen. Stat. § 150B-51(c) (2007).[1] In making its findings of fact and conclusions of law, the superior court "shall not" accord any deference to any prior decision made in the case. *Id.* Whether conduct constitutes just cause for the disciplinary action taken is a question of law we review *de novo*. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 666, 599 S.E.2d 888, 898 (2004).

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1. Citations to the North Carolina General Statutes refer to the statutes in effect at the time of the event giving rise to this case. The General Assembly made extensive changes to N.C. Gen. Stat. § 150B-51 effective 1 January 2012. *See* Act to Increase Regulatory Efficiency in Order to Balance Job Creation and Environmental Protection, ch. 398, sec. 27, 2011 6 N.C. Adv. Legis. Serv. 17, 18 (LexisNexis). These amendments are not applicable to the instant case.

B. Analysis

1. Findings of Fact Required

In its order of remand, the trial court did not make findings of fact as required by statute. *See* N.C. Gen. Stat. § 150B-51(c). Instead, the court stated that the "facts are not disputed and are before the Court as found by Judge Overby." The court based its decision on the factual determination that "the evidence and fact findings are sufficient to show that [p]etitioner had consumed some quantity of alcohol before or during the driving in question." However, the ALJ concluded that the Patrol failed to establish petitioner drove the Patrol vehicle with *any* alcohol in his system. This determination by the ALJ was categorized as a conclusion of law but was clearly a factual determination. Therefore, we treat it as such. *See Peters v. Pennington*, ––– N.C. App. –––, –––, 707 S.E.2d 724, 735 (2011) (reviewing an incorrectly labeled "conclusion of law" as a finding of fact). Thus, there is a conflict between the ALJ's findings of fact and the trial court's findings of fact, which state that petitioner consumed some amount of alcohol prior to driving. We vacate the trial court's order and remand this case so that the trial court can make findings of fact resolving this issue.

2. The Just Cause Framework

We address the parties' arguments on the subject of commensurate discipline because these issues will arise on remand. Career state employees, like petitioner, may not be discharged, suspended, or demoted for disciplinary reasons without "just cause." N.C. Gen. Stat. § 126-35(a). This requires the reviewing tribunal to examine two things: (1) " 'whether the employee engaged in the conduct the employer alleges' " and (2) "'whether that conduct constitutes just cause for the disciplinary action taken.' " *Carroll*, 358 N.C. at 665, 599 S.E.2d at 898 (quoting *Sanders v. Parker Drilling Co.*, 911 F.2d 191, 194 (9th Cir. 1990)). There are two categories of just cause for discipline: "'unsatisfactory job performance and "'unacceptable personal conduct.' " *Id.* at 666, 599 S.E.2d at 899 (quoting N.C. Gen. Stat. § 126-35 (b) (2003)). This case involves only unacceptable personal conduct. The North Carolina Administrative Code defines unacceptable personal conduct as, among other things, "the willful violation of known or written work rules." 25 N.C.A.C. 1J.0614(i)(4) (2006).[2]

2. This regulation was modified effective 1 January 2011, but this modification is not applicable to this case.

Respondent contends that that all forms of unacceptable personal conduct under 25 N.C.A.C. 1J.0614(i) amount to just cause for any disciplinary action authorized by N.C. Gen. Stat. § 126-35, which includes dismissal. Petitioner contends that in making a determination of just cause, the reviewing tribunal must examine the nature of the misconduct and the type of discipline imposed. In other words, the facts of a given case might amount to just cause for discipline but not dismissal. The parties have not cited, and our research has not discovered, any binding precedent that explicitly addresses this issue.

Petitioner contends that this Court adopted a "rational nexus" approach for off-duty misconduct. However, that test applies to off-duty *criminal* conduct:

> [W]here an employee has engaged in off-duty criminal conduct, the agency need not show actual harm to its interests to demonstrate just cause for an employee's dismissal. However, it is well established that administrative agencies may not engage in arbitrary and capricious conduct. Accordingly, we hold that in cases in which an employee has been dismissed based upon an act of off-duty criminal conduct, the agency must demonstrate that the dismissal is supported by the existence of a *rational nexus* between the type of criminal conduct committed and the potential adverse impact on the employee's future ability to perform for the agency.

Eury v. N.C. Emp't Sec. Comm'n, 115 N.C. App. 590, 611, 446 S.E.2d 383, 395–96 (1994) (citations omitted).[3] Our research has not discovered any binding precedent applying the rational-nexus test to non-criminal conduct. The rationale for applying this test is that some off-duty criminal violations may have little bearing on the employee's job. We decline to extend this test to non-criminal conduct based on *Eury*.

Our Supreme Court's opinion in *Carroll* suggests that a commensurate discipline approach is appropriate, but it is not entirely clear at which step of the analysis this should be applied. In *Carroll*, the petitioner was demoted for willfully violating written workplace guidelines. 358 N.C. at 656, 599 S.E.2d at 893. The petitioner, a

3. This proposition applies to all forms of state employee discipline, not just dismissal. *Kelly v. N.C. Dep't of Natural Res.*, 192 N.C. App. 129, 139, 664 S.E.2d 625, 632 (2008) ("Although this Court in *Eury* discussed the issue of just cause specifically in the context of 'dismissal,' we note that the logic requiring a rational nexus applies equally in any case of state employee discipline.").

Department of Environmental and Natural Resources ("DENR") park ranger, exceeded posted speed limits while activating the blue lights on his patrol vehicle for a personal emergency. *Id.* The petitioner was demoted, and his salary was reduced. *Id.* The SPC reversed DENR's decision to discipline the petitioner. *Id.* at 652, 599 S.E.2d at 890. The trial court reversed, and this Court affirmed. *Id.* The Supreme Court reversed. *Id.* at 676, 599 S.E.2d at 905.

The Supreme Court first addressed DENR's argument that discipline was justified because the petitioner violated state law. Under the Administrative Code, unacceptable personal conduct includes "job-related conduct which constitutes a violation of state or federal law." 25 N.C.A.C. 1J.0614(i)(2). But "[e]ven assuming [the petitioner] lacked legal justification or excuse for exceeding the . . . speed limit," the Court explained, this "conduct did not warrant demotion under the 'just cause' standard." *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900. The Court then described the just cause standard:

> We acknowledge that SPC regulations define "just cause" to include "unacceptable personal conduct" and "unacceptable personal conduct" to include "job-related conduct which constitutes a violation of state or federal law." Nonetheless, the fundamental question in a case brought under N.C.G.S. § 126-35 is whether the disciplinary action taken was "just." Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.
>
> "Just cause," like justice itself, is not susceptible of precise definition. It is a " 'flexible concept, embodying notions of equity and fairness,' " that can only be determined upon an examination of the facts and circumstances of each individual case. Thus, not *every* violation of law gives rise to "just cause" for employee discipline.

Id. at 669, 599 S.E.2d at 900–01 (citations omitted). This passage instructs us to consider the specific discipline imposed as well as the facts and circumstances of each case to determine whether the discipline imposed was "just."[4] Based on this language, and the authorities relied upon by the Supreme Court,[5] we hold that a commensurate dis-

4. The Court concluded that the agency lacked just cause to demote the petitioner for exceeding the speed limit. *Id.* at 670, 599 S.E.2d at 901. In reaching this result, the Court examined the petitioner's exemplary employment record as well as the circumstances under which the petitioner exceeded the posted speed limit. *Id.*

5. Among other secondary sources, the Supreme Court cited as persuasive Professors Roger Abrams' and Dennis Nolans' work on just cause. *See id.* at 669, 599

cipline approach applies in North Carolina. Note that the quoted text indicates that this inquiry is appropriate *despite* the fact that the regulations define just cause as unacceptable personal conduct.

However, later in the opinion, the Supreme Court stated, "Although there is no bright line test to determine whether an employee's conduct establishes 'unacceptable personal conduct' *and thus 'just cause' for discipline*, we draw guidance from those prior cases where just cause has been found." *Id.* at 675, 599 S.E.2d at 904 (emphasis added). This quotation is difficult to reconcile with the Court's discussion on the flexibility of the just cause standard because it suggests that all unacceptable personal conduct is just cause for all forms of discipline. If unacceptable personal conduct amounts to just cause, and just cause must be "determined upon an examination of the facts and circumstances of each individual case" by reference to "notions of equity and fairness," *id.* at 669, 599 S.E.2d at 900 (internal quotation mark omitted), it should follow that all categories of unacceptable personal conduct must be determined according to this standard. But not every category provided by the Administrative Code permits this type of flexibility. In *Carroll*, the Supreme Court was presented with the provision stating that "job-related conduct which constitutes a violation of state or federal law" amounts to unacceptable personal conduct. *See id.* at 669, 599 S.E.2d at 900 (internal quotation marks omitted). To account for the lack of flexibility in the language of the regulation, and accommodate the flexible just cause standard, the Court stated that "not every violation of law gives rise to 'just cause' for employee discipline." *Id.* at 670, 599 S.E.2d at 901. In other words, not every instance of unacceptable personal conduct as defined by the Administrative Code provides just cause for discipline.

We conclude that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining

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S.E.2d at 900 (citing Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 Duke L.J. 594, 599 (1985)). In this article, Professors Abrams and Nolan advance a commensurate approach to discipline:

> The nature and severity of the employee's offense, among other things, will determine what form of discipline is appropriate. A small departure from 'satisfactory' work may result in a verbal or written warning. A more serious or repeated offense may produce a suspension without pay. In an extreme case, the employer may be justified in discharging an employee.

Abrams & Nolan, *supra*, at 601–02 (footnotes omitted).

unacceptable personal conduct.[6] The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case." *Id.* at 669, 599 S.E.2d at 900.

III. Conclusion

We vacate the trial court's decision and remand for the trial court to make findings of fact as directed above. These findings should then be analyzed in accordance with the analytical framework set forth above. The trial court may, in its discretion, hold additional hearings in this matter.

VACATED and REMANDED.

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

STATE OF NORTH CAROLINA v. MARCUS LEE BROWN

No. COA11-1340

(Filed 19 June 2012)

1. Burglary and Unlawful Breaking or Entering—first-degree burglary—felony larceny—motion to dismiss—sufficiency of evidence—nighttime—doctrine of recent possession—identity of perpetrator

The trial court did not err by denying defendant's motion to dismiss the charges of first-degree burglary and felony larceny. Viewing the evidence in the light most favorable to the State, the

6. For example, unacceptable personal conduct includes "absence from work after all authorized leave credits and benefits have been exhausted." 25 N.C.A.C. 1J.0614(i)(7). This language provides no leeway to account for the nature of the absence from work or the discipline imposed. It cannot accommodate the just cause standard adopted in *Carroll*.

State presented sufficient evidence that the offense occurred in the nighttime. Based upon the doctrine of recent possession, the State presented sufficient evidence of defendant's identity as the perpetrator of both first-degree burglary and felony larceny.

2. Burglary and Unlawful Breaking or Entering—felonious breaking and entering—failure to give jury instructions—doctrine of recent possession

The trial court did not commit error or plain error by failing to instruct the jury to determine whether the State had proven the elements of the doctrine of recent possession beyond a reasonable doubt during consideration of the lesser-included charge of felonious breaking and entering. The trial court instructed the jury by describing how the elements of that offense differed from that of first-degree burglary. Further, defendant was convicted of first-degree burglary, an offense for which the full recent possession charge was given. Thus, defendant could not show prejudice.

Appeal by defendant from judgment entered 30 March 2011 by Judge Robert F. Johnson in Alamance County Superior Court. Heard in the Court of Appeals 8 March 2012.

Attorney General Roy Cooper by Assistant Attorney General Tawanda N. Foster-Williams for the State.

Kimberly P. Hoppin for defendant-appellant.

STEELMAN, Judge.

The trial court did not err in denying defendant's motion to dismiss the charges of first-degree burglary and felony larceny. The trial court did not commit error, much less plain error, in its jury instructions.

I. Factual and Procedural Background

On 20 July 2010, Octavis White (White) and his wife went to bed in their home in Mebane after dark. After showering the next morning, White noticed that his wallet and money clip that he had left on his bedroom dresser were missing. He subsequently discovered that several laptop computers were missing.

Marcus Lee Brown (defendant) left his girlfriend's apartment in Durham after 10:00 p.m. on 20 July 2010. He returned about 6:00 a.m. the next morning, carrying several bags. One contained a laptop computer that his girlfriend turned on. The name "Octavis White" appeared

on the screen. The police were called. They discovered a number of items that had been stolen from the Whites.

Defendant was indicted for first-degree burglary and felony larceny. On 30 March 2011, defendant was found guilty of both charges. Defendant was sentenced as a Level III offender to consecutive active terms of imprisonment of 84-110 months for the first-degree burglary conviction and 10-12 months for the felony larceny conviction.

Defendant appeals.

II. Motion to Dismiss

[1] In his first argument, defendant contends that the trial court erred in denying his motion to dismiss the charge of first-degree burglary because the State failed to produce evidence that the offense occurred at nighttime and that defendant was the perpetrator. Defendant also argues that the State failed to produce evidence that defendant was the perpetrator of the larceny.

A. Standard of Review

We review 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 trial court must determine whether there is substantial evidence of each essential element of the offense charged and that the defendant is the perpetrator of the offense. *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Bates*, 313 N.C. 580, 581, 330 S.E.2d 200, 201 (1985).

"In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence." *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 256 (2002). "The test of the sufficiency of the evidence on a motion to dismiss is the same whether the evidence is direct, circumstantial, or both. All evidence actually admitted, both competent and incompetent, which is favorable to the State must be considered." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387-88 (1984) (internal citation omitted).

B. Nighttime Requirement for First-Degree Burglary

"The elements of first-degree burglary are: (i) the breaking (ii) and entering (iii) in the nighttime (iv) into the dwelling house or sleeping apartment (v) of another (vi) which is actually occupied at the time of the offense (vii) with the intent to commit a felony

therein." *State v. Singletary*, 344 N.C. 95, 101, 472 S.E.2d 895, 899 (1996). *See also* N.C. Gen. Stat. § 14-51 (2011).

North Carolina has no statutory definition of nighttime. *State v. McKeithan*, 140 N.C. App. 422, 432, 537 S.E.2d 526, 533 (2000). "However, our courts adhere to the common law definition of nighttime as that time after sunset and before sunrise when it is so dark that a man's face cannot be identified except by artificial light or moonlight." *Id.* (internal quotation marks omitted).

White testified that it was dark when he went to bed on the night of 20 July 2010. Defendant requests that we take judicial notice that civil twilight began in Mebane, North Carolina on 21 July 2010 at 5:47 a.m. As our Supreme Court did in *State v. Garrison*, 294 N.C. 270, 280, 240 S.E.2d 377, 383 (1978), we take judicial notice that in Mebane, on 21 July 2010, civil twilight began at 5:47 a.m., as computed by the Astronomical Applications Department of the United States Naval Observatory in "Sun and Moon Data for One Day."

Defendant left his girlfriend's apartment in Durham after 10:00 p.m. on 20 July 2010. He returned about 6:00 a.m. the next morning, carrying several bags.

> [Prosecutor]: Okay. And [defendant] left the house Tuesday night sometime after 10:00; is that correct?
>
> [Defendant's Girlfriend]: Yes.
>
> Q. Okay. And when did you see him next?
>
> A. The next morning.
>
> Q. That would be Wednesday morning?
>
> A. Yeah.
>
> Q. About what time?
>
> A. About 6:00.
>
> Q. Was it light outside or dark or what?
>
> A. It was getting light.

White showered between 6:30 and 7:00 a.m. After showering, White noticed that his wallet and money clip that he had left on his bedroom dresser were missing. He subsequently discovered that several laptop computers were missing. White woke his wife to ask about his missing belongings about 7:30 a.m.

Defendant argues that this evidence was insufficient to establish that the break-in occurred during the nighttime.

"A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C.R. Evid. 201(b) (2011). "Judicial notice may be taken at any stage of the proceeding." N.C.R. Evid. 201(f) (2011).

As we have taken judicial notice of the time of the commencement of civil twilight on 21 July 2010, we also take judicial notice of the driving distance between White's residence and defendant's girlfriend's apartment as being in excess of 27 miles.

In *State v. Saunders*, 245 N.C. 338, 342, 95 S.E.2d 876, 879 (1957), our Supreme Court held that it was appropriate for the trial court to take judicial notice of the distance in miles between cities in Virginia and North Carolina. "It is generally held that the courts will take judicial notice of the placing of the important towns within their jurisdiction . . ." *Id.* (quoting *Furniture Co. v. Express Co.*, 144 N.C. 639, 642, 57 S.E. 458, 459 (1907)).

> A much stronger case for taking such notice can be made out today when almost every town in the country is connected by a ribbon of concrete or asphalt over which a constant stream of traffic flows. . . . In fact, so complete and so general is the common knowledge of places and distances that the court may be presumed to know the distances between important cities and towns in this State and likewise in adjoining states.

Saunders, 245 N.C. at 343, 95 S.E.2d at 879. *See also Whitehurst v. Kerr*, 153 N.C. 76, 68 S.E. 913 (1910) (the Court can take judicial notice of the width of the Albemarle Sound as a physical fact). *See also* Am. Jur. 2d Evidence § 81 (2012) (an appellate court may take judicial notice of distances between towns).

In the event that defendant committed the break-in after 5:47 a.m., he would not have been able to steal the items from the White residence, place them in an automobile, and traverse the distance between Mebane and Durham by 6:00 a.m., even if he drove directly to his girlfriend's apartment.

Viewing the evidence in the light most favorable to the State, the State presented sufficient evidence that the offense occurred in the nighttime. The trial court properly denied defendant's motion to dis-

miss, but, out of an abundance of caution, submitted felonious breaking and entering as a lesser-included offense. The trial court properly left the determination of whether the offense occurred in the nighttime to the jury.

C. Identification of Defendant as Perpetrator of Crimes and Doctrine of Recent Possession

The doctrine of recent possession is "a rule of law that, upon an indictment for larceny, possession of recently stolen property raises a presumption of the possessor's guilt of the larceny of such property." *State v. Maines*, 301 N.C. 669, 673, 273 S.E.2d 289, 293 (1981). When "there is sufficient evidence that a building has been broken into and entered and thereby the property in question has been stolen, the possession of such stolen property recently after the larceny raises presumptions that the possessor is guilty of the larceny and also of the breaking and entering." *Maines*, 301 N.C. at 674, 273 S.E.2d at 293. "When the doctrine of recent possession applies in a particular case, it suffices to repel a motion for nonsuit and defendant's guilt or innocence becomes a jury question." *Id.*

"The possession must be so recent after the breaking or entering and larceny as to show that the possessor could not have reasonably come by it, except by stealing it himself or by his concurrence." *State v. Hamlet*, 316 N.C. 41, 43, 340 S.E.2d 418, 420 (1986). In *Hamlet*, "approximately thirty days" passed before the items were discovered in the defendant's possession. *Hamlet*, 316 N.C. at 45, 340 S.E.2d at 421.

Defendant argues that there was no testimony about when the items discovered in defendant's possession were last known to be secure. However, the evidence presented at trial was that the time period between when the items were missing and when defendant was discovered with the items was a matter of hours. Based upon the doctrine of recent possession, the State presented sufficient evidence of defendant's identity as the perpetrator of both first-degree burglary and felony larceny.

The trial court did not err in denying defendant's motion to dismiss.

III. Challenge to Jury Instructions

[2] In his second argument, defendant contends that the trial court committed plain error in failing to instruct the jury to determine whether the State had proven the elements of the doctrine of recent possession beyond a reasonable doubt during consideration of the lesser-included charge of felonious breaking and entering. We disagree.

By failing to object to the jury instructions, defendant has not preserved the issue for appeal. We review this issue for plain error. *State v. Lawrence*, ___ N.C. ___, ___, ___ S.E.2d ___, ___, 2012 WL 1242316 (April 13, 2012).

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

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

To show plain error, "a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, ___ N.C. at ___, ___ S.E.2d at ___ (internal citation and quotation marks omitted).

The defendant who fails to object to evidence at trial bears the burden of proving that the trial court committed plain error. *State v. Rourke*, 143 N.C. App. 672, 676, 548 S.E.2d 188, 190 (2001). "[T]he test for 'plain error' places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

The trial court instructed the jury on the crimes of first-degree burglary and felonious larceny. As to the charge of first-degree burglary, the trial court charged upon the lesser-included offense of felonious breaking and entering. The trial court gave a detailed instruction on the doctrine of recent possession as to the burglary and larceny charges. The trial court did not repeat the instruction on recent possession for the charge of felonious breaking and entering, but instructed the jury:

> Now, felonious breaking or entering differs from burglary in that both a breaking and an entry are not necessary. Either is enough. Only that a building was involved. It need not have been a dwelling house. And the breaking or entry need not to have been in the nighttime.

Defendant asserts that it was plain error not to repeat the entire recent possession instruction during the charge for felonious breaking and entering. This argument is incorrect for several reasons. First, the trial court instructed the jury on felonious breaking and entering by describing how the elements of that offense differed from that of first-degree burglary. This was a proper manner of instruction. *See* N.C.P.I.—Crim. 214.10 (2008). By describing the differences in charges, and not discussing the doctrine of recent possession in the instruction for felonious breaking and entering, the trial court left the recent possession instruction intact and applicable to the lesser charge of felonious breaking and entering. Second, defendant was convicted of first-degree burglary, an offense for which the full recent possession charge was given. Defendant can show no prejudice from any alleged omission as to the felonious breaking and entering charge. *See* N.C. Gen. Stat. § 15A-1443(a) (2011).

Defendant cannot show error, much less plain error, in the jury instructions.

NO ERROR.

Judges ELMORE and STROUD concur

MICHAEL RAY WILLIAMS, PLAINTIFF v. O'CHARLEY'S, INC., DEFENDANT

No. COA11-1467

(Filed 19 June 2012)

1. Warranties—breach of implied warranty of merchantability —circumstantial evidence of food poisoning

The trial court did not err in a negligence case by concluding that plaintiff presented sufficient circumstantial evidence of a defect in the food to warrant the submission of the issue of breach of an implied warranty of merchantability to the jury.

2. Negligence—motion for judgment notwithstanding verdict—proximate cause

The trial court did not err in a negligence case by denying defendant's motion for judgment notwithstanding the verdict. Plaintiff presented sufficient evidence of proximate cause.

3. Negligence—motion for judgment notwithstanding verdict—medical causation

The trial court did not err in a negligence case by denying defendant's motion for judgment notwithstanding the verdict. Plaintiff presented competent medical causation evidence.

Appeal by defendant from judgment entered 3 January 2011 by Judge Shannon R. Joseph in Rowan County Superior Court. Heard in the Court of Appeals 2 April 2012.

Doran, Shelby, Pethel and Hudson, P.A. by Kathryn C. Setzer for plaintiff-appellee.

Teague Campbell Dennis & Gorham, LLP by Christopher G. Lewis for defendant-appellant.

STEELMAN, Judge.

Plaintiff presented sufficient circumstantial evidence of a defect in the food to warrant the submission of an issue of breach of an implied warranty of merchantability to the jury. Plaintiff presented sufficient evidence of proximate cause and medical causation. The trial court did not err in denying defendant's motion for judgment notwithstanding the verdict.

I. Factual and Procedural History

Michael Williams (plaintiff) ate dinner at an O'Charley's restaurant (defendant) in Concord on 18 March 2008. At about 8:15 p.m., plaintiff ordered grilled chicken, rice, and a baked potato. The food arrived about 45 minutes later. The chicken had a bad aftertaste, stuck to the plate, and was dry. No other member of plaintiff's dining party ate chicken. By 8 a.m. the next morning, plaintiff was suffering from severe diarrhea and vomiting. Plaintiff did not eat any other food on 18 March 2008. He was admitted to Rowan Regional Medical Center on 21 March 2008. Plaintiff was hospitalized for seven days under the treatment of Dr. Christopher McIltrot.

Plaintiff brought this action seeking monetary damages for negligence and breach of an implied warranty of merchantability on 22 July 2009. A jury returned a verdict in favor of defendant on the negligence claim, but in favor of plaintiff on the claim for breach of an implied warranty of merchantability, and awarded $140,000 in damages for personal injuries. On 3 January 2011, the trial court entered judgment based upon the jury verdict. Defendant filed a motion for judgment notwithstanding the verdict on 13 January 2011. This motion was denied on 9 June 2011.

Defendant appeals.

II. Motion for Judgment Notwithstanding the Verdict

Defendant contends that the trial court erred in denying its motion for judgment notwithstanding the verdict. We disagree.

A. Standard of Review

"A motion for judgment notwithstanding the verdict presents the question of whether the evidence was sufficient to entitle the plaintiff to have a jury pass on it." *Morrison v. Kiwanis Club*, 52 N.C. App. 454, 462, 279 S.E.2d 96, 101 (1981). "The question of sufficiency of the evidence to send a case to the jury is a question of law. The question presented to the appellate court in reviewing the decision of the trial court is the identical question which was presented to the trial court by defendant's motion[.]" *Hunt v. Montgomery Ward* and Co., 49 N.C. App. 642, 644, 272 S.E.2d 357, 359-60 (1980) (internal quotation marks omitted).

The question is "whether the evidence, when considered in the light most favorable to plaintiff, was sufficient for submission to the jury." *Hunt*, 49 N.C. App. at 644, 272 S.E.2d at 360. The plaintiff "is entitled to the benefit of every reasonable inference which may legitimately be drawn from the evidence," and all conflicts in the evidence are resolved in favor of the plaintiff. *Morrison*, 52 N.C. App. at 462, 279 S.E.2d at 101.

B. Analysis

"[A] warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." N.C. Gen. Stat. § 25-2-314(1) (2011). To be merchantable, goods must be "fit for the ordinary purposes for which such goods are used[.]" N.C. Gen. Stat. § 25-2-314(2)(c) (2011).

To prove a breach of implied warranty of merchantability, a plaintiff must show (1) that the goods in question were subject to an implied warranty of merchantability; (2) that the goods were defective at the time of the sale and as such did not comply with the warranty; (3) that the resulting injury was due to the defective nature of the goods; and (4) that damages were suffered. *Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 10, 423 S.E.2d 444, 447-48 (1992).

i. Defect

[1] Defendant contends that plaintiff failed to present adequate evidence of the existence of a defect in the chicken.

A plaintiff need not prove a specific defect to carry his or her burden of proof in a products liability action based upon a breach of implied warranty of merchantability. *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 689-90, 565 S.E.2d 140, 151 (2002). In considering a motion for judgment notwithstanding the verdict, the evidence is adequate to submit the case to the jury where "the plaintiff produces adequate circumstantial evidence of a defect." *Red Hill Hosiery Mill, Inc. v. MagneTek, Inc.*, 159 N.C. App. 135, 139, 582 S.E.2d 632, 635 (2003).

> This evidence may include such factors as: (1) the malfunction of the product; (2) expert testimony as to a possible cause or causes; (3) how soon the malfunction occurred after the plaintiff first obtained the product and other relevant history of the product, such as its age and prior usage by plaintiff and others, including evidence of misuse, abuse, or similar relevant treatment before it reached the defendant; (4) similar incidents, when[] accompanied by proof of substantially similar circumstances and reasonable proximity in time; (5) elimination of other possible causes of the accident; and (6) proof tending to establish that such an accident would not occur absent a manufacturing defect.

DeWitt, 355 N.C. at 689-90, 565 S.E.2d at 151 (internal quotation marks and citations omitted) (alteration in original).

Because of the dearth of North Carolina cases concerning food poisoning and the implied warranty of merchantability, we examine precedent from other jurisdictions. *See generally* Jane Massey Draper, Annotation, *Liability for injury or death allegedly caused by spoilage, contamination, or other deleterious condition of food or food product*, 2 A.L.R. 5th 1 (1992).

In *Sneed v. Beaverson*, 395 P.2d 414, 415 (Okla. 1964), the plaintiff testified that she ate a steak at the defendant's grill, became ill, and was in the hospital for two days. Her doctor testified that "assuming the correctness of the [plaintiff's] history," it was his opinion, with reasonable certainty, that her injury came from the meat she ate. *Id.* The Supreme Court of Oklahoma held that this evidence was sufficient to survive a demurrer. *Sneed*, 395 P.2d at 416.

In *Snead v. Waite*, 208 S.W.2d 749, 750 (Ky. 1948), the plaintiff purchased barbecued mutton from the defendant and ate it with bread. By the next day, the plaintiff and his family were violently ill, suffering from nausea, vomiting, cramping, and diarrhea. *Id.* The Court of Appeals of Kentucky held that the evidence "amply proved all of the elements of an implied warranty[.]" *Snead*, 208 S.W.2d at 751.[1]

In *Johnson v. Kanavos*, 6 N.E.2d 434, 435 (Mass. 1937), the plaintiffs noticed a peculiar taste in the frankfurter sandwiches they purchased from the defendant. All of the plaintiffs became sick within four hours. *Id.* Physicians who treated the plaintiffs did not testify that, in their opinion, the sandwiches caused the illnesses. *Johnson*, 6 N.E.2d at 436. The Supreme Judicial Court of Massachusetts held that the evidence was adequate to support a finding in favor of the plaintiffs. *Id.* "Evidence of the presence of a peculiar taste in food has some probative significance on the issue whether the food was unwholesome and the cause of a subsequent illness of a person eating it[.]" *Johnson*, 6 N.E.2d at 435.

In *Barringer v. Ocean S.S. Co.*, 134 N.E. 265, 266 (Mass. 1922), the plaintiff alleged that food served on the defendant's vessel caused the plaintiff to suffer vomiting and cramps. The plaintiff ate some cold meat that did not "taste very good" to him. *Barringer*, 134 N.E. at 265-66. The Supreme Judicial Court of Massachusetts held that the evidence "was very meager; but the credibility of the witnesses was for the trial judge, and if he believed them he could find that the plaintiff's case was proved." *Barringer*, 134 N.E. at 266.

We hold the legal reasoning of these cases to be persuasive.

In the instant case, plaintiff testified that the chicken had a bad aftertaste, stuck to the plate, and was dry as though it had been under a heat lamp. Plaintiff got sick within several hours after eating the chicken. Plaintiff did not eat any other food on 18 March 2008. Dr. McIltrot testified that the chicken was likely the cause of his symp-

1. Before 1976, the Court of Appeals was Kentucky's highest court.

toms. Dr. McIltrot testified that he eliminated other possible causes of the injury by performing medical tests and procedures, including a laparoscopy.

Plaintiff suffered from no pre-existing conditions that would account for these symptoms. Plaintiff ate the chicken at approximately 9:00 p.m. on 18 March 2008, and ate nothing else that night. Plaintiff began suffering from severe vomiting and diarrhea at 8:00 a.m. the next day. Taking all of the evidence in the light most favorable to the plaintiff, sufficient circumstantial evidence was presented of a defect in the chicken to warrant submission of the case to the jury.

ii. Proximate Cause

[2] Defendant next contends that plaintiff failed to provide adequate evidence that a defect was the proximate cause of plaintiff's injury.

"Issues of proximate cause and foreseeability, involving applications of standards of conduct, are ordinarily best left for resolution by a jury under appropriate instructions from the court." *Hastings v. Seegars Fence Co.*, 128 N.C. App. 166, 170, 493 S.E.2d 782, 785 (1997).

In the instant case, the trial court instructed the jury on proximate cause, and defendant does not challenge these instructions. Further, plaintiff had not eaten anything else that day, other than his meal at defendant's establishment. Plaintiff's daughter did not eat any chicken, and she did not become ill. Plaintiff did not eat anything after he went home after his meal. Plaintiff began suffering severe vomiting and diarrhea. Plaintiff had never experienced symptoms of vomiting and diarrhea like he experienced after his meal on 18 March 2008. Plaintiff's daughter drove him to the hospital, where he remained for a week.

Dr. McIltrot, plaintiff's treating physician, testified that plaintiff's condition could have been caused by food poisoning. Dr. McIltrot testified that, based on his "understanding to a reasonable degree of medical certainty[,]" it was more likely than not that defendant's food caused plaintiff's injuries. Dr. McIltrot formed this opinion after observing plaintiff, conducting tests and procedures, and ruling out other anatomic, physical, and medical causes.

The trial court did not err in denying defendant's motion for judgment notwithstanding the verdict on the basis of lack of evidence of proximate cause.

iii. Competent Medical Causation Evidence

[3] Defendant contends that plaintiff failed to provide "competent medical causation evidence[.]"

"In cases involving complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003) (internal quotation marks omitted). "However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation." *Id.*

In *Holley*, the Supreme Court held that the evidence was insufficient to support the Industrial Commission's findings of fact where the doctor's opinion was based entirely on speculation. *Holley*, 357 N.C. at 234, 581 S.E.2d at 754. The doctor's testimony included the statements that the blood clots could have developed prior to the workplace accident, and "[i]t's just a galaxy of possibilities." *Holley*, 357 N.C. at 233, 581 S.E.2d at 753.

In *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 233, 538 S.E.2d 912, 916-17 (2000), the Supreme Court held that the evidence was insufficient to support the Industrial Commission's findings of fact where the doctor's opinion was based entirely on speculation, and the doctor's testimony constituted the sole evidence of causation. The doctor's testimony included the statements: "I must say that a lot of times I have no idea why someone has fibromyalgia. Far and away, fibromyalgia occurs more commonly for unknown reasons." *Young*, 353 N.C. at 231, 538 S.E.2d at 915.

Dr. McIltrot testified that plaintiff's condition could have been caused by food poisoning. Dr. McIltrot testified that, based on his "understanding to a reasonable degree of medical certainty[,]" it was more likely than not that defendant's food was the cause of plaintiff's injuries. Dr. McIltrot formed this opinion after observing plaintiff, conducting tests and procedures, and ruling out other anatomic, physical, and medical causes. The trial court did not err in denying defendant's motion for judgment notwithstanding the verdict based upon the competency of plaintiff's medical causation evidence.

For the reasons stated above, we hold that the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict.

AFFIRMED.

Judges CALABRIA and BEASLEY concur.

STATE OF NORTH CAROLINA v. WESLEY AARON YANCEY

No. COA11-1409

(Filed 19 June 2012)

1. Confessions and Incriminating Statements—custody—Miranda—age—totality of circumstances

The trial court did not err in a breaking or entering case by concluding that defendant was not in custody during his 20 November 2009 encounter with detectives and that his inculpatory statements were not obtained in violation of *Miranda*. Although defendant gave his statement while in the detective's vehicle about two miles from his home, he sat in the front seat of the vehicle and the entire encounter lasted under two hours. Considering the totality of circumstances, defendant's age of 17 years and 10 months did not alter the conclusion that defendant was not in custody.

2. Search and Seizure—backpack—Fourth Amendment—consent

The trial court did not err in a breaking or entering case by concluding that the 15 October 2009 search of defendant's backpack was constitutional. Officers may pose questions, ask for identification, and request consent to search without seizing a person within the meaning of the Fourth Amendment, and because defendant consented to the officer's request to search his backpack, the items were admissible at trial.

Appeal by defendant from judgment entered 1 June 2011 by Judge Yvonne Mims Evans in Burke County Superior Court. Heard in the Court of Appeals 3 April 2012.

Roy Cooper, Attorney General, by Stanley G. Abrams, Assistant Attorney General, for the State.

Andrew L. Farris, for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from a consolidated judgment entered upon his plea of no contest to three counts of breaking or entering. He contends the trial court erred by entering an order denying his motion to suppress statements and evidence he contended were obtained in violation of his constitutional rights. We affirm.

The unchallenged findings of fact in the trial court's order on defendant's motion show the following. A little after 8:00 a.m. on 15 October 2009, Officer Jack Moss with the Valdese Police Department observed defendant, then seventeen, sitting on a sidewalk on Main Street in Valdese, North Carolina. Because defendant appeared to be of school-age, Officer Moss stopped and asked for his name and what he was doing. Defendant appeared nervous, continuously putting his hands in his pockets. After Officer Moss patted him down and asked whether he could look in defendant's backpack, defendant replied, "sure." In defendant's backpack, Officer Moss found loose coins, a plastic bag with coins and jewelry, and an old class ring. Officer Moss then drove defendant to the police department and called defendant's mother, who arrived later and took defendant home.

On 20 November 2009, Detectives David Stikeleather and David South with the Burke County Sheriff's Office, dressed in plain clothes and driving an unmarked vehicle, arrived at defendant's home and asked to speak with him. At that time, defendant had been identified as a possible suspect in several breaking or entering cases. Because defendant had friends visiting his home, the detectives asked defendant to ride in their car with them. The detectives told defendant he was free to leave the vehicle at any time, and they did not touch him. Defendant sat in the front seat of the vehicle while it was driven approximately two miles from his home. When the vehicle was stopped, Detective South showed defendant reports of the break-ins. The detectives told defendant that, if he was cooperative, they would not arrest him that day, but would turn in their paperwork to the district attorney. Defendant gave a statement admitting to committing the break-ins.

This Court's review of a trial court's ruling on a motion to suppress is limited to determining whether the trial court's findings of fact are supported by competent evidence and whether its conclusions of law are legally correct, reflecting a correct application of legal principles to the facts found. *State v. Buchanan*, 353 N.C. 332,

336, 543 S.E.2d 823, 826 (2001). Because defendant fails to challenge any of the trial court's findings of fact, this Court is limited to a de novo review of the trial court's conclusions of law. *See State v. Carter*, —— N.C. App. ——, ——, 711 S.E.2d 515, 520, *motion to dismiss appeal allowed and disc. review denied*, 365 N.C. 351, 718 S.E.2d 147 (2011).

[1] On appeal, defendant first argues that he was "in custody" during his 20 November 2009 encounter with Detectives South and Stikeleather and that his inculpatory statements were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Defendant specifically argues that he was in custody because he knew he was a suspect after the detectives confronted him with the case files from recent break-ins, because Detective South told defendant that if he was cooperative, the detectives would not arrest him that day, which he contends implied he would be arrested if he attempted to leave, and because he was driven two miles from his home. We conclude that, considering the totality of the circumstances, defendant was not in custody at the time he made the inculpatory statements.

The trial court's determination that a person is in custody under *Miranda* is a conclusion of law. *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826. The *Miranda* rule "was conceived to protect an individual's Fifth Amendment right against self-incrimination in the inherently compelling context of custodial interrogations by police officers." *Id.* In addition to the warnings required under the *Miranda* decision, N.C.G.S. § 7B–2101(a) requires specific warnings in the context of custodial interrogation of a juvenile. Before warnings are required under *Miranda* and N.C.G.S. § 7B–2101(a), a juvenile must be in custody. *In re W.R.*, 363 N.C. 244, 247, 675 S.E.2d 342, 344 (2009). The appropriate inquiry for determining whether a defendant is in custody is, based on the totality of the circumstances, whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828. "This determination involves an objective test, based upon a reasonable person standard, and is to be applied on a case-by-case basis considering all the facts and circumstances." *Carter*, —— N.C. App. at ——, 711 S.E.2d at 520 (internal quotation marks omitted). "While no single factor controls the determination of whether an individual is in custody for purposes of *Miranda*[,] our appellate courts have considered such factors as whether a suspect is told he or she is free to leave, whether the suspect is handcuffed, whether the suspect is in the presence of uniformed officers, and the

nature of any security around the suspect." *Id.* (alteration in original) (internal quotation marks and citation omitted). Furthermore, "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." *J.D.B. v. North Carolina*, —— U.S. ——, ——, 180 L. Ed. 2d 310, 326 (2011).[1]

Miranda warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Buchanan*, 353 N.C. at 337, 543 S.E.2d at 827 (internal quotation marks omitted). Defendant voluntarily spoke with and rode with detectives and was told he was free to leave and that he could leave the vehicle at any time. Although defendant gave his statement while in the detective's vehicle approximately two miles from his home, he sat in the front seat of the vehicle and the entire encounter lasted under two hours. *See Carter*, —— N.C. App. at ——, 711 S.E.2d at 521-22 (holding the defendant was not in custody when he rode with detectives to the police station voluntarily, without being frisked or handcuffed, was told several times he was not in custody and was free to leave, and was not restrained during the interview); *State v. Hartley*, —— N.C. App. ——, ——, 710 S.E.2d 385, 394 (holding the defendant was not in custody when he was told on two occasions he was not under arrest, he voluntarily accompanied the officers to the fire department, he was never handcuffed, he rode to the station in the front of the vehicle, officers asked him if he needed food, water, or use of the restroom, he was never misled or deceived, he was not questioned for a long period of time, and the officers kept their distance during the interview and did not employ any form of physical intimidation), *disc. review denied*, 365 N.C. 339, 717 S.E.2d 383 (2011); *State v. Rooks*, 196 N.C. App. 147, 153, 674 S.E.2d 738, 742 (2009) (holding the defendant was not in custody when he was asked to enter an unmarked police car and answer ques-

1. The trial court's order from which defendant appeals was entered 1 June 2011 and *J.D.B.* was decided on 16 June 2011. Therefore, at the time of the trial court's order, *J.D.B.* had not yet been decided. However, "new rules of criminal procedure must be applied retroactively 'to all cases, state or federal, pending on direct review or not yet final,' " *State v. Zuniga*, 336 N.C. 508, 511, 444 S.E.2d 443, 445 (1994) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328, 93 L. Ed. 2d 649, 661 (1987)), and "[a] 'final' case is one in which 'a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.' " *Id.* at 511 n.1, 444 S.E.2d at 445 n.1 (quoting *Griffith*, 479 U.S. at 321 n.6, 93 L. Ed. 2d at 657 n.6). Thus, because this case is not yet final, the holding in *J.D.B.* applies here.

tions, he was told that he was not under arrest, the car was unlocked, he was left unattended after the officer completed the interview, and no evidence was presented indicating that the officer displayed a weapon or otherwise threatened him).

Defendant emphasizes that he was a juvenile at the time of the 20 November 2009 encounter, relying on *J.D.B.* for the proposition that a juvenile's age is a factor in the *Miranda* custody analysis. However, in *J.D.B.*, the United States Supreme Court acknowledged that, although the *Miranda* custody analysis included consideration of a juvenile suspect's age, that was "not to say that a child's age w[ould] be a determinative, or even a significant, factor in every case." *J.D.B.*, ___ U.S. at ___, 180 L. Ed. 2d at 326-27 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 669, 158 L. Ed. 2d 938, 954 (2004) (O'Connor, J., concurring) (explaining that a state-court decision omitting any mention of the defendant's age in the custody inquiry under *Miranda* was not unreasonable under [the Antiterrorism and Effective Death Penalty Act's] deferential standard of review where the defendant "was almost 18 years old at the time of his interview"), and *J.D.B.*, ___ U.S. at ___, 180 L. Ed. 2d at 339 (Alito, J., dissenting) (suggesting that "teenagers nearing the age of majority" are likely to react to an interrogation as would a "typical 18–year–old in similar circumstances")). In this case, defendant was 17 years and 10 months old at the time of the encounter. Considering the totality of the circumstances, defendant's age does not alter this Court's conclusion that defendant was not in custody during the 20 November 2009 encounter with detectives. This argument is overruled.

[2] Defendant next contends the 15 October 2009 search of his backpack was unconstitutional. Defendant asserts that Officer Moss approached him based on his suspicion that defendant should have been in school and argues that this was an investigatory stop within the meaning of the Fourth Amendment. Therefore, defendant argues that, after Officer Moss determined defendant should have been in school, he needed additional reasonable suspicion to request defendant's consent to search his backpack. Because the unchallenged findings of fact in the trial court's order show that the initial encounter between Officer Moss and defendant was consensual and that following the pat-down search of defendant, the encounter was again consensual, we disagree.

"It is well established that [l]aw enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public

places and putting questions to them if they are willing to listen." *State v. Garcia*, 197 N.C. App. 522, 528, 677 S.E.2d 555, 559 (2009) (alteration in original) (internal quotation marks omitted). "Rather, [t]he encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." *Id.* (alteration in original) (internal quotation marks omitted). "Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means." *United States v. Drayton*, 536 U.S. 194, 201, 153 L. Ed. 2d 242, 251 (2002). Only when the encounter loses its consensual nature does it become an investigatory stop which must be supported by reasonable suspicion under the Fourth Amendment. *Garcia*, 197 N.C. App. at 528, 677 S.E.2d at 559.

When Officer Moss approached defendant, he asked him whether he should be in school, what his name was, and what he was doing. Defendant provided his name and said he was waiting for a friend to take him to school. However, defendant could not remember his friend's name and appeared nervous during the encounter, continuously putting his hands in his pockets. At that time, Officer Moss conducted a pat-down search of defendant. Defendant does not challenge the pat-down search. After the pat-down search, Officer Moss asked defendant if he could look in defendant's backpack and defendant replied, "sure." Because officers "may pose questions, ask for identification, and request consent to search" without seizing a person within the meaning of the Fourth Amendment, *see Drayton*, 536 U.S. at 201, 153 L. Ed. 2d at 251, and because defendant consented to Officer Moss's request to search his backpack, *see State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) ("[A] search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given."), there is no merit to defendant's argument that the search of his backpack was unlawful under the Fourth Amendment. We further hold that defendant's argument that the items seized from his backpack were obtained in violation of his *Miranda* rights is entirely without merit. The trial court did not err in concluding, "the items obtained from Defendant's [backpack] were voluntarily submitted to the police by consent and [we]re admissible at trial."

Affirmed.

Judges BRYANT and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. GLENN EDWARD WHITTINGTON

No. COA11-1197

(Filed 19 June 2012)

1. Indictment and Information—fatally defective indictment—trafficking in opium by sale—trafficking in opium by delivery—failure to specifically identify person who bought drugs

The trial court lacked subject matter jurisdiction over the charge of trafficking in opium by sale based on a fatally defective indictment. The indictment failed to identify specifically the person to whom the opium was sold. Further, the Court of Appeals determined *ex mero motu* that the indictment for trafficking by delivery was similarly defective. Thus, the judgments for both of these counts were vacated.

2. Constitutional Law—right to confrontation—admission of lab report without testimony of chemical analyst—failure to deliver lab report by required time—no waiver

The trial court erred in a drugs case by admitting a lab report without the testimony of the chemical analyst who performed the testing. The record failed to show that the State sent defendant a copy of the lab report by the required time before trial, and thus, defendant did not waive his constitutional right to confront the chemical analyst who prepared the lab report.

Appeal by Defendant from judgment entered 7 April 2011 by Judge Quentin T. Sumner in Superior Court, Nash County. Heard in the Court of Appeals 6 March 2012.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Currin & Currin, by George B. Currin, for Defendant.

McGEE, Judge.

Glenn Edward Whittington (Defendant) was indicted on three counts of trafficking in opium on 11 May 2009: Count I, trafficking in opium by sale; Count II, trafficking in opium by delivery; and Count III, trafficking in opium by possession.

Sergeant Phillip Lewis (Sergeant Lewis), an investigator with the narcotics division of the Nash County Sheriff's Office, supervised a controlled drug transaction (the transaction) between Defendant and Joey Sullivan (Sullivan) on 2 July 2008. Sergeant Lewis instructed Sullivan on how to conduct the transaction, and gave Sullivan the money to use in the transaction. Sullivan then drove to the house where Defendant was located, and Defendant let Sullivan inside the house. Sullivan handed Defendant $560.00 in exchange for sixteen pills. The transaction was recorded on audio and video. The pills were sent to the State Bureau of Investigation (SBI) for analysis. Defendant was subsequently arrested.

A lab report (the lab report) dated 8 December 2009, prepared by Brittany Dewell (Dewell), a chemical analyst, identified the pills as: "Oxycodone—Schedule II Opium Derivative. Weight of tablets—4.3 grams." The State filed a "Request for Voluntary Discovery" on 15 February 2010 and, in that document, notified Defendant that it intended "to introduce the following evidence in the trial of the above referenced criminal case: . . . . Pursuant to G.S. § 90-95(g), any and all reports prepared by the N.C. State Bureau of Investigation concerning the analysis of substances seized in the above-captioned case. A copy of report(s) will be delivered upon request." There is no record evidence that Defendant specifically requested a copy of any reports.

At trial, when the State sought to offer the lab report into evidence without calling Dewell, the chemical analyst who had produced the lab report, Defendant objected. Defendant argued that introducing the lab report without Defendant having an opportunity to cross-examine Dewell violated Defendant's constitutional rights under the confrontation clause of the Sixth Amendment to the United States Constitution. The trial court overruled Defendant's objection, and allowed the lab report to be introduced through a witness other than Dewell. The jury found Defendant guilty on all three counts on 7 April 2011. Defendant appeals.

I. Indictments

[1] In Defendant's first argument, he contends the trial court lacked subject matter jurisdiction over the charge of trafficking in opium by sale because the indictment was fatally defective. We agree.

The State agrees with Defendant's position that the indictment for Count I, trafficking by sale, was fatally defective because it failed to name the person to whom Defendant allegedly sold or delivered the controlled substance. *State v. Wall*, 96 N.C. App. 45, 49, 384 S.E.2d

581, 583 (1989) ("[t]he law is settled in this state that an indictment for the sale and/or delivery of a controlled substance must accurately name the person to whom the defendant allegedly sold or delivered, if that person is known") (citations omitted); *see also State v. Bennett*, 280 N.C. 167, 168-69, 185 S.E.2d 147, 149 (1971). The indictment for Count I states that the sale was "to a confidential informant[.]" It is undisputed that the name of the confidential informant was known. The failure to identify specifically the person to whom the opium was sold constitutes a fatal defect in the indictment, which means the trial court never obtained jurisdiction over the matter. *State v. McKoy*, 265 N.C. 380, 381, 144 S.E.2d 46, 47-48 (1965) (a fatally defective indictment is insufficient to confer jurisdiction on the trial court).

Though not argued by Defendant, and not addressed by the State, the indictment for Count II, trafficking by delivery, is similarly defective. The indictment for Count II also fails to name the person to whom Defendant allegedly delivered the opium. This is a fatal defect. *Wall*, 96 N.C. App. at 49, 384 S.E.2d at 583; *Bennett*, 280 N.C. at 168-69, 185 S.E.2d at 149; *see also State v. Wynn*, 204 N.C. App. 371, 696 S.E.2d 203 (2010) (unpublished); *State v. Esquivel*, 184 N.C. App. 379, 646 S.E.2d 443 (2007) (unpublished). Because this is a jurisdictional issue, we address it *ex mero motu*. *McKoy*, 265 N.C. at 381, 144 S.E.2d at 48.

The indictments for Counts I and II are fatally defective. Therefore, we vacate judgment on both these counts. Count III, trafficking by possession, does not suffer the same defect as it does not involve the transfer of the controlled substance by Defendant to another party.

II. Lab Report

[2] In Defendant's second argument, he contends that the trial court erred in admitting the lab report without the testimony of the chemical analyst who performed the testing. We agree.

Defendant objected to the admission of the lab report on constitutional grounds, citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, ——, 174 L. Ed. 2d 314, 321-322 (2009), arguing that admitting the lab report into evidence without affording Defendant an opportunity to confront the chemical analyst who produced the report violated the Sixth Amendment of the United States Constitution. The State argued that Defendant had waived his right to confront the chemical analyst, and the trial court overruled Defendant's objection.

> This Court reviews alleged violations of constitutional rights *de novo*. If a defendant shows that an error has occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A–1443(b) (2009). Under the *de novo* standard of review, this Court "considers the matter anew and freely substitutes its own judgment for that of the [trial court]."

State v. Brewington, 204 N.C. App. 68, 72, 693 S.E.2d 182, 185-86 (2010) (citations omitted).

It is undisputed that the lab report was introduced into evidence without Defendant having had an opportunity to cross-examine the chemical analyst who performed the actual analysis. The State, citing *Melendez-Diaz*, 557 U.S. at ——, 174 L. Ed. 2d at 321-322, concedes that Defendant had the right to confront the chemical analyst unless Defendant waived the right to confrontation. "The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections." *Id.* at, ——, 174 L. Ed. 2d at 323 n.3.

North Carolina has adopted a statute governing the admission of chemical analysis reports without the testimony of the analyst:

> Whenever matter is submitted to the North Carolina State Crime Laboratory . . . for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication and without the testimony of the analyst in all proceedings in the district court and superior court divisions of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed. Provided, however, the provisions of this subsection may be utilized by the State only if:
>
> > (1) The State notifies the defendant at least 15 business days before the proceeding at which the report would be used of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant,[1] and

1. In its 15 February 2010 "Request for Voluntary Discovery" the State stated: "A copy of report(s) will be delivered upon request." We note that the State may not shift the burden to Defendant by requiring Defendant to request a lab report that the State intends to introduce at trial. N.C. Gen. Stat. § 95-90(g)(1) requires the State to not only give notice to Defendant prior to trial of any lab report it intends to introduce at trial without the testimony of the analyst, but to provide the lab report to Defendant as well.

> (2) The defendant fails to file a written objection with the court, with a copy to the State, at least five business days before the proceeding that the defendant objects to the introduction of the report into evidence.
>
> If the defendant's attorney of record, or the defendant if that person has no attorney, fails to file a written objection as provided in this subsection, then the report may be admitted into evidence without the testimony of the analyst.

N.C. Gen. Stat. § 90-95(g) (2011).

There is a presumption against the waiver of fundamental constitutional rights. *State v. Vestal*, 278 N.C. 561, 578–79, 180 S.E.2d 755, 767 (1971). "[T]he waiver of all constitutional rights, must be knowing and voluntary[.]" *State v. Gerald*, 304 N.C. 511, 518, 284 S.E.2d 312, 317 (1981) (citation omitted). "The State bears the burden of proving that a defendant made a knowing and intelligent waiver of his rights[.]" *State v. Bunnell*, 340 N.C. 74, 80, 455 S.E.2d 426, 429 (1995) (citation omitted).

The State concedes that there is no definitive record evidence that Defendant ever received a copy of the lab report as required by N.C.G.S. § 90-95(g). The State argues, however, that it was Defendant's burden to prove that the State did not send the lab report, and not the State's burden to demonstrate at trial that Defendant had waived his constitutional right to confront the chemical analyst who prepared the lab report. The State's argument is incorrect. *Bunnell*, 340 N.C. at 80, 455 S.E.2d at 429 ("The State bears the burden of proving that a defendant made a knowing and intelligent waiver of his rights and that his statement was voluntary. *State v. Reid*, 335 N.C. 647, 440 S.E.2d 776 (1994).").

The State also argues: "The [Supplementary Discovery] notice on 3 September 2010 . . . appears to indicate that it was sent after delivery of the SBI lab report to trial counsel." This 3 September 2010 notice is included in the record; however, we do not find that this notice "appears to indicate" that Defendant received a copy of the lab report, much less that it satisfied the State's burden of proving Defendant received the lab report. The 3 September 2010 notice merely includes a handwritten notation at the bottom of the notice that states: "* SBI Lab." This Court has no way of knowing who wrote the notation, when it was written, or what it signifies. The State also made a statement to the trial court that a "[c]opy of the report was delivered to" Defendant's attorney. However, this unsworn statement

by the prosecutor is insufficient to meet the State's burden of proving Defendant waived his constitutional rights because, even assuming the statement is true, there is no indication when the lab report was delivered. In order for the State to comply with N.C.G.S. § 90-95(g), it was required to provide a copy of the lab report to Defendant at least five business days before the start of Defendant's trial. N.C.G.S. § 90-95(g)(2) required Defendant to object at least five business days before the start of the trial, in writing, to the introduction of the lab report without the State calling Dewell. N.C.G.S. § 90-95(g)(1) required the State to provide notice and a copy of the lab report to Defendant before Defendant's obligation to object was triggered. Therefore, if the State did not provide a copy of the lab report to Defendant at least five business days prior to the start of trial, Defendant would not have been able to object in accordance with the statute.

Our review is limited to the record on appeal. *N.C. Concrete Finishers, Inc. v. Farm Bureau Mut. Ins. Co.*, 202 N.C. App. 334, 337-38, 688 S.E.2d 534, 536 (2010). Because the record does not show that the State sent Defendant a copy of the lab report by the required time before trial, we must hold that Defendant did not waive his constitutional right to confront the chemical analyst who prepared the lab report. N.C.G.S. § 90-95(g)(1); *see also State v. Baldwin*, 161 N.C. App. 382, 388-89, 588 S.E.2d 497, 503 (2003); *State v. Carr*, 145 N.C. App. 335, 340-41, 549 S.E.2d 897, 901 (2001) (Following the defendant's objection to introduction of a lab report absent the chemical analyst who produced the report, the trial court conducted an evidentiary hearing, made findings of fact and conclusions of law, and ruled that the defendant had received the report and the notice as required by N.C.G.S. § 90-95(g)(1). Because record evidence supported the trial court's findings that the defendant had received the report and notice within the time frame required by N.C.G.S. § 90-95(g)(1), the defendant's motion to suppress was properly denied).

Because Defendant did not waive his right to confront the chemical analyst who produced the lab report, it was error for the trial court to admit the lab report into evidence. *Brewington*, 204 N.C. App. at 76, 693 S.E.2d at 189. Without the lab report, the State could not prove an element of the crime—that the pills contained a substance prohibited under N.C. Gen. Stat. § 90-95(h)(4). Therefore, the State cannot show that the error was harmless beyond a reasonable doubt, and we must grant Defendant a new trial on the remaining

charge, Count III, trafficking by possession. *Id.* at 83, 693 S.E.2d at 192. Judgment on Count I and Count II is vacated; new trial on Count III.

It is the State's burden to show that it has complied with the requirements of N.C.G.S. § 90-95(g)(1), and that a defendant has waived his constitutional right to confront a witness against him. This burden includes insuring the record on appeal contains sufficient evidence demonstrating full compliance with N.C.G.S. § 90-95(g)(1). Proper appellate review will be greatly facilitated if, as in *Carr*, the trial court conducts a hearing to determine whether waiver pursuant to N.C.G.S. § 90-95(g)(1) has actually occurred.

Vacated in part; new trial in part.

Judges GEER and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. KENNETH WAYNE MILLS

No. COA12-3

(Filed 19 June 2012)

1. Robbery—dangerous weapon—motion to dismiss—sufficiency of evidence—lawn chair a dangerous weapon

The trial court did not err by denying defendant's motion to dismiss the robbery with a dangerous weapon charge based on alleged insufficient evidence to show that a lawn chair was used to injure the victim or that the lawn chair was a dangerous weapon. The evidence taken together was enough for a reasonable person to conclude that the victim was attacked with the lawn chair and robbed. Further, the victim's wounds were sufficient to raise an inference that the victim was struck with a dangerous weapon within the meaning of N.C.G.S. § 14-87(a).

2. Assault—deadly weapon—motion to dismiss—sufficiency of evidence—lawn chair a deadly weapon

The trial court did not err by denying defendant's motion to dismiss the assault with a deadly weapon charge based on alleged insufficient evidence that a lawn chair was a deadly weapon within the meaning of N.C.G.S. § 14-32(a). The State produced sufficient evidence that the lawn chair was used as a deadly weapon, and the State was not required to present evidence as to

defendant's or the victim's size or condition when the assault occurred.

3. Evidence—lay opinion—substance on lawn chair—bloodstains

The trial court did not commit plain error in an assault with a deadly weapon inflicting serious injury and robbery with a dangerous weapon case by permitting detectives to offer lay opinion that the substance found on a lawn chair was blood. Our Supreme Court has previously upheld lay testimony regarding bloodstains.

4. Damages and Remedies—restitution—amount

The trial court did not err in an assault with a deadly weapon inflicting serious injury and robbery with a dangerous weapon case by ordering $730.00 in restitution. The State presented testimony from the victim that the amount requested represented the money and the items taken from the victim when he was assaulted and robbed.

Appeal by Defendant from judgment entered 13 April 2011 by Judge Christopher M. Collier in Iredell County Superior Court. Heard in the Court of Appeals 25 April 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel D. Addison, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for Defendant.

BEASLEY, Judge.

Kenneth Wayne Mills (Defendant) appeals from judgment entered on his convictions for assault with a deadly weapon inflicting serious injury and robbery with a dangerous weapon. For the following reasons, we find no error.

On the evening of 11 July 2009, a group of people gathered at the home of Stephanie and Carl Proffit "[j]ust to sit around and shoot the breeze." One member of the group, William Clyde Baker (Baker) went to leave and was walking to his car when he was assaulted and robbed. In connection with this attack, Defendant, who was also at the Proffits' residence on 11 July 2009, was indicted for one count of assault with a deadly weapon with intent to kill inflicting serious injury and one count of robbery with a dangerous weapon. On 13

April 2011, Defendant was found guilty of assault with a deadly weapon inflicting serious injury and of robbery with a dangerous weapon by jury verdict. Judgment was entered that same day by the Honorable Christopher M. Collier, and Defendant was sentenced to a term of 40 to 57 months imprisonment for the assault charge and 100 to 129 months imprisonment for the robbery charge. Defendant was also ordered to pay $730.00 in restitution to Baker. Defendant entered oral notice of appeal in open court.

I.

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the robbery with a dangerous weapon charge because there was insufficient evidence to show that the lawn chair was used to injure Baker, or that the lawn chair was a "dangerous weapon" as defined by statute. We disagree.

"In deciding a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, the trial court must determine whether substantial evidence has been presented in support of each element of the charged offense." *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 626 (2011) (citations and internal quotations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990) (citations and internal quotations omitted). "In determining the sufficiency of the evidence we consider it in the light most favorable to the state." *Id.* "The defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971). "The test of the sufficiency of the evidence on a motion to dismiss is the same whether the evidence is direct, circumstantial, or both. All evidence actually admitted, both competent and incompetent, which is favorable to the State must be considered." *State v. Israel*, 353 N.C. 211, 216, 539 S.E.2d 633, 637 (2000).

The State's evidence included the testimony of Baker, an officer and Stephanie Proffit. Baker testified that he was struck by something other than a fist; he was headed to his truck parked in the driveway when he was hit. The officer who took Baker's statement testified that a lawn chair was in the grass next to the driveway, and blood was found in the driveway, on the chair, and on Baker's face. Stephanie Proffit, the owner of the chair, testified that the morning after the assault, there was blood on the chair and it was bent, and that the chair was not bent nor bloody the night before. This evi-

dence, taken together, is enough for a reasonable person to conclude that Baker was attacked with the lawn chair and robbed.

Defendant argues that there were no witnesses to the robbery that saw Baker attacked with the lawn chair, nor did the State test the substance on the chair to confirm that it was in fact blood, and that it belonged to Baker. However, these arguments go to the weight of the evidence; they do not negate the fact that the State presented substantial evidence to survive Defendant's motion to dismiss. The State's evidence showed that the lawn chair was used to injure Baker; that Defendant had mentioned he needed to rob someone to pay his bills; and Defendant's roommate testified that there was a substance which looked like blood on Defendant's hands when he returned home the morning after the party.

Defendant also argues that the State presented insufficient evidence that the lawn chair was a "dangerous weapon" as contemplated in N.C. Gen. Stat. § 14-87. This Court has stated that a "dangerous" weapon "must be one which endangers or threatens life." *State v. Smallwood*, 78 N.C. App. 365, 368, 337 S.E.2d 143, 144 (1985). "Whether a weapon is deadly can be inferred from the wound of the victim." *State v. Phillips*, 87 N.C. App. 246, 248-49, 360 S.E.2d 475, 477 (1987) (finding evidence that the victim had a "board print" on the side of his face, was bloody, and at the hospital was diagnosed with a broken cheekbone and treated for bruises and lacerations was "clearly sufficient to raise an inference that [the defendant] struck the victim with a weapon which could produce great bodily harm.")

Here, Baker was knocked unconscious by something other than a fist, according to his experience having been hit by a fist before. He suffered multiple facial fractures and injuries which required surgery. After surgery, his jaw was wired shut for several weeks, and he missed between two and three weeks of work. At trial, Baker testified that he still suffered from vision problems, including blurriness and trouble seeing distances. We find that these wounds are sufficient to raise an inference that Baker was struck with a "dangerous weapon" within the meaning of N.C. Gen. Stat. § 14-87(a).

The trial court did not err in denying Defendant's motion to dismiss the charge of robbery with a dangerous weapon.

II.

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the assault with a deadly weapon charge because

the State did not present sufficient evidence that the lawn chair was a "deadly weapon" within the meaning of N.C. Gen. Stat. § 14-32(a). We disagree.

Defendant points to this Court's opinion in *State v. Lawson*, 173 N.C. App. 270, 619 S.E.2d 410 (2005), where we remanded the case because the State had not presented sufficient evidence to support the "deadly weapon" element of the charge of assault with a deadly weapon. The weapon in that case, the defendant's fists, is not considered deadly *per se* so we stated that "there must be sufficient evidence at trial regarding the size and condition of defendant versus the victim as well as sufficient evidence pertaining to the manner of the weapon's use." *Id.* at 280, 619 S.E.2d at 416. We remanded the case after finding that the evidence established the manner of use of the weapon, but did not establish the defendant's size or condition compared to that of the victim. *Id.*

Since we decided *Lawson* we have refined the law on this topic. In *State v. Smith*, 186 N.C. App. 57, 64, 650 S.E.2d 29, 34 (2007), we explicitly stated that where a defendant used his hands not to directly assault the victim but to "bring the [victim] to an instrument of the assault," the State "need not show that [the victim] was significantly smaller or weaker than defendant or that the [victim] was injured or otherwise incapacitated when defendant assaulted him." The State presented evidence that Defendant assaulted Baker with a lawn chair and not his fists alone. Accordingly, the State was not required to present evidence as to the Defendant's or Baker's size or condition when the assault occurred. We have already held that the State presented sufficient evidence that the lawn chair was used to assault Baker, *see* Section I, *supra*. The trial court did not err in denying Defendant's motion to dismiss the charge of assault with a deadly weapon.

III.

[3] Defendant asserts the trial court committed plain error when it permitted detectives to offer lay opinion that the substance found on the lawn chair was blood. We disagree.

At the outset, we note that Defendant did not challenge the detectives' testimony at trial and so our review of this issue is limited to plain error. N.C.R. App. P. 10(a)(4).

> 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. We find

> plain error only in exceptional cases where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.

State v. Wilkerson, 363 N.C. 382, 412, 683 S.E.2d 174, 193 (2009) (citations and quotations omitted).

Opinion testimony given by a witness not testifying as an expert is governed by N.C. Gen. Stat. § 8C-1, Rule 701 (2011). Rule 701 provides that such testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." Rule 701. It is well established that under this rule, "a witness may state the instantaneous conclusions of the mind as to the appearance, condition, or . . . physical state of . . . things, derived from observation of a variety of facts presented to the senses at one and the same time." *State v. Braxton*, 352 N.C. 158, 187, 531 S.E.2d 428, 445 (2000) (citations and quotations omitted).

Defendant challenges the testimony of two separate officers in the case *sub judice*. First, Detective Sergeant Nathan Speaks (Speaks), who investigated the crime scene after Baker was assaulted. He testified that there was blood in the driveway when he arrived at the Proffits, and that the lawn chair was lying close to the blood in the driveway and also had blood on it. Speaks testified that he based this conclusion on his seven years of experience as a law enforcement officer, during which he has seen blood on objects other than a person several times and has found that "blood has a distinct smell and appearance[.]" Defendant also challenges the testimony of Detective Mark Nicholson (Nicholson), who also investigated the scene of Baker's assault. Nicholson also opined that the substance on the lawn chair was blood, and he based this conclusion on the "hundreds and maybe thousands" of times that he has seen blood in his life, both in the capacity as a law enforcement officer and otherwise.

Defendant contends that this testimony was neither rationally based nor helpful to the jury, arguing that these opinions were inadmissible because the detectives were not qualified as experts in this area. However, our Supreme Court has upheld lay testimony regarding bloodstains, stating that when a witness testifies that something looked like blood to him "he has stated his conception," and that statement is permissible opinion testimony. *State v. Jones*, 291 N.C. 681, 685, 231 S.E.2d 252, 254 (1977). *See also State v. Mason*, 295 N.C.

584, 595, 248 S.E.2d 241, 248 (1978)(holding that the argument that lay witnesses should not be allowed to identify blood or bloodstains has no merit). The detectives' testimony was properly allowed by the trial court.

IV.

[4] Defendant contends that the trial court erred in ordering $730.00 in restitution where there was insufficient evidence of the value of items taken from Baker. We disagree.

"In the absence of an agreement or stipulation between defendant and the State, evidence must be presented in support of an award of restitution. Further, it is elementary that a trial court's award of restitution must be supported by competent evidence in the record." *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992). However, this review is deferential to the trial court, as when "there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986).

The State presented testimony from Baker that prior to being robbed, he had on him "two sets of keys, snuff, a pocket knife, a bandana, [his] money clip," and approximately $680.00 in cash. Baker later confirmed that the $730.00 in requested restitution represented the money and the items taken from him when he was assaulted and robbed. The testimony of the victim is competent evidence to support the restitution order.

No Error.

Judges CALABRIA and STEELMAN concur.

CARL ALSTON, AS ADMINISTRATOR OF THE ESTATE OF JEARLENE ALSTON, PLAINTIFF v. GRANVILLE HEALTH SYSTEM (FORMERLY GRANVILLE MEDICAL CENTER, A COUNTY OWNED HOSPITAL AND AGENCY OF GRANVILLE COUNTY), GRANVILLE MEDICAL CENTER BOARD OF TRUSTEES, AND DR. REGINALD HALL, DEFENDANTS

No. COA11-1522

(Filed 19 June 2012)

1. Collateral Estoppel and Res Judicata—summary judgment motion—not a relitigation of same issues in prior motions to dismiss

The trial court did not err by granting summary judgment in favor of defendants in an action seeking to hold defendants liable for decedent's injuries sustained while she was a patient under defendants' medical care even though plaintiff contended the motion was an attempt by defendants to relitigate the very same issues that were litigated in the context of their prior motions to dismiss. The question determined by the Court of Appeals in the first appeal was not the same question addressed by the trial court in its summary judgment order.

2. Medical Malpractice—failure to include Rule 9(j) certification—negligence—doctrine of res ipsa loquitur inapplicable

The trial court did not err by concluding that defendants were not entitled to judgment as a matter of law on plaintiff's negligence claim alleging the application of *res ipsa loquitur*. The *res ipsa loquitur* doctrine was unavailable since evidence of decedent's injury was available. Plaintiff's action was one for medical malpractice, and plaintiff's complaint was properly dismissed for failure to include the necessary N.C.G.S. § 1A-1, Rule 9(j) certification.

Appeal by Plaintiff from orders entered 26 May and 9 June 2011 by Judge Henry W. Hight, Jr., in Granville County Superior Court. Heard in the Court of Appeals 24 April 2012.

D. Lynn Whitted for Plaintiff.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Timothy P. Lehan and Bryan A. McGann, for Defendants Granville Health System and Granville Medical Center Board of Trustees.

Young Moore and Henderson, P.A., by William P. Daniell, Elizabeth P. McCullough, Kelly E. Street, and Michelle A. Greene, for Defendant Dr. Reginald Hall.

STEPHENS, Judge.

Plaintiff Carl Alston, administrator of the estate of Jearlene Alston, commenced this action in Granville County Superior Court against Defendants Granville Health System, Granville Medical Center Board of Trustees, and Dr. Reginald Hall, seeking to hold Defendants liable for injuries Jearlene Alston ("Decedent") sustained while she allegedly was a patient under Defendants' medical care. Upon Defendants' motions, the trial court subsequently dismissed Plaintiff's complaint for failure to state a claim pursuant to North Carolina Rule of Civil Procedure 12(b)(6). In *Alston v. Granville Health Sys.*, No. COA09-1540, 2010 N.C. App. LEXIS 1838 (Sept. 21, 2010), this Court reversed the dismissal, holding that Plaintiff had sufficiently pled a *prima facie* case of negligence based on the doctrine of *res ipsa loquitur* to survive Defendants' Rule 12(b)(6) motions.

On remand, and following a brief period of discovery, Defendants filed motions for summary judgment. The evidence presented in connection with Defendants' motions tended to show the following: When Defendant Dr. Hall performed surgery on Decedent at Defendant Granville Medical Center, Decedent was under anesthesia and was restrained during the surgery, and Dr. Hall did not remove the restraint following the surgery. When Dr. Hall "stepped away from the operative table" "to write [his] operative note," "the anesthesiologist and/or [Certified Registered Nurse Anesthetists] was/were responsible for [Decedent's] care." Those anesthesiological personnel "used [their] anesthesia training and experience in making the determination as to whether [Decedent's] restraint could safely be removed." At some point after surgery, the anesthesiological personnel removed Decedent's restraint. Thereafter, Decedent "quickly flipped or fell off of the right side of the [operating] table." Decedent was injured when she fell and passed away several years later.

Following the hearing, the trial court, the Honorable Henry W. Hight, Jr., presiding, granted summary judgment for Defendants. Plaintiff appeals.

[1] On appeal, Plaintiff first argues that the trial court's decision to grant summary judgment for Defendants was erroneous because Defendants' motions for summary judgment were attempts by

Defendants to "re-litigate the very same issues that were litigated . . . in the context of their [] motions to dismiss . . . and which were ultimately decided by the [] Court of Appeals," and the trial court's ruling on those motions violated the "law of the case" doctrine. This argument is meritless.

> [A]s a general rule when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, *provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal.*

Hayes v. Wilmington, 243 N.C. 525, 536, 91 S.E.2d 673, 681-82 (1956) (emphasis added). In this case, the question determined by this Court in the first appeal is not the same question addressed by the trial court in its summary judgment order and now before this Court in this appeal.

It is well settled that

> [t]he test on a motion to dismiss under Rule 12(b)(6) is whether the pleading is legally sufficient. The test on a motion for summary judgment made under Rule 56 and supported by matters outside the pleadings is whether on the basis of the materials presented to the court there is any genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. Therefore, the denial of a motion to dismiss made under Rule 12(b)(6) does not prevent the court . . . from thereafter allowing a subsequent motion for summary judgment made and supported as provided in Rule 56.

Barbour v. Little, 37 N.C. App. 686, 692, 247 S.E.2d 252, 255-56 (1978). Accordingly, although in the first appeal we held that Plaintiff's *complaint*, considered on its own and taking its allegations as true,[1] sufficiently set forth a claim of negligence under the theory of *res ipsa loquitur*, the trial court was not precluded from thereafter determining that "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

1. When reviewing a trial court's dismissal pursuant to Rule 12(b)(6), we determine 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. *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011). Plaintiff's argument is overruled.

[2] Plaintiff next argues that the trial court's ruling was erroneous because Defendants were not entitled to judgment as a matter of law on Plaintiff's negligence claim alleging the application of *res ipsa loquitur*. We disagree.

The doctrine of *res ipsa loquitur* applies when "(1) direct proof of the cause of an injury is not available, (2) the instrumentality involved in the accident is under the defendant's control, and (3) the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission." *Grigg v. Lester*, 102 N.C. App. 332, 333, 401 S.E.2d 657, 657-58 (1991) (citation omitted). In our previous opinion, we held that Plaintiff "alleged sufficient facts to establish a *prima facie* case of negligence under the doctrine of *res ipsa loquitur* to survive Defendants' 12(b)(6) motion." We concluded that, taken as true, Plaintiff's allegations "that it is unknown how Decedent fell off the gurney; that Decedent and the gurney were under Defendants' control; and that this injury would not have occurred in the absence of negligence" satisfied the elements of a *res ipsa loquitur* claim. On remand, however, Defendants presented evidence showing that *res ipsa loquitur* is not applicable because there is evidence that direct proof of the cause of Decedent's injury is available.

According to evidence offered by Defendants, as Decedent was regaining consciousness after undergoing anesthesia, she "quickly flipped or fell off" the operating table. At the time, Decedent was still unconscious and was unrestrained. In an affidavit offered by Defendants, a board-certified anesthesiologist opined that Decedent slipped from the operating table as a result of her "suddenly moving on the operative table" in reaction to her realization of "the presence of the intubation tube" in her throat. Various other affidavits tend to show that the cause of Decedent's fall from the table was the failure of the medical personnel to restrain Decedent. Furthermore, Plaintiff offered nothing to refute Defendants' forecast of evidence on why Decedent fell off the table, and, indeed, asserts in his pleading that Decedent's injuries were "caused diretly [sic]" by medical personnel's failure "to make sure that [Decedent] was securely strapped to the operating table."[2]

2. We note further that Plaintiff offered no evidence at all in response to Defendants' summary judgment motions. Rather, it appears he contends that the mere allegation of the applicability of the *res ipsa loquitur* doctrine in his confusing and

"Our Court has held that the *res ipsa loquitur* doctrine is only applicable where there is no direct proof of the cause of the injury available to the plaintiff." *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 352, 666 S.E.2d 127, 136 (2008) (internal quotation marks omitted). As such, where evidence constituting direct proof of the cause of injury is presented, "the doctrine of *res ipsa loquitur* [is] not applicable." *Id.* at 353, 666 S.E.2d at 136.

In *Yorke*, the plaintiff consistently identified an overly-tightened blood pressure cuff as the source of his injury. *Id.* In *Rowell v. Bowling*, 197 N.C. App. 691, 697, 678 S.E.2d 748, 752 (2009), the evidence pointed to incisions made by the defendant in the plaintiff's knee as the cause of her injury. In each case, we held that the existence of such direct proof of the cause of the injury precluded the applicability of the *res ipsa loquitur* doctrine. *See Yorke*, 192 N.C. App. at 353, 666 S.E.2d at 136; *Rowell*, 197 N.C. App. at 697, 678 S.E.2d at 752. Similarly, in this case, the uncontradicted affidavits presented by Defendants establish that the cause of Decedent's injury was the absence of restraints on Decedent as she awoke from anesthesia. This proof of the cause of Decedent's injury precludes application of the *res ipsa loquitur* doctrine.

"If the facts of the case justify [] the application of the doctrine of *res ipsa loquitur*, the nature of the occurrence and the inference to be drawn supply the requisite degree of proof to carry the case to the jury without direct proof of negligence." *Tice v. Hall*, 310 N.C. 589, 593, 313 S.E.2d 565, 567 (1984). However, "where the [*res ipsa loquitur*] rule does not apply, the plaintiff must prove circumstances tending to show some fault of omission or commission on the part of the defendant *in addition* to those which indicate the physical cause of the accident." *Kekelis v. Whitin Machine Works*, 273 N.C. 439, 444, 160 S.E.2d 320, 323 (1968) (emphasis in original) (quoting *Harris v. Mangum*, 183 N.C. 235, 237, 111 S.E. 177, 178 (1922)). As evidence of

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contradictory complaint entitles him to take his case to the jury. This is not so. As discussed *infra*, the *res ipsa loquitur* doctrine is only available to a Plaintiff where there is an absence of direct proof of negligence. Surely, one could imagine a scenario based on Plaintiff's scant pleading where the doctrine would be applicable—perhaps where no doctors present in the operating room had any idea how Decedent fell. Thus, we held in the first appeal that Plaintiff's allegations—including his allegation that "[d]irect proof of the cause of the injuries herein before complained of is not available to [Decedent]"—*taken as true*, sufficiently set forth a claim of negligence based on the doctrine of *res ipsa loquitur*. However, that allegation of the absence of direct proof has been refuted by Defendants, and, rather than presenting his own evidence to rebut or supplement Defendants' evidence, Plaintiff instead unwisely chose to rest on his pleadings.

the cause of Decedent's injury—failure to restrain—is available and, thus, the *res ipsa loquitur* doctrine is unavailable, Plaintiff must have presented some evidence tending to show that medical personnel negligently failed to restrain Decedent on the operating table. The evidence presented by Defendants in support of their summary judgment motions, however, shows that the decision to restrain a patient under anesthesia is one that requires use of specialized skill and knowledge and, therefore, is considered a professional service. *See Smith v. Keator*, 21 N.C. App. 102, 105-06, 203 S.E.2d 411, 415 (defining professional services as acts arising out of employment involving specialized knowledge, labor, or skill), *aff'd*, 285 N.C. 530, 206 S.E.2d 203, *appeal dismissed*, 419 U.S. 1043, 42 L. Ed. 2d 636 (1974); *cf. Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 630, 652 S.E.2d 302, 306 (2007) ("Because the decision to apply restraints is a medical decision requiring clinical judgment and intellectual skill, it is a professional service." (internal citation omitted)). Based upon the forecast of evidence presented by Defendants and unrefuted by Plaintiff, Plaintiff's action is one for medical malpractice that requires North Carolina Rule of Civil Procedure 9(j) certification. *See Sturgill*, 186 N.C. App. at 627, 652 S.E.2d at 305 (claim for negligent provision of professional medical service is a claim for medical malpractice); *see also* N.C. Gen. Stat. § 1A-1, Rule 9(j) (2011) (medical malpractice claims that do not establish application of *res ipsa loquitur* must contain required certification). As Plaintiff's complaint does not contain the Rule 9(j) certification, it "shall be dismissed." N.C. Gen. Stat. § 1A-1, Rule 9(j). Accordingly, we conclude that the trial court did not err by granting summary judgment for Defendants and dismissing Plaintiff's complaint. The order of the trial court is

AFFIRMED.

Judges MCGEE and HUNTER, ROBERT N., JR., concur.

C. RICHARD EPES, M.D., PLAINTIFF v. B.E. WATERHOUSE, LLC AND A.J. WATERHOUSE, LLC, DEFENDANTS/COUNTERCLAIMANTS

No. COA11-1528

(FILED 19 JUNE 2012)

1. Guaranty—declaratory judgment—bankruptcy—automatic stay did not prevent actions against loan guarantor

The trial court did not err in a declaratory judgment action by granting summary judgment in favor of defendants. Defendants showed that Fuddruckers defaulted, an event which plaintiff guarantor conceded would trigger a guaranty obligation. Although Fuddruckers filed for bankruptcy, the automatic stay did not prevent actions against guarantors of loans.

2. Guaranty—declaratory judgment—no ambiguity in assignment and guaranty language—no release

The trial court did not err in a declaratory judgment action by granting summary judgment in favor of defendants even though plaintiff guarantor contended the language in the assignment to the guaranty and the continuation of the guaranty with Fuddruckers was ambiguous and should have been construed against defendants. The clear and unambiguous language of both the assignment and guaranty reflected that the assignment to Fuddruckers would not release plaintiff from liability as guarantor.

3. Declaratory Judgments—motion for new trial or relief from judgment—no fraud—default

The trial court did not abuse its discretion in a declaratory judgment action by denying defendant's motion for a new trial or relief from judgment pursuant to N.C.G.S. § 1A-1, Rule 60 even though plaintiff contended defendants committed fraud by asserting that Fuddruckers was in default under the contract. The Court of Appeals had already concluded that Fuddruckers was in default.

Appeal by Plaintiff from orders entered 25 February 2011 and 3 August 2011 by Judge Michael Morgan in Guilford County Superior Court. Heard in the Court of Appeals 25 April 2012.

Douglas S. Harris for Plaintiff-Appellant.

Hendrick Bryant Nerhood & Otis, LLP, by Kenneth C. Otis, for Defendants/Counterclaimants-Appellees.

BEASLEY, Judge.

C. Richard Epes, M.D. (Plaintiff) appeals from an order granting summary judgment in favor of B.E. Waterhouse, LLC and A.J. Waterhouse, LLC (Defendants) entered 25 February 2011, and an order denying his motions for a new trial or relief from judgment entered 3 August 2011. For the following reasons, we affirm both orders.

Plaintiff signed a Guaranty Agreement dated 1 October 1998 to act as guarantor to the lease entered into between Primax Properties, LLC (Primax), the lessor, and CRC Management Company, LLC (CRC), the lessee. On or about 27 December 2001, Primax assigned its rights, duties, and obligations under the lease to PMC, Inc. (PMC). On or about 2 December 2005, PMC assigned the rights, titles, and interest in the lease to Defendants, including all right, title, and interest in the Guaranty Agreement. CRC sold its assets to Fuddruckers Inc. (Fuddruckers) pursuant to an asset purchase agreement.

Plaintiff commenced this action on 2 July 2010 by filing a complaint asking for a declaratory judgment that Plaintiff "has no ongoing duties, obligations, or liability of any type to defendants under any agreement or under applicable law." Defendants moved for summary judgment on 24 January 2011. Summary judgment was granted for Defendants by order filed 25 February 2011 in Guilford County Superior Court. On 7 March 2011, Plaintiff filed a motion for a new trial and/or hearing pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. Plaintiff then filed a motion for a new trial and/or relief from judgment pursuant to Rule 60 of the North Carolina Rules of Civil Procedure on 7 April 2011. Both motions were denied by order entered 3 August 2011. Plaintiff filed notice of appeal to this Court on 2 September 2011.

I.

[1] Plaintiff first argues that the trial court erred in granting summary judgment to Defendants where Defendants did not show that Fuddruckers defaulted, and where a lessor has not defaulted, a guarantor is not liable. We disagree.

A motion for summary judgment will be granted "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) (2011). "[F]indings of fact made by the trial judge are conclusive on appeal if supported

by competent evidence, even if . . . there is evidence to the contrary. Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Tillman v. Commer. Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008) (internal quotation marks and citations omitted).

The lease delineates four Events of Default, upon the occurrence of which "the party not in default shall have the right to exercise any rights or remedies" available to it. According to 19(a)(iii) of the lease, an Event of Default will occur if

> [t]enant shall become bankrupt or insolvent, or file any debtor proceedings, or file pursuant to any statute a petition in bankruptcy or insolvency or for reorganization, or file a petition for the appointment of a receiver or trustee for all or substantially all of Tenant's assets (if such petition or appointment shall not have been set aside within sixty (60) days from the date of such petition or appointment), or if Tenant makes an assignment for the benefit of creditors, or petitions for or enters into an arrangement. . . .

In support of their assertion that Fuddruckers has defaulted on the lease, Defendants point to the affidavit of Blake E. Waterhouse, Manager of Defendant B.E. Waterhouse, LLC, which states that Fuddruckers filed for bankruptcy protection on or about 21 April 2010.

Plaintiff does not argue that Fuddruckers did not file bankruptcy, but instead that under the lease it is permissible to file bankruptcy and avoid default so long as the petition of bankruptcy is set aside within 60 days. In support of this argument, Plaintiff points to the following circumstance listed in third Event of Default: "file a petition for the appointment of a receiver or trustee for all or substantially all of Tenant's assets (if such petition or appointment shall not have been set aside within sixty (60) days from the date of such petition or appointment)[.]" Plaintiff misreads the lease, as the 60 day provision applies when a tenant has filed a petition for the appointment of a receiver or trustee, not when a Tenant has filed for bankruptcy. Accordingly, Defendants have shown that Fuddruckers defaulted; an event which Plaintiff concedes would trigger a guaranty obligation.

Plaintiff also argues that federal bankruptcy law provides for a stay on collection actions put in place at the time of a bankruptcy filing, and Defendants therefore had to obtain an order setting aside the stay from bankruptcy court. Specifically, Plaintiff relies on 11 U.S.C. § 362(a)(6), which provides that a petition of bankruptcy oper-

ates as a stay on "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case. . . ." Plaintiff's reliance is misplaced, as federal courts have held that the automatic stay does not prevent actions against guarantors of loans. *See*, *e.g.*, *Credit Alliance Corp. v. Williams*, 851 F.2d 119, 121 (4th Cir. 1988).

II.

[2] Plaintiff next argues that the trial court erred in granting summary judgment to Defendants because the language in the assignment to the guaranty and the continuation of the guaranty with Fuddruckers was ambiguous and should have been construed against Defendants. We disagree.

"A guaranty of payment is an absolute and unconditional promise to pay the debt at maturity if not paid by the principal debtor." *Jennings Communications Corp v. PCG of the Golden Strand*, *Inc.*, 126 N.C. App. 637, 640, 486 S.E.2d 229, 231 (1997). "The nature and extent of the liability of a guarantor depends on the terms of the contract as construed by the general rules of construction." *Id.* at 641, 486 S.E.2d at 232.

> Under the general rules of contract construction, where an agreement is clear and unambiguous, no genuine issue of material fact exists and summary judgment is appropriate. In contrast, an ambiguity exists in a contract if the language of the contract is fairly and reasonably susceptible to either of the constructions asserted by the parties.

Carolina Place Joint Venture v. Flamers Charburgers, *Inc.*, 145 N.C. App. 696, 699, 551 S.E.2d 569, 571 (2001)(internal quotations, brackets, and citations omitted).

Plaintiff first contends that there is ambiguity in the 31 December 2001 Assignment and Assumption of Lease (the Assignment), where Fuddruckers assumed the lease on the property. The provision of the Assignment that both parties point to is paragraph 6, which states:

> Landlord, agrees that from the Effective Date CRC shall be released from all of its obligations under the Lease accruing or relating to any period after the Effective Date. Nothing contained herein is intended to release or terminate (i) the liability of CRC for any of its obligations under the Lease accruing or relating to any period prior to the Effective Date, and CRC shall remain fully

> liable therefor or (ii) *that certain Guaranty of the Lease dated 1998 from Dr. C. Richard Epps [sic] which Guaranty shall continue in full force and effect.* (emphasis added).

Unlike the liability of CRC, which is clearly limited by the Assignment, Plaintiff's liability as guarantor is explicitly said to continue in full force and effect. There is no ambiguity in that statement.

Plaintiff also argues that ambiguity exists because the Assignment redefines "tenant" under the lease to reflect that Fuddruckers is the new tenant, but the same was not done in the Guaranty Agreement (Guaranty). This argument is also unpersuasive, because not only does the Assignment specifically state that the Guaranty will continue "in full force and effect", as noted above, but the Guaranty itself clearly states that "Landlord and Tenant, without notice to or consent by Guarantor, may at any time or times enter into such modifications, extensions, amendments or other covenants respecting the Lease and Guarantor should not be released thereby[.]" Therefore, the clear and unambiguous language of both the Assignment and Guaranty reflect that the assignment to Fuddruckers would not release Plaintiff from liability as guarantor, and summary judgment was appropriately granted to Defendants.

III.

[3] Finally, Plaintiff argues that the trial court abused its discretion by denying his motion for a new trial or relief from judgment pursuant to N.C. Gen. Stat. §1A-1, Rule 60[1] where Defendants committed fraud. We disagree.

"On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party[.]" N.C. Gen. Stat. § 1A-1, Rule 60(b)(3) (2011). "[T]he standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Plaintiff essentially argues that Defendants were fraudulent in asserting that Fuddruckers was in default under the contract. We

1. Plaintiff withdrew his argument regarding the N.C. Gen. Stat. § 1A-1, Rule 59 motion that was filed with the Rule 60 motion; we need not address it here.

have already concluded that Fuddruckers was in default, see Section I *supra*, so this argument is without merit.

Affirmed.

Judges CALABRIA and STEELMAN concur.

IN THE MATTER OF N.J.

No. COA11-1369

(Filed 19 June 2012)

1. **Juveniles—motion to suppress drugs—failure to make any written or oral findings of fact or conclusions of law prior to ruling**

   The trial court erred in a drugs case by failing to make any written or oral findings of fact or conclusions of law prior to ruling on a juvenile's motion to suppress in violation of N.C.G.S. § 15A-977(f). The case was reversed and remanded for entry of findings of fact and conclusions of law related to the denial of the juvenile's motion to suppress.

2. **Juveniles—possession of a controlled substance with intent to manufacture, sell, or deliver—failure to inform of most restrictive disposition prior to accepting admission**

   The trial court erred in a possession of a controlled substance with intent to manufacture, sell, or deliver case by failing to inform a juvenile of the most restrictive disposition on the charge prior to accepting his admission.

Appeal by Juvenile from orders entered 3 August 2011 by Judge Pat Evans in District Court, Durham County. Heard in the Court of Appeals 3 April 2012.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Hannah Hall, for Juvenile.

McGEE, Judge.

Officer Christopher Tidwell (Officer Tidwell) and Officer Kimbell[1] of the Durham Police Department were on patrol early in the evening of 27 February 2011. The two officers were on foot, looking for trespassers at a Durham Housing Authority housing complex when they came upon N.J. (Juvenile) and three other people, sitting on an electrical box located on the housing complex grounds. Two of the other three people were females, one adult and one seventeen-year-old juvenile. The other person was a juvenile male, J.J. As the officers were approaching the four individuals, Officer Tidwell noticed a toboggan-style hat being tossed from the direction of the electrical box onto the ground. The officers asked the four individuals if they were trespassing. All four responded that they were not. J.J. stated that he lived in the housing complex with one of his parents.

Officer Tidwell asked J.J. if he could search him for weapons, and J.J. consented to the search. During the search, Officer Tidwell felt something in J.J.'s jeans, and asked J.J. if it was marijuana. J.J. admitted that it was marijuana, and Officer Tidwell handcuffed and arrested J.J. At this time, Officer Kimbell conducted a pat-down weapons search of the other three individuals. Nothing was found on Juvenile or on the two women and they were asked to sit back down on the electrical box. The officers began questioning Juvenile and the women concerning where they lived. While Officer Kimbell continued to talk with Juvenile and the women, Officer Tidwell walked over to the toboggan laying on the ground, and picked it up. Inside the toboggan, Officer Tidwell discovered thirteen individually-wrapped plastic bags containing a green leafy substance. Officer Tidwell asked, "whose marijuana it was" and Juvenile answered that it was his. Juvenile was then arrested. The contents of seven of the thirteen plastic bags were analyzed by the State Bureau of Investigation crime lab and were determined to be marijuana. The State filed a petition on 14 March 2011 charging Juvenile with possession of a controlled substance with intent to manufacture, sell, or deliver.

During Officer Tidwell's testimony at the adjudication hearing, Juvenile moved to suppress statements Juvenile had made regarding the marijuana. Juvenile argued that he was in custody at the time Officer Tidwell asked who the marijuana belonged to, but that Juvenile had not been advised of his rights under *Miranda* or the North Carolina Juvenile Code. Juvenile argued that this violated his rights, including rights under the Fifth Amendment to the United

1. Officer Kimbell's first name is not included in the record.

States Constitution, and required the suppression of Juvenile's statement. The trial court denied Juvenile's motion to suppress.

Juvenile then agreed to admit to one count of possession of a controlled substance with intent to manufacture, sell, or deliver, but retained his right to appeal the denial of his motion to suppress. In its colloquy with Juvenile, the trial court touched on the six requirements set out in N.C. Gen. Stat. § 7B-2407(a) for accepting Juvenile's admission, including the requirement that the trial court personally inform "the juvenile of the most restrictive disposition on the charge." N.C. Gen. Stat. § 7B-2407(a)(6) (2011). To this end, the trial court asked Juvenile: "Have you discussed the most serious or severe disposition of this charge given your delinquency history level with your attorney?" Juvenile answered: "Yes, ma'am." The trial court then asked: "And now do you personally admit the charge?" Juvenile again answered: "Yes, ma'am." The trial court did not, however, personally inform Juvenile as to what the most restrictive disposition on the charge could be. The trial court accepted Juvenile's admission, and entered disposition. A Transcript of Admission memorializing the admission agreement was filed on 3 August 2011. Juvenile appeals.

I. Findings of Fact and Conclusions of Law

[1] In his second argument, Juvenile contends that "[t]he trial court erred by failing to make any written or oral findings of fact or conclusions of law prior to ruling on [his] motion to suppress in violation of N.C. Gen. Stat. § 15A-977(f)." We agree.

Initially, though neither Juvenile nor the State addresses this issue, we must determine if N.C. Gen. Stat. § 15A-977(f) applies in this case. N.C. Gen. Stat. § 15A-977 is titled: "Motion to suppress evidence in superior court; procedure." N.C. Gen. Stat. § 15A-977 (2011). There is nothing in N.C.G.S. § 15A-977 to suggest that it applies to motions to suppress in district court. However, in *State v. Norris*, this Court held that "the procedural standards for juveniles must be at least as strict as those for adults" and applied the protections found in N.C. Gen. Stat. 15A–974 to the juvenile defendant in *Norris*. *Norris*, 77 N.C. App. 525, 529, 335 S.E.2d 764, 766 (1985), *disapproved of on other grounds by In re Stallings*, 318 N.C. 565, 350 S.E.2d 327 (1986). N.C. Gen. Stat. § 15A-974, "Exclusion or suppression of unlawfully obtained evidence[,]" states in relevant part:

(a) Upon timely motion, evidence must be suppressed if:

> (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina[.]
>
> . . . .
>
> (b) The court, in making a determination whether or not evidence shall be suppressed under this section, shall make findings of fact and conclusions of law which shall be included in the record, pursuant to G.S. 15A-977(f).

N.C. Gen. Stat. § 15A-974 (2011). Unlike N.C.G.S. § 15A-977, nothing in N.C.G.S. § 15A-974 limits its provisions to superior court. N.C.G.S. § 15A-977(f) states: "The judge must set forth in the record his findings of facts and conclusions of law." This Court, in *State v. Baker*, addressed the proper standard to use when determining whether a trial court had complied with N.C.G.S. § 15A-977, stating:

> We observe that the language of section 15A–977(f) is mandatory—a trial court "*must* set forth in the record [her] findings of fact and conclusions of law." N.C. Gen. Stat. § 15A–977(f) (2007) (emphasis added). *Compare In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978) (noting that, when a statute employs the word "may," it ordinarily shall be construed as permissive and not mandatory, but legislative intent must control the statute's construction) *with State v. Inman*, 174 N.C. App. 567, 621 S.E.2d 306 (2005) (observing that use of the words "must" and "shall" in a statute are deemed to indicate a legislative intent to make the provision of the statute mandatory such that failure to observe it is fatal to the validity of the action)[.]
>
> The language of section 15A–977(f) has been interpreted as mandatory to the trial court "*unless* (1) the trial court provides its rationale from the bench, *and* (2) there are no material conflicts in the evidence at the suppression hearing." "If these two criteria are met, the necessary findings of fact are implied from the denial of the motion to suppress." The North Carolina Supreme Court has articulated its preference that a trial court make findings of fact, even when no material conflict in the evidence exists, opining that "it is always the better practice to find all facts upon which the admissibility of the evidence depends." A record containing findings of fact and conclusions of law will facilitate "a meaningful appellate review of the [trial court's] decision."
>
> In the absence of controlling authority to the contrary, and in light of the mandatory language contained in section 15A–977(f),

> we conclude that when a trial court's failure to make findings of fact and conclusions of law is assigned as error, the appropriate standard of review on appeal is as follows: The trial court's ruling on the motion to suppress is fully reviewable for a determination as to whether the two criteria set forth in *Williams*[2] have been met—(1) whether the trial court provided the rationale for its ruling on the motion to suppress from the bench; and (2) whether there was a material conflict in the evidence presented at the suppression hearing. If a reviewing court concludes that both criteria are met, then the findings of fact are implied by the trial court's denial of the motion to suppress, . . . and shall be binding on appeal if supported by competent evidence[.] If a reviewing court concludes that either of the criteria is not met, then a trial court's failure to make findings of fact and conclusions of law, contrary to the mandate of section 15A–977(f), is fatal to the validity of its ruling and constitutes reversible error.

State v. Baker, ___ N.C. App. ___, ___, 702 S.E.2d 825, 828-29 (2010) (some citations omitted).

In the present case, the trial court had to determine whether Juvenile's inculpatory statement was obtained in violation of Juvenile's constitutional rights and, specifically, whether Juvenile was in custody for the purposes of a Fifth Amendment *Miranda* analysis such that *Miranda* warnings (and state statutory warnings) were required. Following the suppression hearing, the trial court made no written or oral findings of fact or conclusions of law and failed to articulate any rationale for its denial of Juvenile's motion to suppress. The trial court simply stated to Juvenile's council: "Your motion is denied at this time."

Because the trial court failed to provide its rationale for denying the motion, and also failed to make findings of fact and conclusions of law, we reverse and remand for the entry of findings of fact and conclusions of law relating to the denial of Juvenile's motion to suppress. *Baker*, ___ N.C. App. at ___, 702 S.E.2d at 833.

II. Most restrictive disposition

[2] In Juvenile's third argument, he contends that the trial court erred by failing to inform him of "the most restrictive disposition on the charge prior to accepting [his] admission." We agree.

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2. *State v. Williams*, 195 N.C. App. 554, 555, 673 S.E.2d 394, 395 (2009).

According to N.C. Gen. Stat. § 7B-2407 (2011): "When admissions by juvenile may be accepted. . . . The court may accept an admission from a juvenile only after first addressing the juvenile personally and: . . . (6) Informing the juvenile of the most restrictive disposition on the charge."

The State agrees with Juvenile that the trial court failed to inform the Juvenile personally of the most restrictive disposition associated with the charge to which Juvenile admitted. Our review of the transcript reveals that Juvenile's argument has merit. We vacate the adjudication and disposition orders in this case and remand to the trial court. We also vacate the 3 August 2011 admission agreement entered into by Juvenile and the State.

III. Review

In light of our holdings above, we do not address Juvenile's additional arguments. The adjudication and disposition orders in this matter are vacated. This matter is remanded to the trial court to articulate its rationale, supported by findings of fact and conclusions of law, for either granting or denying Juvenile's motion to suppress. The trial court may, in its discretion, receive new evidence to this end.

Vacated in part, reversed in part and remanded.

Judges STEPHENS and HUNTER, JR. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 JUNE 2012)

ACADIA NORTHSTAR, L.L.C v. KINSTON CHARTER ACADEMY, INC. No. 11-1546	Rutherford (11CVS224)	Dismissed
ACADIA NORTHSTAR, L.L.C. v. KINSTON CHARTER ACADEMY, INC. No. 11-1547	Rutherford (11CVS224)	Dismissed
BLUERIDGE GEN. INC. v. CURRITUCK CNTY. No. 11-1572	Currituck (08CVS403)	Affirmed
CITY OF CHARLOTTE v. MPP SOUTH POINT LAND, LLC No. 11-1191	Mecklenburg (10CVS3835)	Dismissed
EUBANK v. VAN-RIEL No. 11-1088	Forsyth (10CVS3244)	Affirmed
EXPERIENCEONE HOMES, LLC v. TOWN OF MORRISVILLE No. 11-1193	Wake (09CVS16153)	Affirmed
HARDY v. VANCE CNTY. BD. OF EDUC. No. 11-1418	Vance (10CVS1037)	Affirmed
HARMON v. HUNT No. 11-1395	Wake (09CVS25433)	Affirmed
IN RE J.L.B.B. No. 12-151	Rutherford (10JT56)	Affirmed
IN RE K.R.H. No. 12-53	Mecklenburg (09JT65-68)	Affirmed
IN RE N.T.D. No. 11-1419	Guilford (08JT80)	Affirmed
IN RE S.L. No. 11-1433	Buncombe (09JA187)	Affirmed
IN RE WILL OF BARRON No. 11-1472	Burke (06E40)	Affirmed

JAMES v. BLEDSOE No. 11-944	Guilford (07CVS12345)	Affirmed
RAETHER v. GCO ENERGY CORP. No. 12-86	Wake (11CVD7064)	Affirmed
SOUTHEAST SHORTLINES, INC. v. RUTHERFORD R.R. No. 11-1569	Rutherford (09CVS1499)	Affirmed
STATE v. BUTLER No. 11-1583	Transylvania (10CRS916)	No Error
STATE v. EDWARDS No. 12-117	Orange (10CRS50792-94)	No error in part; dismissed in part
STATE v. FISHER No. 11-981	Cumberland (10CRS7276)	Affirmed in part and remanded in part
STATE v. GEE No. 11-1507	Rowan (06CRS58602-03)	No Error
STATE v. HARRIS No. 11-936	Buncombe (96CRS61003) (98CRS2945) (98CRS2947) (98CRS2949)	Affirmed
STATE v. JACK No. 11-1429	Wake (08CRS78910)	No Error
STATE v. JOA No. 11-1573	Wake (10CRS201599)	No Error
STATE v. JORDAN No. 12-2	Pasquotank (09CRS52286-89)	No Prejudicial Error
STATE v. LOPEZ No. 11-722	Swain (09CRS870-872) (10CRS647-650)	No error in part; Vacated in part; and Remanded in part
STATE v. NELSON No. 11-1531	Durham (07CRS54602)	No Error
STATE v. PENDERGRASS No. 12-128	Mecklenburg (09CRS213019) (09CRS79459)	Affirmed

STATE v. PETTIS No. 11-1438	Gaston (09CRS61054-59) (11CRS4481-83)	Vacated in part; Affirmed in part
STATE v. PIGFORD No. 11-1411	Cumberland (10CRS50697)	No Error
STATE v. QUINN No. 11-1231	Yancey (10CRS50790) (11CRS16)	No Error
STATE v. UPCHURCH No. 11-1509	Guilford (11CRS66888) (11CRS66890-91)	Dismissed
STATE v. WORESLY No. 11-1036	Wayne (04CRS57797)	No Error
TOWN OF FOREST CITY v. RUTHERFORD R.R. No. 11-1567	Rutherford (07CVS22)	Affirmed

STATE OF NORTH CAROLINA v. VICENTE JUAREZ HUERTA

No. COA11-1401

(Filed 3 July 2012)

1. Drugs—three bags of cocaine—combined before testing

The extent to which defendant possessed more than 400 grams of cocaine was a question for the jury rather than the court where three bags of a white powder found in defendant's home were mixed together between preliminary and definitive testing. Prior decisions concerning the testing of combined amounts remain valid.

2. Appeal and Error—preservation of issues—no objection to other evidence

Defendant did not preserve for appellate review the question of the admission of a handgun found in the home in which he lived with other people where he objected to the admission of the handgun itself, but did not object to a significant amount of testimony concerning the firearm and did not argue plain error. Even if he had preserved the question for review, his argument concerning the gun was relevant to the trafficking charges and there was overwhelming evidence of guilt.

3. Drugs—constructive possession—evidence sufficient

The trial court did not err by refusing to dismiss a charge of trafficking in cocaine by possession for insufficient evidence where there was an anonymous tip and information from a DEA investigation that drug activities were occurring at a certain address; defendant was present at the address when officers went there and admitted that he lived there with his family; he had a pistol, ammunition and $9,000 in cash at the house; cocaine was found within easy reach in the attic; and the house had no residents other than defendant and his family. This evidence was sufficient to support a determination that defendant constructively possessed the cocaine.

4. Drugs—maintaining a dwelling for keeping controlled substances—constructive possession—evidence sufficient

The trial court did not err in a cocaine trafficking prosecution by denying defendant's motion to dismiss the charge of maintaining a dwelling for keeping controlled substances where the State

had presented sufficient evidence to support a finding that defendant constructively possessed the cocaine at issue in the case.

Appeal by defendant from judgment entered 18 May 2011 by Judge James M. Webb in Guilford County Superior Court. Heard in the Court of Appeals 25 April 2012.

Attorney General Roy Cooper, by Assistant Attorney General Durwin P. Jones, for the State.

Ryan McKaig for Defendant-appellant.

ERVIN, Judge.

Defendant Vincente Juarez Huerta appeals from a judgment entered based upon his convictions for trafficking in more than 400 grams of cocaine by possession and maintaining a dwelling for the purpose of keeping and selling controlled substances. On appeal, Defendant argues that the trial court erred by admitting evidence identifying a substance seized from his house as cocaine; admitting a handgun and ammunition seized from his house into evidence; and denying his motion to dismiss the charges that had been lodged against him for insufficiency of the evidence. After a careful review of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that Defendant is not entitled to relief from the trial court's judgment.

I. Factual Background

A. Substantive Facts

In April, 2003, Detective Alexander Williams of the Greensboro Police Department was assigned to the Department's vice and narcotics section, which focused its attention upon "mid-level, higher level drug dealers" and "major drug traffickers that are operating in [the] area." On the afternoon of 23 April 2003, Detective Williams was contacted by Detective Larry Marshall, a colleague in the vice and narcotics section of the Greensboro Police Department, who was, at that time, assigned to work as a liaison with the United States Drug Enforcement Agency. On that occasion, Detective Marshall gave Detective Williams a list of street addresses in Greensboro that had been determined to be of interest during a recent DEA investigation, including 1409 Dorsey Street.[1] As a result, Detectives Williams,

1. The Dorsey Street address had also been the subject of a citizen's complaint in 2002 which alleged that drug sales might be occurring at that location.

Marshall, and D.D. James went to 1409 Dorsey Street for the purpose of investigating the illegal activities that were alleged to be occurring at that location.

As the officers approached the Dorsey Street residence, which was a "very small" single-story house with an attic above the hallway, Defendant arrived in a pick-up truck and parked in the driveway. After Detective Williams, who had observed an Hispanic woman and several children in the house, identified himself as a law enforcement officer, Defendant stated that he lived in the house and that the individuals in the residence were his wife and children. When Detective Williams asked if Defendant would speak with them, Defendant invited the officers inside.

After the investigating officers entered the house, Defendant and his wife displayed their drivers' licenses. At that point, Detective Williams explained that they "had a complaint about his residence being involved in narcotics, or narcotics activity, and at that point just asked if he would mind if we searched his house for any narcotics." Defendant consented to the requested search.

As the officers began to search Defendant's residence, Detective Williams asked Defendant if there were any guns in the house. In response to this inquiry, Defendant told Detective Williams that he had a firearm in his bedroom closet. At that location, investigating officers found a .40 caliber pistol and in excess of $9,000.00 in cash. Subsequently, investigating officers also found "two vehicle titles," one of which listed Defendant as the owner and gave the Dorsey Street residence as his address; "paperwork, and . . . two loaded .40 caliber magazines" in the bedroom closet as well. Defendant admitted that he was in the United States unlawfully; acknowledged that he had purchased the gun illegally; stated that he, his wife, and children had lived at the Dorsey Street address for about three years; and claimed that the cash that the investigating officers had found had been earned by him and his wife.

After Detectives James and Marshall searched the ground floor, Detective Williams stood on a chair, moved a piece of plywood covering an opening leading from the hall into the attic, and looked into the attic. At that point, Detective Williams saw "a book-sized greenish-colored package" which appeared "to be a kilogram-sized package of narcotics" "within arm's reach, not very far from the opening of the attic space." After Detective Marshall opened the package, Detective Williams "observed that it contained [a] white powder substance, which [he] suspected to be cocaine."

At that point, Defendant was placed under arrest, and Detective Williams conducted a further search of the attic. During that process, Detective Williams found a plastic bag containing ten individually wrapped packets of white powder and a "grocery bag contain[ing] two large plastic ziplock bags," each of which "contained [twelve] individually packaged amounts of the same white powdered substance." Although the officers kept the powder for testing, they decided to have the packaging material subjected to fingerprint analysis. As Detective Williams explained:

> . . . . In order to have these items fingerprinted, you can't submit these items with the cocaine in the packaging. . . . [W]e would have packaged, for example, the kilogram amount, the book-sized amount I described, that would have been one package. One of the grocery bag items I described, that would have been a second package. And then the third grocery bag would have been a third package.

Patrick Sigafoos, a forensic specialist with the Greensboro Police Department, tested the packaging materials for the presence of fingerprints and found fifteen latent prints on a few of the plastic baggies. Amy Wild, a fingerprint examiner with the Greensboro Police Department, examined the latent fingerprints and determined that only five of them were identifiable and that none of the identifiable prints belonged to Defendant.

Special Agent Sheila Bayler of the State Bureau of Investigation tested the powder seized from Defendant's residence. After receiving the powder in three separate plastic bags, Special Agent Bayler weighed the three bags and performed initial chemical testing on the material contained in each bag, ultimately determining that the response of the powder in each bag to the chemical reagent was "consistent with each other." At that point, Special Agent Bayler combined the material contained in the three bags, explaining that, "when we are submitted evidence, if it is all collected from the same location, packaged in the same manner, appears the same, and gives us the same preliminary test, we combine the material for analysis to do one confirmation of the identity." After combining the contents of the three bags, Agent Bayler performed an infrared spectrophotometer test and determined that the material in the bags contained cocaine hydrochloride, which is "typically what people think of as powder cocaine," that had a combined weight of 1,729.5 grams. Although Special Agent Bayler tested the material in the bags for "a very broad range of [controlled and non-controlled] substances," she did not find

any substances in the mixture other than cocaine hydrochloride. According to Detective Williams, the cocaine seized from Defendant's residence would have had a street value of about $50,000.00 in 2003.

B. Procedural History

On 23 April 2003, magistrate's orders were issued charging Defendant with maintaining a house for keeping and selling controlled substances and trafficking in than 400 grams of cocaine by possession. On 7 July 2003, the Guilford County grand jury returned bills of indictment charging Defendant with trafficking in between 200 and 400 grams of cocaine by possession and maintaining a dwelling for the purpose of keeping and selling controlled substances. On 12 August 2003, a warrant for arrest was issued charging Defendant with failing to appear for trial. On 16 December 2003, the State dismissed the charges against Defendant with leave.

In September 2010, Defendant was returned to custody. On 29 November 2010, the Guilford County grand jury returned superseding bills of indictment charging Defendant with trafficking in more than 400 grams of cocaine by possession and maintaining a house for the purpose of keeping and selling controlled substances. The charges against Defendant came on for trial before the trial court and a jury at the 16 May 2011 Criminal Session of the Superior Court of Guilford County. At the conclusion of the trial, the jury convicted Defendant of trafficking in more than 400 grams of cocaine by possession and maintaining a dwelling for the purpose of keeping and selling controlled substances. At the ensuing sentencing hearing, the trial court consolidated Defendant's convictions for purposes of sentencing and sentenced Defendant to a term of 175 to 219 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Testimony Concerning the Weight of the Cocaine

[1] As an initial matter, Defendant contends that "the trial court erred in admitting evidence about the identity of the substance as cocaine where no confirmatory test was ever conducted prior to all three of the bags being mixed together" and that, in the absence of the trial court's error, the record would not have contained sufficient evidence to support the jury's verdict. We are not persuaded by Defendant's argument.

As we have already established, investigating officers seized (1) a package containing a kilogram-sized brick of white powder; (2) a

plastic bag containing ten smaller plastic bags containing white powder; and (3) another plastic bag containing two other plastic bags, each of which contained twelve smaller baggies containing white powder, from Defendant's attic. Before sending the powder to the State Bureau of Investigation laboratory for testing, the officers removed the packaging material surrounding the powder and consolidated the powder into three bags—one of which held the powder that had been compressed into a brick and two bags that held the powder that had been contained in the smaller bags. As a result, the small bags found in each of the two larger plastic bags were mixed together and submitted for testing in two bags.

After receiving the bags at the State Bureau of Investigation laboratory, Special Agent Bayler performed a preliminary chemical test on the material contained in each of the three bags, noting that the material in each bag responded to the reagent that she used in exactly the same manner. At that point, Special Agent Bayler consolidated the contents of the three bags into a single mixture, performed a definitive test on that mixture, and determined that the mixture contained cocaine hydrochloride.

In challenging the admission of Special Agent Bayler's testimony that the substance seized from his residence was cocaine, Defendant asserts, in reliance upon *State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010), in which the Supreme Court held that prescription medications could not be identified as controlled substances based solely on a visual examination, and *State v. James*, ____ N.C. App ____, 715 S.E.2d 884 (2011), in which we held that a preliminary field test did not provide an adequate basis for identifying a particular substance as a controlled substance, that Special Agent Bayler's identification of the substance in the combined mixture as cocaine was inadmissible. In essence, Defendant argues that, because the preliminary testing was not sufficiently reliable to support Special Agent Bayler's identification testimony, the fact that the contents of each bag were mixed together prior to the performance of definitive testing precluded the jury from finding him guilty of trafficking in more than 400 grams of cocaine by possession. N.C. Gen. Stat. § 90-95(h)(3) (stating, in pertinent part, that "[a]ny person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine . . . or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as 'trafficking in cocaine,' " with a person convicted of trafficking in more than 400 grams of cocaine to be punished as a Class D felon). However, the record clearly reflects that Special

Agent Bayler did not base her testimony identifying the substance seized from Defendant's residence as cocaine on the preliminary test results. Instead, she based her identification testimony upon the infrared spectrophotometer testing that she performed on the mixture of all the powder seized from Defendant's residence, an approach which Defendant concedes to be a scientifically valid method for identifying cocaine. As a result, the extent to which the preliminary tests were sufficiently reliable to support an identification of the substance seized from Defendant's residence as cocaine has no bearing on the proper resolution of this case.

Although Defendant discusses the prerequisites that must be satisfied prior to the admission of expert testimony, he really appears to be arguing that, (1) because Agent Bayler combined the substance in each bag before performing a definitive test, she had no basis for opining that each separate bag contained cocaine at the time that those bags were seized from Defendant's residence; (2) that, given the manner in which the testing at issue in this case was performed, all of the cocaine could have been contained in the smallest of the three bags; and (3), for that reason, Defendant could have only been convicted of trafficking in cocaine based upon the weight of the cocaine in the smallest of the three bags. As Defendant's trial counsel argued in the court below:

> . . . . I would contend that, at the least, the most which could be admitted was package number one, the 250 grams, and, of course, that would drop from Level III to Level II as far as the quantity.
>
> . . . .
>
> . . . . [I]t's quite possible that the substance which was actually demonstrated to be cocaine could have been from any one of those three packages. If it was from package number one, that would be Level II trafficking rather than Level III trafficking, and that's essentially the basis of my objection.

Thus, we conclude that, while Defendant had not objected to the fact that Special Agent Bayler used infrared spectrophotometer testing in order to identify the combined mixture as cocaine, he does contend that the fact that all of the powder seized from Defendant's residence was combined into a single bag prior to the infrared spectrophotometer testing precludes any determination that all of the powder seized from Defendant's residence was cocaine.

The fundamental problem with Defendant's argument is that this Court has rejected it on several occasions. For example, in *State v. Worthington*, 84 N.C. App. 150, 352 S.E.2d 695, *disc. review denied*, 319 N.C. 677, 356 S.E.2d 785, (1987), we considered a case in which a chemical analyst combined the contents of three separate containers of powder before testing the combined mixture. On appeal, the defend-ant argued that the State had failed to present sufficient evidence of the weight of the controlled substance at issue in that case given the absence of any way of knowing that all three of the bags had contained a controlled substance. As our opinion reflects:

> [The defendant] contends that the State failed to present substantial evidence that the white powder . . . consisted, in its original form, of a cocaine mixture weighing 28 grams or more. . . . The chemist testified that the white powder . . . was contained in three separate plastic bags when he received it [, and] . . . was removed from the separate bags and combined into one bag prior to analysis. His laboratory analysis revealed that the bag contained 70 grams of a cocaine mixture. [The defendant] contends that the agent's mixing of the contents of the three separate bags precludes the State from presenting sufficient evidence of requisite drug quantity. He argues that, prior to the mixing, two of the bags may have contained nothing but a cutting agent while the third bag may have contained a quantity of cocaine insufficient to support the trafficking offense charged.

Worthington, 84 N.C. App. at 160-61, 352 S.E.2d at 702. In rejecting the defendant's argument, the Court reviewed previous cases addressing the same issue, stating that:

> In *State v. Teasley*, 82 N.C. App. 150, 346 S.E. 2d 227 (1986), [*appeal dismissed*, 318 N.C. 701, 351 S.E.2d 759 (1987),] a large quantity of white powder in a sealed plastic bag was found on a shelf at the defendant's residence. A smaller quantity of white powder was discovered on a glass table approximately 18 inches away from the shelf. An officer . . . combined the two substances in the large plastic bag. This court held that, on the evidence presented, it was for the jury to decide whether the defendant possessed the requisite quantity of cocaine to support a conviction for cocaine trafficking.
>
> In *State v. Horton*, 75 N.C. App. 632, 331 S.E. 2d 215, *cert. denied*, 314 N.C. 672, 335 S.E. 2d 497 (1985), the contents of six tinfoil packets were combined by a laboratory agent for analysis.

> Combined, they contained 6.65 grams of heroin. Notwithstanding defendant's contention that all of the heroin could have been in one packet, this court held the evidence sufficient to support a conviction for heroin trafficking of the combined quantity.
>
> Pursuant to *Teasley* and *Horton*, we hold that it was for the jury to decide whether defendant Warren possessed a mixture of cocaine weighing 28 grams or more.

Worthington at 161, 352 S.E.2d at 702. *See also State v. Dorsey*, 71 N.C. App. 435, 438, 322 S.E. 2d 405, 407 (1984) (upholding a conviction for trafficking in heroin despite the fact that no chemical analysis was performed upon the substance at issue in that case until after the contents of 105 bags had been combined, noting that "it is the weight of the mixture, rather than that of the drug itself, that controls"). As a result, in each of these cases, several containers of powder suspected to be a controlled substance were seized from the defendant and combined prior to the performance of chemical testing. Even so, on each occasion, we held that the jury should decide whether the defendant possessed the requisite amount of contraband and that speculation concerning the weight or concentration of the substance in each container did not render expert testimony that the combined mixture had a specific total weight inadmissible.

Defendant has not discussed these decisions in his brief or made any effort to distinguish them from the present case. Although these decisions antedated *Ward* and *James*, *t*here is nothing in either of those decisions that casts any doubt whatsoever on the continuing validity of our prior controlled substance "combination" decisions. As a result, we conclude that the evidence at issue here was admissible and that the extent to which Defendant possessed more than 400 grams of cocaine was a question for the jury rather than for the court. Thus, Defendant is not entitled to relief from the trial court's judgment on the basis of this contention.

B. Testimony Concerning the Handgun and Ammunition

[2] Secondly, Defendant argues that the "trial court, over [Defendant's] objections, [allowed the introduction of] evidence of a .40 caliber handgun and ammunition found in [his] closet during the search of his home." According to Defendant, given that his "home appears to have been shared with other people," the admission of the challenged evidence "allowed the jury to improperly link the gun and the drugs," rendering the challenged evidence irrelevant. Defendant's argument lacks merit.

As an initial matter, we must address the validity of Defendant's contention that he adequately preserved this issue for appellate review by objecting to the introduction of the evidence in question at trial. A careful review of the record, however, indicates that, while Defendant objected to the admission of the weapon and ammunition themselves, he did not object to considerable testimony concerning their discovery. For example, Detective Williams testified on direct examination that:

Q And given the nature of the complaint, if you will, and the reasons for the search that was conducted, were there any concerns regarding any weapons that might be located?

A Absolutely.

Q Can you tell me something, based upon your prior background and experience in investigating drug-related offenses, about the concerns for weapons?

A Yeah. Basically, those who engage in drug dealing, narcotics trafficking, are known to often carry weapons; firearms, other weapons.

. . . .

Q Did you ask about any weapons, any guns, anything that might create some sort of safety concern?

A Yes, I did. . . . I asked if there were any weapons in the house, any guns in the house, and [Defendant] stated that there were.

Q And did you ask him where the weapon might be located?

A Yes. He advised us that it was in his bedroom closet.

Q Okay. Did you provide that information to the other officers or did you retrieve the weapon yourself?

A I provided that information to Detectives Marshall and James, who were searching.

. . . .

A . . . . They recovered the .40 caliber pistol that [Defendant] admitted to. In the same closet where the pistol was located, they also located a substantial amount of currency. . . . After he had admitted about the gun and then the detectives had located the currency, I asked him about those particular items. . . . Basically, I asked [Defendant] where he had obtained the

> handgun, and he admitted to me that he had obtained it illegally. He said that he had bought it on the streets about two years prior. He stated that he had bought the gun from a black male whom [he did] not know.

As a result, a significant amount of testimony concerning the firearm was introduced without objection by Defendant. "It is well established that a criminal defendant loses the benefit of an objection when the same or similar evidence is later admitted without objection." *State v. Robinson*, 346 N.C. 586, 603, 488 S.E.2d 174, 185 (1997) (citing *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995)). As a result, since "Defendant did not object to this testimony at trial and has not argued in his brief that admission of this evidence amount[ed] to plain error," "we will not review this contention." *State v. Williams*, 363 N.C. 689, 703, 686 S.E.2d 493, 502 (2009), *cert. denied*, ____ U.S. ____, 131 S. Ct. 149, 178 L. Ed. 2d 90 (2010) (citing N.C.R. App. P. 10(c)(4)).

Even if we were to address Defendant's challenge to the admission of the firearm and the ammunition on the merits, we would not find his argument persuasive. As this Court has stated in rejecting an argument quite similar to the one at issue here:

> [T]he presence of a gun was relevant to the possession and trafficking charges. . . . Further, a jury could conclude that the shotgun was consistent with maintaining a dwelling for the purpose of keeping or selling cocaine, especially given the street value of the drugs found.

State v. Boyd, 177 N.C. App. 165, 171-72, 628 S.E.2d 796, 802 (2006) (citing *State v. Smith*, 99 N.C. App. 67, 72, 392 S.E.2d 642, 645 (1990) (holding that evidence that the defendant possessed a gun was relevant to the charge of possession with intent to sell or deliver cocaine because, "as a practical matter, firearms are frequently involved for protection in the illegal drug trade"), *cert. denied*, 328 N.C. 96, 402 S.E.2d 824 (1991), and *State v. Willis*, 125 N.C. App. 537, 543, 481 S.E.2d 407, 411 (1997) (stating that there is a "common-sense association of drugs and guns")). In addition, Defendant has failed to establish that "there is a reasonable possibility that, had the [alleged] 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(a), given the overwhelming evidence of Defendant's guilt. As a result, for all of these reasons, Defendant's challenge to the admission of the gun and ammunition found in his residence lacks merit.

C. Motion to Dismiss

Finally, Defendant contends that the trial court erred by denying his motion to dismiss the charges that had been lodged against him on the grounds that the evidence was insufficient to support either of his convictions. Once again, we conclude that Defendant's argument lacks merit.

> "In ruling upon a motion to dismiss, the trial court must examine the evidence in the light most favorable to the [S]tate, giving the [S]tate the benefit of all reasonable inferences which may be drawn from the evidence." A motion to dismiss is properly denied where the State presents substantial evidence of each element of the crime charged and that defendant is the perpetrator of the offense. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence."

State v. Alston, 193 N.C. App. 712, 714, 668 S.E.2d 383, 385-86, (2008), (quoting *State v. Autry*, 101 N.C. App. 245, 251, 399 S.E.2d 357, 361 (1991), citing *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990), and quoting *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984), and *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)), *aff'd*, 363 N.C. 367, 677 S.E.2d 455 (2009).

1. Trafficking by Possession

[3] As we have already noted, Defendant was convicted of trafficking in more than 400 grams of cocaine by possession and maintaining a house for the purpose of keeping or selling controlled substances. " '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 [400] grams or more.' " *State v. Acolatse*, 158 N.C. App. 485, 488, 581 S.E.2d 807, 809 (2003) (quoting *State v. White*, 104 N.C. App. 165, 168, 408 S.E.2d 871, 873-74 (1991)). In his brief, Defendant argues that the State did not prove that he possessed the cocaine seized from his residence.

"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) (citing *State v. Butler*, 356 N.C. 141, 146, 567

S.E.2d 137, 140 (2002) (other citation omitted)). " 'Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession.' 'However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred.' " *State v. Hough*, 202 N.C. App. 674, 685, 690 S.E.2d 285, 292 (2010) (quoting *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972), and *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989)). "Our cases addressing constructive possession have tended to turn on the specific facts presented." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009). As a result:

> "North Carolina courts have cited a variety of factors that may be used in conjunction with the defendant's presence near the seized contraband to support a finding of constructive possession." "[C]onstructive possession depends on the totality of circumstances in each case," so that "[n]o single factor controls."

State v. Ferguson, 204 N.C. App. 451, 460, 694 S.E.2d 470, 477 (2010) (quoting *State v. Fortney*, 201 N.C. App. 662, 668, 687 S.E.2d 518, 523 (2010), and *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986)). Assuming, without in any way deciding, that Defendant's home was not under his exclusive control, the record contains more than sufficient evidence tending to show the existence of the additional incriminating circumstances needed to permit the submission of the issue of Defendant's guilt of trafficking by possession to the jury on the basis of a constructive possession theory.

The evidence developed at trial, viewed in the light most favorable to the State, tended to show that: (1) in 2002, the Greensboro Police Department received an anonymous tip that drug sales were occurring at 1409 Dorsey Street; (2) in 2003, information concerning activities allegedly occurring at the same address emerged during a DEA investigation; (3) when law enforcement officers went to the Dorsey Street address on 23 April 2003, Defendant was present and admitted that he had lived there with his wife and children for the past three years; (4) Defendant had a .40 caliber pistol, which he admitted having purchased illegally; ammunition; and more than $9,000.00 in cash in his bedroom closet; (5) Defendant had more than $2,000.00 in cash on his person; (6) almost two kilograms of powder cocaine worth more than $50,000.00 in 2003 dollars were discovered

within easy reach of an opening leading from the hallway area of Defendant's home to the attic; and (7) the house in question was "very small" and had no residents other than Defendant and his family. We have no difficulty whatsoever in concluding that this evidence sufficed to support a determination that Defendant constructively possessed the cocaine found in his attic.

In seeking to persuade us to reach a contrary conclusion, Defendant cites certain evidence that he contends would support a contrary finding, such as, for example, the fact that Defendant's fingerprints did not appear on the material with which the cocaine was packaged. However, "[o]n review of a denial of a motion to dismiss, this Court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences," so that "[c]ontradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *State v. Steele*, 201 N.C. App. 689, 692, 689 S.E.2d 155, 158 (2010) (citing *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002).

In addition, Defendant makes several assertions which lack adequate record support. For example, Defendant contends that "there was evidence that other people lived at the residence as well." Although investigating officers did find several documents bearing the names of other people, including a vehicle title issued to Pedro Huerta Hernandez, one of Defendant's relatives, located in Defendant's bedroom closet alongside a vehicle title issued to Defendant; an identification card bearing information concerning Pedro Huerta Hernandez; and certain receipts and documents bearing the name of Defendant's landlord in the Dorsey Street residence, the house did not contain any clothing, furnishings, or personal possessions that belonged to anyone other than Defendant and his family. Moreover, Defendant never claimed at any point during his conversations with investigating officers that anyone else lived in the Dorsey Street residence. When considered in context, such evidence does not show "that other people lived at the residence." Similarly, Defendant stresses the existence of a "third bedroom" and argues that "another person could have been living in the third bedroom, the room in which the attic was located where the cocaine was found." However, the record contains no evidence definitively establishing that there was a third bedroom in the Dorsey Street residence. Moreover, the uncontradicted evidence shows that the attic was accessed from the hallway, rather than a bedroom. Finally, even if the record did contain evidence suggesting the presence of a third bed-

room or the possibility that another person might have resided at the Dorsey Street residence, that set of facts does not tend to show that the State failed to elicit sufficient evidence that Defendant possessed a sufficient quantity of cocaine to successfully withstand a motion to dismiss for insufficiency of the evidence. Thus, the trial court did not err by declining to dismiss the trafficking by possession charge.

2. Maintaining a Dwelling for Using or Keeping Drugs

[4] Secondly, Defendant was convicted of violating N.C. Gen. Stat. § 90-108(a)(7), which makes it "unlawful for any person" to "knowingly keep or maintain any . . . dwelling house, building, . . . or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same[.]" In challenging the sufficiency of the evidence to support his conviction for maintaining a dwelling for keeping controlled substances, Defendant questions "whether the State presented sufficient evidence that [Defendant] knew about the drugs in his attic." As we recently noted in addressing a similar contention, however, "our conclusion that the State presented substantial evidence to show Defendant was in constructive possession of the marijuana disposes of this argument." *State v. Hudson*, 206 N.C. App. 482, 492, 696 S.E.2d 577, 584, *disc. review denied*, 364 N.C. 619, 705 S.E.2d 360 (2010). Thus, given our previous determination that the State presented sufficient evidence to support a finding that Defendant constructively possessed the cocaine at issue in this case, we necessarily conclude that the trial court did not err by denying Defendant's motion to dismiss the maintaining a dwelling for the purpose of keeping or selling controlled substances charge that had been lodged against him for insufficiency of the evidence.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgment have merit. As a result, the trial court's judgment should, and hereby does, remain undisturbed.

NO ERROR.

Judges HUNTER and STROUD concur.

STATE OF NORTH CAROLINA v. JOSHUA EDWARD HARWOOD

No. COA11-1513

(Filed 3 July 2012)

1. Appeal and Error—plain error—no objection at trial—not listed in issues in record—argued in brief

The denial of defendant's motion to suppress was reviewed for plain error after defense counsel did not object to the admission of challenged evidence at trial but specifically argued plain error on appeal. Even though defendant did not mention the plain error doctrine in the issues listed in the record on appeal, defendant clearly argued plain error in his brief.

2. Search and Seizure—seizure of defendant—not a traffic stop—insufficient grounds

There was a seizure of defendant rather than a traffic stop where officers followed defendant as he drove away from a suspected drug sale, defendant pulled into the driveway of a residence not his own, the officers parked behind him, and the officers removed defendant from the car at gunpoint, placed him on the ground, and handcuffed him. The officers needed a reasonable and articulable suspicion of criminal activity.

3. Search and Seizure—basis for seizure of defendant—anonymous tip—not sufficient

Investigating officers lacked a sufficient basis for seizing defendant where the justification was provided by an anonymous tip that contained limited details and the officers did not corroborate the tip's allegations of illegal activity.

4. Search and Seizure—obtained after illegal seizure of person—plain error

The trial court committed plain error in a drugs case by admitting evidence obtained after defendant was seized without the necessary reasonable, articulable suspicion. Defendant's statement and his consent to a search of his residence resulted directly from the officer's decision to detain him and, without the evidence obtained as a result of that unlawful detention, the record would probably not have contained sufficient evidence to establish defendant's guilt.

Appeal by defendant from judgment entered 3 August 2011 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 4 April 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Angel E. Gray, for the State.

Russell J. Hollers III, for defendant-appellant.

ERVIN, Judge.

Defendant Joshua Edward Harwood appeals from a judgment sentencing him to twelve to fifteen months imprisonment based upon his convictions for possession of a firearm by a convicted felon, possession of marijuana with intent to sell or deliver, possession of cocaine with intent to sell or deliver, and simple possession of a schedule IV controlled substance. On appeal, Defendant contends that the trial court erred by denying his motion to suppress, admitting evidence obtained as the result of an unlawful detention of his person, and ordering the forfeiture of currency found in his possession and that his trial counsel's failure to object to the admission of the challenged evidence at trial constituted ineffective assistance of counsel. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that Defendant is entitled to a new trial and that the order of forfeiture should be vacated pending further proceedings in the court below.

I. Factual Background

A. Substantive Facts

On 15 July 2010, Agent Mitch McAbee, a deputy with the Buncombe County Sheriff's Department who worked as a member of the Buncombe County Anticrime Task Force, received an anonymous tip indicating that, later that day, Defendant would be selling marijuana to an unidentified individual at a certain convenience store located in Weaverville and that Defendant would be driving a "white vehicle." Although Agent McAbee had not previously encountered Defendant, he had learned from "talking to people in the community . . . since [being] on patrol" that Defendant had been "supposedly . . . selling illegal drugs in that part of the county for a long time."

After obtaining a photograph of Defendant and reviewing Defendant's local criminal history, Agent McAbee and Agent Tim Goodridge, another member of the Buncombe County Anticrime

Taskforce, drove to the convenience store in an unmarked vehicle which lacked blue lights or a siren. As Agent McAbee pulled into the convenience store parking lot, a white vehicle, beside which an individual was standing, began backing out of a parking space. As the white vehicle backed out, Agent McAbee identified Defendant as the driver and followed Defendant's vehicle onto the highway.

After traveling a short distance, Agent McAbee observed Defendant's vehicle accelerate and then turn off the highway onto a secondary road and into a housing development. At that point, Defendant parked his vehicle in the driveway of a residence which had an address different than that of Defendant. As a result, Agent McAbee pulled into the driveway behind Defendant's vehicle. After Agent Goodridge observed that the front doors to Defendant's vehicle appeared to be open, both officers exited their vehicle with weapons drawn, identified themselves, and ordered Defendant and his passenger, David White, to exit Defendant's vehicle. Agent McAbee approached Defendant, "placed him on the ground and handcuffed him."

As other officers arrived, Agent McAbee escorted Defendant to the agents' vehicle in order to speak with him. At some point, Agent McAbee determined that there was an outstanding warrant for Defendant's arrest. Although Agent McAbee could not recall if he removed Defendant's handcuffs or read Defendant his *Miranda* rights, his standard practice would have been to do so. After Agent McAbee told Defendant about the anonymous tip that he had received and after a certain amount of additional conversation, Defendant admitted that he had traveled to the gas station for the purpose of selling marijuana. When Agent McAbee asked if Defendant had any more marijuana and if he would be "willing to let [agents] go back to his residence and look," Defendant agreed. As Agent McAbee was speaking with Defendant, Agent Goodridge took Mr. White aside, removed his handcuffs, and discovered a small amount of marijuana on his person which Mr. White indicated belonged to Defendant.

After the agents and Defendant arrived at Defendant's residence, Defendant provided a key to the door. The agents and Defendant went inside the home and into Defendant's bedroom, where the agents found a loaded SKS rifle and two ammunition canisters containing quantities of marijuana, cocaine and pills, some of which were identified as Diazepam. After making this discovery, Defendant was placed under arrest based upon the outstanding warrant.

B. Procedural History

On 9 November 2010, warrants for arrest charging Defendant with possession of marijuana with the intent to sell or deliver, possession of cocaine with the intent to sell or deliver, and simple possession of a schedule IV controlled substance were issued. On 2 May 2011, the Buncombe County Grand Jury returned bills of indictment charging Defendant with possession of marijuana with the intent to sell or deliver, possession of cocaine with the intent to sell or deliver, simple possession of a schedule IV controlled substance, and possession of a firearm by a felon. On 1 August 2011, Defendant filed a motion seeking the suppression of any evidence, including statements, obtained as the result of his encounter with Agent McAbee and the subsequent search of his residence on the grounds that the evidence in question was obtained in violation of his constitutional right to be free from unreasonable searches and seizures.

The charges against Defendant came on for trial before the trial court and a jury at the 1 August 2011 criminal session of Buncombe County Superior Court. After conducting a pre-trial hearing, the trial court denied Defendant's suppression motion, reciting findings of fact on the record consistent with the factual statement set out above and concluding that (1) a traffic stop did not take place and (2) the officers possessed a "sufficient articulable suspicion that the [D]efendant was involved with the possession and sale and distribution of illegal substances." At the conclusion of all of the evidence, Defendant's counsel renewed his suppression motion, which the trial court denied once again. Defendant's counsel did not, however, object when the State offered testimony concerning Defendant's consent to the search of his residence or when the firearm and controlled substances seized inside Defendant's residence were admitted into evidence.

On 3 August 2011, the jury returned verdicts convicting Defendant as charged. The trial court consolidated Defendant's convictions for judgment, sentenced Defendant to an active term of twelve to fifteen months imprisonment, and ordered that certain currency taken from Defendant be forfeited. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Standard of Review

[1] In our review of trial court orders addressing suppression motions, " 'the trial court's findings of fact are conclusive on appeal if

supported by competent evidence, even if the evidence is conflicting. This Court must not disturb the trial court's conclusions if they are supported by the [trial] court's factual findings. However, the trial court's conclusions of law are fully reviewable on appeal.' " *State v. Leach*, 166 N.C. App. 711, 715, 603 S.E.2d 831, 834 (2004) (quoting *State v. McArn*, 159 N.C. App. 209, 211-12, 582 S.E.2d 371, 373-74 (2003) (internal citations and quotation marks omitted)), *appeal dismissed*, 359 N.C. 640, 614 S.E.2d 538 (2005).

"[A] pretrial motion to suppress evidence is not sufficient to preserve for appellate review the issue of whether the evidence was properly admitted if the defendant fails to object at the time the evidence is introduced at trial." *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120 (2002) (citations omitted), *cert. denied*, 538 U.S. 1040, 123 S. Ct. 2087, 155 L. Ed. 2d 1074 (2003). In view of the fact that Defendant's counsel failed to object to the admission of the challenged evidence at trial, Defendant did not preserve his challenge to the denial of his suppression motion for appellate review. *State v. Jackson*, ____ N.C. App. ____, ____, 710 S.E.2d 414, 418 (2011) (holding that the defendant waived his right to appellate review of the denial of his suppression motion by failing to object to the admission of the challenged evidence when it was offered at trial). However, given that Defendant has specifically argued that the trial court committed plain error by allowing the admission of the challenged evidence,[1] *State v. Lawrence*, ____ N.C. ____, ____, 723 S.E.2d 326, 333 (2012) (stating that, "[t]o have an alleged error reviewed under the plain error standard, the defendant must 'specifically and distinctly' contend that the alleged error constitutes plain error" (quoting N.C. R. App. P. 10(a)(4)); *Jackson*, ____ N.C. App. at ____, 710 S.E.2d at 418 (declining to review the denial of the defendant's suppression motion under a plain error standard where the defendant failed to do more than simply state that the trial court committed plain error by admitting the challenged evidence), we will review the trial court's denial of Defendant's suppression motion for plain error. *Leach*, 166 N.C. App. at 714, 603 S.E.2d at 833-34 (reviewing the denial of a defendant's suppression motion using a plain error standard of review in a

1. Although the State argues that Defendant failed to mention the "plain error" doctrine in the issues listed in the record on appeal and failed to adequately advance a "plain error" claim for that reason, we do not find the State's argument convincing given that Defendant clearly asserted plain error in his brief and given that N.C. R. App. P. 10(b) specifically provides that "[p]roposed issues . . . are to facilitate the preparation of the record on appeal and shall not limit the scope of the issues presented on appeal in an appellant's brief."

case in which the defendant, after failing to object to the admission of the challenged evidence at trial, specifically argued "plain error" on appeal).

As this Court and the Supreme Court have frequently stated, plain error consists of an error that is "so fundamental that it undermines the fairness of the trial, or [has] a probable impact on the guilty verdict." *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 240 (2002). In order to obtain relief on plain error grounds, an appealing party must show "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or a denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997) (citations omitted). Given that "[a] prerequisite to our engaging in a 'plain error' analysis is the determination that the [trial court's ruling] constitutes 'error' at all," *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), we will initially determine if the trial court erred by denying Defendant's suppression motion and then ascertain whether any error committed by the trial court rose to the level of plain error.

B. Substantive Legal Analysis

1. Seizure

[2] The first substantive issue that we must address is whether the trial court correctly determined that Defendant was not "stopped" because a traffic stop had not taken place. After carefully reviewing the record, we conclude that, although a traffic stop does not appear to have ever taken place, Defendant was subjected to a "seizure."

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." "[T]here are generally two ways in which a person can be 'seized' for Fourth Amendment purposes: (1) by arrest, which requires a showing of probable cause; or (2) by investigatory detention, which must rest on a reasonable, articulable suspicion of criminal activity." *State v. Carrouthers*, ____ N.C. App. ____, ____, 714 S.E.2d 460, 463 (2011), *disc. review denied*, 365 N.C. 361, 718 S.E.2d 392 (2011) (citation omitted). While "law enforcement officers do not violate the Fourth Amendment's prohibition against unreasonable seizures 'merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen,' " *State v.*

Isenhour, 194 N.C. App. 539, 542, 670 S.E.2d 264, 267 (2008) (quoting *United States v. Drayton*, 536 U.S. 194, 200, 122 S. Ct. 2105, 2110, 153 L. Ed. 2d 242, 251 (2002)), such officers do effectuate a seizure for Fourth Amendment purposes when, " 'by means of physical force or show of authority,' [they] terminate[] or restrain[] [a person's] freedom of movement[.]" *Brendlin v. California*, 551 U.S. 249, 254, 127 S. Ct. 2400, 2405, 168 L. Ed. 2d 132, 138 (2007) (quoting *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386, 115 L. Ed. 2d 389, 398 (1991) (citation and quotation marks omitted)). The operative question for purposes of determining if a seizure occurred is whether "a reasonable person would feel free to terminate the encounter[;]" if so, "then he or she has not been seized." *Drayton*, 536 U.S. at 201, 122 S. Ct. at 2110, 153 L. Ed. 2d at 251.

As the trial court found in denying Defendant's suppression motion, the investigating officers, after following Defendant's vehicle, parked their vehicle directly behind Defendant's vehicle, drew their firearms, and ordered Defendant and his passenger to exit Defendant's vehicle. After Defendant got out of his vehicle, Agent McAbee placed Defendant on the ground and handcuffed him, thereby restraining Defendant's freedom of movement " 'by means of physical force [and] . . . authority' " and creating a situation in which a reasonable person would not have felt free to terminate the encounter. *Brendlin*, 551 U.S. at 254, 127 S. Ct. at 2405, 168 L. Ed. 2d at 138 (quoting *Bostick*, 501 U.S. at 434, 111 S. Ct. at 2386, 115 L. Ed. 2d at 398). Thus, although the officers did not, in fact, initiate a traffic stop, Defendant was "seized" by the agents. As a result, "in order [for the agents] to conduct [such] a warrantless, investigatory stop [of Defendant, they] must have [had] a reasonable and articulable suspicion of criminal activity." *State v. Hughes*, 353 N.C. 200, 206-07, 539 S.E.2d 625, 630 (2000) (citation omitted).[2]

2. Validity of Seizure

[3] Having concluded that Defendant was seized for Fourth Amendment purposes, we must now address his claim that the investigating officers "lacked . . . reasonable suspicion to accost and frisk him, [so that Defendant's] statements and the physical evidence [seized as a result of that detention] should have been suppressed as the 'fruit of the poisonous tree' of [an] illegal seizure." A careful

2. In light of our determination that the investigating officers lacked an adequate justification for detaining Defendant, we need not address his contention that the circumstances surrounding his encounter with the officers constituted a full-scale arrest requiring probable cause rather than an investigative detention.

review of the record convinces us that the investigating officers lacked a sufficient basis for seizing Defendant.[3]

"*Terry v. Ohio* and its progeny have taught us that in order to conduct a warrantless, investigatory stop, an officer must have a reasonable and articulable suspicion of criminal activity." *Hughes*, 353 N.C. at 206-07, 539 S.E.2d at 630 (citing *Terry*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). A law enforcement officer is permitted to conduct a brief stop and frisk of an individual if there are "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906. Under the "reasonable articulable suspicion" standard, a stop must " 'be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.' " *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (quoting *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994)), *cert. denied*, 555 U.S. 914, 129 S. Ct. 264, 172 L. Ed. 2d 198 (2008). For that reason, there must be a "minimal level of objective justification, something more than an 'unparticularized suspicion or hunch,' " *Watkins*, 337 N.C. at 442, 446 S.E.2d at 70 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1, 10 (1989) (citation and quotation marks omitted)), to justify an investigative detention. Thus, "the ultimate issue before the trial court in a case involving the validity of an investigatory detention is the extent to which the investigating officer has a reasonable articulable suspicion that the defendant might be engaged in criminal activity." *State v. Mello*, 200 N.C. App. 437, 444, 684 S.E.2d 483, 488 (2009), *aff'd*, 364 N.C. 421, 700 S.E.2d 224 (2010). We consider " 'the totality of the circumstances' " in determining whether the requisite reasonable articulable suspicion required for a valid investigative detention exists. *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621, 629 (1981)).

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3. Although the State asserts in its brief that the existence of a warrant authorizing Defendant's arrest justified the decision of the investigating officers to take him into custody, it has not cited any authority in support of that proposition and we have not found any such authority in the course of our own research. A careful examination of the record discloses that the investigating officers did not know that this warrant existed at the time that they detained Defendant and decided to detain him because they believed that they had sufficient "reasonable articulable suspicion" to do so. As a result, we take no position concerning the validity of the State's assertion.

"Where the justification for a warrantless stop is information provided by an anonymous informant, a reviewing court must assess whether the tip at issue possessed sufficient indicia of reliability to support the police intrusion on a detainee's constitutional rights." *State v. Johnson*, 204 N.C. App. 259, 263, 693 S.E.2d 711, 715 (2010) (citing *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)). "[I]f [the anonymous tip] does not [have sufficient indicia of reliability], then there must be sufficient police corroboration of the tip before the stop may be made." *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630 (citing *Alabama v. White*, 496 U.S. 325, 329, 110 S. Ct. 2412, 2415-16, 110 L. Ed. 2d 301, 308 (1990)). As a result, we must determine (1) whether the anonymous tip provided to Agent McAbee, taken as a whole, possessed sufficient indicia of reliability and, if not, (2) whether the anonymous tip could be made sufficiently reliable by independent corroboration in order to uphold the challenged investigative detention. *Id.* at 209, 539 S.E.2d at 631.

Although determining whether an anonymous tip is sufficiently reliable to justify an investigative detention clearly hinges upon the "totality of the circumstances," the informant's "veracity," "reliability" and "basis of knowledge" are "important factors to consider." *Id.* 353 N.C. at 205, 539 S.E.2d at 629. As a general proposition, "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity inasmuch as ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations and given that the veracity of persons supplying anonymous tips is 'by hypothesis largely unknown, and unknowable.' " *White*, 496 U.S. at 329, 110 S. Ct. at 2415, 110 L. Ed. 2d at 308 (quoting *Gates*, 462 U.S. at 237, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548). Furthermore, a sufficiently reliable anonymous tip should "contain[] a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted.' " *Gates*, 462 U.S. at 245, 103 S. Ct. at 2335-36, 76 L. Ed. 2d at 552. Finally, " 'if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable.' " *Hughes*, 353 N.C. at 206, 539 S.E.2d at 630 (quoting *White*, 494 U.S. at 330, 110 S. Ct. at 2416, 110 L. Ed. 2d at 309).

"The reasonable suspicion . . . at issue [in an anonymous tip situation] requires that [the] tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Florida v. J.L.*, 529 U.S. 266, 272, 120 S. Ct. 1375, 1379, 146 L. Ed. 2d 254, 261

(2000) (holding that an anonymous telephone call to the effect that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun" did not provide adequate support for an investigative detention given that "[t]he anonymous call . . . provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility," so that "[a]ll the police had to go on . . . was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about [the suspect]"). "The type of detail provided in the tip and corroborated by the officers is critical in determining whether the tip can supply the reasonable suspicion necessary for the stop. Where the detail contained in the tip merely concerns identifying characteristics, an officer's confirmation of these details will not legitimize the tip." *Johnson*, 204 N.C. App. at 264, 693 S.E.2d at 715 (holding that an anonymous tip to the effect that a "black male suspect wearing a white shirt in a blue Mitsubishi with a certain license plate number" was "selling drugs and guns at the intersection of Pitt and Birch Streets" and that the suspect "had just left the area, but would return shortly," did not suffice to justify an investigative stop of the defendant's car given that there was "nothing inherent in the tip . . . to allow a court to deem it reliable"). A reviewing court is more likely to find that an anonymous tip provides the requisite "reasonable articulable suspicion" when the information provided in the tip is specific and can be substantially corroborated. *White*, 496 U.S. at 332, 110 S. Ct. at 2417, 110 L. Ed. 2d at 310 (upholding an investigative detention based upon an anonymous tip to the effect that (1) the defendant would be carrying drugs in a brown attaché case; (2) the defendant would be leaving a specific apartment address and room number; (3) the defendant would be leaving her room at a specific time, (4) the defendant's car had a detailed description; and (5) the specific destination to which the defendant would travel, with all of these details having been subsequently confirmed through surveillance).

After analyzing the totality of the circumstances before us in this case, we conclude that the anonymous tip at issue here did not "exhibit sufficient indices of reliability . . . ." *Johnson*, 204 N.C. App. at 264, 693 S.E.2d at 715. The tip in question simply provided that Defendant would be selling marijuana at a certain location on a certain day and would be driving a white vehicle. "The record contains no information about who the caller was, no details about what the caller had seen, and no information even as to where the caller was

located." *State v. Peele*, 196 N.C. App. 668, 673, 675 S.E.2d 682, 686, *disc. review denied*, 363 N.C. 587, 683 S.E.2d 383 (2009). Unlike the anonymous tip determined to be sufficient in *White*, the tip in this case lacked any detail concerning the nature of Defendant's present and planned activities, such as the time at which Defendant would be at the gas station, the type of vehicle that Defendant would be driving, the identity of the person to whom the sale would be made, or the manner in which the sale would be conducted. Put another way, "while the tip at issue [here] included identifying details of a person and car allegedly engaged in illegal activity, it offered few details of the alleged crime, no information regarding the informant's basis of knowledge, and scant information to predict the future behavior of the alleged perpetrator." *Johnson*, 204 N.C. App. at 263, 693 S.E.2d at 714-15. As a result, since nothing inherent in the tip itself provided investigating officers with the "reasonable articulable suspicion" required to justify detaining Defendant, the only way that Defendant's detention could be upheld would be in the event that the tip contained sufficient details, corroborated by the investigating officers, to warrant a reasonable belief that Defendant was engaging in criminal activity.

Nothing in the subsequent activities of the investigating officers "buttressed" the tip through "sufficient police corroboration." *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630. The information obtained by or known to Agent McAbee prior to observing Defendant at the convenience store did not provide any additional particularized justification for detaining him. Agent McAbee's knowledge of Defendant's previous drug activity, which consisted of "talking to" unnamed individuals in the community, was not specific in nature and did nothing more than indicate that, as a general matter, Defendant engaged in the business of selling controlled substances. Upon arriving at the convenience store, investigating officers observed a white vehicle driven by an individual identified as Defendant backing out of a parking space. The observations made by the investigating officers at the convenience store consisted of nothing more than identifying a "determinate person" at a determinate location, a degree of corroboration that does not suffice to justify an investigative detention. *J.L.*, 529 U.S. at 272, 120 S. Ct. at 1379, 146 L. Ed. 2d at 261 (stating that "an accurate description of a subject's readily observable location, while "reliable" by "help[ing] the police correctly identify the person whom the tipster means to accuse," "does not show that the tipster has knowledge of concealed criminal activity"). Although Agent McAbee watched Defendant drive away from the convenience store and ultimately pull his vehicle into the driveway of a residence with an

address that differed from his own, Defendant could just as easily have been visiting an acquaintance, giving Mr. White a ride home, or turning around as opposed to engaging in evasive or unlawful conduct. Thus, "the information provided [and known to Agent McAbee prior to the seizure] did not contain the 'range of details' required by White and Gates to sufficiently predict [D]efendant's specific future action[;]"it "was . . . peppered with uncertainties and generalities." *Hughes*, 353 N.C. at 208, 539 S.E.2d at 631. Therefore, "given the limited details contained in the tip, and the failure of the officers to corroborate the tip's allegations of illegal activity, the tip lacked sufficient indicia of reliability to justify the warrantless stop in this case." *Johnson*, 204 N.C. App. at 263, 693 S.E.2d at 715. As a result, the investigating officers lacked the "reasonable articulable suspicion" necessary to support their decision to detain Defendant.[4]

3. Plain Error

[4] "Evidence that is discovered as a direct result of an illegal search or seizure is generally excluded at trial as fruit of the poisonous tree unless it would have been discovered regardless of the unconstitutional search." *State v. Jackson*, 199 N.C. App. 236, 244, 681 S.E.2d 492, 497 (2009). "[I]f a person is illegally arrested [or seized], any inculpatory statement he makes [or evidence obtained during and after that time] must be suppressed unless the State can show the causal chain was broken by some independent circumstance which will show the statement was not caused by the arrest [or seizure]." *State v. Allen*, 332 N.C. 123, 128, 418 S.E.2d 225, 228 (1992). In other words, we must determine " 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " *State v. Barnard*, 184 N.C. App. 25, 40, 645 S.E.2d 780, 790 (2007) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441, 455 (1963) (quotation marks and citation omitted)), *aff'd*,

4. In seeking to persuade us to reach a different result, the State relies upon *State v. Garcia*, 197 N.C. App. 522, 530-31, 677 S.E.2d 555, 560 (2009), in which we upheld the validity of an investigative detention because "Detective Jones corroborated . . . information in the anonymous tips [to the effect that marijuana was being sold at a particular residence] through [examination of material contained in a computer database] and her days of surveillance at" the residence and passed the information along to other officers, who "followed [the d]efendant to a location known for drug activity." *Garcia* is readily distinguishable from the present case, however, since there is no evidence in the present record to the effect that the convenience store was "a location known for drug activity" and since the investigating officers did not observe the sort of activity detected during the surveillance which occurred in *Garcia* before detaining Defendant.

362 N.C. 244, 658 S.E.2d 643, *cert. denied*, 555 U.S. 914, 129 S. Ct. 264, 172 L. Ed. 2d 198 (2008).

A careful review of the record demonstrates that Defendant's statement admitting that he had sold marijuana at the convenience station directly resulted from the investigating officers' decision to detain him. Similarly, Defendant's subsequent decision to consent to the search of his residence, resulting in the discovery of the rifle and the seizure of various controlled substances, directly resulted from the investigating officers' detention of Defendant. For that reason, the challenged evidence could not have been discovered " 'by means sufficiently distinguishable to be purged of the primary taint,' " *Id.* (quoting *Wong Sun*, 371 U.S. at 488, 83 S. Ct. at 417, 9 L. Ed. 2d at 455), and should have been suppressed. Moreover, absent the admission of the evidence obtained as a result of the unlawful investigative detention, the record would probably not have contained sufficient evidence to establish Defendant's guilt of the offenses for which he was convicted.[5] N.C. Gen. Stat. § 14-415.1; N.C. Gen. Stat. § 90-95(a) and (d)(2). For that reason, Defendant has shown that a "different result probably would have been reached but for the [trial court's] error" in admitting the challenged evidence. *Bishop*, 346 N.C. at 385, 488 S.E.2d at 779. As a result, the trial court committed plain error by admitting the challenged evidence, so that Defendant is entitled to a new trial[6] and to have the forfeiture order vacated pending further proceedings in the Buncombe County Superior Court. *State v. Burrow*, ____ N.C. App. ____, ____, 721 S.E.2d 356, 360 (holding that the trial court committed plain error by admitting testimony and a laboratory report concerning the extent to which a particular substance was a controlled substance in violation of the Confrontation Clause given that, "[a]bsent the erroneous admission of the . . . report and testimony regarding the report, no chemical analysis evidence was presented to the jury to show the pills [the defendant allegedly possessed] were oxycodone"), *temporary stay allowed*, ____ N.C. ____, 722 S.E.2d 209 (2012).[7]

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5. Aside from a generalized assertion that the trial court did not err, much less commit plain error, in admitting the challenged evidence, the State did not advance any argument in its brief specifically explaining why any error committed by the trial court did not rise to the level of plain error.

6. Having granted Defendant a new trial on plain error grounds, we need not address his ineffective assistance claim. *See State v. Ewell*, 168 N.C. App. 98, 106, 606 S.E.2d 914, 920, *disc. review denied*, 359 N.C. 412, 612 S.E.2d 326 (2005).

7. Since N.C. Gen. Stat. § 90-112(a)(2), the relevant forfeiture statute, "is a criminal, or *in personam*, forfeiture statute" and since "[c]riminal forfeiture . . . must follow

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court committed plain error by admitting the challenged evidence. As a result, Defendant is entitled to a new trial and to have the order of forfeiture vacated pending further proceedings in the court below.

NEW TRIAL; ORDER OF FORFEITURE VACATED.

JUDGES ROBERT C. HUNTER and STROUD concur.

STATE OF NORTH CAROLINA v. KERRY LEMAR MORSTON

No. COA12-133

(Filed 3 July 2012)

1. Sentencing—resentencing—same sentence—no failure to exercise discretion

The resentencing court properly conducted a *de novo* resentencing hearing and did not abuse its discretion or act under a misapprehension of the law where the court clearly considered new evidence and made new determinations. Resentencing a defendant to the same sentence is not *ipso facto* evidence of any failure to exercise independent decision-making or to conduct a *de novo* review.

2. Sentencing—resentencing—failure to find same mitigating factor

The trial court did not err by declining to find the limited mental capacity mitigating factor at a resentencing hearing, even though the same judge had found that factor at a prior sentencing hearing on what defendant contends was the same evidence. The evidence at the resentencing did not substantially show that defendant had a limited capacity at the time of the offenses.

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criminal conviction", *State v. Johnson*, 124 N.C. App. 462, 476, 478 S.E.2d 16, 25 (1996), *cert. denied*, 345 N.C. 758, 485 S.E.2d 304 (1997), we need not address Defendant's challenge to the trial court's forfeiture order in any detail.

3. Sentencing—aggravating and mitigating factors—weight attached to one factor

The trial court did not abuse its discretion by attaching more weight to the one aggravating factor over the mitigating factors and sentencing defendant to consecutive terms greater than the presumptive range where the one aggravating factor was that defendant had prior convictions resulting in sentences of more than sixty days. A trial court's weighing of aggravating and mitigating factors will not be disturbed on appeal unless it is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasonable decision.

Appeal by defendant from judgments entered 15 June 2011 by Judge B. Craig Ellis in Hoke County Superior Court. Heard in the Court of Appeals 24 May 2012.

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.

McCULLOUGH, Judge.

Kerry Lemar Morston ("defendant") appeals his sentences entered 15 June 2011 based on convictions for conspiracy to commit murder, assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), and discharging a firearm into occupied property. Defendant received a sentence of thirty years for conspiracy to commit murder, twenty years for AWDWIKISI, and ten years for discharging a firearm into occupied property. Defendant was also convicted of first-degree murder for which he received a sentence of life imprisonment. He does not appeal this sentence. For the following reasons, we affirm the trial court's resentencing of defendant.

I. Background

Southern Pines Police Officer, Ed Harris, had been investigating drug trafficking involving Bernice McDougald for a period of time. Prior to joining the Southern Pines Police Department, Detective Harris had served as a deputy with the Hoke County Sheriff's Department, and still resided in Hoke County. On the evening of 4 April 1991, Detective Harris and McDougald had an argument in the

parking lot of a Southern Pines apartment complex regarding some recent shots fired as well as McDougald's involvement in the drug trade. Soon thereafter, McDougald decided Detective Harris was impeding his business and that he needed to "get rid of" him that night. That same night, McDougald met up with a group of men, including defendant, who planned to kill Detective Harris at his home in Hoke County.

While contemplating the murder of Detective Harris, the group proceeded to drink gin, laced with crack cocaine and Tylenol. At trial, one man testified that defendant's eyes were big and red and that he "looked like he was high." As the men ventured to Harris' house, McDougald gave them an opportunity to back out, but defendant reaffirmed his willingness. After arriving at Harris' house and parking a few blocks away, one of the men knocked on Harris' door. As Harris opened his front door, defendant and McDougald fired multiple shots, hitting Harris between four and five times. Harris' wife, sitting in the family's living room, had one of her fingers severed by a stray bullet. Detective Harris died en route to the hospital. Following the shooting, defendant claimed that he "got him," referring to Detective Harris, and even bragged about it the next day.

On 13 May 1991, defendant was indicted by a grand jury for first-degree murder and conspiracy to commit murder. Subsequently, on 19 August 1991, defendant was indicted on the other charges of AWDWIKISI and discharging a firearm into occupied property. After a trial before Judge B. Craig Ellis, beginning on 27 April 1992, a jury found defendant guilty on all charges. At the 1992 sentencing hearing, defendant presented evidence that he had fallen behind in elementary school, had taken "special ed" classes, and had been denoted as "emotionally handicapped." Furthermore, following his arrest, defendant was treated for clinical depression at Dorothea Dix Hospital; and while in jail, he helped a jailor who was held hostage during a jailbreak. Based on all the evidence, the trial court found four statutory aggravating factors and three mitigating factors for the charge of conspiracy to commit murder. The trial court concluded the aggravating factors outweighed the mitigating and sentenced defendant to thirty years. On the AWDWIKISI charge for shooting Detective Harris' wife, the trial court found three aggravating factors and three mitigating factors, but again found the aggravating factors outweighed the mitigating, sentencing defendant to twenty years. Finally, on the charge of discharging a firearm into occupied property, the trial court found four aggravating factors and three mitigating with the aggra-

vating again outweighing the mitigating. The trial court sentenced defendant to ten years on this charge with all three sentences to run consecutively with the life imprisonment sentence on the first-degree murder conviction.

Defendant appealed his sentences to our Supreme Court, which affirmed his convictions based on guilt, but found errors in the sentencing phases relating to the conspiracy, AWDWIKISI, and discharging a firearm charges. The trial court had erred by finding two aggravating factors for the conspiracy charge based on the same evidence. Moreover, the trial court's finding of aggravating factor number seven on AWDWIKISI and discharging a firearm was in error because the aggravating factor was based on evidence also used to prove an element of each offense. Consequently, our Supreme Court remanded the case to the trial court for resentencing

On remand in 1995, Judge Joe F. Britt conducted a resentencing hearing during which the State summarized the evidence from trial. The defense accepted the evidence and minimally supplemented it. The State submitted certified copies of defendant's prior convictions. Subsequently, both parties were given an opportunity to argue in favor of aggravating and mitigating factors. The trial court found three aggravating factors and three mitigating for both charges of conspiracy and discharging a firearm. On the charge of AWDWIKISI, the trial court found one aggravating factor and the same three mitigating factors. The trial court went on to find that the aggravating factors outweighed the mitigating factors on all charges and sentenced defendant to the same greater-than-presumptive, consecutive terms, as Judge Ellis did in 1992. Defendant appealed to this Court through a writ of certiorari, which this Court granted on 30 September 2009. In his appeal, defendant contended Judge Britt failed to conduct a *de novo* resentencing hearing. This Court agreed in holding that the hearing "was not the result of an independent decision-making process" and, thus, was not a *de novo* resentencing hearing. The matter was again vacated and remanded to the trial court for a third sentencing hearing.

The 26 May 2011 resentencing hearing was again held before Judge Ellis. The State again presented evidence to support the aggravating factor that defendant has prior convictions punishable by more than sixty days' confinement. Specifically, the State presented evidence that defendant had been convicted of assault with a deadly weapon inflicting serious injury, involving the alleged accidental shooting of his cousin while playing with a gun; three convictions for

assault on a female against his ex-wife; injury to personal property; carrying a concealed weapon; and resisting, delaying, and obstructing justice. Furthermore, the State presented evidence of the admiration for Detective Harris within the community.

Alternatively, defendant presented evidence in furtherance of the mitigating factors, including the ones regarding his mental abilities while in elementary school. Defendant testified at the 2011 hearing that he had fallen behind in school when his grandfather had a stroke and he had been the only one capable of taking care of him, resulting in his having to drop out of school at age fifteen. However, he admitted that during school he was "in the same classes as everybody else" and was not "slow." Furthermore, he ultimately received his GED while incarcerated. After his grandfather improved, he held various employment positions, which allowed him to support his wife and child, as well as his mother. Defendant admitted to his prior convictions and testified regarding the night of the incident. That night he was drunk on various substances, which he had not previously used. He admitted to making the choice to go to Detective Harris' house with a gun, while also knowing that the other guys were not supposed to have guns. He claims there was no reason for murdering Detective Harris other than his having taken LSD and having consumed alcohol. The parties also admitted transcripts of the trial, as well as both prior sentencing hearings.

The State argued against three of the mitigating factors and in favor of the trial court finding the one aggravating factor. Defendant alternatively asked the trial court to find all previous mitigating factors, as well as the non-statutory factors that defendant had a support system in the community; had active positive employment history; supported his family; and earned his GED while in prison. Moreover, defendant asked that he be sentenced within the presumptive range. The trial court stated, "the original sentencing the errors in the judgments were—were mine and the Clerk's and so, that's why we're back here today is to rectify the paperwork more than anything else." The trial court went on to state, "[h]aving heard testimony—new testimony today and also having received the transcript of the trial, based on all of that, I will render my judgments now, so, Mr. Morston, if you would stand up." As a result, the trial court found the one aggravating factor, along with two statutory and four non-statutory mitigating factors on each charge. The trial court specifically did not find the statutory mitigating factor concerning a "limited mental capacity" at the time of the offense. Consequently, the trial court again found that the

one aggravating factor outweighed the mitigating factors on all the charges and sentenced defendant to the same more-than-presumptive range sentences, to all run consecutively with his life imprisonment sentence. Defendant gave oral notice of appeal in open court.

II. Analysis

A. Misapprehension of Law and *De Novo* Resentencing Hearing

[1] Defendant raises three issues on appeal with his first being that the trial court acted under a misapprehension of law by failing to conduct a *de novo* resentencing hearing. Defendant contends the trial court failed to consider new evidence in sentencing defendant to the same sentences he received in both 1992 and 1995. We disagree.

> For all intents and purposes the resentencing hearing is *de novo* as to the appropriate sentence. *See State v. Watson*, 65 N.C. App. 411, 413, 309 S.E.2d 3, 4 (1983); *State v. Lewis*, 38 N.C. App. 108, 247 S.E.2d 282 (1978). On resentencing the judge makes a new and fresh determination of the presence in the evidence of aggravating and mitigating factors. The judge has discretion to accord to a given factor either more or less weight than a judge, or the same judge, may have given at the first hearing. However, in the process of weighing and balancing the factors found on rehearing the judge cannot impose a sentence greater than the original sentence.

State v. Mitchell, 67 N.C. App. 549, 551, 313 S.E.2d 201, 202 (1984).

Near the end of the 2011 resentencing hearing, the trial court stated that the original sentencing errors "were mine and the Clerk's and so, that's why we're back here today is to rectify the paperwork more than anything else." In 1992, the trial court erred by using the same evidence to find more than one aggravating factor. Our Supreme Court, along with this Court, have both remanded for "resentencing in accordance with the provisions of Articles 81 and 81A of Chapter 15A of the North Carolina General Statutes." *State v. Morston*, 336 N.C. 381, 410, 445 S.E.2d 1, 17 (1994); S*tate v. Morston*, 147 N.C. App. 313, 556 S.E.2d 355 (2001). Thus, defendant claims the trial court should make a "new and fresh" determination regarding all relevant issues. Moreover, defendant requested at the 2011 resentencing hearing that the trial court "not [] simply give him 60 years because that's what you did 20 years ago." However, the trial court went on to resentence defendant to the same sentence as both 1992 and 1995, based on finding that the aggravating factor of prior convictions resulting in confinement of more than sixty days outweighed the mitigating factors.

The State, alternatively, argues the trial court properly rendered its judgments on new testimony presented at the resentencing hearing, as well as a consideration of all the prior evidence, resulting in a thorough *de novo* resentencing proceeding. The State pointedly notes that the trial court made more than just the statement that it was correcting previous clerical errors, but in fact stated, "[h]aving heard testimony—new testimony today and also having received the transcript of the trial, based on all of that, I will render my judgments now, so, Mr. Morston, if you would stand up." Three of the six mitigating factors found by the trial court at the 2011 hearing were not found at the prior sentencing hearings. Moreover, defendant testified at the 2011 hearing after not testifying in either of the previous hearings. Clearly, the trial court considered new evidence and made new determinations regarding the mitigating factors in hearing defendant's testimony. A trial court's resentencing of a defendant to the same sentence as a prior sentencing court is not *ipso facto* evidence of any failure to exercise independent decision-making or conduct a *de novo* review. *See State v. Mason*, 125 N.C. App. 216, 223, 480 S.E.2d 708, 712 (1997).

Defendant attempts to rely on two previous decisions from this Court in which we reversed new sentences entered by two trial courts during resentencing hearings where both trial courts attempted to be consistent and rely on prior sentencing courts' reasoning. In *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557, *aff'd per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986), this Court held that it was "clear from the transcript that the trial court misapprehended the law and felt constrained to find the aggravating factor previously found and upheld[.]" *Id.* at 755, 338 S.E.2d at 560. Furthermore, in *State v. Abbott*, 90 N.C. App. 749, 370 S.E.2d 68 (1988), the resentencing court found the same aggravating and mitigating factors as the prior sentencing court. This Court held in *Abbott* that the resentencing court's statement that "it was trying to be consistent with [the prior sentencing court], while not intimating that the previous findings were the law of the case, indicates to us that its decision was not independent." *Id.* at 752, 370 S.E.2d at 69. In the case at hand, the resentencing court never made any statements that it felt constrained to impose the same sentence as the previous courts and, additionally, it did not find the same aggravating and mitigating factors. Moreover, the sentencing court did not give any indication that it considered the sentences previously imposed. Consequently, the resentencing court properly conducted a *de novo* resentencing hearing and did not abuse its discretion or act under a misapprehension of the law.

B. Limited Mental Capacity Mitigating Factor

[2] Defendant next argues the trial court erred by failing to find the same mitigating factor as the previous sentencing courts had found in that defendant had a limited mental capacity at the time of the shooting, which significantly reduced his culpability for the offenses. Defendant asked Judge Ellis to find the same statutory mitigating factor in 2011 that he found in 1992 for the charges of conspiracy to commit murder and AWDWIKISI, in that "defendant's limited mental capacity at the time of the commission of the offense significantly reduced his culpability for the offense." N.C. Gen. Stat. § 15A-1340.4(a)(2)(e) (1993) (current version at N.C. Gen. Stat. s§ 15A-1340.16(e)(4) (2011)). However, Judge Ellis specifically refused to find the factor at the 2011 resentencing hearing based on new evidence heard during the hearing. Based on the following, we disagree with defendant's contention in arguing that the trial court erred by failing to find the same mitigating factor in 2011.

"A trial judge's failure to find a statutory mitigating factor is error only where evidence supporting the factor is uncontradicted, substantial, and manifestly credible." *State v. Maness*, 321 N.C. 454, 462, 364 S.E.2d 349, 353 (1988). "[O]n resentencing, the trial court must make a new and fresh determination of the sufficiency of the evidence underlying each factor in aggravation and mitigation, including those factors previously found and affirmed by the appellate court." *Mason*, 125 N.C. App. at 224, 480 S.E.2d at 713 (internal quotation marks and citation omitted). The burden is on defendant to prove the desired mitigating factor "by a preponderance of the evidence." *State v. Ingram*, 65 N.C. App. 585, 589, 309 S.E.2d 576, 579 (1983). "[Defendant] is asking the court to conclude that 'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn,' and that the credibility of the evidence 'is manifest as a matter of law.' " *State v. Jones*, 309 N.C. 214, 219-20, 306 S.E.2d 451, 455 (quoting *North Carolina National Bank v. Burnette*, 297 N.C. 524, 536-37, 256 S.E.2d 388, 395 (1979)).

Defendant contends he presented substantial, uncontradicted, and manifestly credible evidence supporting the finding of the mitigating factor, which happened to be the same evidence presented in 1992 when Judge Ellis initially found the mitigating factor regarding a limited mental capacity. Moreover, defendant notes that the capital sentencing jury found a mitigating factor in its capital verdict that "the capacity of the defendant to appreciate the criminality of the law

was impaired." Thus, defendant argues the trial court should have found the mitigating factor in 2011, as it is substantially similar to the one found by the capital sentencing jury. However, a sentencing court is not bound by a jury's finding of a capital mitigating factor, as the factors are not the same and the sentencing hearing is conducted *de novo*. *See State v. Freeman*, 313 N.C. 539, 552, 330 S.E.2d 465, 475 (1985). Judge Ellis was certainly in the realm of his authority in not finding the mitigating factor solely because the capital sentencing jury found a similar factor.

Additionally, defendant contends he presented sufficient evidence at the resentencing hearing to warrant a finding of the mitigating factor. Specifically, he presented evidence that he had been designated as "emotionally handicapped" in elementary school; had been placed in a "special ed" category; had dropped out of school at age fifteen; had been treated for clinical depression; and at the time of the offense had been drunk and high on various substances. Furthermore, defendant argues his limited mental capacity was the sole reason for his involvement in the killing, as he was not upset with Detective Harris and was not making conscious choices at the time of the killing. As a result, defendant claims the trial court incorrectly considered his mental capacity at the resentencing hearing in 2011 and not at the time of the commission of the offenses in 1991.

"A 'limited mental capacity' is defined as a low level of intelligence or I.Q." *State v. Hall*, 85 N.C. App. 447, 454, 355 S.E.2d 250, 255 (1987) (citation omitted). "The trial court's determination [of the 'limited mental capacity' mitigating factor] involves a two part inquiry: (1) whether the defendant suffers from a limited mental capacity (or from 'immaturity') and (2) if so, its effect on his culpability for the offense." *Id.* at 455, 355 S.E.2d at 255 (citation omitted). The limited mental capacity must have "significantly reduce[d] the [defendant's] culpability for the offense." *State v. Colvin*, 90 N.C. App. 50, 58, 367 S.E.2d 340, 345 (1988). In addition, "[i]t is within the trial judge's discretion to assess the conditions and circumstances of the case in determining whether the defendant's immaturity or limited mental capacity significantly reduced culpability." *State v. Holden*, 321 N.C. 689, 696, 365 S.E.2d 626, 630 (1988).

While defendant may have initially presented some evidence that while in elementary school he was placed in separate classes, he testified at the 2011 resentencing hearing that he attended "the same classes as everybody else" and was not "slow." The trial court relied

on this evidence in 2011 in declining to find the requested mitigating factor that defendant had a limited mental capacity. The evidence tended to show that defendant had been labeled "emotionally handicapped" because of behavioral problems during his childhood and had actually dropped out of school to take care of his grandfather, rather than for intelligence issues. Defendant even received his GED while in prison. Furthermore, defendant's own testimony exhibited that he understood the difference between right and wrong, and that he consciously made the decision to go to Detective Harris' home, with a gun, despite knowing it was wrong. Defendant's argument that he was intoxicated at the time of the murder does not support a finding of the limited mental capacity mitigating factor. *See State v. Barranco*, 73 N.C. App. 502, 511-12, 326 S.E.2d 903, 910 (1985). Based on the new evidence presented at the 2011 resentencing hearing, the trial court did not err in declining to find the limited mental capacity mitigating factor, as the evidence, including defendant's own testimony, did not substantially show that defendant had a limited mental capacity at the time of the offenses in 1991.

C. Weight of Sentencing Factors

[3] Defendant's final argument on appeal is that the trial court abused its discretion in finding that the one aggravating factor outweighed all the mitigating factors, and then sentencing defendant to consecutive terms of imprisonment outside of the presumptive range. We disagree.

"A trial court's weighing of mitigating and aggravating factors will not be disturbed on appeal absent a showing that there was an abuse of discretion." *State v. Wampler*, 145 N.C. App. 127, 133, 549 S.E.2d 563, 568 (2001). Moreover, "[a] judgment will not be disturbed because of sentencing procedures unless there is a showing of . . . procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 130 (1962). Nonetheless, " '[a] sentencing judge properly may determine in appropriate cases that one factor in aggravation outweighs more than one factor in mitigation and vice versa.' " *Wampler*, 145 N.C. App. at 133, 549 S.E.2d at 568 (quoting *State v. Parker*, 315 N.C. 249, 258, 337 S.E.2d 497, 502 (1985)). " 'The balance struck by the sentencing judge in weighing the aggravating against the mitigating factors, being a matter within his discretion, will not be disturbed unless it is manifestly unsupported by reason, or so arbi-

trary that it could not have been the result of a reasoned decision.' " *Id.* (quoting *Parker*, 315 N.C. at 258-59, 337 S.E.2d at 502-03).

Defendant contends that his prior convictions were fairly weak while the six mitigating factors found by the trial court were extremely strong. Defendant had one prior felony conviction for assault with a deadly weapon inflicting serious injury when he allegedly accidentally shot his cousin, but he also had several misdemeanors for domestic violence against his ex-wife. The trial court found six mitigating factors in that the defendant's commission of the offenses was under compulsion which reduced culpability; defendant suffered from a mental condition that was insufficient to constitute a defense, but significantly reduced his culpability; defendant attempted to render assistance to a jailor during an attempted jailbreak; defendant financially supported his family; defendant had a history of gainful employment; and defendant had a support system within the community. " '[A] trial judge need not justify the weight he attaches to any factor.' " *State v. Lane*, 77 N.C. App. 741, 745, 336 S.E.2d 410, 413 (1985) (quoting *State v. Ahearn*, 307 N.C. 584, 596-97, 300 S.E.2d 689, 697 (1983)). Furthermore,

> [t]he discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. The court may very properly emphasize one factor more than another in a particular case.

State v. Melton, 307 N.C. 370, 380, 298 S.E.2d 673, 680 (1983). Judge Ellis was clearly within his discretion to attach more weight to the aggravating factor that defendant had prior convictions resulting in sentences of more than sixty days over the six mitigating factors. In *State v. Parker*, 319 N.C. 444, 448, 355 S.E.2d 489, 491-92 (1987), our Supreme Court upheld a defendant's sentence where the trial court found that one aggravating factor of prior convictions outweighed four mitigating factors.

Additionally, defendant argues the trial court erred in sentencing him to the same exact sentence as the two previous sentencing courts after this Court and our Supreme Court had twice remanded the case. However, in *Mitchell*, 67 N.C. App. at 553, 313 S.E.2d at 203, this Court held that the trial court did not abuse its discretion where it imposed the same sentence as the original sentencing court, while having

found four fewer aggravating factors than the original sentencing court. As previously stated, the trial court "has discretion to accord to a given factor either more or less weight than a judge, or the same judge, may have given at the first hearing." *Id.* at 551, 313 S.E.2d at 202. The trial court cannot look at just the number of factors in aggravation or mitigation, but must give weight to each factor. "Once a trial court has found, by the preponderance of the evidence, that aggravating factors outweigh mitigating factors, the trial court has the discretion not only to increase the sentence above the presumptive term, but also the discretion to determine to what extent the sentence will be increased." *State v. Canty*, 321 N.C. 520, 527, 364 S.E.2d 410, 415 (1988). Thus, the trial court did not err in giving more weight to the sole aggravating factor and then sentencing defendant to the same greater-than-presumptive range sentence as the previous sentencing courts. In addition, the trial court did not abuse its discretion by sentencing defendant to consecutive sentences. *See State v. Ysaguire*, 309 N.C. 780, 784-88, 309 S.E.2d 436, 440 (1983). As a result, the trial court did not abuse its discretion in attaching more weight to the one aggravating factor over the mitigating factors and sentencing defendant to consecutive terms greater than the presumptive range.

III. Conclusion

We affirm the decision of the trial court in sentencing defendant to consecutive sentences of thirty, twenty, and ten years on the charges of conspiracy to commit murder, AWDWIKISI, and discharging a firearm into occupied property. The trial court did not act under a misapprehension of the law because it did conduct a *de novo* resentencing hearing. Moreover, it did not abuse its discretion in declining to find the mitigating factor that defendant suffered from a limited mental capacity, nor in finding that the one aggravating factor outweighed all mitigating factors in sentencing defendant to consecutive sentences.

Affirmed.

Judges CALABRIA and STROUD concur.

CHAMPAK PATEL D/B/A LIBERTY INN, PLAINTIFF v. SCOTTSDALE INSURANCE COMPANY, DEFENDANT

No. COA11-1198

(Filed 3 July 2012)

Insurance—fire—value of destroyed building—appraisal process required

Summary judgment for plaintiff was reversed and remanded in an insurance action involving the disputed value of a motel destroyed in a fire. The policy included a provision that required an appraisal process before a legal action was brought and plaintiff never invoked the appraisal process. The trial court should have stayed the litigation and ordered the parties to engage in the appraisal process, as would be the case in an arbitration proceeding.

Appeal by plaintiff from order entered 13 July 2011 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 8 February 2012.

Brent Adams & Associates, by Brenton D. Adams and Ashley B. Currin, for Plaintiff-appellant.

Dean & Gibson, PLLC, by Jeremy S. Foster and Michael G. Gibson, for Defendant-appellee.

ERVIN, Judge.

Plaintiff Champak Patel d/b/a Liberty Inn appeals from an order granting summary judgment in favor of Defendant Scottsdale Insurance Company. On appeal, Plaintiff contends that the trial court erred by entering summary judgment in favor of Defendant on the grounds that the record demonstrates the existence of a genuine issue of material fact sufficient to preclude the entry of judgment in Defendant's favor. After careful consideration of Plaintiff's challenge to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be reversed and that this case should be remanded to the Wake County Superior Court for further proceedings not inconsistent with this opinion.

I. Background

A. Substantive Facts

Plaintiff owned the Liberty Inn, which was a motel located in Tarboro, North Carolina. In August 2008, Plaintiff purchased an insurance policy applicable to the motel property under which he was insured against certain losses, including losses caused by fire. In early 2009, the motel was totally destroyed by fire. After Plaintiff filed a claim with Defendant, Defendant conducted an investigation for the purpose of determining, among other things, the amount of the loss payment to which Plaintiff was entitled under the policy.

As part of the investigation process, Defendant hired Crawford & Company to prepare an estimate of the cost of repairing the motel. After conducting an extensive analysis, Clyde A. Baker, an adjuster employed by Crawford & Company, determined that the motel had a replacement value of $346,500.39; that the "property to be repaired was subject to depreciation of $68,132.42;" that the "Actual Cash Value of the repairs is obtained by subtracting the depreciation from the Replacement Cost Value;" and that "the Actual Cash Value of the repairs to [the motel] is $278,367.97." As Mr. Baker clearly stated, "[t]he repair estimate that I prepared does not reflect the [motel's] fair market value;" the amounts set out in his report do not "give the actual cash value" of the motel; and that the monetary figure "that I prepared . . . provides only the estimated cost to repair the property."

In addition, Defendant hired Moore & Piner, L.L.C., to conduct an appraisal of the market value of the motel building. According to Andy E. Piner, an appraiser with Moore & Piner, the fifty-one year old motel building had a market value of $76,533.00. In order to estimate the motel's market value immediately prior to the fire, Mr. Piner first determined that the cost of reproducing the motel would be $382,666.00. Next, Mr. Piner reduced this reproduction cost figure by a $306,133.00 allowance for depreciation. Unlike Mr. Baker, who based his depreciation figure solely on the physical deterioration of the motel property, Mr. Piner's depreciation estimate relied on market-related factors. More specifically, Mr. Piner utilized the Effective Age-Life method, which rests upon "the ratio of an improvement's Effective Age and its Total Economic Life Expectancy," in order to determine an appropriate allowance for depreciation. In the course of applying the Average Age-Life method, Mr. Piner determined that the average "economic life expectancy" of the motel was 40 years; that, based on a comparison of the amount that the motel would need to

earn in order to support a $382,666.00 investment and the amount that the motel was actually earning, the motel was 80% depreciated; and that a reduction in the reproduction cost amount to reflect an 80% depreciation allowance left a fair market value of $76,533.00. According to Mr. Piner, this valuation estimate, which used a cost-based approach, was consistent with the results he derived using an income-based approach.

In seeking to establish that a higher valuation was appropriate, Plaintiff employed David W. Duke, an appraiser with Tom Keith & Associates, Inc., "to appraise the market value of the structure or building located on the property in question separate and apart from the land upon which it sat as that market value existed just prior to the loss by fire." Mr. Duke opined that the motel had a market value of $199,246.00. However, a careful examination of Mr. Duke's report indicates that he employed a "cost approach" that only recognized "physical depreciation." Mr. Duke believed the "cost approach" to be an appropriate method of determining market value because, "[f]or insurance purposes, the courts have generally accepted the definition of market value to be the actual cash value or replacement cost new, less physical depreciation." As a result, Mr. Duke developed his $199,246.00 estimate by subtracting $132,831.00 in physical depreciation from an estimated replacement cost of $332,077.00.

Finally, Plaintiff stated that he "owned the motel described in [the] Complaint" and that, "prior to the fire . . . my motel building and structure was in good repair and . . . in excellent condition." According to Plaintiff, he had "purchased at least three motels during [his] life" and had "spent many years in the motel business." Plaintiff also asserted that, in addition to his own motel-related experience, he had "family members and close friends who are and have for many years been in the motel business and in the business of buying and selling motels." Based upon his own experience and what he knew of the experiences of his family and friends, Plaintiff believed that he had "obtained a knowledge of motel real estate values in eastern North Carolina." As a result, Plaintiff opined that "the fair market value and the market value, which terms are synonymous, of the building structure of the motel . . . immediately prior to the fire," "separate and apart from the land upon which [his] motel sat . . . was no less than $278,367.97."

Based on this investigation, Defendant concluded, based on the provisions of the policy, that, since Mr. Baker's repair cost estimate exceeded Mr. Piner's market value estimate, it was obligated to pay

an amount equal to Mr. Piner's market value estimate in settlement of Plaintiff's claim for damage to the motel building. As a result, Defendant paid Plaintiff $20,000.00 relating to Plaintiff's business personal property loss, $23,760.00 for debris removal, and $75,533.00 relating to the destruction of the motel building. Although Plaintiff did not dispute the payments that he received for loss of business personal property and debris removal, he did not agree with Defendant's estimate of the motel building's market value.

B. Procedural History

On 22 March 2010, Plaintiff filed a complaint against Defendant in which he sought compensatory and punitive damages for breach of contract, violation of N.C. Gen. Stat. § 58-63-15(11), infliction of emotional distress, and unfair or deceptive trade practices. In his complaint, Plaintiff alleged that, given the terms of the applicable insurance policy, Defendant owed Plaintiff the policy limit of $250,000.00 as compensation for the loss of the motel building. Defendant filed an answer and an amended answer on 29 June 2010 and 2 August 2010, respectively, in which it denied the material allegations of Plaintiff's complaint, asserted various defenses, and sought dismissal of Plaintiff's claims.

On 5 May 2011, Defendant filed a motion seeking entry of an order granting summary judgment for Defendant in which it alleged, in part, that:

> The Plaintiff owned a motel which was destroyed by fire. The motel was insured by the Defendant at the time of the fire. The Defendant retained an independent adjuster to determine the cost of repairing the motel and also retained an independent appraiser to determine the actual cash value of the motel prior to the fire. The Plaintiff's insurance policy allowed the Defendant to settle the claim by electing to pay the Plaintiff either the cost to repair the damaged property or the actual cash value of the property prior to the fire. The Defendant has paid to the Plaintiff the actual cash value of the motel prior to the fire and has complied fully with the terms, conditions and requirements of the insurance policy. . . .

In support of its motion, Defendant submitted various documents, including a copy of the applicable insurance policy; various discovery responses provided by or on behalf of Plaintiff; an affidavit executed by Mr. Baker, which was accompanied by a repair estimate; and an appraisal prepared by Mr. Piner. On 22 June 2011, Plaintiff filed a

response to Defendant's summary judgment motion in which he submitted his own affidavit; that of Mr. Duke, which was accompanied by an appraisal report; and the deposition of Mr. Baker, and asserted that there were "disputed issues of material fact" which precluded the entry of summary judgment in favor of Defendant.

After a hearing conducted during the 29 June 2011 civil session of the Wake County Superior Court, at which it considered the arguments of counsel, the materials submitted by the parties, and Mr. Piner's deposition, the trial court entered an order on 13 July 2011 granting summary judgment in favor of Defendant. Plaintiff noted a timely appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

According to N.C. Gen. Stat. § 1A-1, Rule 56(c), summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." "A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations omitted). "The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citing *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002)). "Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 401 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810, *cert. denied*, 534 U.S. 950, 122 S. Ct. 345, 151 L. Ed. 2d 261 (2001). "A genuine issue of material fact arises when 'the facts alleged . . . are of such nature as to affect the result of the action.' " *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 116 (2011) (quoting *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971) (citation and quo-

tation marks omitted)); *see also City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E.2d 190, 193 (1980) (stating that "[a]n issue is material if, as alleged, facts would constitute a legal defense, or would affect the result of the action or if its resolution would prevent the party against whom it is resolved from prevailing in the action").

B. Construction of Insurance Policies

"We begin by noting the well-established principle that 'an insurance policy is a contract and its provisions govern the rights and duties of the parties thereto.' " *Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299, 524 S.E.2d 558, 563 (2000) (quoting *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986).

> The rules of construction for insurance policies are likewise familiar:
>
> > ". . . "Where a policy defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. . . . [I]f the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein."

Gaston County, 351 N.C. at 299-300, 524 S.E.2d at 563 (quoting *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505-06, 246 S.E.2d 773, 777 (1978)).

C. Plaintiff's Compliance with Policy Provisions

According to the relevant policy provisions:

> In the event of loss or damage covered by this Coverage Form, at our option, we will either:
>
> (1) Pay the value of lost or damaged property;
>
> (2) Pay the cost of repairing or replacing the lost or damaged property . . .;

> (3) Take all or any part of the property at an agreed or appraised value; or
>
> (4) Repair, rebuild or replace the property with other property or like kind and quality[.]
>
> We will determine the value of lost or damaged property, or the cost of its repair or replacement, in accordance with the applicable terms of the Valuation Condition in this Coverage Form or any applicable provision which amends or supersedes the Valuation Condition.

In addition, the policy provides that "[w]e will determine the value of Covered Property in the event of loss or damage" "[a]t actual cash value as of the time of loss or damage." The policy defined the term "actual cash value" as "market value," which was further defined, in the event of a total loss, as "the amount that a reasonable purchaser would have paid for the property covered at the time of loss." As a result, Defendant clearly had the choice of paying Plaintiff either the cost of "repairing or replacing" the motel or "the amount that a reasonable purchaser would have paid" for the motel "at the time of the loss."

Although the parties have spent considerable time and energy debating the extent, if any, to which there was a genuine issue of material fact concerning the market value of Plaintiff's motel, we conclude that we need not address that issue in order to resolve this case. According to another policy provision:

> No one may bring a legal action against us under this Coverage Part unless:
>
> 1. There has been full compliance with all of the terms of this Coverage Part; and
>
> 2. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

Consistently with N.C. Gen. Stat. § 58-44.16(f)(14), the policy also provides, in pertinent part, that:

> If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The

> appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
>
> a. Pay its chosen appraiser; and
>
> b. Bear the other expenses of the appraisal and umpire equally.
>
> If there is an appraisal, we will still retain our right to deny the claim.

Finally, the policy states that:

> We will pay for covered loss or damage within 30 days after we receive the sworn proof of loss, if you have complied with all of the terms of this Coverage Part and:
>
> (1) We have reached agreement with you on the amount of loss; or
>
> (2) An appraisal award has been made.

According to Defendant, the fact that Plaintiff never invoked the appraisal provision required by N.C. Gen. Stat. § 58-44-16(f)(14) precludes him from maintaining the present litigation. More specifically, Defendant argues that:

> If Patel wanted to contest the value of his property, the proper channel for resolving the dispute was to select his own appraiser and submit the matter to an umpire - not to initiate litigation. In fact, the policy states that no legal action against Scottsdale may be initiated unless the insured has complied with the terms of the policy[.]

A careful examination of the policy language satisfies us that Defendant is correct in contending that initiation of, participation in, and completion of the appraisal process is a condition precedent to the commencement of litigation against Defendant. Simply put, the relevant policy language explicitly provides that Defendant has no obligation to make a loss payment until the parties have either agreed on the amount of the loss or the appraisal process has been completed. Although Plaintiff appears to contend that the appraisal procedures are optional rather than mandatory, the fact that either agreement or an appraisal decision is a prerequisite to the making of a loss payment precludes us from finding Plaintiff's argument to be persuasive

despite the use of what appears to be permissive language in certain parts of the policy that prescribe the initiation of the appraisal process. As a result, we conclude that Plaintiff was required to participate in and complete the appraisal process prior to filing his complaint in this case and that he appears not to have done so.[1]

The fact that Plaintiff failed to comply with the mandatory appraisal process does not, however, end our inquiry. Instead, we are required to determine what remedy should be adopted in light of Plaintiff's failure to comply with the relevant policy provisions. In *Enzor v. North Carolina Farm Bureau Mut. Ins. Co.*, 123 N.C. App. 544, 545, 473 S.E.2d 638, 639 (1996), a case in which "[p]laintiff's potatoes were destroyed by fire," the trial court ordered "that the actual cash value of plaintiff's 1990-1991 sweet potato crop be determined by the appraisal method as set out in the policy." In deciding an appeal from a trial court order adopting a report developed at the conclusion of the appraisal process, we noted that "[t]his policy appraisal procedure is analogous to an arbitration proceeding." *Enzor*, 123 N.C. App at 546, 473 S.E.2d at 639. For that reason, we conclude that the appropriate remedy for use in situations in which a litigant initiates civil litigation based on a claim that is, in fact, subject to arbitration provides a useful analogy for purposes of determining what steps should be taken in the event that a plaintiff initiates civil litigation without having first complied with the appraisal procedures mandated by N.C. Gen. Stat. § 58-44-16(f)(14).

After reviewing the relevant decisions of this Court, we note that, in the event that a litigant initiates civil litigation on the basis of a claim that is subject to arbitration, the appropriate remedy is to order the parties to arbitrate their dispute and to stay the litigation pending completion of the arbitration process. *N.C. Farm Bureau Mut. Ins. Co. v. Sematoski*, 195 N.C. App. 304, 310, 672 S.E.2d 90, 94 (2009) (holding that certain disputed claims were arbitrable and reversing a trial court order denying the defendant's motion to compel arbitration and stay proceedings); *see also*, *e.g.*, *In re Fifth Third Bank, Nat'l Ass'n*, ____ N.C. App ____, ____, 716 S.E.2d 850, 853 (2011) (noting that the trial court had "entered an order compelling Plaintiffs to submit their claims against [defendant] to binding arbitration, [and] staying the litigation of Plaintiffs' claims against [defendant] pending

1. As we understand Plaintiff's brief, he makes no claim to have initiated or attempted to initiate the appraisal process. For that reason, we need not determine whether any action that Plaintiff has taken to date has had the effect of initiating the appraisal process.

completion of the arbitration process"). Consistently with this line of decisions, the trial court in *Enzor* stayed the civil litigation between the parties until completion of the appraisal process. Such an approach seems reasonable to us. As a result, we conclude that a similar procedure should be adopted in cases involving a failure to comply with the appraisal provisions required by N.C. Gen. Stat. § 58-44.16(f)(14) and that, instead of granting summary judgment in Defendant's favor, the trial court should have stayed the proceedings resulting from the filing of Plaintiff's complaint, ordered the parties to engage in the appraisal process required by the relevant policy language, and retained jurisdiction over the case for the purpose of resolving any additional issues that might arise between the parties.

III. Conclusion

Thus, we conclude that (1), given the language of the applicable policy provisions, participation in the appraisal process is a condition precedent to Plaintiff's ability to file suit against Defendant; (2) the parties have not completed the appraisal process as set out in the insurance contract; (3), since the appraisal process is the appropriate forum for determination of the dispute between the parties over the amount of Plaintiff's loss and since Defendant invoked Plaintiff's failure to comply with the appraisal process as a defense to Plaintiff's claim, the trial court had no authority to grant summary judgment in favor of Defendant on the basis of any failure on Plaintiff's part to forecast evidence demonstrating the existence of a genuine issue of material fact concerning the amount of Plaintiff's loss; and (4), rather than dismissing Plaintiff's claim based on his failure to comply with the appraisal process, the trial court should have simply stayed further proceedings in this case until the appraisal process had been completed.[2] As a result, for the reasons discussed above, we conclude that the trial court's order granting summary judgment in favor of Plaintiff should be, and hereby is, reversed and that this case should be, and hereby is, remanded to the Wake County Superior Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges BRYANT and ELMORE concur.

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2. We express no opinion concerning the extent, if any, to which Plaintiff is currently entitled to initiate the appraisal procedures set out in the relevant policy language or whether Plaintiff has any other grounds for resisting the invocation of the appraisal process and leave such issues for determination by the trial court on remand

NICOLE ANGELINE MOSTELLER PLAINTIFF, v. GARY WAYNE STILTNER, DEFENDANT

No. COA12-89

(Filed 3 July 2012)

Witnesses—licensed clinical social worker—assertion of privilege—no standing

An appeal by a licensed clinical social worker from an order requiring compliance with a subpoena was dismissed because the social worker lacked standing. The social worker asserted the statutory privilege under N.C.G.S. § 8-53.7, which is identical to the physician-patient privilege, but the privilege belongs to the patient and there was no indication in the record that the patient asserted the privilege.

Appeal by non-party deponent from order entered 10 October 2011 by Judge C. Thomas Edwards in Catawba County District Court. Heard in the Court of Appeals 7 June 2012.

Davis & Hamrick, L.L.P., by Jason L. Walters, for non-party deponent appellant Susan Indenbaum.

No brief filed for plaintiff appellee.

No brief filed for defendant appellee.

McCULLOUGH, Judge.

Nicole Angeline Mosteller ("plaintiff") commenced the underlying action by filing a complaint against Gary Wayne Stiltner ("defendant") for child custody and child support of their minor daughter. In response, defendant filed an answer and counterclaim also seeking child custody and child support of the minor. In connection with the underlying action, on 26 July 2011, counsel for plaintiff filed and served a notice of deposition and subpoena *duces tecum* on appellant, Susan Indenbaum ("Indenbaum"), with whom defendant had consulted for therapy and counseling services. The subpoena requests both the deposition testimony of Indenbaum, as well as the production of "all records regarding any treatment, sessions, counseling, therapy, or meetings with [defendant] from the beginning of time through and including date of this subpoena."

Indenbaum is a licensed clinical social worker by the State of North Carolina. On 12 September 2011, Indenbaum filed a motion for

a protective order and a motion to quash the subpoena, asserting the statutory privilege between a licensed clinical social worker and her patient under N.C. Gen. Stat. § 8-53.7 (2011). The trial court held a hearing on the motions, and on 10 October 2011, the trial court entered an order requiring Indenbaum's compliance with the subpoena.

Indenbaum filed a written notice of appeal from the trial court's order to this Court on 4 November 2011. Neither plaintiff nor defendant submitted briefs in this matter. Rather, plaintiff has filed a motion to dismiss Indenbaum's appeal, asserting that Indenbaum lacks standing to appeal the trial court's order, and therefore, we must dismiss her appeal for lack of jurisdiction. We agree.

Under N.C. Gen. Stat. § 8-53.7 (2011), entitled "Social worker privilege":

> No person engaged in delivery of private social work services, duly licensed or certified pursuant to Chapter 90B of the General Statutes shall be required to disclose any information that he or she may have acquired in rendering professional social services, and which information was necessary to enable him or her to render professional social services: provided, that the presiding judge of a superior or district court may compel such disclosure, if in the court's opinion the same is necessary to a proper administration of justice and such disclosure is not prohibited by G.S. 8-53.6 or any other statute or regulation.

Id. We note this privilege between social worker and patient is identical in both operation and effect to the privilege that exists between physician and patient provided under N.C. Gen. Stat. § 8-53 (2011). Given these similarities, and given that there is no law in North Carolina concerning the social worker privilege, as Indenbaum concedes, we look to the body of law concerning the physician-patient privilege for guidance.

It is well-established in North Carolina that "[t]he privilege belongs to the patient." *Cates v. Wilson*, 321 N.C. 1, 15, 361 S.E.2d 734, 742 (1987) (quoting *Capps v. Lynch*, 253 N.C. 18, 22, 116 S.E.2d 137, 141 (1960)). "The physician-patient privilege is strictly construed and the patient bears the burden of establishing the existence of the privilege and objecting to the introduction of evidence covered by the privilege." *Roadway Express, Inc. v. Hayes*, 178 N.C. App. 165, 170, 631 S.E.2d 41, 45 (2006); *see also Mims v. Wright*, 157 N.C. App. 339, 342, 578 S.E.2d 606, 609 (2003) ("Because this statutory [physician-

patient] privilege is to be strictly construed, the patient bears the burden of establishing the existence of the privilege and objecting to the discovery of such privileged information[.]" (citations omitted)).

"Moreover, the privilege is not absolute and may be waived, either by express waiver or by waiver implied from the patient's conduct." *Mims*, 157 N.C. App. at 342, 578 S.E.2d at 609; *see also Spencer v. Spencer*, 70 N.C. App. 159, 165, 319 S.E.2d 636, 642 (1984). "[I]t is well-established that a failure to object to requested disclosure of privileged information constitutes a waiver of that privilege." *In re K.D.*, 178 N.C. App. 322, 326, 631 S.E.2d 150, 153 (2006) (addressing assertion of psychologist-patient privilege under N.C. Gen. Stat. § 8-53.3). "A patient may expressly or impliedly waive his physician-patient privilege during discovery and at trial." *Adams v. Lovette*, 105 N.C. App. 23, 28-29, 411 S.E.2d 620, 624 (1992). Accordingly, our Supreme Court has held that "[i]n North Carolina the statutory privilege is not absolute, but is qualified. *A physician or surgeon may not refuse to testify;* the privilege is that of the patient." *Sims v. Insurance Co.*, 257 N.C. 32, 38, 125 S.E.2d 326, 331 (1962) (emphasis added); *see also State v. Bryant*, 5 N.C. App. 21, 26, 167 S.E.2d 841, 845-46 (1969). Indeed, this Court has reiterated that "our Supreme Court has held that the privilege created by that statute is for the benefit of the patient alone[.]" *In re Farrow*, 41 N.C. App. 680, 682, 255 S.E.2d 777, 779 (1979) (citation omitted). The facts and circumstances of a particular case determine whether a patient's conduct constitutes an implied waiver, and "a patient impliedly waives his privilege when he does not object to requested disclosures of the privileged information." *Adams*, 105 N.C. App. at 29, 411 S.E.2d at 624.

Applying the foregoing principles to the assertion of the social worker privilege under the facts of this case, we fail to see how Indenbaum has standing to refuse to testify or produce her documents, and to appeal the trial court's order compelling her to do so, when there is no indication in the record before this Court that defendant, the patient, has asserted the privilege Indenbaum seeks to guard. The trial court's order indicates that defendant was present at the underlying hearing on Indenbaum's motion to quash the subpoena, yet there is no evidence in the record indicating defendant objected to the deposition of Indenbaum or the production of her records. Indeed, defendant neither filed notice of appeal nor filed a brief with this Court challenging the trial court's order compelling Indenbaum to testify and produce documents concerning his counseling with Indenbaum. Had he done so, as both the patient and a party to the

action, we would have reached the merits of such a challenge. *See, e.g.*, *Sharpe v. Worland*, 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999) ("[W]hen . . . a *party* asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right [allowing for review of the interlocutory discovery order]." (emphasis added)).

Nonetheless, the record before this Court, and the actions of defendant in not participating in this appeal, demonstrate that defendant, the patient, has raised no objection to Indenbaum's testimony or document production. Accordingly, because the privilege belongs to defendant alone, Indenbaum has no standing to appeal the trial court's order compelling her compliance with the subpoena. *See Henke v. First Colony Builders, Inc.*, 126 N.C. App. 703, 704, 486 S.E.2d 431, 432 (1997) ("It is well settled that an appeal may only be taken by an aggrieved real party in interest. A person aggrieved is one adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights." (internal quotation marks and citations omitted)). Therefore, we dismiss her appeal in this matter.

Dismissed.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA v. SAMUEL KRIS HUNT

No. COA10-666-2

(Filed 17 July 2012)

1. Constitutional Law—effective assistance of counsel—counsel's performance below objective standard—opened door to testimony—no prejudice

Defendant did not receive ineffective assistance of counsel in a trial for second-degree sexual offense and crime against nature where trial counsel opened the door to testimony about other sexual offense charges pending against defendant. Although trial counsel's performance fell below an objective standard of reasonableness because there was no strategic benefit in opening

the door to this testimony, the evidence about the other pending sexual offense charges did not likely affect the jury's verdicts, and defendant was not prejudiced by his trial counsel's error.

2. Constitutional Law—effective assistance of counsel —double jeopardy—second-degree sexual offense—crime against nature—lesser-included offense

Defendant received ineffective assistance of counsel in a trial for second-degree sexual offense and crime against nature to the extent that his trial counsel failed to argue double jeopardy. On the particular facts of defendant's case, crime against nature was a lesser-included offense of second-degree sexual offense, and entry of judgment on both convictions subjected defendant to unconstitutional double jeopardy.

3. Attorneys—potential conflict of interest—trial court's consideration—denial of motion for mistrial—no abuse of discretion

The trial court did not abuse its discretion in refusing to grant defendant's motion for a mistrial in a second-degree sexual offense and crime against nature case based on defense counsel's potential conflict of interest. The trial court's actions reflected its consideration of defense counsel's potential conflict of interest to the extent it believed was adequate and sufficient, and the court's subsequent denial of defendant's motion for a mistrial cannot be characterized as so arbitrary that it could not have been the result of a reasoned decision.

Appeal by Defendant from judgment entered 8 October 2009 by Judge Edwin G. Wilson, Jr., in Randolph County Superior Court. Heard in the Court of Appeals 26 October 2010. An opinion was filed on 3 May 2011 vacating the 8 October 2009 judgment. *See State v. Hunt*, ____ N.C. App. ____, 710 S.E.2d 339 (2011). The North Carolina Supreme Court, by opinion filed on 9 March 2012, reversed and remanded to the Court of Appeals for consideration of Defendant's remaining issues on appeal. *See State v. Hunt*, ____ N.C. ____, 722 S.E.2d 484 (2012).

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for the State.

M. Alexander Charns for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

In *State v. Hunt*, ____ N.C. App. ____, ____, 710 S.E.2d 339, 340 (2011), this Court vacated Defendant Samuel Kris Hunt's convictions for second-degree sexual offense and crime against nature after concluding that the State failed to present sufficient evidence of the victim's mental disability to survive Defendant's motions to dismiss. Our Supreme Court reversed, holding that the State presented sufficient evidence to survive Defendant's motions to dismiss the charges of second-degree sexual offense and crime against nature, and remanded for this Court to consider Defendant's issues on appeal not addressed by our original opinion. *State v. Hunt*, ____ N.C. ____, ____, 722 S.E.2d 484, 492 (2012).

On 6 October 2009, Defendant was tried on charges of second-degree sexual offense and crime against nature during the criminal session of the Randolph County Superior Court. The State's evidence tended to show that on 25 May 2008 Defendant's daughter Madison[1] had a sixteenth birthday party followed by a sleepover at Defendant's home, which her friends Clara, then age seventeen, and Ashley attended. Defendant and his wife went out drinking with another couple around 9:00 p.m., returning at about 3:00 a.m. the next morning.

Clara testified that, when Defendant returned home, she was watching a movie with Madison, Ashley, and Defendant's four younger children. Defendant came and tapped Clara on the arm, motioning for her to follow him into the kitchen. Once in the kitchen, Defendant began touching Clara on her breasts, vagina, and "butt" and asked if she "like[d] it[.]" Defendant then pulled his penis out of his sweatpants and forced Clara's head down. Clara was scared, but put Defendant's penis in her mouth. When Clara tried to raise her head, Defendant pushed her head back down and forced his penis into her mouth again. Defendant told her, "Don't tell nobody. I can get in serious trouble." Eventually Clara pulled her head away. Defendant then told Clara to go to a bedroom and take off her clothes, but instead she returned to the living room.

Clara told Ashley what Defendant had done, and later told Madison, asking for protection from Defendant. The next morning, Madison told her mother what had happened. The mother confronted Defendant, who eventually admitted what had occurred. When Clara returned home that morning and told her father what had happened,

1. We refer to Defendant's minor daughter and the party guests by pseudonyms to protect their identities.

he took her to the police station to give a statement. Defendant was subsequently detained by police. The State presented testimony from Clara's special education teacher, school resource officer, and social workers regarding Clara's mental disability, to wit, that Clara was "classified as intellectually disabled in the mild category[,]" had an IQ lower than 70, and was enrolled in classes for children with learning disabilities.

Defendant testified that, when he returned home from a night of drinking, he believed Clara was interested in a sexual encounter. Defendant admitted that Clara performed oral sex on him, but claimed that this contact was consensual. Defendant stated that Clara had called boyfriends from his home. He said Clara's father had told Defendant he was proud of Clara being a "straight A student." Defendant denied knowing that Clara had any mental disability until the police informed him of this fact. Defendant also testified that while he was in school, he took "Slow Learning Disability" classes, had failed the second and eighth grades, and failed in his first attempt to obtain his GED.

On 8 October 2009, a jury found Defendant guilty of second-degree sexual offense and crime against nature. The trial court consolidated the convictions and sentenced Defendant to 73-97 months in prison. Defendant gave notice of appeal in open court.

Discussion

On remand, we address Defendant's two remaining arguments on appeal: (1) that Defendant received ineffective assistance of counsel at trial; and (2) that the trial court erred by not granting Defendant's motion for a mistrial based on defense counsel's purported conflict of interest. As discussed below, we vacate Defendant's conviction for crime against nature as a violation of constitutional prohibitions on double jeopardy. We find no error concerning Defendant's conviction for second-degree sexual offense.

Ineffective Assistance of Counsel Claims

A. "Opening the Door" to Evidence of Defendant's Other Sexual Offense Charges[2]

[1] Defendant argues that his trial counsel provided ineffective assistance when he asked Defendant on direct examination if he had "ever

2. The phrase "opening the door" refers to the principle that "[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to

done such a thing before," despite knowing of other sexual offense charges pending against Defendant. We disagree.

A criminal defendant has a constitutional right to the effective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citation omitted).

> 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. However, the fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings. This determination must be based on the totality of the evidence before the finder of fact.

State v. Batchelor, 202 N.C. App. 733, 739, 690 S.E.2d 53, 57 (2010) (citations, quotation marks, and brackets omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698 (1984). Our appellate courts "engage[] in a presumption that trial counsel's representation is within the boundaries of acceptable professional conduct" when reviewing ineffective assistance of counsel claims. *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (citation omitted).

Here, at the time of trial, Defendant faced sexual offense charges based on allegations by his daughter Madison that Defendant had sexually abused her when she was between the ages of eleven and fifteen. When trial counsel asked Defendant if he had "ever done such a thing before," Defendant replied, "No." As a result, the State was allowed to call Madison to testify about Defendant's alleged sexual abuse of her. Defendant contends that his trial counsel's performance fell below an objective standard of reasonableness because there was no strategic benefit in opening the door to Madison's testimony on this point. We agree. However, because we conclude that the evidence about the other pending sexual offense charges did not likely

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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).

affect the jury's verdicts, Defendant was not prejudiced by his trial counsel's error and, accordingly, has failed to successfully assert an ineffective assistance of counsel claim.

A defendant commits second-degree sexual offense when he engages in a sexual act with a victim who is mentally disabled and who the defendant knew or reasonably should have known was mentally disabled. N.C. Gen. Stat. § 14-27.5(a)(2) (2011). Defendant admitted to engaging in a sex act with Clara, and substantial evidence of Clara's mental disability was presented. Thus, the main factual question for the jury was whether Defendant knew or should have known about Clara's mental disability.

The evidence that came in when Defendant's trial counsel opened the door concerned Defendant's alleged sexual offenses against his own daughter while she was a minor and the resulting criminal charges Defendant faced at the time of trial. This evidence suggested that Defendant was inclined to (1) commit incestuous acts and (2) have sexual encounters with a girl he knew to be underage. Thus, this evidence was irrelevant to the main issue before the jury in deciding the second-degree sexual offense charge: Defendant's awareness of Clara's mental disability.

We recognize that evidence of Defendant's alleged sexual offenses against his daughter reflected poorly on Defendant's character, to say the least, and may have suggested to the jury that Defendant was a thoroughly unpleasant person who showed an appalling lack of judgment when it came to his roles as a father and an adult man. However, Defendant had already revealed this distasteful aspect of himself to the jury by admitting that he had a sexual encounter with his daughter's seventeen-year-old friend in the family kitchen during his daughter's sixteenth birthday sleepover while his daughter and other children were present in the next room. As such, we cannot conclude that the evidence in question likely altered the jury's verdict. Accordingly, we overrule Defendant's ineffective assistance of counsel challenge to his conviction for second-degree sexual offense.

B. Double Jeopardy

[2] Defendant also argues that he received ineffective assistance of counsel to the extent his trial counsel failed to argue double jeopardy regarding the second-degree sexual offense and crime against nature charges against him, and in the alternative, that if trial counsel did adequately raise the issue, the court erred in failing to arrest judgment upon one of his subsequent convictions. We agree.

> Double jeopardy bars additional punishment where the offenses have the same elements or when one offense is a lesser included offense of the other. On the other hand, where each offense requires proof of an additional element not included in the other, the offenses are distinct and the defendant may be prosecuted and punished for each offense. If . . . 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.

State v. McAllister, 138 N.C. App. 252, 255-56, 530 S.E.2d 859, 862 (2000) (citations omitted).

As noted by our Supreme Court in the case at bar, following the United States Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508 (2003), a defendant challenged the constitutionality of our State's crime against nature statute, N.C. Gen. Stat. § 14-177, asserting that there was no legitimate state interest in regulating many types of sexual acts traditionally charged under the statute. *See State v. Whiteley*, 172 N.C. App. 772, 616 S.E.2d 576 (2005). This Court held the crime against nature statute was constitutional, but also held that it can only "properly be used to prosecute conduct in which a minor is involved, conduct involving nonconsensual or coercive sexual acts, conduct occurring in a public place, or conduct involving prostitution or solicitation[.]" *Id.* at 779, 616 S.E.2d at 581. Thus, following *Lawrence* and *Whiteley*, a conviction under section 14-177 requires proof not only of commission of an unnatural sexual act (as pre-*Lawrence*), but also proof of one of the additional four circumstances listed in *Whiteley*.

As discussed *supra*, second-degree sexual offense, as charged in Defendant's indictment, required proof of (1) a sexual act with a victim who was (2) mentally disabled such that she could not consent to the sexual act, and (3) who Defendant knew or should have known could not consent. N.C. Gen. Stat. § 14-27.5(a); *see also State v. Washington*, 131 N.C. App. 156, 167, 506 S.E.2d 283, 290 (1998) (holding that a person who is mentally disabled is "statutorily deemed incapable of consenting" to sexual acts). Also, as discussed above, the crime against nature charge here required proof of (1) a sex act (2) that was nonconsensual based on the victim's mental disability. *Whiteley*, 172 N.C. App. at 779, 616 S.E.2d at 581; *Hunt*, ____ N.C. at ____, 722 S.E.2d at 490-91. The specific sex act committed by Defendant was fellatio, which is a "sexual act" for purposes of both

statutes. N.C. Gen. Stat. § 14-27.1(4) (2011); *see also State v. Jacobs*, 128 N.C. App. 559, 495 S.E.2d 757 (holding that fellatio is a sexual act for purposes of second-degree sexual offense), *cert. denied*, 348 N.C. 506, 510 S.E.2d 665 (1998); *State v. Poe*, 40 N.C. App. 385, 252 S.E.2d 843, *cert. denied and appeal dismissed*, 298 N.C. 303, 259 S.E.2d 304 (1979) (holding that fellatio is a crime against nature), *appeal dismissed*, 445 U.S. 947, 63 L. Ed. 2d 782 (1980).

Here, the trial court instructed the jury that to find Defendant guilty of second-degree sexual offense, it must find beyond a reasonable doubt that Defendant (1) committed the sex act of fellatio with Clara who was (2) mentally disabled such that she could not consent and that Defendant (3) knew or should reasonably have known of Clara's mental disability. As to the crime against nature charge, the trial court instructed the jury that to return a guilty verdict, it must find beyond a reasonable doubt that Defendant (1) committed the unnatural sex act of fellatio with Clara, (2) "an adult who was mentally disabled or incapacitated or physically helpless so as to be incapable of properly consenting." Thus, on the particular facts of Defendant's case, crime against nature was a lesser-included offense of second-degree sexual offense, and entry of judgment on both convictions subjected Defendant to unconstitutional double jeopardy. *See McAllister*, 138 N.C. App. at 255, 530 S.E.2d at 862.

We recognize that in discussing the sufficiency of the evidence to withstand Defendant's motions to dismiss the crime against nature charge, our Supreme Court also referred to the presence of other *Whiteley* circumstances in this case, specifically that Clara was coerced and was a minor.[3] *Hunt*, ____ N.C. at ____, 722 S.E.2d at 490-91 ("Here, the record contains sufficient evidence that [D]efendant engaged in nonconsensual or coercive sexual acts with a minor. As [D]efendant concededly knew, Clara was seventeen at the time of her encounter with him."). Either of these *Whiteley* circumstances

3. We note that Clara was seventeen years old at the time of the offense. Thus, based upon Clara's age alone (rather than on her mental disability), Defendant's sexual relations with her, while perhaps morally reprehensible, would not be criminal under our statutes regarding indecent liberties with a child, N.C. Gen. Stat. § 14-202.1 (2011), statutory rape, N.C. Gen. Stat. § 14-27.7A (2011), or any other criminal statute, as the "age of consent" in this State is sixteen (in the absence of force or other additional circumstances). *See also* N.C. Gen. Stat. § 14-27.2 (2011) (first-degree rape); N.C. Gen. Stat. § 14-27.2A (2011) (rape of a child); N.C. Gen. Stat. § 14-27.4 (2011) (first-degree sexual offense); N.C. Gen. Stat. § 14-27.4A (2011) (sexual offense with a child). However, in light of our Supreme Court's opinion in *Hunt*, it appears that sexual acts committed with a consenting sixteen- or seventeen-year-old could sustain a charge under the crime against nature statute.

would have been sufficient to support the crime against nature charge and would have required proof of an additional fact not part of the second-degree sexual offense charge, avoiding double jeopardy. However, as noted *supra*, as to the crime against nature charge, the trial court *only* instructed the jury on lack of consent based upon Clara's mental disability. Accordingly, we must vacate Defendant's conviction for crime against nature and remand to the trial court for resentencing.

Motion for Mistrial

[3] Defendant also argues that the trial court erred in refusing to grant his motion for a mistrial. We disagree.

"Whether to grant a motion for mistrial is within the sound discretion of the trial court and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion." *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 36 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). A trial court abuses its discretion only where "its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985) (citation omitted). A mistrial should be declared only "when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Norwood*, 344 N.C. 511, 537, 476 S.E.2d 349, 361 (1996) (citation and quotation marks omitted), *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997).

Here, near the end of the State's case-in-chief, the prosecutor raised a concern about possible perjury by the Defendant's teenage son. Out of the presence of the jury, the trial court called to the stand a therapeutic counselor who had custody of Defendant's son at the time of trial. The counselor testified on *voir dire* that, following a phone conversation with defense counsel the night before, the son had asked what would happen to someone who lied in court. The counselor also testified that he had not actually heard defense counsel telling the son what to say in court. Defendant did not move for a mistrial. At the close of the State's evidence, Defendant moved to dismiss on various grounds, all of which were denied by the trial court. The trial court also addressed the counselor's *voir dire* testimony, remarking that while an attorney cannot offer evidence he knows to be false, a good trial lawyer would certainly prepare a witness and go over the witness' testimony. Neither side raised any objection to the trial court's remarks, and subsequently, defense counsel indicated that he would not call the son as doing so would not "help either side."

Later, midway through Defendant's case, defense counsel did move for a mistrial, stating that he might now want to call the son, but feared that he (defense counsel) would be called as a witness if the son testified. Following a discussion with defense counsel, the trial court denied the motion, stating that until the son was called and testified, there were no grounds for a mistrial. The trial court also assured defense counsel that if the son were called and anything occurred requiring a mistrial, it would reconsider the motion. However, the defense never called the son to testify.

The dissent suggests that the trial court was required to conduct an evidentiary hearing into the matter. However, our Supreme Court has specifically rejected the argument that a trial court is required to hold an evidentiary hearing into a possible conflict of interest, stating that "trial courts can determine in their discretion whether such a full-blown proceeding [an evidentiary hearing] is necessary or whether some other form of inquiry is adequate and sufficient." *State v. Choudhry*, 365 N.C. 215, 223, 717 S.E.2d 348, 354 (2011).

Here, regarding the possible conflict of interest, the trial court held a *voir dire* of the therapeutic counselor, discussed the latitude and limits of an attorney's responsibility to prepare witnesses for trial, discussed the possible grounds for a mistrial with defense counsel extensively, and assured defense counsel that a mistrial would be declared if grounds arose as the trial proceeded. These actions reflect the trial court's consideration of defense counsel's potential conflict of interest to the extent it believed was "adequate and sufficient." *Id.* In light of this consideration, we cannot characterize the court's subsequent denial of Defendant's motion for a mistrial as "so arbitrary that it could not have been the result of a reasoned decision." *Hayes*, 314 N.C. at 471, 334 S.E.2d at 747. As such, we see no abuse of discretion in the trial court's handling of this situation. Accordingly, we overrule this argument.

Conclusion

In sum, we conclude that Defendant received effective assistance of counsel and a trial free from prejudicial error as to the second-degree sexual offense charge, but vacate his conviction for crime against nature and remand to the trial court for resentencing.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Chief Judge MARTIN concurs.

Judge STROUD concurs in part and dissents in part.

STROUD, Judge concurring in part and dissenting in part.

Because I believe that the trial court erred by failing to conduct an evidentiary hearing to determine whether defense counsel's conflict of interest would require that the court order a mistrial, I dissent from the majority's opinion. I agree with the majority's determination that defense counsel's actions in "opening the door" to evidence regarding defendant's sexual abuse of his daughter fell below a reasonable standard but, because defendant was not prejudiced by his trial counsel's error, this did not amount to ineffective assistance of counsel. I also agree with the majority's determination regarding defendant's remaining arguments as to ineffective assistance of counsel and that the charge of crime against nature amounted to a violation of defendant's double jeopardy rights. I will only review the facts as necessary to address the issue upon which I dissent.

The majority concludes that the trial court did not abuse its discretion in denying defendant's motion for a mistrial because "the defense never called the son to testify[.]" I disagree, as this analysis fails to address the heart of the motion for mistrial which was defense counsel's conflict of interest. Defendant argues that his motion for a mistrial should have been granted because his trial counsel "had a direct conflict of interest between defending himself from accusations of possibly suborning perjury and coaching a minor witness," and having the witness testify on defendant's behalf or even presenting an offer of proof for preservation of the record. Defendant argues that accusations by the prosecutor and the subsequent warnings from the trial court to his trial counsel "unconstitutionally chilled defense counsel's representation of [defendant]" by preventing him from presenting his defense, as defendant's son was not called by defense counsel even though he "claimed to have information sufficient to make a difference in the trial[.]" Defendant concludes that by giving warnings to his defense counsel regarding perjury, misrepresentation to the court, and coaching a witness and then denying defense counsel's motions for mistrial based on a conflict of interest, the trial court "improperly projected himself into this case in a manner calculated to alter counsel's trial strategy" and therefore, he should have a new trial. The State counters that "[t]he facts in this case show that nothing occurred that effected defendant's ability to receive a fair trial" and the trial court did not abuse its discretion in denying defense counsel's motions for mistrial. The State further argues that the trial

court's actions in handling the accusations that defense counsel had coached the witness were "fair, just and impartial[,]" the trial court's remarks to defense counsel did not deprive defendant of due process, and defendant's argument should be overruled because it lacks merit.

N.C. Gen. Stat. § 15A-1061 (2007) states that

> [u]pon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case. . . .

"[A] motion for mistrial must be granted if there occurs an incident of such a nature that it would render a fair and impartial trial impossible under the law." *State v. McCraw*, 300 N.C. 610, 620, 268 S.E.2d 173, 179 (1980) (citation omitted). The decision as to whether substantial and irreparable prejudice has occurred lies within the court's discretion and, absent a showing of abuse of that discretion, the decision of the trial court will not be disturbed on appeal. *State v. Mills*, 39 N.C. App. 47, 50, 249 S.E.2d 446, 448 (1978) (citation omitted), *disc. review denied*, 296 N.C. 588, 254 S.E.2d 33 (1979). As an actual conflict of interest could "render a fair and impartial trial impossible under the law[,]" *see McCraw*, 300 N.C. at 620, 268 S.E.2d at 179, a motion for a mistrial can be based on a conflict of interest. *See State v. Bruton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996); *State v. Whiteside*, 325 N.C. 389, 407, 383 S.E.2d 911, 921 (1989).

This Court has stated that

> [a] criminal defendant subject to imprisonment has a Sixth Amendment right to counsel. *Argersinger v. Hamlin*, 407 U.S. 25, 37, 32 L. Ed. 2d 530, 538 (1972). The Sixth Amendment right to counsel applies to the states through the Fourteenth Amendment of the United States Constitution. *State v. James*, 111 N.C. App. 785, 789, 433 S.E.2d 755, 757 (1993). Sections 19 and 23 of the North Carolina Constitution also provide criminal defendants in North Carolina with a right to counsel. *Id.* The right to counsel includes a right to "representation that is free from conflicts of interests." *Wood v. Georgia*, 450 U.S. 261, 271, 67 L. Ed. 2d 220, 230 (1981).

State v. Mims, 180 N.C. App. 403, 409, 637 S.E.2d 244, 247-48 (2006). In order to establish a violation of this right, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348, 64 L.Ed. 2d 333, 346-47 (1980). Additionally,

> prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts . . . [p]rejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'

Strickland v. Washington, 466 U.S. 668, 692, 80 L.Ed. 2d 674, 696 (1984) (quoting *Cuyler*, 446 U.S. at 345-50, 348, 64 L.Ed.2d at 347, 346). "If the possibility of conflict is raised before the conclusion of trial" or "[w]hen the court becomes aware of a potential conflict of interest with regard to a defendant's retained counsel[,]" the trial court must "take control of the situation" by conducting a hearing

> "to determine whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment." . . . In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given the opportunity to express his or her views.

James, 111 N.C. App. at 791, 433 S.E.2d at 758-59 (quoting United *States v. Alberti*, 470 F.2d 878, 881-82 (2d Cir. 1972), *cert. denied*, 411 U.S. 919, 36 L.Ed. 2d 311 (1973) and *cert. denied*, *Depompeis v. U.S.*, 411 U.S. 965, 36 L.Ed. 2d 685 (1973) and *United States v. Cataldo*, 625 F. Supp. 1255, 1257 (S.D.N.Y. 1985)). Our Supreme Court has further stated that

> [w]hile the court is not required to act if it is aware only "of a vague, unspecified possibility of conflict," *Mickens v. Taylor*, 535 U.S. 162, 169, 152 L. Ed. 2d 291, 302 (2002), when the court "knows or reasonably should know" of "a particular conflict,"

> that court must inquire "into the [that conflict of interest]," *Sullivan*, 446 U.S. at 346-47, 64 L. Ed. 2d at 345-46.

State v. Khuram Ashfaq Choudhry, 365 N.C. 215, 220, 717 S.E.2d 348, 352 (2011). When this Court cannot determine from the record on appeal whether defendant's counsel had a conflict of interest, this Court may remand the matter to the trial court for an evidentiary hearing to address the issue. *Mims*, 180 N.C. App. at 411, 637 S.E.2d at 249. *See James*, 111 N.C. App. at 791, 433 S.E.2d at 759 (noting that "[o]rdinarily, we would remand the case to the trial court for a hearing to determine if the actual conflict adversely affected the lawyer's performance."). The *James* Court further stated that "the Sixth Amendment right to conflict-free representation can be waived by a defendant, if done knowingly, intelligently and voluntarily." *Id.* (citations omitted).

Even though the majority gives a brief summary of the proceedings, I believe a more thorough look at the trial is needed to address defendant's argument. From the trial transcript, it appears that the possible conflict of interest first arose during the presentation of the State's evidence. The prosecutor called Wayne Rivers as a witness, asked the trial court for a *voir dire* outside the present of the jury, and made the following statement:

> [The State]: Your Honor, I think I have a obligation [sic] as Assistant D.A. to prevent any crimes occurring. I have been informed this morning that one of [defense counsel's] witnesses asked yesterday could he—words to the effect, could he get in trouble for not telling the truth or committing perjury. That witness has also conveyed to me this morning that that witness, once he got off the phone with [defense counsel], said something to the effect that, I'm going to say something to get my daddy out of jail. And so I want to put that on the record outside the hearing of the jury. Put Your Honor and [defense counsel] on notice what I know in an attempt to not muddy the case for the Court of Appeals and get what Mr. Rivers said on the record.

Defendant's son Chris[1] was brought into the court room. Wayne Rivers, the therapeutic foster parent for Chris, testified that Chris was living with him. He further testified that Chris received a phone call the night before from defendant's trial counsel. Mr. Rivers was in the same room with Chris but did not hear all of the conversation.

1. A pseudonym.

When Chris got off the phone "he said something like, if I tell this, my dad can walk tomorrow" but did not explain what he meant by "this[.]" Mr. Rivers explained that "you know, it might have been the truth. It may not have been." Later that night, Chris asked Mr. Rivers "what happens if somebody lies in court? And [Mr. Rivers] explained to him, you get charged with perjury[.]" After a long conversation with Chris, Mr. Rivers was concerned that Chris had been "coached" by defense counsel as to what he should say in court. He felt like the conversation should not have occurred without a guardian present. The trial court told the prosecutor to proceed with his next witness and he would "think about how to deal with this issue[.]"

After the State rested its case and before defendant testified, the trial court, out of the presence of the jurors, stated that he did not know if Mr. Rivers or Chris would be called as a witness but if so, "the rules against perjury would apply to them, as well as anyone else." The trial court then directed toward defense counsel the following statements: "[T]he rules of professional conduct, as you know, prevent certain things from being said" and read to him portions of North Carolina Rule of Professional Conduct 3.3 regarding making false statements of material fact and offering evidence that a lawyer knows to be false. Also, citing *State v. McCormick*, 298 N.C. 788, 791-92, 259 S.E.2d 880, 882-83 (1979), the trial court stated that it was not improper for defense counsel to prepare his witness for trial and to explain the applicable law as "[s]uch preparation is the mark of a good trial lawyer and is to be commended because it promotes more efficient administration of justice and saves the Court time." The trial court explained that nothing improper occurs unless "the attorney has placed in the witness's mouth or false or perjured testimony." After this statement, defense counsel informed the trial court that he had emailed the State Bar and had correspondence from them. The trial court stated that he would put the correspondence in the court file[2] and that they should proceed with the trial but told defense counsel, "who you decide to call as a witness is up to you." Defense counsel then informed the trial court that he was not calling Chris as a witness. During defendant's testimony, defendant made an apparent attempt to bring in Chris' testimony:

> [Defense counsel:] Okay. All right. So how come you didn't see [Clara] more often?

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2. There is no correspondence from the State Bar in the record on appeal.

> [Defendant:] Because I was never really home. I hate to admit it, but even, you know, if my son testified, he would tell you that I—
>
> Q. Well, let's not talk about what your son would say.
>
> A. I wasn't there much at my home. I kind of stayed away after —I tried to stay busy after certain things happened.

Prior to the State's cross-examination of defendant, defense counsel moved for a mistrial:

> I think that the—this issue about regarding what I knew was coming would definitely preclude me from calling him as a witness. So it would make me a witness basically as to what I said to a witness out of court in front of his guardian. And so I'd have to move for a mistrial. Basically, I think there has been a—I'd have to move for a mistrial.

After the trial court stated that he did not completely understand his reasoning for the motion, defense counsel explained that he had contacted Chris in order to get a suit for defendant but after talking with Chris, he "[d]ecided [Chris] might be able to help his father[,]" and tried to subpoena Chris. He further explained that, at some point, he talked again with Chris, when Mr. Rivers was listening to their conversation, and Mr. Rivers thought that he was asking Chris to say something that was untrue and reported this to the prosecutor. He explained that this would preclude him from calling Chris as a witness because any line of questioning regarding what was said would make him a witness in this case. The trial court stated that the only testimony relevant to the trial was what defendant's son was going to testify in the trial regarding defendant, not the conversation between defense counsel and Chris, as "any conversation you [had] with him and anything subsequent might be an issue for something else, but not for this trial." Defense counsel responded that he knew defendant's son's testimony would not be perjured but the allegations against him "put[] a freeze on my ability to call [Chris] as a witness[.]" The trial court then denied defense counsel's motion for a mistrial, stating that there was no reason for a mistrial since defense counsel had decided not to call Chris as a witness. The prosecutor argued that Chris was not a witness to anything that occurred and it would not help defendant's case at all for him to be called as a witness. The trial court reiterated that he was not granting defense counsel's motion for a mistrial. After the verdict, defense counsel renewed his motion for a mistrial pursuant to N.C. Gen. Stat. § 15A-1061.

The above summary shows that there was an apparent conflict of interest between defense counsel and defendant regarding the decision to call Chris as a witness. From defense counsel's perspective, putting Chris on the stand and giving him an opportunity to testify that he had been coached by defense counsel to commit perjury could have resulted in defense counsel being subjected to discipline for violation of the North Carolina Revised Rules of Professional Conduct. Rule 3.3(a) states, in pertinent part, that

> [a] lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> . . . .
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal. . . . [3]

Rule 1.16 states also that "a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if (1) the representation will result in violation of law or the Rules of Professional Conduct[.]" In the case cited by the trial court, *State v. McCormick*, the Court addressed the point at which preparation of a trial witness can be considered "coaching" a witness:

> It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer, *see*, *e.g.*, *A. Morrill*, *Trial Diplomacy*, Ch. 3, Part 8 (1973), and is to be commended because it promotes a more efficient administration of justice and saves court time.

3. The last part of Rule 3.3(a)(3) states that, "A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false." This portion is inapplicable because, as noted above, defense counsel told the trial court that Chris' testimony would not be perjured, showing that this was not the reason he declined to call Chris as a witness.

> Even though a witness has been prepared in this manner, *his* testimony at trial is still his voluntary testimony. Nothing improper has occurred so long as the attorney is preparing the witness to give *the witness*' testimony at trial and not the testimony that the attorney has placed in the witness' mouth and not false or perjured testimony.
>
> When a witness' testimony appears to have been memorized or rehearsed or it appears that the witness has testified using the attorney's words rather than his own or has been improperly coached, then these are matters to be explored on cross-examination, and the weight to be given the witness' testimony is for the jury. The sanctions of the Code of Professional Responsibility are there for the attorney who goes beyond preparing a witness to testify to that about which the witness has knowledge and instead procures false or perjured testimony. DR7-102, Code of Professional Responsibility.

298 N.C. 788, 791-92, 259 S.E.2d 880, 882-83 (1979) (emphasis in original).

From the defendant's perspective, the record indicates that Chris' testimony could have benefited defendant's defense. Mr. Rivers testified that Chris told him that he could testify and his "dad could walk[.]" Also, defendant's reference to Chris in his testimony at least shows that there was a possibility that Chris could have confirmed defendant's claim that he did not know that Clara was mentally disabled because he was never around her, casting doubt on the highly contested and essential element of the charged offense, first degree sexual offense. *See* N.C. Gen. Stat. § 14-27.5(a)(2). Also, defense counsel stated that when he talked with Chris he "[d]ecided [Chris] might be able to help his father[,]" and tried to subpoena Chris. In *State v. Mackey*, this Court highlighted a defendant's right to offer the testimony of witnesses in support of his defense:

> "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

58 N.C. App. 385, 388, 293 S.E.2d 617, 619 (quoting *Washington v. Texas*, 388 U.S. 14, 19, 18 L.Ed. 2d 1019, 1023 (1967)), *appeal dismissed and disc. review denied*, 306 N.C. 748, 295 S.E.2d 761 (1982). In summary, defense counsel had an apparent conflict of interest with his client, defendant, and defense counsel clearly recognized this conflict and stated it to the trial court.[4] If defense counsel put Chris on the stand, even to make an offer of proof, there was a possibility that he could testify that he had been coached to commit perjury. However, Chris also could have testified that defendant was not around that much, confirming defendant's claims that he did not know that Clara was mentally disabled. It is also possible that Chris' truthful testimony would not have been helpful to defendant's case at all, in which case defense counsel's decision not to call him to testify was reasonable and did not prejudice defendant. Contrary to the majority's reasoning, the fact that Chris was not called as a witness did not resolve this conflict, as defense counsel may have chosen not to call Chris to testify to protect his own interests. In fact, that was essentially the choice which the trial court gave him, but this is not a choice which defense counsel should have been required to make.

Following the prosecutor's accusation, Mr. Rivers' testimony, and the trial court's warnings to defense counsel regarding perjury, the trial court never addressed the extent of this conflict of interest but left defense counsel to resolve it himself, which he did by declining to call Chris to testify. Even though the trial court made no ruling following the prosecutor's allegations of subornation of perjury, defense counsel did highlight this conflict of interest in his motion for a mistrial. In his motion, defendant stated that he could not call Chris as a witness because he had been implicated by the prosecutor and Mr. Rivers as coaching Chris to commit perjury. Defense counsel also stated that the allegations against him "put[] a freeze on my ability to call [Chris] as a witness[.]" Further, the trial court noted that "any conversation [defense counsel had] with [Chris] and anything subsequent might be an issue for something else, but not for this trial." The "something else" appears to be a reference to the possibility of an accusation that defense counsel violated the Rules of Profession Conduct and potentially subsequent proceedings by the State Bar.

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4. I further note that due to this possible conflict of interest, continued representation of defendant could have resulted in violation of other rules: Rule 1.7(a)(2) of the North Carolina Revised Rules of Professional Conduct states that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . . (2) the representation of one or more clients may be materially limited . . . by a personal interest of the lawyer."

The apparent conflict of interest at issue in this case was not "vague" or "unspecified" and the trial court should have known or reasonably should have known to address this issue, *see Khuram Ashfaq Choudhry*, 365 N.C. at 220, 717 S.E.2d at 352, because it was raised twice during the trial, first by the prosecutor in informing the trial court and second by defense counsel in his motion for a mistrial. At no time did the trial counsel "take control of the situation" by conducting a hearing "to determine whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the sixth amendment[,]" or to "fully advise[] [defendant] of the facts underlying the potential conflict and . . . [giving him] the opportunity to express his . . . views." *See James*, 111 N.C. App. at 791, 433 S.E.2d at 758-59. There is no record that defendant "knowingly, intelligently and voluntarily" waived this possible conflict. *See id.* at 791, 433 S.E.2d at 759. The trial court's error is clearly illustrated by the fact that the record fails to show whether defense counsel did in fact coach Chris to commit perjury or whether Chris would have testified truthfully that defendant was not around that much because the trial court never brought Chris to the stand to find out what Chris would say.[5] Of course, as I have no way of knowing what Chris' testimony would be, I cannot say that the failure to grant defendant's motion for mistrial was reversible error. The trial court should have conducted an evidentiary hearing to determine the nature and extent of the conflict of interest and whether defendant would be prejudiced by the conflict of interest. Depending on the substance of Chris' testimony, the fact that he was not called to testify may have made no difference to defendant's defense or it may have been helpful to defendant. I would therefore remand for an evidentiary hearing to determine the nature and extent of the conflict of interest and whether the failure to call Chris to testify may have prejudiced defendant. *See Mims*, 180 N.C. App. at 411, 637 S.E.2d at 249. If the trial court were to determine that defendant's defense was impaired by the conflict of interest, I believe that the trial court should then order a new trial.

For the above reasons, I respectfully concur in part and dissent in part, and would remand for a hearing regarding defense counsel's conflict of interest.

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5. The record indicates that Chris was at the trial.

STATE OF NORTH CAROLINA v. RODNEY LAMAR ROBINSON

No. COA11-1584

(Filed 17 July 2012)

1. Constitutional Law—due process—competency to stand trial—evidence did not support determination—no prejudice

The trial court abused its discretion in a first-degree murder case by denying defendant's motion to be evaluated by a mental health professional to determine his competency to proceed with trial. The trial court conducted a proper competency hearing but the evidence did not support its determination that defendant was competent to proceed with trial. However, in light of a medical expert's testimony for the defense at trial that he was not concerned about defendant's current competency, the trial court's error did not prejudice defendant.

2. Confessions and Incriminating Statements—Miranda rights—waiver—voluntary

The trial court did not err in a first-degree murder case by failing to suppress defendant's statement. The evidence was sufficient to demonstrate that defendant's waiver of his *Miranda* rights prior to making any incriminating statements was knowing, intelligent, and voluntary. Further, defendant's argument that the language used to convey the fourth *Miranda* right to him was inadequate was not preserved for appellate review.

Appeal by defendant from judgment entered 28 February 2011 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 24 May 2012.

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

Glover & Peterson, P.A., by James R. Glover, for defendant appellant.

McCULLOUGH, Judge.

On 28 February 2011, a jury found Rodney Lamar Robinson ("defendant") guilty of first-degree murder. The trial court entered judgment on the verdict, sentencing defendant to life imprisonment without the possibility of parole. On appeal, defendant challenges the trial court's (1) denial of his motion requesting that he be evaluated by a mental health professional to determine his competency to proceed with trial, and (2) denial of his motion to suppress his statements made during a recorded interrogation at the police station during which he produced a handwritten statement. After careful review, we hold defendant received a fair trial free from prejudicial error.

I. Background

On 16 August 2009, just before 2:00 p.m., defendant assaulted Angela Hart ("Hart") with a paring knife, and Hart died as a result of the loss of blood from the injuries inflicted during the assault. During the four months prior to her murder on 16 August 2009, Hart lived with defendant in defendant's mother's home located on Woodlawn Avenue in Asheville, North Carolina.

On the date of the assault, Hart contacted defendant by telephone, during which defendant lied to Hart and told her that his mother had a nervous breakdown and that she needed to come home. When she arrived at the house, defendant again lied to her and told her he had stored some of her belongings in the basement and that she should accompany him to the basement. At the top of the basement stairs, defendant first stabbed Hart in the neck with the paring knife. Hart attempted to run from defendant, and he chased her outside around the house onto Young Street, where he tackled her against a parked car. Defendant proceeded to stab Hart repeatedly. Hart again attempted to run away from defendant, but she fell down, upon which defendant caught her and began stabbing her repeatedly. Hart then tried to run towards a nearby house, as defendant followed and continued to stab her. When Hart no longer moved, defendant returned to his house.

Several neighbors in the area heard a female screaming for help, saw defendant stabbing Hart multiple times, and called 911. Officer Robert Bingaman with the Asheville Police Department ("Officer Bingaman") was the first police officer to arrive at the scene at approximately 1:50 p.m. As Officer Bingaman approached the area, he observed defendant crossing the street in front of defendant's house with his hands, arms, bare chest, and pants covered in blood. Officer Bingaman exited his patrol vehicle and approached defendant

in front of defendant's house, and defendant "threw his hands in the air" and stated that he was "not resisting." Defendant complied with Officer Bingaman's order to get on the ground and was handcuffed. During this time, defendant stated that he "just killed a woman." When Officer Bingaman stood defendant up and asked defendant where the woman was, defendant motioned with his head and eyes in the direction of Hart's body and stated, "She's over there." After providing his name and address to Officer Bingaman, defendant spontaneously stated, "I'm glad this is over. I'm about to meet my maker." A dispatcher riding with Officer Bingaman checked the location indicated by defendant and reported back to Officer Bingaman that he had observed a body. EMS personnel arrived soon thereafter and pronounced Hart dead at the scene.

The pathologist who conducted Hart's autopsy testified that Hart sustained a total of 57 sharp force injuries. Forty-four of those injuries were superficial, penetrating through the skin and soft tissue but no vital organs or major blood vessels. The remaining thirteen were deeper stab wounds, including four in Hart's back that penetrated both of her lungs. Thirty-six of the injuries were inflicted on Hart's face, head and neck, one of which penetrated her eyeball. The paring knife used in the assault was left imbedded in Hart's right cheek. At the scene, EMS personnel also asked defendant if he was injured, to which defendant responded that he had cut his hand when he was "cutting that b---h." Defendant was arrested and taken to the Asheville Police Department.

At approximately 4:30 p.m., Detective Matthew Davis ("Detective Davis"), with defendant's consent, took swabs of the blood on defendant's chest and a swab from defendant's cheek for DNA. Defendant asked Detective Davis if Hart was dead or alive, to which Detective Davis responded that he did not know the status of her condition at that time. Defendant was then taken to a decontamination room where he was bathed and bandaged. Defendant was placed in an interview room equipped with an audio-video recording system and was given some food.

As defendant was finishing his meal, Detective Davis entered the interview room at approximately 7:00 p.m. and asked defendant if he was "ready to talk for a little bit[.]" Defendant responded that he was ready, that he "wanted to do the right thing," that he was "sorry for what he did," and that he had "asked God to forgive him." Detective Davis informed defendant that he would need to sign a waiver of his *Miranda* rights in order to speak with the detective about what had

happened. Specifically, Detective Davis told defendant, "You've got to waive your rights, basically saying you want to talk to me, that's all this is saying, and then we can move on and hear your story." Detective Davis confirmed that defendant could read and write and then read the *Miranda* rights to defendant from a pre-printed waiver form. Detective Davis had defendant initial beside each paragraph and sign the waiver form. Detective Davis then proceeded to question defendant about the assault. During the interrogation, Detective Davis asked defendant to make a written statement, with which defendant complied. Defendant's statements to Detective Davis revealed that he had become frustrated with Hart and that he had planned to kill her and commit suicide afterwards. However, his mother would not let him back inside the house after he assaulted Hart. After obtaining defendant's written statement, Detective Davis informed defendant that Hart had died and that defendant would be charged with first-degree murder.

Defendant was indicted for first-degree murder on 5 April 2010. The case came on for trial on 21 February 2011 in Buncombe County Superior Court. At the call of the case, defense counsel presented to the trial court a motion questioning defendant's competency to proceed with the trial and seeking an assessment of his competency by a mental health professional. After conducting a brief hearing on the issue, the trial court denied the motion.

Defense counsel also moved the court to suppress defendant's statements made during the interrogation by Detective Davis following his arrest. Defense counsel asserted defendant did not knowingly and voluntarily waive his *Miranda* rights, and therefore, his statements as a result of the interrogation must be excluded. The trial court conducted a *voir dire* hearing on the motion, and at the conclusion of the hearing, the trial court enunciated multiple findings of fact and a conclusion of law that defendant had knowingly and voluntarily waived his *Miranda* rights prior to making the challenged statements and therefore the statements were admissible.

On 28 February 2011, the jury returned a verdict finding defendant guilty of first-degree murder. The trial court entered judgment on the verdict, sentencing defendant to life imprisonment without the possibility of parole. Defendant gave oral notice of appeal in open court.

II. Motion for Competency Evaluation

[1] Defendant first argues the trial court erred in denying his motion requesting that he be evaluated by a mental health professional to determine his competency to proceed with trial.

" '[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial.' " *State v. McRae*, 139 N.C. App. 387, 389, 533 S.E.2d 557, 559 (2000) (hereinafter *McRae I)* (alteration in original) (quoting *Drope v. Missouri*, 420 U.S. 162, 171, 43 L. Ed. 2d 103, 113 (1975)); *see also* N.C. Gen. Stat. § 15A-1001(a) (2011). "Failure of the trial court to protect a defendant's right not to be tried or convicted while mentally incompetent deprives him of his due process right to a fair trial." *McRae I*, 139 N.C. App. at 389, 533 S.E.2d at 559 (citing *Pate v. Robinson*, 383 U.S. 375, 385, 15 L. Ed. 2d 815, 822 (1966)). Thus, "[a] conviction cannot stand where defendant lacks capacity to defend himself." *Id.* at 389-90, 533 S.E.2d at 559.

The question of a defendant's mental capacity may be raised at any time on motion by the prosecutor, the defendant, defense counsel, or the court. *State v. Goode*, 197 N.C. App. 543, 548, 677 S.E.2d 507, 511 (2009). Section 15A-1002(b) of our General Statutes provides that "[w]hen the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed." N.C. Gen. Stat. § 15A-1002(b) (2011). "Although the present statute requires the court to conduct a hearing when a question is raised as to a defendant's capacity to stand trial, no particular procedure is mandated. The method of inquiry is still largely within the discretion of the trial judge." *State v. Gates*, 65 N.C. App. 277, 282, 309 S.E.2d 498, 501 (1983). The statutory hearing requirement "appears to be satisfied as long as it appears from the record that the defendant, upon making the motion, is provided an opportunity to present any and all evidence he or she is prepared to present." *Id.* at 283, 309 S.E.2d at 502.

The burden rests upon the defendant to establish his mental incapacity. *Goode*, 197 N.C. App. at 549, 677 S.E.2d at 512; *see also State v. O'Neal*, 116 N.C. App. 390, 395, 448 S.E.2d 306, 310 (1994) ("A defendant has the burden of proof to show incapacity or that he is not competent to stand trial."). Ultimately, "the decision to grant a motion for an evaluation of a defendant's capacity to stand trial remains within the trial judge's discretion." *Gates*, 65 N.C. App. at 283, 309

S.E.2d at 502; *see also State v. Wolfe*, 157 N.C. App. 22, 30, 577 S.E.2d 655, 661 (2003).

> The trial court may determine the question of capacity with or without a jury. When proceeding without a jury, the trial court's findings of fact are conclusive on appeal when there is competent evidence to support them, even if there is evidence to the contrary. The trial court has not erred if it does not make findings of fact where the evidence would compel the ruling made, but the better practice is to make findings and conclusions.

O'Neal, 116 N.C. App. at 395-96, 448 S.E.2d at 310-11 (citations omitted). "Where the procedural requirement of a hearing has been met, defendant must show that the trial court abused its discretion in denying the motion before reversal is required." *Gates*, 65 N.C. App. at 284, 309 S.E.2d at 502.

We note also that our Supreme Court has advised that "[w]here a defendant demonstrates or where matters before the trial court indicate that there is a significant possibility that a defendant is incompetent to proceed with trial, the trial court must appoint an expert or experts to inquire into the defendant's mental health in accord with N.C.G.S. § 15A-1002(b)(1)." *State v. Grooms*, 353 N.C. 50, 78, 540 S.E.2d 713, 730 (2000).

Here, at the call of the case for trial, defense counsel presented to the trial court a motion, supported by an affidavit by defense counsel and prior mental health evaluation reports, questioning defendant's capacity to proceed with trial and seeking an assessment of his competency by a mental health professional. The trial court conducted a hearing on the motion, considering the documentary evidence and arguments presented by defense counsel.

In both his affidavit and his arguments to the trial court, defense counsel reported that he had met with defendant on multiple occasions during the weeks leading up to trial and that he observed a "substantial deterioration" in defendant's mental functioning on both the day before and the morning of trial. Defense counsel stated that defendant was agitated, was completely tangential in the sense that he could not carry on a rational conversation or stick to the point, could not follow a train of thought, and could not logically or rationally discuss any of the important issues involved in the defense of his case. Defense counsel also stated defendant was very animated and was unable to listen to or absorb the information and advice that

defense counsel was trying to give him. Defense counsel further reported that defendant cycled back and forth between mania and depression within a single conversation and that defendant was not taking his prescribed antidepressant medication while in jail. Defense counsel asserted that defendant was not presently capable of assisting his defense in a reasonable and rational manner or comprehending his situation in reference to the proceedings.

The evidence from the prior psychiatric evaluation reports indicated that defendant had a history of significant mental disorders. Defendant's IQ level was determined to be 68 by the Department of Corrections in 2006, placing him in the mild mental retardation range. In 2007, defendant was committed to Broughton Hospital, where he was diagnosed with impulse control disorder. In 2008, defendant was diagnosed with major depressive disorder associated with his being HIV-positive for nearly 20 years. Also in 2008, defendant was diagnosed with affective mood disorder with agitation and depression and was prescribed an antidepressant medication.

In December 2009, defendant was evaluated by both Dr. David Bartholomew, a psychiatrist, and Dr. Lavonne Fox, a psychologist, at Central Regional Hospital to determine his competency to stand trial. Both physicians noted their opinion that defendant was competent to stand trial, although Dr. Fox noted that defendant "should be assessed further if he exhibits changes in his cognitive functioning."

Defendant was again evaluated by both Dr. Claudia Coleman, a neuropsychologist, on 13 October 2010, although her report was dated 9 January 2011, and Dr. George Corvin, a psychiatrist, on 30 September and 23 November 2010, approximately three months prior to trial. Dr. Coleman found that defendant's cognitive functioning had "worsened to some degree" since his prior evaluations by Drs. Bartholomew and Fox. Dr. Coleman did not directly address defendant's competency to stand trial at that time, but noted that "[i]n order for [defendant] to attend readily and process information in an ongoing manner required during trial[, defendant] will need to demonstrate a relatively stable mood with no obsessive, bizarre, or paranoid thinking." Similarly, Dr. Corvin opined that defendant was competent to stand trial at the time of his evaluation but noted that "should his overall symptom picture worsen to any appreciable degree as the stress of trial builds, he could easily decompensate to the extent that he would be viewed as not capable of proceeding." Accordingly, Dr. Corvin warned that defendant's "condition and degree of understand-

ing of factors related to his case" should be closely monitored as litigation proceeds.

This evidence, presented to and considered by the trial court during the competency hearing, does not support the trial court's conclusion to deny defendant's motion for a competency evaluation prior to proceeding to trial. Although defendant had been found competent to proceed in the prior psychiatric evaluations, those same evaluations indicated defendant's competency could decline to the point of incompetence to proceed prior to his trial. In fact, over a period of ten months, from December 2009 to October 2010, defendant's mental condition was found to have "worsened to some degree." Defense counsel detailed in his affidavit his observation that defendant's mental condition had significantly declined during the week prior to trial, consistent with the warnings contained in the prior evaluations. "Because defense counsel is usually in the best position to determine that the defendant is able to understand the proceedings and assist in his defense, it is well established that significant weight is afforded to a defense counsel's representation that his client is competent." *State v. McRae*, 163 N.C. App. 359, 369, 594 S.E.2d 71, 78 (2004) (hereinafter *McRae II*); *see also State v. Blancher*, 170 N.C. App. 171, 174, 611 S.E.2d 445, 447 (2005).

The entirety of the evidence presented to the trial court indicated a "significant possibility" that defendant may have been incompetent to proceed with trial, necessitating the trial court to appoint an expert or experts to inquire into defendant's mental health, as defense counsel requested. *See Grooms*, 353 N.C. at 78, 540 S.E.2d at 730. Thus, because the evidence does not support the trial court's determination that defendant was competent to proceed with trial at the time of his competency hearing, the trial court abused its discretion in denying defendant's motion to continue the proceedings until defendant's competency to stand trial could be evaluated and determined.

The proper remedy in a case where, as here, the trial court conducted a proper competency hearing but abused its discretion in proceeding to trial in light of the evidence indicating the defendant's incompetency to proceed is to vacate defendant's judgment and remand the case to the trial court for a new trial if and when defendant is properly determined competent to proceed with trial. *Compare McRae II*, 163 N.C. App. at 361, 594 S.E.2d at 74 (noting the proper remedy in cases where the trial court failed to conduct a competency hearing in violation of a defendant's due process rights is to remand the case to the trial court to (1) determine whether it is possible for

a retrospective competency hearing to be held effectively, and (2) if so, to hold such a hearing to determine defendant's competency at the time of trial), with *State v. Reid*, 38 N.C. App. 547, 550, 248 S.E.2d 390, 392 (1978) (holding that where the trial court's determination that the defendant was mentally capable to proceed with trial was not supported by the evidence, the verdict and judgment must be vacated and the cause remanded for further proceedings against the defendant).

Nonetheless, in the present case, Dr. Corvin was called to testify on behalf of the defense on the fourth day of trial. During his testimony on direct examination, Dr. Corvin stated "there has been a time during my evaluation where I was somewhat concerned about [defendant's current competency to stand trial], although not currently." In light of that testimony, defense counsel did not proceed to question Dr. Corvin on any possibility of defendant's incompetency to stand trial. Given Dr. Corvin's presence at trial and his testimony that he was not currently concerned with defendant's competency to stand trial, we fail to see how the trial court's error prejudiced defendant. Accordingly, under the particular facts of this case, we must uphold the trial court's judgment.

III. Motion to Suppress

[2] Defendant next argues the trial court erred in failing to suppress both his statements made during the recorded interrogation at the police station and his handwritten statement. Defendant argues the trial court erred in failing to suppress this evidence because the State failed to show that these custodial statements were preceded by a knowing, intelligent, and voluntary waiver by defendant of his *Miranda* rights. Defendant further challenges the adequacy of his *Miranda* warnings. Specifically, defendant argues that the officer did not convey in understandable terms that, despite his lack of means to pay a lawyer, the court would provide one at no expense to advise him before and during the interrogation unless he chose to waive that right.

Our review of a trial court's denial of a motion to suppress is strictly limited to determining whether the trial court's underlying findings of fact are supported by competent evidence, and whether those factual findings in turn support the trial court's ultimate conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "[T]he trial court's findings of fact after a *voir dire* hearing concerning the admissibility of a confession are conclusive and binding on the appellate courts if supported by competent evidence. This is true even though the evidence is conflicting." *State v. Simpson*, 314

N.C. 359, 368, 334 S.E.2d 53, 59 (1985) (citations omitted). However, the trial court's conclusion of law that a defendant's statements were knowingly, intelligently, and voluntarily made is fully reviewable on appeal. *Id.; see also State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000).

It is well established that the State is

> prohibited from using any statements resulting from a custodial interrogation of a defendant unless, prior to questioning, the defendant had been advised of his right to remain silent; that any statement may be introduced as evidence against him; that he has the right to have counsel present during questioning; and that, if he cannot afford an attorney, one will be appointed for him.

Simpson, 314 N.C. at 367, 334 S.E.2d at 58-59 (citing *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966)). However, "a defendant may waive effectuation of these rights by a voluntary, knowing, and intelligent waiver." *Id.* The State bears the burden of showing that the waiver was knowingly, intelligently, and voluntarily made. *Id.* "Whether a waiver is knowingly and intelligently made depends on the specific facts and circumstances of each case, including the background, experience, and conduct of the accused." *Id.* at 367, 334 S.E.2d at 59. Similarly, our Courts consider the totality of the circumstances of the case in determining whether a defendant's statement was voluntary. *Hyde*, 352 N.C. at 45, 530 S.E.2d at 288. Factors to be considered include the defendant's familiarity with the criminal justice system, length of interrogation, amount of time without sleep, whether the defendant was held incommunicado, whether there were threats of violence, whether promises were made to obtain the confession, the age and mental condition of the defendant, and whether the defendant had been deprived of food. *State v. Kemmerlin*, 356 N.C. 446, 458, 573 S.E.2d 870, 880-81 (2002). "The presence or absence of any one of these factors is not determinative." *Id.* at 458, 573 S.E.2d at 881.

Here, although defendant has not challenged any of the trial court's findings of fact, he argues the evidence does not support the trial court's conclusion that his statements were made after a knowing, intelligent, and voluntary waiver of his *Miranda* rights. Rather, defendant contends the totality of the circumstances indicate his *Miranda* waiver was neither knowing and intelligent nor voluntary. Defendant contends Detective Davis misled him about Hart's condi-

tion, asked him if he was ready to talk before informing him of his *Miranda* rights, and instructed him to sign the waiver form without asking him if he understood the implications. Defendant also points to the evidence concerning his limited mental capacity and his previously determined IQ score placing him in the category of borderline mental retardation.

However, in light of the foregoing principles, we disagree with defendant's arguments and conclude, as did the trial court, that the evidence is sufficient to demonstrate that defendant's waiver of his *Miranda* rights prior to making any incriminating statements was knowing, intelligent, and voluntary. The record reveals defendant was familiar with the criminal justice system, having four prior convictions, two of which were felony offenses. The record reveals no threats or promises were made to defendant prior to his agreeing to talk with Detective Davis. Although Detective Davis informed defend-ant that he did not know the status of Hart's condition, the record in no way indicates Detective Davis's statement misled defendant into talking about the incident when he otherwise would not have done so.

Further, the record reveals defendant was not deprived of any necessaries. To the contrary, defendant was given a shower, medical care, and food, as the trial court properly found. In addition, although there is evidence in the record documenting defendant's limited mental capacity, the record in no way indicates defendant was confused at any time during the custodial interrogation, that he did not understand any of the rights as they were read to him, or that he was unable to comprehend the ramifications of his statements. Indeed, "evidence of the defendant's below-average intelligence and his previous psychological problems do not compel suppression of the statement." *Simpson*, 314 N.C. at 369, 334 S.E.2d at 60. As the trial court's unchallenged findings of fact indicate, at all times during defendant's statements to Detective Davis, he "appeared lucid," "appeared to be awake," and "was alert." Thus, the evidence wholly indicates defendant was aware of his actions and wished to inform the officer about what had happened during his encounter with Hart.

As to defendant's argument regarding the adequacy of the language used to convey the fourth *Miranda* right to him, our Courts have long held that "where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount . . . .' " *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207

N.C. 6, 10, 175 S.E. 836, 838 (1934)). Here, the record indicates defendant presented both a written motion to suppress and arguments thereon to the trial court, contending defendant's statements must be suppressed in that they were not made after a knowing, intelligent, and voluntary waiver of his *Miranda* rights. At no time before the trial court did defendant present the adequacy of the rights as given to defendant as a basis for the suppression of his statements. Thus, this argument is not properly before this Court for appellate review. *See State v. Dewalt*, 190 N.C. App. 158, 164, 660 S.E.2d 111, 115-16 (2008).

Nonetheless, defendant contends the adequacy of the language used by the detective to convey the *Miranda* rights to defendant is an issue to be considered in determining whether defendant properly understood his *Miranda* rights and made a knowing and intelligent waiver of those rights. Again, however, the record supports the trial court's conclusion that defendant's waiver was knowing and intelligent, especially in light of his previous history with law enforcement. Indeed, defendant told Detective Davis he cooperated with law enforcement at the time of his arrest because "[he] knew [his] rights."

Furthermore, even assuming, *arguendo*, that the trial court erred in failing to suppress defendant's statements, such error is harmless beyond a reasonable doubt in this case. Defendant contends that without the challenged statements, the jury would have been left with a reasonable doubt as to the elements of premeditation and deliberation necessary for a first-degree murder conviction. To the contrary, however, the State presented overwhelming evidence of defendant's premeditation and deliberation, notwithstanding defendant's statements to police.

To sustain a conviction for first-degree murder,

> the State must prove beyond a reasonable doubt that the defendant formed a specific intent to kill after premeditation and deliberation. Premeditation means that the defendant thought about killing the victim for some period of time, however short, before the killing. Deliberation means the execution of an intent to kill in a cool state of blood without legal provocation and in furtherance of a fixed design; it does not require reflection for any appreciable length of time.

State v. Bray, 321 N.C. 663, 671, 365 S.E.2d 571, 576 (1988). "Premeditation and deliberation 'are usually proven by circumstantial evidence because they are mental processes that are not readily susceptible to proof by direct evidence.' " *State v. Dennison*, 171 N.C.

App. 504, 509, 615 S.E.2d 404, 407 (2005) (quoting *State v. Sierra*, 335 N.C. 753, 758, 440 S.E.2d 791, 794 (1994)).

> Among the circumstances from which premeditation and deliberation may properly be inferred in a prosecution for first-degree murder are:
>
> > "(1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulty between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds."

Id. at 509, 615 S.E.2d at 407-08 (quoting *State v. Vause*, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991)).

Here, even had the trial court excluded the statements made by defendant to Detective Davis following his arrest, multiple witnesses testified that defendant chased Hart outside the house and through the neighborhood with a paring knife; stabbed her repeatedly, thirty-five of which were wounds to her face and one of which penetrated her eyeball; knocked her down on the ground where he continued to stab her repeatedly; told a neighbor who witnessed the event that he "had to kill that b---h;" and stated voluntarily to officers after the assault that he had "killed a woman" and that he had cut his hand when he was "cutting that b----." The overwhelming evidence indicates defendant's ill-will towards Hart at the time of the assault and establishes that he continued to stab her repeatedly and in a brutal manner, even after she had fallen and was rendered helpless. Moreover, defendant called two expert witnesses to testify, both of which testified that defendant had given them an account of the incident consistent with the statements he made to police. Thus, even if the trial court had excluded defendant's statements to Detective Davis for deficiencies in his *Miranda* warnings, any such error was harmless beyond a reasonable doubt under the facts of this case.

IV. Conclusion

Given the evidence presented to the trial court indicating a significant possibility that defendant may have been incompetent to proceed with trial, the trial court abused its discretion in denying

defendant's motion to continue the proceedings until defendant's competency to stand trial could be evaluated and determined. Nonetheless, given the testimony by Dr. Corvin during the course of defendant's trial, we hold the trial court's error is harmless under the particular facts of this case. In addition, we hold the trial court did not err in denying defendant's motion to suppress both his handwritten statement, and the incriminating statements he made to Detective Davis during interrogation, as they were made after defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights. Thus, defendant received a fair trial free from prejudicial error.

No prejudicial error.

Judges CALABRIA and STEELMAN concur.

DENNIS E. BULLARD, M.D. AND WENDY W. BULLARD, PLAINTIFFS V. WAKE COUNTY, A BODY POLITIC AND CORPORATE, TROY HOWARD PARROTT, IN HIS OFFICIAL CAPACITY AS A WAKE COUNTY BUILDING INSPECTOR, JOHN DIPETRIO, IN HIS OFFICIAL CAPACITY AS A WAKE COUNTY BUILDING INSPECTOR, STEVEN ADEN BRANCH, IN HIS OFFICIAL CAPACITY AS A WAKE COUNTY BUILDING INSPECTOR, AND EDWARD LANGSTON SAVAGE, IN HIS OFFICIAL CAPACITY AS A WAKE COUNTY BUILDING INSPECTOR, DEFENDANTS

No. COA11-1022

(Filed 17 July 2012)

Immunity—sovereign immunity—sufficiently pled—no insurance—no waiver—summary judgment proper

The trial court did not err in a case involving allegations of negligent inspection and negligent misrepresentation in connection with defendant county's inspection of plaintiffs' house by granting summary judgment in favor of defendants on the grounds of sovereign immunity. The county sufficiently pled the affirmative defense and as the county did not, during the pertinent time frame, have insurance that would cover the claims in this case, there was no waiver of sovereign immunity under N.C.G.S. § 153A-435. Because there was no waiver, the Court of Appeals did not address the parties' contentions regarding the statute of limitations.

Appeal by plaintiffs from order entered 24 August 2010 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 11 January 2012.

Troutman Sanders, LLP, by Gary S. Parsons and D. Kyle Deak, for plaintiffs-appellants.

Office of the Wake County Attorney, by Wake County Attorney Scott W. Warren and Deputy County Attorney Roger A. Askew, for defendants-appellees.

GEER, Judge.

Plaintiffs Dennis E. Bullard, M.D. and Wendy W. Bullard ("the Bullards") appeal from the trial court's grant of summary judgment in favor of defendants Wake County, Troy Howard Parrott, John Dipetrio, Steven Aden Branch, and Edward Langston Savage ("the County")[1] on the grounds of sovereign immunity and the statute of limitations. We hold that because the County did not, during the pertinent time frame, have insurance that would cover the claims in this case, there was no waiver of sovereign immunity under N.C. Gen. Stat. § 153A-435 (2011). The trial court, therefore, properly granted the motion for summary judgment.

Facts

In 1991, the Bullards bought 5.28 acres of land in North Raleigh on which to build a home. The Bullards contracted with Tall House Building Company to serve as the general contractor for the construction of a French Chateau-style single family residence. Structural drawings for the project were approved by the Wake County Inspections Department on 6 November 2002.

Construction of the house started in April 2003 and continued until the issuance of the certificate of occupancy on 15 December 2004. During construction, the County performed inspections of the foundation, footings, foundation slab, framing, plumbing systems, electrical systems, and insulation. At the final inspection, the County approved energy, life safety, and structural elements. The certificate

1. The individual defendants were sued solely in their official capacities. Suits against individuals in their official capacities are merely suits against the governmental entity, which, in this case, is the County. *Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 725 (1998) ("As we have previously noted, official-capacity suits are merely another way of pleading an action against the governmental entity."). We, therefore, refer to defendants collectively as "the County."

of occupancy issued for the house asserted that "all required building code inspections [had] been completed" and that "code violations discovered during such inspections [had] been duly noted, ordered corrected and [had] been re-inspected."

At some point after the certificate of occupancy was issued, although the precise date is disputed, plaintiffs began to discover problems with the construction that they have described as "major construction deficiencies." Plaintiffs arbitrated their claims against Tall House, and an arbitration panel issued an award in plaintiffs' favor on 4 August 2006.

During the course of the repairs ordered by the arbitration panel, the Bullards learned that the house also had significant floor framing issues. The Bullards had not discovered those issues earlier because the defective work was covered by floor sheathing. Since then, the Bullards have continued to uncover structural deficiencies in the house that collectively are so severe that the house has been deemed not fit for human habitation.

The Bullards returned to arbitration with Tall House. The second arbitration panel issued an order on 9 April 2009 requiring Tall House to pay $2,626,452.45 for repair and damages associated with the faulty construction of the Bullards' house, as well as fees and costs. Following that award, Tall House declared bankruptcy.

On 7 April 2009, the Bullards filed suit against the County, asserting claims for negligent inspection and negligent misrepresentation in connection with the County's inspection of the Bullards' house. The County filed an answer including, among other affirmative defenses, the statute of limitations and sovereign immunity.

On 30 April 2010, the County filed a motion for summary judgment. On 24 August 2010, the trial court entered an order granting the motion on the grounds that "there are no genuine issues of material fact as to the issue of sovereign immunity [and] the Court concludes that the [sic] all of the plaintiff's claims raised herein are barred by sovereign immunity . . . ." The court further concluded that summary judgment should also be granted based on the statute of limitations. The Bullards timely appealed to this Court.

Discussion

Summary judgment is properly granted "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.R. Civ. P. 56(c). This Court reviews the trial court's grant of summary judgment de novo. *Nationwide Mut. Fire Ins. Co. v. Mnatsakanov*, 191 N.C. App. 802, 805, 664 S.E.2d 13, 15 (2008).

Our Supreme Court has explained the burdens applicable to a motion for summary judgment:

> The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. This burden may be met by proving that an essential element of the opposing party's claim is non-existent, 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.

DeWitt v. Eveready Battery Co., 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (internal citations and quotation marks omitted).

Once the moving party meets its burden, "then the nonmovant must produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (internal quotation marks omitted), *overruled in part on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998). In order to meet this burden, the nonmoving party " 'may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in [Rule 56] must set forth specific facts showing that there is a genuine issue for trial.' " *Id.* (quoting N.C.R. Civ. P. 56(e)).

We consider first whether the trial court erred in granting summary judgment based upon sovereign immunity. Under North Carolina law, counties are entitled to sovereign immunity unless the county waives immunity or otherwise consents to be sued. *Dawes v. Nash Cnty.*, 357 N.C. 442, 445, 584 S.E.2d 760, 762 (2003). *See also Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) ("Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity.").

The General Assembly has provided that a county may waive immunity through the purchase of insurance:

> A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negli-

> gent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment. The board of commissioners shall determine what liabilities and what officers, agents, and employees shall be covered by any insurance purchased pursuant to this subsection.
>
> *Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function.*

N.C. Gen. Stat. § 153A-435(a) (emphasis added).

The Bullards, however, first argue that the County failed to properly plead the affirmative defense of sovereign immunity because the answer did not set out the specific policy language on which the County was relying. The County's Fourth Affirmative Defense alleged:

> For and as a Fourth defense, the answering defendants move the court to dismiss the plaintiffs' complaint as said complaint alleges negligent acts, actions or omissions arising out of governmental functions and/or duties of these answering defendants and all claims are barred by the doctrine of governmental or sovereign immunity. It is also specifically alleged that these defendants have not waived any immunity defense by the purchase of liability insurance coverage or otherwise as by law allowed. The foregoing Affirmative defense of sovereign immunity or governmental immunity is hereby pleaded as a complete bar to this action.

(Emphasis omitted.)

In *Patrick v. Wake Cnty. Dep't of Human Servs.*, 188 N.C. App. 592, 593, 655 S.E.2d 920, 922 (2008), the defendant asserted as an affirmative defense that " '[a]ll claims of Plaintiff against all Defendants are barred by sovereign immunity as there has been no waiver of immunity by the purchase of insurance.' " This Court, in affirming the trial court's order granting summary judgment based on sovereign immunity held that "[d]efendants did not waive sovereign immunity through the purchase of this policy *and properly asserted this affirmative defense in their answer*." *Id.* at 597, 655 S.E.2d at 924 (emphasis added). Since there is no meaningful distinction

between the articulation of the affirmative defense in *Patrick* and the affirmative defense in this case, we hold that the County sufficiently pled the affirmative defense of sovereign immunity.

Turning to the merits of that affirmative defense, it is well established that the mere purchase of insurance standing alone does not waive a county's sovereign immunity. "[I]f the action brought against [the county] is excluded from coverage under [its] insurance policy," then there is no waiver of immunity. *Id.* at 596, 655 S.E.2d at 923. *See also Norton v. SMG Bldg., Inc.*, 156 N.C. App. 564, 569-70, 577 S.E.2d 310, 314-15 (2003) (holding that purchase of liability insurance did not waive sovereign immunity because policy excluded coverage for plaintiff's claim); *Doe v. Jenkins*, 144 N.C. App. 131, 135, 547 S.E.2d 124, 127 (2001) ("[B]ecause the insurance policy does not indemnify defendant against the negligent acts alleged in plaintiff's complaint, defendant has not waived its sovereign immunity . . . .").

The County, in this instance, did have insurance coverage continuously from 13 January 2003 (when the building permit for the Bullards' house was issued) through 15 December 2004 (when the certificate of occupancy was issued). For the period 1 June 2002 to 1 June 2003 and the period 1 June 2003 to 1 June 2004, the relevant policies contained the following endorsement:

> **GOVERNMENTAL IMMUNITY ENDORSEMENT**
>
> This Policy is not intended by the insured to waive its governmental immunity as allowed by North Carolina General Statutes Sec. 153A-435. Accordingly, subject to this policy and the Limits of Liability shown on the Declarations, this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defense is asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable.

This Court addressed the impact of this specific endorsement on sovereign immunity in *Patrick*. In that case, the plaintiff sued Wake County Department of Human Services for negligence and negligent infliction of emotional distress. 188 N.C. App. at 592-93, 655 S.E.2d at 921-22. This Court held that the above endorsement "exclude[d] coverage for plaintiff's action for negligence and negligent infliction of emotional distress. Defendants did not waive sovereign immunity through the purchase of this policy and properly asserted this affirmative defense in their answer. The defense of sovereign immunity

clearly applies to bar plaintiff's claims." *Id.* at 597, 655 S.E.2d at 924. Accordingly, the Court held that "[t]he trial court properly granted defendants' motion for summary judgment." *Id.*

This Court applied *Patrick* to similar policy language in *Estate of Earley v. Haywood Cnty. Dep't. of Soc. Servs.*, 204 N.C. App. 338, 694 S.E.2d 405 (2010), in which the plaintiff had asserted a negligence claim. In *Earley*, Haywood County's insurance policy included an exclusion for " '[a]ny claim, demand, or cause of action against any Covered Person as to which the Covered Person is entitled to sovereign immunity or governmental immunity under North Carolina Law.' " *Id.* at 342, 694 S.E.2d at 408. Relying on *Patrick*, the Court held that because of this exclusion, the County had not waived sovereign immunity as to the plaintiff's claim. *Id.* at 343, 694 S.E.2d at 409.

The Court observed, however:

> We acknowledge the arguably circular nature of the logic employed in *Patrick*. The facts are that the legislature explicitly provided that governmental immunity is waived to the extent of insurance coverage, but the subject insurance contract eliminates any potential waiver by excluding from coverage claims that would be barred by sovereign immunity. Thus, the logic in *Patrick* boils down to: Defendant retains immunity because the policy doesn't cover his actions and the policy doesn't cover his actions because he explicitly retains immunity. Nonetheless in this case, as in *Patrick*, where the language of both the applicable statute and the exclusion clause in the insurance contract are clear, we must decline Plaintiff's invitation to implement "policy" in this matter. Any such policy implementation is best left to the wisdom of our legislature.

Id., 694 S.E.2d at 409-10.

We are bound by both *Patrick* and *Earley* and, consequently, must hold that the County, in this case, did not waive its sovereign immunity as to the Bullards' claims during the periods of 1 June 2002 to 1 June 2003 and 1 June 2003 to 1 June 2004. Plaintiffs contend, however, that because the certificate of occupancy was issued on 15 December 2004, sovereign immunity should be determined based on the policy in effect from 1 June 2004 to 1 June 2005. During that period, the County's insurance policy did not include the endorsement quoted above. The County argues, however, that this policy still does not provide coverage for the Bullards' claim.

The 1 June 2004 to 1 June 2005 policy specified that the duty of the insurance company

> to pay any sums that [the County] become[s] legally obligated to pay arises *only after there has been a complete expenditure of [the County's] retained limit by means of payments for judgments*, *settlements*, *or defense costs*. [The County's] retained limit shall not be exhausted by [its] office expenses, employees' salaries, or expenses of any claims servicing organization that [the County has] engaged. [The insurance company] will then be liable only for that portion of damages in excess of [the County's] retained limit up to [the policy's] Limits of Insurance.

(Emphasis added.) "Retained Limit" under the policy "refers to the amount stated in the Declarations. This amount may consist of a self-insured retention, underlying insurance, or a combination thereof." (Emphasis omitted.) Although the Bullards assert that the retained limit under this policy includes defense costs, they have overlooked an endorsement to the policy that provided, instead, that the retained limit, "with respect to a self-insured retention, shall not include defense costs . . . ."

The County had a retained limit of $500,000.00 for "[a]ny one occurrence or wrongful act." The County chose to cover its retained limit through self-insurance as allowed by N.C. Gen. Stat. § 153A-435(a). That statute provides in relevant part that:

> [i]f a county uses a funded reserve instead of purchasing insurance against liability for wrongful death, negligence, or intentional damage to personal property, or absolute liability for damage to person or property caused by an act or omission of the county or any of its officers, agents, or employees acting within the scope of their authority and the course of their employment, the county board of commissioners may adopt a resolution that deems the creation of a funded reserve to be the same as the purchase of insurance under this section. *Adoption of such a resolution waives the county's governmental immunity only to the extent specified in the board's resolution*, but in no event greater than funds available in the funded reserve for the payment of claims.

Id. (emphasis added).

On 6 October 2003, the Wake County Board of Commissioners adopted a Resolution pursuant to N.C. Gen. Stat. § 153A-435(a)

regarding its self-insured retention and providing, in the Resolution's preamble, that the Board "desire[d] to waive the County's governmental immunity to the limited extent provided in this resolution." The text of the Resolution itself reiterated that "[t]his resolution is intended only to waive the County's immunity in the limited circumstances described herein." After various restrictions on waiver not pertinent here, the Resolution stated: "Waiver of immunity pursuant to this Resolution *is limited to the voluntary settlement of claims*. Settlements are not available under this Resolution after the institution by Claimant of any legal proceeding regarding the claim against the County, its officials, employees, or agents." (Emphasis added.)

The County thus limited its waiver of immunity with respect to the $500,000.00 retained limit to those instances involving the "voluntary settlement of claims" prior to the filing of any legal proceedings. The Bullards' claims were not voluntarily settled prior to the filing of this action and, therefore, the claims do not fall within the scope of the waiver of sovereign immunity set out in the Resolution with respect to the $500,000.00 retained limit. *See Cunningham v. Riley*, 169 N.C. App. 600, 603, 611 S.E.2d 423, 424-25 (2005) (holding that to the extent plaintiff's total loss fell within County's self-insured retention, plaintiff's claims were barred by sovereign immunity).

The question remains whether the County's purchase of insurance waived sovereign immunity for the portion of the Bullards' claim exceeding the $500,000.00 retained limit. That issue is resolved by this Court's decisions in *Arrington v. Martinez*, 215 N.C. App. 252, 716 S.E.2d 410 (2011), and *Magana v. Charlotte-Mecklenburg Bd. of Educ.*, 183 N.C. App. 146, 645 S.E.2d 91 (2007).

In *Magana*, this Court considered whether a school board had waived its sovereign immunity by the purchase of insurance pursuant to N.C. Gen. Stat. § 115C-42 (2005), a statute equivalent to N.C. Gen. Stat. § 153A-435 but applicable to school boards. The school board's insurance policy provided "coverage for damages in excess of the Board's self-insured retention of $1,000,000." *Magana*, 183 N.C. App. at 147, 645 S.E.2d at 92. With respect to damages in excess of $1,000,000.00, the policy provided that "when 'the insured's legal obligation to pay damages to which this insurance applies has been determined, and: (1) the amount of such damages is greater than . . . [$1,000,000], and (2) the insured has paid . . . [$1,000,000] to the claimant, then and only then will the insured be entitled to make claim for indemnity under this Policy.' " *Id.* at 148, 645 S.E.2d at 92.

This Court first concluded that these clauses had the effect of making the "insurance policy's coverage . . . contingent upon the Board's liability for the first $1,000,000 of any damage award." *Id.* Because the school board had not purchased insurance for any amount below the $1,000,000.00 coverage limit, it had not waived its sovereign immunity for any damages under $1,000,000.00. The Court then concluded that even though the plaintiffs sought damages in excess of $1,000,000.00, since the board had immunity for claims seeking damages under $1,000,000.00, "it cannot be required to pay any part of the $1,000,000 self-insured amount and, therefore, the excess policy will provide no indemnification." *Id.* at 149, 645 S.E.2d at 93.

Although the Bullards attempt to distinguish *Magana* by arguing that the *Magana* policy language differs from the language in the Wake County policy, this Court, in *Arrington*, applied the same reasoning as in *Magana* to a City of Raleigh policy with language identical to that in the Wake County policy. The City of Raleigh policy provided, just like the policy in this case:

> Our duty to pay any sums that **you** become legally obligated to pay arises only after there has been a complete expenditure of **your retained limit** by means of payments for judgments, settlements, or defense costs. **Your retained limit** shall not be exhausted by **your** office expenses, **employees**' salaries, or expenses of any claims servicing organization that you have engaged. **We** will then be liable only for that portion of damages in excess of **your retained limit** up to your Limits of Insurance.

Arrington, 215 N.C. App. at 265, 716 S.E.2d at 418.

This Court interpreted this provision as requiring an " 'expenditure' of the City's $2,000,000.00 retained limit 'by means of payments for judgments, settlements, or defense costs before providing indemnification.' " *Id.*[2] The Court concluded that the plaintiff could not just "skip over" the amount that was "self-insured by the City by the [self-funded reserve], and recover only upon the policies which provide excess coverage for damages in excess of" the self-funded reserve. *Id.* at 264, 716 S.E.2d at 418. Accordingly, the Court concluded that because of the lack of exhaustion of the retained limit under the City's policies, there was "no genuine issue of material fact as to plaintiff's failure to trigger the City's

2. The County's policy differs from the City's policy in that the County's policy does not include defense costs within the retained limit.

waiver of immunity." *Id.* at 265, 716 S.E.2d at 419. The Court, therefore, reversed the trial court's denial of summary judgment and remanded for entry of judgment in favor of the City. *Id.* at 267, 716 S.E.2d at 420.

Here, as this Court held in *Magana* and *Arrington*, because the County is entitled to sovereign immunity as to the Bullards' negligence claims for the first $500,000.00 of their damages and because defense costs are excluded from the amount included within the retained limit, there will be no "complete expenditure" of the retained limit through payments for judgments. While the County's Resolution regarding the self-insured retention provides for waiver of the immunity in the event of voluntary settlements, it specifies that "[s]ettlements are not available under this Resolution after the institution by Claimant of any legal proceeding regarding the claim against the County, its officials, employees, or agents." Accordingly, there can be no qualifying settlements in this case. There will, therefore, be no expenditure of the retained limit. As a result, *Magana* and *Arrington* require that we conclude that the County has not, pursuant to N.C. Gen. Stat. § 153A-435, waived sovereign immunity as to the Bullards' claims.

The Bullards argue vigorously that such a construction of the policy would fall within the reasoning of *Fulford v. Jenkins*, 195 N.C. App. 402, 409, 672 S.E.2d 759, 763 (2009) (internal citations and quotation marks omitted):

> Were we to adopt Defendants' interpretation of the policy, we would have to assume that Duplin County intended to purchase an insurance policy that provided it almost no coverage. Because Duplin County is a governmental entity and political subdivision of the State, if the policy exempts Duplin County from coverage for all of its governmental functions, it is uncertain what acts by Duplin County *would* be covered by the policy. The vast majority of actions for which Duplin County could face liability are those performed in its official capacity as a political subdivision of this State. It is thus unclear how the contracting parties could have had any meaningful meeting of the minds as to what services were and were not excluded if the policy as written was not intended to cover the official acts of Duplin County.

This precise argument in relation to self-insured retentions was, however, addressed in *Magana*: "The plaintiffs have argued that such a reading of the policy renders it meaningless, offering no coverage for any eventuality. We cannot agree. There are several instances

where immunity is not available either because of federal or state statutes, or because of exceptions to the sovereign immunity doctrine. *See, e.g., Smith [v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 424 (1976)] (abolishing state sovereign immunity in the contractual context)." *Magana*, 183 N.C. App. at 149, 645 S.E.2d at 93. Because, like here, none of those instances applied, the Court affirmed the grant of summary judgment. *Id.*

The Bullards further contend that the County is bound by a response to a request for admissions and by the deposition testimony of the County's Rule 30(b)(6) designee. The admission stated:

> 8. The policy attached hereto as *Exhibit 2* provides coverage for the County and the Inspectors for the claims set forth in the Complaint, subject to a $500,000.00 self insured retention limit.
>
> RESPONSE:
>
> Admitted upon information and belief to the extent that this request addresses whether one or both the causes of action, if proven, would be covered by said policy subject to the retention referred to above. Defendants have made reasonable inquiry into the matters addressed by this Request and at this time this request is admitted based upon that inquiry. Defendants reserve the right to supplement or amend this response as information becomes available and to the extent that the issue of coverage is or may be determined by the court or pursuant to N.C.G.S. § 153A-435(b).

The Rule 30(b)(6) designee testified as follows:

> Q All right. You'll see the allegation says that Wake County has waived Defendants' governmental immunity by contracting to insure itself, its officers, agents or employees against liability for those claims. You see that?
>
> A Yes.
>
> Q And you will see in looking at Paragraph 10 of the Answer that that has been denied.
>
> A Yes.
>
> Q Tell me what facts support that denial, please.
>
> A Our waiver of immunity? Because we are not fully insured. We are only insured for a portion above $500,000.

Q So you're immune from $500,000 down, but you're insured above $500,000; is that right?

A We are insured for over $500,000.

Q So the basis for that denial is that there is a $500,000 gap in coverage, correct?

A Yes.

Q Okay. Any other basis?

A Not that I'm aware of.

Q All right. Again, you are the County for purposes of responding to this, correct?

A I understand.

The Bullards argue that the County has, therefore, admitted a waiver of immunity for amounts greater than $500,000.00. In support of their position, they cite *Cowell v. Gaston Cnty.*, 190 N.C. App. 743, 748, 660 S.E.2d 915, 919 (2008), in which the parties disputed whether the insurance policy provided coverage for building inspections given an endorsement excluding coverage for losses arising out of the rendering of professional services. In concluding that building inspections did not fall within the exclusion for professional services, the Court relied upon the testimony of Gaston County's Rule 30(b)(6) designee that he did not consider building inspection to be a professional service. *Id.* at 749-50, 660 S.E.2d at 920.

Cowell, however, hinged on the Court's conclusion that the policy was ambiguous—it was reasonably susceptible of different constructions. *Id.* at 749, 660 S.E.2d at 920. Here, however, the policies are unambiguous. It is settled, at least with respect to unambiguous policies, that " '[t]he interpretation of language used in an insurance policy is a question of law, governed by well-established rules of construction.' " *Magnolia Mfg. of N.C., Inc. v. Erie Ins. Exch.*, 179 N.C. App. 267, 278, 633 S.E.2d 841, 847 (2006) (Tyson, J., dissenting) (quoting *N.C. Farm Bureau Mut. Ins. Co. v. Mizell*, 138 N.C. App. 530, 532, 530 S.E.2d 93, 95 (2000)), *rev'd per curiam for reasons in dissenting opinion*, 361 N.C. 213, 639 S.E.2d 443 (2007).

The question whether the terms of the County's policy waived the County's sovereign immunity as to the Bullards' claims is thus a question of law. Rule 36(a) of the Rules of Civil Procedure only allows requests for admission of the truth of any matters "that relate to state-

ments or opinions of fact or of the application of law to fact." Similarly, parties are not bound by testimony as to questions of law given by their Rule 30(b)(6) witnesses. *See AstenJohnson, Inc. v. Columbia Cas. Co.*, 562 F.3d 213, 229 n.9 (3d Cir. 2009) (holding with respect to Rule 30(b)(6) testimony regarding meaning of term in insurance policy that "[t]his type of legal conclusion is not binding on [the carrier]"); *R & B Appliance Parts, Inc. v. Amana Co.*, 258 F.3d 783, 787 (8th Cir. 2001) (holding that while party was bound by Rule 30(b)(6) testimony regarding facts, it was not bound by legal conclusion that agreement had been terminated).

In short, under the terms of the insurance policy in this case and this Court's prior holdings in *Arrington* and *Magana*, we are bound to conclude that the trial court properly granted the County summary judgment. Because we have concluded that the County did not waive its sovereign immunity as to the Bullards' claims, we need not address the parties' contentions regarding the statute of limitations.

Affirmed.

Judges STEELMAN and ROBERT N. HUNTER, JR. concur.

STATE OF NORTH CAROLINA v. ALFRED MANGA BELL

No. COA11-864

(Filed 17 July 2012)

1. Search and Seizure—consent—voluntary—motion to suppress—properly denied

The trial court did not err in a first-degree burglary, robbery with a dangerous weapon, first-degree sexual offense, first-degree kidnapping, and second-degree kidnapping of a person under the age of 16 case by denying defendant's motion to suppress evidence obtained as a result of a search of his apartment. As there was no dispute in the evidence regarding voluntariness, it can be inferred that the trial court found the consent to be voluntary from its conclusion that defendant gave valid oral consent.

2. Appeal and Error—preservation of issues—argument not presented at trial—plain error not argued

Defendant failed to preserve for appellate review his argument that the trial court erred in a first-degree burglary, robbery with a dangerous weapon, first-degree sexual offense, first-degree kidnapping, and second-degree kidnapping of a person under the age of 16 case by denying his motion to suppress evidence obtained as a result of a search of his apartment because the search of the room did not exceed any consent given. Defendant failed to make this constitutional argument at trial and did not argue plain error on appeal.

3. Kidnapping—first-degree—additional confinement—after robbery and sex offenses—sufficient evidence—separate offenses

The trial court did not err in a first-degree burglary, robbery with a dangerous weapon, first-degree sexual offense, first-degree kidnapping, and second-degree kidnapping of a person under the age of 16 case by denying defendant's motion to dismiss the charges of first-degree kidnapping. The additional confinement of the two female victims at the end of the invasion, after the robbery and sex offenses were finished, was sufficient evidence of kidnapping separate from the other offenses.

4. Kidnapping—person under age of 16—sufficient evidence

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree kidnapping of a person under the age of 16 as there was sufficient evidence that defendant confined the victim's son.

Appeal by defendant from judgments entered 24 February 2011 by Judge George W. Abernathy in Person County Superior Court. Heard in the Court of Appeals 11 January 2012.

Attorney General Roy Cooper, by Assistant Attorney General Douglas W. Corkhill, for the State.

W. Michael Spivey for defendant-appellant.

GEER, Judge.

Defendant Alfred Manga Bell appeals from the judgments entered on his conviction of three counts of second degree kidnapping, two counts of robbery with a dangerous weapon, four counts of first

degree sexual offense, and one count of first degree burglary. Defendant primarily contends on appeal that the trial court improperly denied his motion to suppress evidence obtained as a result of a search of his apartment. Although the trial court found that defendant consented to the search, defendant contends the trial court erred in failing to find that the consent was voluntary. Because defendant contended at trial that he did not consent at all and did not argue that any consent was involuntary, the trial court's order, including its determination that defendant gave "valid" consent was adequate.

Facts

The State's evidence tended to show the following facts. On the night of 4 September 2010, Stacey Thornburg was living with her son and her mother, Sandra Johnson, in a single family home in Person County, North Carolina. That evening, Ms. Thornburg went to her bedroom, leaving her son watching television. Sometime after going to sleep, Ms. Thornburg was awakened by a noise in the house. She got out of bed and started down the hallway when she saw a man dressed all in black come out of the laundry room holding a gun. The man was wearing a black mask and gloves and a black waist-length leather jacket. The gloves had some sort of white markings on them.

When Ms. Thornburg saw the intruder, she screamed. The intruder told her to quit screaming, or he would hurt her family. After she stopped, the intruder led her down the hall to the living room where her son, who had fallen asleep on the couch, asked what was happening. The intruder, speaking with an African or Jamaican accent, told Ms. Thornburg to put her son in his room. Ms. Thornburg told her son to go to his room, and he did.

The intruder asked if Ms. Thornburg had any money in the house. She said she had just a few dollars in her purse. The intruder then asked if there was anyone else in the home, and Ms. Thornburg admitted that her mother was there. When the intruder asked if Ms. Thornburg's mother had any money, she told him that she likely did not. The intruder still directed Ms. Thornburg to go to her mother's bedroom. After Ms. Thornburg's mother, Ms. Johnson, opened the door to her bedroom, the intruder entered the room, and she gave him a diamond ring that he put into his pocket.

The intruder asked the two women if they had a camera. After Ms. Thornburg brought the intruder the camera, he told the two women to sit on the edge of the bed and disrobe. The intruder then demanded that Ms. Thornburg insert her fingers in Ms. Johnson's

vagina and perform cunnilingus on her—afterwards, he forced Ms. Johnson to do the same to Ms. Thornburg. The intruder used the camera to photograph the women during the sexual acts. The intruder also penetrated both women with his fingers. Ms. Thornburg noticed that he appeared to have on latex gloves instead of the black gloves she had first seen.

While the women were in Ms. Johnson's bedroom, Ms. Thornburg's son began to cry out. Ms. Thornburg called to him every three minutes to tell him that everything was going to be okay and to stay in his room. At one point, defendant told the women that if they went to the police, he would publish the pictures he had taken of them. He claimed that if they did not call the police, he would return the camera to them in a month.

Towards the end of the invasion, the intruder claimed that he had acted as he had because he had lost his job, he needed money for rent, his wife had left him, he was going to lose his home, and he had a son Ms. Thornburg's son's age. The intruder then grilled Ms. Johnson about Bible verses and made the two women stand and pray with him. After praying, the intruder told Ms. Thornburg to take the gun from him and to hold it so that he could see if he could trust her and her mother. After she held the gun, he took it back from her. He also returned the diamond ring Ms. Johnson had given him. The intruder then told the women that they could go to Ms. Thornburg's son's room. After giving Ms. Thornburg a hug, the intruder left the house.

After the women had assured Ms. Thornburg's son that everything would be okay, Ms. Johnson called the police. The police arrived within minutes at around 6:30 or 7:00 a.m. Ms. Thornburg told them there had been a man who lived next door who was from Africa and had a son. When one of her neighbors, Donna Bruster, called to make sure that the family was okay, Ms. Thornburg asked her if she remembered the name of the man from Africa who had a son and lived next door. Ms. Bruster confirmed that he was called "Alfred," he had lived with their neighbors for some months because he had separated from his wife, and he had a son.

Ms. Thornburg gave a description of the intruder and of what he was wearing to the officers. The Sheriff of Person County, Dewey Jones, was one of the officers who responded to Ms. Johnson's call. Ms. Bruster met Sheriff Jones in the yard and told him that she and Ms. Thornburg thought that the intruder could be a man who used to

live next door with other neighbors. She told the Sheriff that the man's name was "Alfred" and that he spoke with an African or Jamaican accent like the one Ms. Thornburg had described.

From that information, the Sheriff's Department determined that the man who had lived with the neighbors was defendant Alfred Manga Bell, and his current address was in Durham. Sheriff Jones and Investigator Ryan Weaver contacted the Durham Police Department and met three Durham officers near the address where defendant was living. Sheriff Jones, Investigator Weaver, and one of the Durham officers entered the address, a boarding house, at approximately 10:00 a.m. and found defendant in his room.

Sheriff Jones and Investigator Weaver asked for defendant's consent to search his room, and defendant agreed. Defendant stood in the hallway with some of the Durham officers and watched Sheriff Jones and Investigator Weaver conduct the search. In a dresser with partially opened drawers, Sheriff Jones found a silver camera of the type described as stolen by Ms. Thornburg. At approximately the same time, Investigator Weaver lifted the bed's mattress and found two black gloves with white markings similar to those described by both Ms. Thornburg and Ms. Johnson. When the officers discovered those items, defendant revoked his consent to their search.

Sheriff Jones and Investigator Weaver immediately withdrew from the room and called the District Attorney's Office for advice. Based on that advice, Sheriff Jones and Investigator Weaver reentered the room and recovered the items they had found prior to defendant's revocation of his consent, including the black gloves, some latex gloves, and the camera. They did not, however, search any further. When the officers turned on the camera, it showed pictures of Ms. Thornburg and Ms. Johnson engaged in sexual acts.

Investigator Weaver then obtained a search warrant for defendant's room and car. In the room, officers found two leather jackets and a pair of boots with grass on the tops and soles. Having had defendant's car towed to the Person County impound lot, Investigator Weaver discovered what turned out to be a black BB gun that looked like a handgun in the glove box and latex gloves inside a hard hat in the trunk. Ms. Thornburg testified that the gun recovered by Investigator Weaver was similar to the one used by the intruder.

Defendant was indicted for first degree burglary, two counts of robbery with a dangerous weapon, four counts of first degree sexual offense, two counts of first degree kidnapping, and one count of sec-

ond degree kidnapping of a person under the age of 16. The jury convicted defendant of all the charges. The trial court arrested judgment on the two first degree kidnapping convictions and sentenced defendant for the lesser included offense of second degree kidnapping.

The trial court then sentenced defendant (1) to a presumptive-range term of 240 to 297 months imprisonment for the charge of first degree sex offense involving Sandra Johnson, (2) to a consecutive presumptive-range term of 240 to 297 months imprisonment for the charge of first degree sex offense involving Stacy Thornburg, (3) to a consecutive presumptive-range term of 24 to 38 months imprisonment for the second degree kidnapping of Ms. Thornburg's son, (4) to two concurrent presumptive-range terms of 24 to 38 months imprisonment for the second degree kidnapping of Ms. Johnson and Ms. Thornburg, (5) to a single concurrent presumptive-range term of 59 to 80 months imprisonment for the two counts of robbery with a dangerous weapon, and (6) to a concurrent presumptive-range term of 240 to 297 months imprisonment for the consolidated charges of first degree burglary and two counts of first degree sex offense. Defendant timely appealed to this Court.

I

[1] Defendant first contends that the trial court improperly denied his motion to suppress because defendant did not voluntarily consent to the search of his room and, in any event, the search of the room exceeded any consent given. Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

In denying defendant's motion to suppress, the trial court made the following relevant findings of fact:

> 6. The defendant answered the door of his room and had conversation with Sheriff Jones, Sergeant Weaver and at least one Durham officer.

7. The defendant gave oral consent to Sheriff Jones and Sergeant Weaver to search his room, which consent was overheard by a Durham officer.

8. Upon the discovery by Sheriff Jones and Sergeant Weaver of items which were construed by them to be evidence of the crimes they were investigating, the defendant revoked his consent to the search of his room.

9. Sheriff Jones and Sergeant Weaver ceased their search and withdrew from the room upon the defendant's revocation of his consent.

10. Review of the items already seized led Sheriff Jones and Sergeant Weaver to place the defendant under arrest.

11. Sergeant Weaver subsequently secured a search warrant for the room, using as part of his statement of probable cause the items seized pursuant to the brief consensual search.

Sheriff Jones' and Investigator Weaver's testimony was the basis for the court's findings. As those findings are supported by competent evidence, they are binding on appeal. *State v. Kuegel*, 195 N.C. App. 310, 315, 672 S.E.2d 97, 100 (2009).

Defendant argues, however, that the trial court erred in failing to make an explicit finding that defendant's consent to search his room was voluntarily given. While a search is reasonable under the Fourth Amendment "when lawful consent to the search is given," *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997), the State must still prove that any consent was "freely and intelligently given, without coercion, duress or fraud." *State v. Vestal*, 278 N.C. 561, 578–79, 180 S.E.2d 755, 767 (1971).

In support of his contention that the order was required to include an express finding regarding the voluntariness of his consent, defendant points to *State v. Smith*, 135 N.C. App. 377, 520 S.E.2d 310 (1999). In *Smith*, a police officer testified at a hearing on a motion to suppress evidence found during a search of a hotel room that the defendant consented to the search, while the defendant testified that the officers had not asked for permission to search, and he had not given permission. *Id.* at 378-79, 520 S.E.2d at 311. In the trial court's ruling denying the motion to suppress, the court did not resolve that dispute in the evidence regarding consent, stating only that it had some doubts regarding the truthfulness of both the officer and the defendant. *Id.* at 379-80, 520 S.E.2d at 311-12.

In reversing, this Court held that while a failure to find a fact is not error when there is no conflict in the evidence, the State's evidence and the defendant's evidence had been in conflict over whether the defendant had consented. *Id.* at 380, 520 S.E.2d at 312. The Court held that remand for further findings was necessary because "[t]he trial court's findings did not include a specific finding as to whether defendant voluntarily consented to the search of room 224 of the Kinston Motor Lodge." *Id.*

While defendant reads this last quotation as requiring an express finding of voluntariness, it is important to note that the voluntariness of any consent was not an issue in *Smith*. This Court specifically observed that "[n]o evidence was presented to suggest coercion or intimidation by the detectives in obtaining defendant's consent to search." *Id.* We do not read *Smith* as holding that findings regarding voluntariness must be made even when there is no conflict in the evidence regarding whether any consent—if given—was voluntary. Indeed, any such holding in *Smith* would be dicta and not controlling since the issue of voluntariness was necessary to the decision in *Smith*.

If the trial court in *Smith* had actually made a finding that the defendant, in that case, consented to the search, then *Smith* would be indistinguishable from this case. However, according to the *Smith* opinion, the only finding made by the trial court on the issue of consent was: " 'Officer Harrell testified that he informed the defendant as to the reason for the presence of the officers, asked for permission to search the room, and testified that the defendant gave permission to search.' " *Id.* at 379, 520 S.E.2d at 311 (quoting trial court's findings of fact). The Court further noted that "[w]hile the trial court stated it had 'some serious questions with the truthfulness' of both Detective Harrell and defendant, the trial court found there was sufficient evidence to deny defendant's motion to suppress." *Id.*

In other words, the trial court recited the officer's testimony regarding consent, found that the officer's truthfulness was in doubt (as well as the defendant's), and then denied the motion to suppress without ever resolving the dispute between the witnesses on the issue of consent. It is well established that a finding reciting a witness' testimony is not adequate to resolve a conflict in the testimony. *See State v. Lang*, 309 N.C. 512, 520, 308 S.E.2d 317, 321 (1983) ("Certain of the findings in the order denying suppression are more correctly described as recitations of testimony presented at the hearing. They do not resolve conflicts in the evidence but are merely statements of

what a particular witness said. Although such recitations of testimony may properly be included in an order denying suppression, they cannot substitute for findings of fact resolving material conflicts.").

It was the duty of the trial court in *Smith* to resolve the conflict in the testimony and not just to describe the testimony. *See State v. Neal*, 210 N.C. App. 645, 653, 709 S.E.2d 463, 468 (2011) (reversing denial of motion to suppress and remanding for entry of written order and findings of fact when trial court acknowledged conflict arising from officer's and defendant's testimony but nonetheless denied motion to suppress because " 'there is insufficient evidence' " for court to resolve the conflict). Consequently, this Court, in *Smith*, reversed and remanded for reconsideration and further findings of fact. 135 N.C. App. at 380, 520 S.E.2d at 312.

In this case, Sheriff Jones and Investigator Weaver testified that they asked defendant for consent to search his room, and he gave it. On the other hand, defendant testified that when he opened the door of his room, the officers, after asking if they could speak with him, pushed past him and announced they wanted to search his room. Defendant further testified that he demanded their search warrant and never gave consent. Thus, there was a conflict in the evidence as to whether or not defendant consented at all to the search. There was no conflict as to whether defendant's consent was voluntary. The trial court, in its order, made a specific finding of fact resolving the conflict in the evidence: "The defendant gave oral consent to Sheriff Jones and Sergeant Weaver to search his room, which consent was overheard by a Durham officer."

The trial court's failure in *Smith* to make a finding expressly resolving the question whether the defendant consented to the search is a material distinction from this case. In *Smith*, the case was being remanded in any event, and, on remand, the defendant could choose, in contrast to the first trial, to also argue the voluntariness of any consent. Here, defendant's position would give him two bites at the apple. Although defendant apparently chose not to argue voluntariness before the trial court, he asks this Court to reverse and remand to give him a chance to do so now that it has been established that defendant consented.

This approach is contrary to our rules regarding preservation of issues for appeal. *See State v. Lloyd*, 354 N.C. 76, 86–87, 552 S.E.2d 596, 607 (2001) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal."); *see also*

N.C.R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, *stating the specific grounds* for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." (emphasis added)).

In any event, the trial court in this case, after making findings of fact resolving the dispute whether consent was given, stated in its conclusion of law that "[t]he defendant gave Sheriff Jones and Sergeant Weaver valid oral consent to search his room." In order for the search to be "valid" under North Carolina law, defendant's consent must have been given voluntarily. *State v. Boyd*, 207 N.C. App. 632, 637, 701 S.E.2d 255, 258 (2010) ("In order for consent to be valid it must be 'voluntar[y]. To be voluntary the consent must be . . . "freely and intelligently given," . . . free from coercion, duress or fraud, and not given merely to avoid resistance.' " (quoting *State v. Little*, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967))). Because of the lack of any dispute in the evidence regarding voluntariness, we can infer that the trial court found the consent to be voluntary from its conclusion that defendant gave "valid oral consent." *See Smith*, 135 N.C. App. at 380, 520 S.E.2d at 312 (" 'If there is no conflict in the evidence on a fact, failure to find that fact is not error. Its finding is implied from the ruling of the court.' " (quoting *State v. Munsey*, 342 N.C. 882, 885, 467 S.E.2d 425, 427 (1996))).

[2] Defendant next argues that even if the trial court properly found he consented to the search, the officers' search exceeded the scope of the consent. However, after a review of defendant's motion to suppress and the transcript of the hearing, it appears that defendant also failed to make this constitutional argument to the trial court. Defendant's motion to suppress argues only that the "initial search of the Defendant's apartment was done without his consent." The supporting affidavit from his attorney states only that defendant "has informed me that he did not give Sheriff Dewey Jones or any other law enforcement officer permission to enter or search his apartment . . . ."

We have found no indication that defendant made any argument at the trial level that the search exceeded the scope of the consent. An argument that a search exceeds the consent given is substantively very different than an argument that no consent was given at all. It calls for very different evidence and findings of fact. We hold, there-

fore, that defendant did not preserve this specific constitutional argument for appellate review.

Although defendant asks this Court to conduct plain error review in the event that the Court determines that defendant's counsel did not object each time the State sought to admit the challenged evidence, defendant has not argued plain error with regard to this particular constitutional argument. As our Supreme Court very recently stressed: "To have an alleged error reviewed under the plain error standard, the defendant must *specifically and distinctly* contend that the alleged error constitutes plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (emphasis added) (internal quotation marks omitted). We, therefore, do not consider the merits of defendant's "scope of consent" argument.

II

[3] Defendant next contends that the trial court erred in denying defendant's motion to dismiss the charges of first degree kidnapping. Defendant argues that any confinement of Ms. Johnson and Ms. Thornburg was inherent in the armed robberies and sexual offenses and, therefore, could not be the basis for separate kidnapping convictions.

"Under N.C.G.S. § 14-39, a defendant commits the offense of kidnapping if he: (1) confines, restrains, or removes from one place to another; (2) a person; (3) without the person's consent; (4) for the purpose of facilitating the commission of a felony, doing serious bodily harm to the person, or terrorizing the person." *State v. Mann*, 355 N.C. 294, 302, 560 S.E.2d 776, 782 (2002). The Supreme Court has recognized that "this statute presents the potential for a defendant to be prosecuted twice for the same act." *State v. Boyce*, 361 N.C. 670, 672, 651 S.E.2d 879, 881 (2007). This potential exists because "certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978).

In *Fulcher*, *id.*, our Supreme Court held "that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes." On the other hand, the Court reasoned that "there is no constitutional barrier to the conviction of a defendant for kidnapping, by restraining his victim, and also of another felony to facilitate which such restraint was committed, provided the restraint, which constitutes

the kidnapping, is a separate, complete act, independent of and apart from the other felony." *Id.* at 524, 243 S.E.2d at 352.

Therefore, in order to survive defendant's motion to dismiss, the State must have presented sufficient evidence to enable the jury to reasonably find that defendant committed a confinement, restraint, or removal of the victim that was "a separate, complete act, independent of and apart from the other felony." *Id.* In *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981), our Supreme Court further explained this separate restraint requirement, holding that the State could survive a motion to dismiss a kidnapping charge if the victim was "exposed to greater danger than that inherent in the armed robbery itself."

The jury was instructed in this case that in order to find defendant guilty of first degree kidnapping, they were required to find that defendant "confined the person for the purpose of facilitating the commission of a sexual assault or for the purpose of terrorizing a person." The key question with respect to defendant's motion to dismiss is, therefore, whether defendant confined the two women in an act separate from the confinement inherent in the armed robberies and sexual offenses. Confinement has been defined by our Supreme Court as involving "some form of imprisonment within a given area, such as a room, a house or a vehicle." *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351.

This Court applied this definition of confinement in *State v. Johnson*, 183 N.C. App. 576, 646 S.E.2d 123 (2007), when considering whether the confinement of the victim was sufficient to support both a charge of attempted first degree murder and kidnapping. The Court concluded that there was sufficient evidence of some form of imprisonment within a given area separate and apart from the attempted murder when the victim testified that although she asked the defend-ant to leave, he continued to block the only exit from the victim's apartment, and he ultimately closed and locked the door to the apartment, confining the victim inside, at which point he committed the attempted murder. *Id.* at 581, 646 S.E.2d at 126.

Here, the State alleged that defendant committed armed robbery of the camera. After Ms. Thornburg handed defendant the camera and after he stopped forcing the women to engage in the sexual acts, defendant continued to hold them at gunpoint while he talked to them about what had happened to him, grilled Ms. Johnson about Bible verses, and made them pray with him. Just as the initial con-

finement in *Johnson* before the attempted murder supported a separate kidnapping conviction, so too, in this case, the additional confinement at the end of the invasion, after the robbery and sex offenses were finished, is sufficient evidence of kidnapping separate from the other offenses.

Defendant, however, points to *State v. Cartwright*, 177 N.C. App. 531, 629 S.E.2d 318 (2006). In *Cartwright*, the defendant first demanded money from the victim in her kitchen and then moved her to the den of her home and raped her. Afterward, he again demanded money from the victim who walked down the hall to her bedroom and gave him a dollar, at which point the defendant left the house. *Id.* at 536-37, 629 S.E.2d at 323. In other words, the robbery was ongoing, beginning when the defendant first confronted the victim and continuing until the victim gave him the dollar at the end of the encounter. The State presented no evidence of confinement, restraint, or removal after the robbery and rape were complete.

In this case, in contrast to *Cartwright*, defendant did not leave the premises after the robbery and sexual offenses were concluded. Rather, he continued to hold the two women in the room at gunpoint for a period of time, engaging in acts wholly unrelated to the robbery and sexual offenses. The trial court, therefore, properly denied the motion to dismiss the kidnapping charges with respect to the two women.

III

[4] Finally, defendant contends that the trial court erred in denying his motion to dismiss the charge of second degree kidnapping of a person under the age of 16 because there was insufficient evidence that he confined Ms. Thornburg's son. When the victim is under 16, the elements of kidnapping under N.C. Gen. Stat. § 14-39(a) (2011) remain the same, but the State must prove, in addition, that the child's parent or legal guardian did not consent to the restraint, confinement, or removal. *State v. Hunter*, 299 N.C. 29, 40, 261 S.E.2d 189, 196 (1980).

Here, the State presented evidence that defendant, while threatening Ms. Thornburg and her son with a gun, told her to put her son in his room. Ms. Thornburg followed that order by directing her son to go to his bedroom. After that, whenever her son called out, Ms. Thornburg called back to keep him in his bedroom. In short, the boy was confined to his bedroom because defendant ordered it while, as the boy knew, holding the boy's mother at gunpoint. It is well established that "the use of fraud, threats or intimidation is equivalent to

the use of force or violence so far as a charge of kidnapping is concerned." *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351. The State, therefore, presented sufficient evidence of confinement to support the kidnapping charge with respect to Ms. Thornburg's son. As defendant makes no other argument in support of his motion to dismiss, we hold the trial court properly denied the motion.

No error.

Judges STEELMAN and ROBERT N. HUNTER, JR. concur.

STATE OF NORTH CAROLINA v. HAROLD BRIGHT HARRIS, JR.

No. COA11-829

(Filed 17 July 2012)

1. Criminal Law—prosecutor's statements—closing argument—defendant's decision not to testify—not grossly improper

The trial court did not abuse its discretion in a sexual offenses case by failing to intervene *ex mero motu* during the prosecutor's closing argument. The challenged comment emphasized the limitations of the physical evidence and did not function as a comment on defendant's decision not to testify. Therefore, the comment failed to meet the standard of gross impropriety necessary to require the trial court to intervene *ex mero motu*.

2. Constitutional Law—testimony—DNA analysis results—supervising agent—confrontation clause not violated

The trial court did not commit plain error in a sexual offenses case by allowing a serologist SBI Special Agent to testify to the significance of DNA analysis results obtained by SBI trainee Applebee. Trainee Applebees' analysis was done under the supervision of Agent Boodee and the admission of Agent Boodee's testimony regarding the DNA evidence did not violate defendant's right to confrontation. Defendant could not reasonably contend that the admission of the serologist's testimony, premised on the testimony of Agent Boodee, violated defendant's right to confrontation.

3. Constitutional Law—right to confrontation—testimony—probability—unavailability of purported population geneticists—not prejudicial—no ineffective assistance of counsel

The trial court did not commit plain error in a sexual offenses case by allowing into evidence an SBI agent's testimony that the probability of an unrelated, randomly chosen person who could not be excluded from the DNA mixture taken from the victim's rape kit was extremely low. Even presuming that the unavailability of the purported population geneticists who prepared the statistical data violated defendant's right to confrontation, the admission of the statistical data did not so prejudice defendant that the jury would have reached a different result had the data not been presented. Defendant's ineffective assistance of counsel claim based on this same argument was also overruled.

4. Appeal and Error—preservation of issues—prosecutor's closing argument—no ineffective assistance of counsel

Defendant failed to preserve for appellate review the argument that the trial court erred in a sexual offenses case by allowing the prosecutor to make an argument not supported by the evidence. Furthermore, defendant's argument that he received ineffective assistance of counsel based upon trial counsel's failure to preserve defendant's argument for appellate review was overruled. Given the record evidence, there was no reasonable probability that had there been an objection by defense counsel during the prosecutor's closing argument the outcome of the trial would have been different.

Appeal by defendant from judgment entered 27 January 2011 by Judge Lindsay R. Davis, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 11 January 2012.

Attorney General Roy Cooper, by Assistant Attorney General Anita LeVeaux, for the State.

Mark Montgomery for defendant-appellant.

BRYANT, Judge.

Where the trial court did not abuse its discretion in failing to intervene *ex mero motu* because the prosecutor commented that "only two people in this courtroom . . . actually know what happened," where the admission of testimony from a serologist regarding

a comparison of DNA profiles did not amount to plain error, and because we do not review contentions arising out of closing arguments for plain error, we hold there was no error in the judgment of the trial court.

On 25 January 2011, a criminal trial against defendant Harold Harris, Jr., was commenced before a Forsyth County Superior Court jury. Defendant was charged with first-degree rape of a child, three counts of first-degree sexual offense with a child, first-degree kidnapping, and taking indecent liberties with a child. At the time of trial, the victim, Zora[1], defendant's step-daughter, was sixteen years old; defendant was fifty.

Zora testified that when she was ten years old, on 19 November 2004, at some time after 9 p.m., defendant drove her down Linville Road, then onto a side street in an unfamiliar residential area. When the vehicle stopped, Zora attempted to get out, but defendant pulled her back in and struck her in the face. Zora testified that after her pants and underwear were removed, defendant undressed, digitally penetrated her vagina, performed cunnilingus, and inserted his penis into her vagina. This occurred over the course of an hour. Zora testified that on the way home, "[h]e told me if I told anybody that he would kill me, that he would kill my mother, and that he would kill himself." Zora confided in her mother the next morning. Testimony was also given by the sexual assault nurse examiner (SANE nurse) who examined Zora, as well as agents with the State Bureau of Investigation (SBI) who extracted and compared DNA samples from Zora and defendant.

In accordance with the jury verdict, the trial court entered a consolidated judgment against defendant for first-degree rape, first-degree sexual offense with a child, and second-degree kidnapping and another consolidated judgment for first-degree sexual offense with a child and taking indecent liberties with a child. The trial court sentenced defendant to two active terms of 420 to 513 months, to be served consecutively. Defendant appeals.

On appeal, defendant raises the following issues: whether the trial court committed plain error in allowing (I) the prosecutor to comment to the jury about the fact that defendant did not testify; (II) a serologist to testify about DNA analysis developed by a non-testifying

1. A pseudonym has been used to protect the victim's identity.

witness; and (III) the prosecutor to make an argument not supported by the evidence.

I

[1] Defendant first argues that the trial court committed plain error in failing to intervene when the prosecutor commented to the jury on the fact that defendant did not testify, and, alternatively, if this issue was not preserved for appellate review, defendant asks this Court to determine whether he received ineffective assistance of counsel. We disagree.

"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). However, plain error does not apply to issues arising from closing arguments. *State v. Phillips*, 365 N.C. 103, 144, 711 S.E.2d 122, 150 (2011). Our Supreme Court has applied an abuse of discretion standard when considering whether a trial court erred in failing to intervene *ex mero motu* when a defendant failed to object at trial but, on appeal, alleged a prosecutor improperly commented on the defendant's decision not to testify. *See State v. Miller*, 357 N.C. 583, 588 S.E.2d 857 (2003).

> Because [the] defendant did not object to this portion of the closing argument at trial, he carries the burden on appeal of showing the prosecutor's argument was so grossly improper that the trial court should have intervened *ex mero motu*. The impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it. In evaluating whether the prosecutor improperly commented on defendant's failure to testify, we must consider the prosecutor's comments in the context in which they were made and in light of the overall factual circumstances to which they referred.

Id. at 588-89, 588 S.E.2d at 862 (citations and quotations omitted).

Defendant focuses upon the following comment made during the prosecutor's closing argument: "There are only two people in this courtroom as we sit here today that actually know what happened between the two people, and that's [Zora] and the defendant." We note that the comment was made in the context of the prosecutor's acknowledgement that while the SANE nurse who examined Zora testified to abrasions and tears indicative of vaginal penetration, the

nurse could not tell if Zora's vagina was penetrated by a penis. The prosecutor went on to recount evidence that semen containing defendant's DNA was found on vaginal swabs taken from Zora as well as cuttings from Zora's panties.

We hold that the prosecutor's comment emphasized the limitations of the physical evidence and did not function as a comment on defendant's decision not to testify. Therefore, the comment fails to meet the standard of gross impropriety necessary to require the trial court to intervene *ex mero motu*. As such, we cannot find an abuse of discretion in the trial court's failure to intervene *ex mero motu*. In addition, we do not find this comment to have been sufficiently prejudicial to support an ineffective assistance of counsel claim. Accordingly, defendant's argument is overruled.

II

[2] Next, defendant argues that the trial court committed plain error in allowing serologist SBI Special Agent Mackenzie Dehaan to testify to the significance of DNA analysis results obtained in part by witnesses unavailable for cross-examination—primarily SBI trainee Jill Applebee. Alternatively, defendant requests that we consider whether, because counsel failed to object to the admission of evidence developed by witnesses unavailable for cross-examination, he received ineffective assistance of counsel.

SBI Agent Mark Boodee, qualified as an expert in forensic DNA analysis, was called to testify for the State regarding the procedure used in analyzing DNA found on articles from Zora's rape kit. During Agent Boodee's testimony, defendant learned that SBI trainee Jill Applebee performed the DNA analysis under the supervision of Agent Boodee and was not available to testify. Defendant objected to the testimony of Agent Boodee regarding the DNA analysis results on the ground that trainee Applebee was not available for cross-examination. The jury was then excused, and the prosecutor informed the trial court of the following:

> [Agent Boodee's] name is on all the paperwork as far as the analysis and the samples; and in further looking at the discovery provided by the State to the defense, it does show a J. A. as an initial on some of the documents on the testing. . . . [H]e [Agent Boodee] checked every single thing, and he wrote the opinion because she was a trainee and could not write the opinion.

Thereafter, on voir dire, Agent Boodee testified regarding the DNA analysis performed on articles taken from Zora's rape kit. Agent Boodee testified that the SBI received from Zora's rape kit a blood stain, vaginal swabs, and a cutting from a pad taken from her panties. At the time, Agent Boodee was serving as a special agent assigned to the DNA unit and, also, assistant special agent in charge—a management position. While working on this case, Agent Boodee was assisted by trainee Applebee.

A. As part of our trainee program, we oversee—or we watch trainees as they do the analysis, and she performed the analysis on this particular case. I stood over her shoulder. Watched every step of the process.

. . .

Q. And when you say you watched every step, can you please tell [the Court] what steps.

A. From—I accepted the evidence in this case. We would get the evidence out of the locker. We worked the evidence, meaning we extract the evidence. We amplified it, using PCR. We then separated it with the use of a genetic analyzer. We then got the results together. We looked at it side by side to determine what the results were. We then did the frequency data for this case as well. I wrote up the report, and I put it into review.

. . .

Q. So the DNA analysis done by Jill Applebee was done under your scrutiny?

A. Under my watch the entire time.

. . .

Q. All right. And did you agree with her findings?

A. Well, they were my findings. They were my findings, but I agreed with everything that she did.

After the voir dire, the trial court concluded that Agent Boodee's testimony regarding results of the DNA analysis reflected his own opinion, that he was not testifying to the opinion of someone else, and that he was present in court and available for cross-examination. The trial court overruled defendant's objection to the admission of Agent Boodee's testimony.

Agent Boodee testified before the jury as to the procedure used to extract DNA profiles from the items in Zora's rape kit: the blood stain, the vaginal swabs, and the pad taken from Zora's panties. Agent Boodee further testified to the results obtained upon comparing these DNA extracts to Zora's DNA profile.

Special Agent Agent Mackenzie Dehaan, qualified as an expert in DNA analysis and as a forensic molecular geneticist, testified regarding defendant's DNA. Agent Dehaan testified, without objection, that she performed a DNA extract on a specimen taken from defendant and compared defendant's DNA profile to the profiles obtained by Agent Boodee from specimens taken from Zora's rape kit. Agent Dehaan testified that the DNA from a cutting of the pad in Zora's rape kit matched defendant's DNA. Therefore, defendant could not be excluded as a contributor to the DNA mixture found on the samples from Zora's rape kit.

> [Dehaan]: For the mixture that was obtained from the vaginal swabs, the estimates of the combined probability of inclusion—and what that means is the chance of selecting an individual at random who would also be expected to be included in this mixture—for this mixture—are for the North Carolina Caucasian population, 1 in 45.7 million; for the North Carolina black population, 1 in 9.63 million; for the North Carolina Lumbee Indian population, 1 in 10.3 million; and for the North Carolina Hispanic population, 1 in 6.49 million.

Agent Dehaan further testified as to the significance of the match. She stated that the odds of randomly selecting an individual unrelated to defendant with a DNA profile that matched the partial DNA profile taken from the sperm fraction found on the pad in Zora's panties was "1 in greater-than-one-trillion—which is more than the world's population . . . ."

On appeal, defendant contends that because Agent Dehaan's testimony on DNA profile comparisons was premised on tests performed by trainee Applebee—who was unavailable for examination—and on the basis of statistical information prepared by other, unknown, individuals, the admission of Agent Dehaan's testimony amounts to plain error. We disagree.

According to Rule of Appellate Procedure 10(a), "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the spe-

cific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2012). "Generally, a purported error, even one of constitutional magnitude, that is not raised and ruled upon in the trial court is waived and will not be considered on appeal." *State v. Anderson*, 355 N.C. 136, 142, 558 S.E.2d 87, 92 (2002) (citations omitted); *see also*, *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) ("Generally speaking, the appellate courts of this state will not review a trial court's decision to admit evidence unless there has been a timely objection. To be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial. (citations and quotations omitted)).

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2012).

> [Our Supreme Court] has recognized that "the plain error rule applies only in truly exceptional cases," *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986), and that a defendant relying on the rule bears the heavy "burden of showing . . . (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial," *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

Anderson, 355 N.C. at 142, 558 S.E.2d at 92.

Defendant acknowledges that he made a confrontation clause objection and argument before the trial court as to Agent Boodee's testimony, as premised on trainee Applebee's DNA analysis, but made no similar objection in relation to Agent Dehaan's testimony. Defendant now asks this Court to consider whether the admission of Agent Dehaan's testimony premised in part on trainee Applebee's DNA analysis amounted to a violation of defendant's confrontation clause rights rising to the level of plain error. We reject defendant's challenge in this regard.

At trial, Agent Dehaan testified without objection to DNA profile evidence based upon reports generated by Agent Boodee and trainee Applebee. Agent Boodee's testimony regarding the procedure used to

analyze DNA samples, the reports generated therefrom, and his conclusions, was subjected to direct and cross-examination. Defendant objected to Agent Boodee's testimony arguing that the unavailability of trainee Applebee violated his Sixth Amendment right to confront the witnesses against him. Defendant's argument was overruled by the trial court, and the trial court's ruling on that argument is not challenged on appeal.

However, even a cursory review of defendant's contention leaves little doubt that the admission of Agent Boodee's testimony regarding DNA evidence did not violate defendant's right to confrontation. Agent Boodee testified that the process trainee Applebee utilized to obtain DNA profiles from specimens in Zora's rape kit was performed under his observation and the findings reported as a result of the analysis were his own. *See State v. Hough*, 202 N.C. App. 674, 682-83, 690 S.E.2d 285, 291 (2010) (where the analyst who testified asserted his or her own expert opinion, even though she did not conduct the original testing, there was no violation of the defendant's Sixth Amendment right to confrontation as considered under *Crawford v. Washington*, 541 U.S. 36, ____, 158 L. Ed. 2d 177, 187 (2004), and *Melendez-Diaz v. Massachusetts*, ____ U.S. ____, ____, 174 L. Ed. 2d 314, 331 (2009). (citing *State v. Watts*, 172 N.C. App. 58, 67, 616 S.E.2d 290, 297 (2005), *modified on other grounds after remand*, 185 N.C. App. 539, 648 S.E.2d 862 (2007) (holding that the defendant's right to confrontation under *Crawford* was not violated where the analyst who testified concerning DNA evidence testified to his own opinion based on tests run by another analyst), reviewed in *Watts v. Thomas*, 2009 WL 3199891, at *5-6 (M.D.N.C. 25 September 2009) (reviewing a petition for habeas corpus, "the federal court acknowledged that the parties made arguments based on the holding of *Melendez-Diaz;* however, the court's analysis focused on *Crawford* since that was the only Supreme Court precedent available at the time of the defendant's appeal in state court." Citing *Watts*, 2009 WL 3199891, at *5-6. "Ultimately, the federal court held that this Court's analysis was not contrary to the application of U.S. Supreme Court precedent and denied the defendant's *habeas* petition." Citing *Watts* at *6.)).

Therefore, we do not view this issue in defendant's favor. Having apparently accepted the trial court's ruling that the absence of trainee Applebee did not result in a Confrontation Clause violation, that would in turn result in the exclusion of evidence and testimony of supervising Agent Boodee, defendant cannot reasonably contend that the admission of Agent Dehaan's testimony—premised on the testi-

mony of Agent Boodee—amounted to a violation of defendant's Sixth Amendment right to confront the witnesses against him and rose to the level plain error. *Anderson*, 355 N.C. at 142, 558 S.E.2d at 92 ("a defendant relying on the rule bears the heavy "burden of showing . . . that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial[.]" (citation omitted)).

[3] Defendant also raises a Confrontation Clause challenge to Agent Dehaan's testimony that the probability of an unrelated, randomly chosen person who could not be excluded from the DNA mixture taken from Zora's rape kit was extremely low. Specifically, defendant argues that the population geneticists who made the probability determination were unavailable for cross-examination about the reliability of their statistical methodology. Again, this argument was not raised before the trial court. Defendant contends on appeal that this is a Confrontation Clause violation that rises to the level of plain error. We disagree.

Initially, we note that Agent Dehaan was available for cross-examination; that she gave her opinion that the DNA profile found on the pad from Zora's rape kit matched defendant's DNA profile; and that the statistical information upon which she relied in developing her opinion regarding the significance of the match was of a type reasonably relied upon by experts in the field of DNA analysis, such being admissible under North Carolina Rules of Evidence, Rule 703, "Bases of opinion testimony by experts." N.C. Gen. Stat. § 8C-1, Rule 703 (2011) ("If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."); *see also Williams v. Illinois*, No. 10-8505 (U.S. 18 June 2012) (upholding admissibility of testimony regarding DNA analysis based upon work performed by an outside laboratory despite the prosecution's failure to present testimony from an analyst employed by the outside laboratory); *State v. Appleby*, 289 Kan. 1017, 1059, 221 P.3d 525, 551 (2009) ("population frequency data and the statistical programs used to make that data meaningful are nontestimonial."). For that reason, we conclude the admission of the statistical information was not error.

But even presuming that the unavailability of the purported population geneticists who prepared the statistical data amounted to a violation of defendant's Sixth Amendment right to confront the witnesses against him, it does not follow that such a violation automatically rises to the level of plain error. *See State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986) (holding that an infringement on the defendant's

fundamental due process right, in the form of a comment on the defendant's silence by the prosecution, did not rise to level of plain error). To establish plain error, defendant must show "that a different result probably would have been reached but for the error . . . ." *Anderson*, 355 N.C. at 142, 558 S.E.2d at 92 (citation omitted).

In his brief to this Court, defendant argues that the statistics presented by Agent Dehaan "sealed [] defendant's fate" as evidence that "it was very unlikely that anybody other than [] defendant was the contributor" to the DNA mixture found on specimens taken from Zora's rape kit. However, we note other substantial and compelling evidence presented by the SANE nurse who examined Zora the morning after the sexual assault and who testified to the physical trauma she observed to Zora's vagina, by Zora's mother in whom Zora confided about the sexual assault and who testified to Zora's unusual behavior when she returned home with defendant, and to the change in Zora's general demeanor, and by Zora, sixteen years old at the time of trial, who testified about how, when she was ten years old, defendant lured her from her home, drove her to an unfamiliar residential area, struck her, physically restrained her, penetrated her vagina with his fingers, mouth, and penis, and then threatened her life, as well as, that of her mother to secure Zora's silence.

Reviewing the whole record, we cannot say that the admission of the statistical data upon which Agent Dehaan relied in forming her opinion so prejudiced defendant that the jury would have reached a different result had the data not been presented; this analysis presumes that the admission of the challenged evidence amounted to an error, which we do not. *See Williams v. Illinois*, *supra*. Accordingly, we overrule defendant's contentions regarding the admissibility of Agent Dehaan's testimony.

Alternatively, defendant asks that if he is "den[ied] relief under the plain error standard for prejudice that [this Court] would have granted under the constitutional standard for prejudice," we consider whether he received ineffective assistance of counsel. In support of his contention, defendant asserts only that "[i]t was unreasonable of trial counsel not to have objected to Agent DeHaan's [sic] testimony."

> To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test. *See Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). First, he must show that counsel's performance fell below an objective standard of reasonableness. *See State v. Braswell*, 312 N.C. 553,

561-62, 324 S.E.2d 241, 248 (1985). 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. *Id.* at 563, 324 S.E.2d at 248.

State v. Gainey, 355 N.C. 73, 112, 558 S.E.2d 463, 488 (2002).

Though defendant contends that "[i]t was unreasonable of trial counsel not to have objected to Agent DeHaan's [sic] testimony[,]" defendant does not contend that the error was "so serious that a reasonable probability exists that the trial result would have been different." *Id.* at 112, 558 S.E.2d at 488 (citation omitted). Further, as we have held that the admission of Agent Dehaan's testimony does not amount to error, let alone plain error, defendant cannot establish ineffective assistance of counsel. Accordingly, we reject defendant's ineffective assistance of counsel claim.

III

[4] Defendant argues that the trial court committed plain error in allowing the prosecutor to make an argument not supported by the evidence. Specifically, defendant asserts that during her closing argument the prosecutor stated that both SBI Agents Boodee and Dehaan testified that swabs taken from Zora's vagina and samples from the pad in her panties contained defendant's DNA; however, defendant contends that the evidence merely provides that he could not have been excluded as a contributor to the DNA mixture.

We note that before the trial court defendant did not object to the statements and, on appeal, contends that the trial court's failure to intervene *ex mero motu* during the prosecutor's closing argument amounted to plain error. However, "[p]lain error analysis applies to evidentiary matters and jury instructions." *Garcell*, 363 N.C. at 35, 678 S.E.2d at 634 (citation omitted). As defendant did not preserve his argument contesting the prosecutor's closing argument by objection and has not explicitly argued that the prosecutor's argument was so egregious as to merit *ex mero motu* intervention, *see State v. Murrell*, 362 N.C. 375, 391, 665 S.E.2d 61, 73 (2008), *cert. denied*, 556 U.S. ____, 173 L. Ed. 2d 1099 (2009), we do not review the contested statements for plain error.

Defendant also asks this Court to consider whether he received ineffective assistance of counsel based upon trial counsel's failure to preserve defendant's argument for appellate review. *See Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698 ("The 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

As stated in issue *II*, the record indicates that substantial and compelling evidence was presented in the form of testimony from Zora, Zora's mother, and the SANE nurse who examined Zora shortly after the assault. Witnesses qualified as experts in serology and forensic DNA analysis testified that defendant's DNA profile matched a DNA profile taken from a specimen found inside Zora's underwear, and that defendant's profile could not be excluded from a DNA mixture taken from Zora's vagina. Defendant did not present any evidence.

Given the record evidence, there does not exist a reasonable probability that had there been an objection by defense counsel during the prosecutor's closing argument the outcome of the trial would have been different. Accordingly, we hold that the failure of defendant's trial counsel to object to the contested portion of the prosecutor's closing argument does not constitute ineffective assistance of counsel.

No error.

Judges ELMORE and ERVIN concur.

CAMERON JAMES, PETITIONER v. CHARLOTTE-MECKLENBURG COUNTY BOARD OF EDUCATION, RESPONDENT

No. COA11-1376

(Filed 17 July 2012)

1. Administrative Law—Board of Education—termination of employment—administrative remedies exhausted

The trial court erred in a case involving petitioner's dismissal from employment as a school teacher by concluding that petitioner had failed to exhaust his administrative remedies prior to filing a petition for judicial review. Petitioner exhausted his administrative remedies by adhering to the procedures prescribed in N.C.G.S. § 115C-325, specifically, by requesting a hear-

ing before the Board of Education and subsequently appealing the Board's decision to the superior court in accordance with N.C.G.S. § 115C-325(n).

2. Schools and Education—Board of Education—hearing date not unreasonable—no prejudice

Respondent Board of Education did not lack jurisdiction to hear petitioner's case due to its failure to comply with the mandatory requirements of N.C.G.S. § 115C-325(j)(1). The Board's decision to conduct the hearing approximately two weeks later than petitioner's proposed dates for the hearing was not unreasonable in light of the parties' inability to set a date and petitioner was not prejudiced by any delay.

3. Public Officers and Employees—Board of Education—whole record review—findings sufficient—sufficiency of evidence not contested

Respondent Board of Education's review of the record in a case involving petitioner's dismissal from employment as a school teacher was not erroneous where the Board accepted the superintendent's recommendation to terminate petitioner's employment after considering the record as a whole. The Board appropriately replaced the findings it deemed insufficiently supported by the evidence and the Board's actions in this respect were sufficient to comply with N.C.G.S. § 115C-325(j2)(7). Furthermore, petitioner failed to contest the sufficiency of the evidence to support his dismissal in a manner sufficient to preserve the issue for appellate review.

Appeal by Petitioner from order entered 22 July 2011 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 May 2012.

Tin Fulton Walker & Owen, P.L.L.C., by John W. Gresham, for Petitioner-appellant.

Fisher & Phillips LLP, by J. Michael Honeycutt, for Respondent-appellee.

HUNTER, JR., Robert N., Judge.

Cameron James ("Petitioner") appeals from the trial court's order dismissing his petition for judicial review of the Charlotte-

Mecklenburg County Board of Education's ("the Board") decision to terminate his employment. We affirm.

I. Factual & Procedural Background

Petitioner began his employment with the Charlotte-Mecklenburg School System ("CMS") in January 2004 as a teacher at Cochrane Middle School. During the 2004-05 school year, CMS transferred Petitioner to West Mecklenburg High School and promoted him to the position of Dean of Students. Petitioner subsequently attained the position of Assistant Principal at West Mecklenburg High School for the 2005-06 school year before taking medical leave in May 2006 "to treat advanced colorectal cancer."

Following a successful operation in January 2007, Petitioner was cleared to return to work that April. CMS placed Petitioner as an assistant principal at Piedmont Middle School ("Piedmont"), where Petitioner's physicians believed the work would be "less stressful" than his previous position at West Mecklenburg High School.

That spring, Piedmont's principal, Dee Gardner ("Principal Gardner"), received complaints from teachers at the school that Petitioner was "being too friendly" and made them feel "uncomfortable." The complaints stemmed from Petitioner's conduct and interactions with the female staff at after-school "stress relief" social gatherings, which generally took place at local bars and restaurants. Principal Gardner discussed the complaints with Petitioner "after [she] observed him for a couple of months" and also informed him in writing that she wanted him "to be more professional and less casual with particularly the female staff." In addition, Principal Gardner expressed her concern (via the same writing) with Petitioner's "communication and the intensity of his responses with parents and children." Nonetheless, Petitioner received a positive summative evaluation at the close of the 2006-07 school year, in which Principal Gardner noted that Petitioner had "only been [at Piedmont] a short time but he ha[d] definitely established himself as a leader, a team player, an energizer, an enforcer, and a vital part of the administrative team." Following this evaluation and prior to the 2007-08 school year, CMS extended Petitioner a four-year contract to stay on as assistant principal at Piedmont.

Petitioner's problems interacting with students and parents persisted throughout the 2007-08 school year. Consequently, Principal Gardner placed Petitioner on an action plan designed to improve

Petitioner's ability to "[c]ommunicate effectively when speaking with students, staff, and parents," which Petitioner reviewed with Principal Gardner and signed on 14 December 2007. Petitioner failed to complete the action plan as directed.

In January 2008, Principal Gardner was approached by a male teacher at Piedmont who expressed concern that some of the female staff members at the school "were being harassed" by Petitioner. Principal Gardner interviewed the female staff members regarding their concerns and met with Petitioner to discuss his "inappropriate remarks to female staff." Additionally, Principal Gardner completed her mid-year assessment of Petitioner's performance in February 2008, in which she instructed Petitioner to "[e]liminate inappropriate communication to female staff."

In June 2008, a female teacher at Piedmont, Alanda Singletary, complained to Principal Gardner that Petitioner had issued her a poor job performance evaluation and "continued to harass her" because "she would not succumb to his advances." She also stated that Petitioner showed her a text image of a "smiley face with the middle finger up." Ms. Singletary set forth numerous allegations in a written memorandum to Principal Gardner dated 6 June 2008, including complaints that Petitioner had "obtained [her] phone number without [her] permission" from Piedmont's emergency telephone directory; that Petitioner "sent inappropriate/vulgar texts to [her] cell phone on a consistent basis;" that Petitioner had once told her he "preferred to date black women;" and that Petitioner had shown an "inappropriate text" to other teachers in the school cafeteria in the presence of a student. In light of these allegations, Principal Gardner launched an investigation through which she learned, among other things, that Petitioner had showed the smiley face image to 19 other staff members at Piedmont.

On 4 August 2008, Petitioner was suspended with pay pursuant to N.C. Gen. Stat. § 115C-325(f1) pending allegations of sexual harassment and interference with an investigation after being instructed not to have contact with staff. By letter dated 5 September 2008, the CMS superintendent provided Petitioner with a written notice of charges and stated that he was considering recommending Petitioner's dismissal to the Board on grounds of inadequate performance and failure to comply with the reasonable requirements of the Board. By letter dated 19 September 2008, the superintendent notified Petitioner of his intent to recommend dismissal and of Petitioner's right to contest his dismissal as provided under N.C. Gen. Stat.

§ 115C-325. The superintendent subsequently sent Petitioner an amended written notice of charges, in which the superintendent added "insubordination" as a third asserted statutory ground for Petitioner's dismissal.

Petitioner responded by requesting a hearing before a case manager, which was held at CMS' administrative offices on 23 and 24 November 2009. After hearing testimony and arguments from both sides, the case manager submitted his report and recommendation on 16 April 2010. The report included findings of fact relevant to each of the superintendent's three asserted grounds for dismissal and a recommendation that the grounds for dismissal were not substantiated by the evidence presented.

Notwithstanding the case manager's recommendation, the superintendent notified Petitioner of his intent to recommend Petitioner's dismissal to the Board. Petitioner requested a hearing before the Board to contest his dismissal and, as discussed further in Part III(B) *infra*, the parties agreed to schedule the Board hearing outside the time period prescribed by N.C. Gen. Stat. § 115-325(j1)(3). Petitioner took issue with the 27 May 2010 hearing date set by the Board, and Petitioner's counsel appeared at the Board hearing for the limited purpose of contesting the Board's jurisdiction over the matter in light of its alleged failure to schedule the hearing as prescribed by statute. When the Board rejected Petitioner's jurisdictional argument, Petitioner's counsel exited the hearing without presenting any arguments on the merits of Petitioner's dismissal. The Board voted to proceed with the hearing and heard arguments from the superintendent on the merits of the case. By resolution dated 1 June 2010, the Board unanimously voted to accept the superintendent's recommendation to dismiss Petitioner from his assistant principal position at Piedmont and to terminate Petitioner's employment with CMS.

Petitioner filed a petition for judicial review with Mecklenburg County Superior Court on 28 June 2010. The Board filed an answer to the petition on 25 August 2010, in which it asserted numerous defenses, including claims that Petitioner had failed to exhaust his administrative remedies and that Petitioner's right to seek judicial review was precluded "by knowingly failing to attend the board hearing regarding his dismissal." The trial court agreed with the Board's position and, by order entered 22 July 2011, dismissed Petitioner's petition for judicial review based upon Petitioner's failure to exhaust his administrative remedies. The trial court also stated an alternative basis for its decision, ruling that even assuming *arguendo* that

Petitioner had exhausted his administrative remedies, the Board correctly followed the statutorily prescribed procedure and, further, that there was substantial evidence in the record to support Petitioner's dismissal. Petitioner appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011), as Petitioner appeals from a final order of the superior court as a matter of right.

III. Analysis

A. Exhaustion of Administrative Remedies

[1] Petitioner contends the trial court erred in concluding that he failed to exhaust his administrative remedies prior to filing a petition for judicial review. We agree.

> As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts. This is especially true where a statute establishes, as here, a procedure whereby matters of regulation and control are first addressed by commissions or agencies particularly qualified for the purpose. In such a case, the legislature has expressed an intention to give the administrative entity most concerned with a particular matter the first chance to discover and rectify error. Only after the appropriate agency has developed its own record and factual background upon which its decision must rest should the courts be available to review the sufficiency of its process. An earlier intercession may be both wasteful and unwarranted. "To permit the interruption and cessation of proceedings before a commission by untimely and premature intervention by the courts would completely destroy the efficiency, effectiveness, and purpose of the administrative agencies."

Presnell v. Pell, 298 N.C. 715, 721-22, 260 S.E.2d 611, 615 (1979) (citations omitted).

Section 115C-325 of our General Statutes sets forth in exhaustive detail the procedures for employing, demoting, and dismissing public school teachers and administrators. This regime affords a school administrator the right to contest the superintendent's grounds for dismissal through an evidentiary hearing held before a case manager. N.C. Gen. Stat. § 115C-325(h)(3) (2011). The superintendent may rec-

ommend dismissal to the board notwithstanding a finding by the case manager that the superintendent's grounds for dismissal are unsubstantiated, N.C. Gen. Stat. § 115C-325(i1)(3) (2011), in which case the school administrator may request a hearing before the board to challenge the superintendent's recommendation, N.C. Gen. Stat. § 115C-325(j1)(1) (2011). If the board determines that dismissal is appropriate based upon its review of the record, the school administrator may appeal the board's decision to the superior court pursuant to N.C. Gen. Stat. § 115C-325(n), which provides, in pertinent part:

> (n) Appeal.—Any career employee who has been dismissed . . . shall have the right to appeal from the decision of the board to the superior court for the superior court district or set of districts . . . in which the career employee is employed. This appeal shall be filed within a period of 30 days after notification of the decision of the board. . . . A career employee who has been demoted or dismissed, or a school administrator whose contract is not renewed, *who has not requested a hearing before the board of education* pursuant to this section shall not be entitled to judicial review of the board's action.

N.C. Gen. Stat. § 115C-325(n) (2011) (emphasis added). Although the plain language of N.C. Gen. Stat. § 115C-325(n) requires only that the career employee *request* a hearing before the board, this Court has held that a request, alone, is not sufficient to exhaust one's administrative remedies. *See Church v. Madison County Bd. of Educ.*, 31 N.C. App. 641, 645, 230 S.E.2d 769, 771 (1976). In *Church*, the plaintiff school principal requested a hearing before the board, but then prevented the hearing from taking place by filing an action for damages and injunctive relief in superior court. *Id.* "Instead of filing an appeal with the superior court *after* the board hearing and *after* dismissal, [the plaintiff] brought the [] action in the superior court *before* either of these events took place." *Id.* We held "the plaintiff had not exhausted her administrative remedies before resorting to the courts" and affirmed the trial court's dismissal of the plaintiff's petition. *Id.* at 647, 230 S.E.2d at 772.

We disagree with the Board's contention that our holding in *Church* required dismissal of Petitioner's petition for judicial review in the instant case. Petitioner exhausted his administrative remedies by adhering to the procedures prescribed in N.C. Gen. Stat. § 115C-325, specifically, by requesting a hearing before the Board and subsequently appealing the Board's decision to the superior court in

accordance with N.C. Gen. Stat. § 115C-325(n). Unlike the plaintiff in *Church*, Petitioner did not prematurely resort to the courts by petitioning for judicial review before the Board could rule on the matter.

Petitioner's failure to argue the merits of his case at the hearing before the Board does not alter our conclusion. Petitioner presented evidence and arguments on the merits before the case manager, and these were part of the record upon which the Board reached its decision. There is no requirement in the exhaustive language of N.C. Gen. Stat. § 115C-325 that a plaintiff be present at the board hearing, much less raise arguments on the merits of his case, in order to exhaust his administrative remedies. Indeed, N.C. Gen. Stat. § 115C-325(j2)(6) (2011) generally prohibits parties from presenting new evidence at the board hearing, and N.C. Gen. Stat. § 115C-325(j2)(5) provides merely that the parties "shall be *permitted* to make oral arguments to the board" at the hearing, N.C. Gen. Stat. § 115C-325(j2)(5) (2011) (emphasis added). We therefore decline to extend our holding in *Church* to require a plaintiff to argue the merits of his case before the board in order to exhaust his administrative remedies.

Lastly, we note our language in *Church* indicating the plaintiff's failure "to present her side of the dismissal issue" before the board as one reason supporting our conclusion that the plaintiff failed to exhaust her available administrative remedies. *See Church*, 31 N.C. App. at 645, 230 S.E.2d at 771. Notwithstanding this language, it is clear from our analysis in that case that the primary basis for our ruling was the plaintiff's *bypass of the board hearing altogether* and not the plaintiff's failure to present arguments on the merits of her case before the board. *See id.* at 645-47, 230 S.E.2d at 771-72 (stressing the importance of adhering to the statutorily prescribed administrative scheme and stating, "To allow the courts to *prematurely interrupt or stop* these administrative proceedings would completely negate the effectiveness and purpose for which they were statutorily created"). Here, Petitioner did not bypass, interrupt, or prevent the Board hearing from taking place. Rather, Petitioner requested a hearing before the Board, the hearing took place, and the Board reached its decision on the merits of Petitioner's dismissal, all of which occurred *before* Petitioner appealed his case to the superior court. We hold this was sufficient to satisfy the exhaustion of administrative remedies requirement, and we proceed to address the merits of Petitioner's appeal.

B. The Board's Jurisdiction

[2] Petitioner contends the Board lacked jurisdiction to hear his case because the Board "failed to comply with the mandatory requirements of § 115C-325(j)(1) [sic]" in scheduling and conducting the Board hearing.

We recognize at the outset that a school board "is permitted to operate under a more relaxed set of rules than is a court of law" and is likewise afforded "a wider latitude in procedure." *Baxter v. Poe*, 42 N.C. App. 404, 409, 257 S.E.2d 71, 74 (1979). A former version of N.C. Gen. Stat. § 115C-325(j1)(3) sets forth the applicable timeframe for conducting a board hearing and provides, in pertinent part:

> Within two days after receiving the superintendent's recommendation and before taking any formal action, the board shall set a time and place for the hearing and shall notify the career employee by certified mail or personal delivery of the date, time, and place of the hearing. The time specified shall not be less than seven nor more than 10 days after the board has notified the career employee, unless both parties agree to an extension.

N.C. Gen. Stat. § 115C-325(j1)(3) (2009).[1]

Here, the superintendent notified Petitioner of his intent to recommend Petitioner's dismissal to the Board on 20 April 2010, Petitioner requested a hearing before the Board on 23 April 2010, and the matter came on before the Board on 27 May 2010. The record is silent with respect to several important facts, such as when the Board received the superintendent's recommendation and when the Board notified Petitioner of the hearing. Absent these facts, we cannot determine the relevant ("not [] less than seven nor more than 10 day[]") timeframe within which the Board hearing should have been held in order to comport with N.C. Gen. Stat. § 115C-325(j1)(3). Regardless, the record reveals correspondence between the parties indicating their agreement to schedule the hearing *outside* the statutorily prescribed period. In an email to the superintendent's attorney dated 28 April 2010, counsel for Petitioner stated: "We agreed that the time period would be extended through May 12th and that I am available on May 11 and May 12." The superintendent's attorney responded in an email dated 29 April 2010, stating, "We agreed that to accom-

1. N.C. Gen. Stat. § 115C-325(j1)(3) has been amended to provide that "[t]he time specified [for the board hearing] *shall not be less than 10 nor more than 30 days* after the board has notified the career employee, unless the parties agree to an extension." N.C. Gen. Stat. § 115C-325(j1)(3) (2011) (emphasis added).

modate schedules that we would extend the hearing date beyond the 10 day period set forth in the statute and that I would check my availability and that of the board to conduct the hearing May 11 or 12 which you have open." This correspondence, which is the only evidence of the parties' communication on this issue, indicates the parties agreed to conduct the Board hearing outside the statutory period prescribed in N.C. Gen. Stat. § 115C-325(j1)(3), but failed to reach consensus regarding the date or dates on which the hearing would be held. As N.C. Gen. Stat. § 115C-325(j1)(3) does not contemplate this precise situation, we conclude the Board's decision to conduct the hearing on 27 May 2010, approximately two weeks later than Petitioner's proposed dates for the hearing, was not unreasonable in light of the parties' inability to set a date. Significantly, we note that even if the Board erred in conducting the hearing outside the statutory period, we would nevertheless reject Petitioner's position on this issue, as Petitioner has failed to offer any argument concerning how he was prejudiced by the Board's delay. *See Davis v. Pub. Sch. of Robeson County, Bd. of Educ.*, 115 N.C. App. 98, 102, 443 S.E.2d 781, 784 (1994) (rejecting the petitioner's argument that the Board violated various sections of N.C. Gen. Stat. § 115C-325 where the petitioner was not prejudiced or "unduly prejudiced" by the alleged procedural violations). Absent a showing of prejudice, Petitioner's argument must fail and is accordingly overruled.

C. The Board's Review of the Record

[3] Petitioner challenges the Board's review of the record in reaching its decision and contends "[t]he Board's rejection of the case manager's report was contrary to the statute and the Ferris [sic] decision." Petitioner argues the Board was required to make alternative findings of fact or to remand to the case manager for additional findings upon determining the case manager's findings were not supported by substantial evidence, but instead "relied on the recitation of the Superintendent's attorney of only that portion of the record that supported the Superintendent to reach its decision."

N.C. Gen. Stat. § 150B-51 provides that this Court may reverse or modify the Board's decision if it was "[m]ade upon unlawful procedure." N.C. Gen. Stat. § 150B-51(b)(3) (2011); *see Farris v. Burke County Bd. of Educ.*, 355 N.C. 225, 236, 559 S.E.2d 774, 781 (2002) (reviewing the Board's action "to determine whether its decision was based upon 'wrongful procedure.' "). We review the procedure employed by the Board *de novo*, *see* N.C. Gen. Stat. § 150B-51(c), and

we accordingly "consider[] the matter anew and freely substitute[] [our] own judgment for that of the [Board]." *In re Appeal of Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

N.C. Gen. Stat. § 115C-325(j2)(7) governs the Board's review of the case manager's findings of fact and provides, in pertinent part:

> The board shall accept the [case manager's] findings of fact unless a majority of the board determines that the findings of fact are not supported by substantial evidence when reviewing the record as a whole. In such an event, the board shall make alternative findings of fact. If a majority of the board determines that the [case manager] did not address a critical factual issue, the board may remand the findings of fact to the [case manager] to complete the report to the board.

N.C. Gen. Stat. § 115C-325(j2)(7) (2011).

Our review of the record indicates the Board rejected the case manager's findings of fact that it deemed unsupported by substantial evidence and substituted those findings with the alternative findings of fact submitted at the Board hearing by counsel for the superintendent. Both "[t]he unsupported and alternative findings of fact [were] noted in the transcript of the Board hearing as presented by the attorney representing the Superintendent." This equated to the Board making alternative findings of fact in accordance with N.C. Gen. Stat. § 115C-325(j2)(7). Moreover, the instant case is distinguishable from *Farris*, the case upon which Petitioner predicates his argument on this issue. There, our Supreme Court held that the respondent board of education failed to comply with N.C. Gen. Stat. § 115C-325(j2)(7) by making *additional*, rather than alternative, findings of fact to those already made by the case manager and then mislabeling the additional findings as "alternative findings of fact." *Farris*, 355 N.C. at 238, 559 S.E.2d at 782. The Board here appropriately *replaced* the findings it deemed insufficiently supported by the evidence, and we conclude the Board's actions in this respect were sufficient to comply with N.C. Gen. Stat. § 115C-325(j2)(7).

Furthermore, Petitioner's contention that the Board accepted the superintendent's recommendation to terminate his employment based solely upon the superintendent's arguments before the Board and without considering the record as a whole is without merit. N.C. Gen. Stat. § 115C-325(j2) sets forth the "procedures [that] shall apply to a hearing conducted by the board" and provides that the Board shall consider the following in reaching its decision:

> a. The whole record from the hearing held by the case manager, including a transcript of the hearing, as well as any other records, exhibits, and documentary evidence submitted to the case manager at the hearing.
>
> b. The case manager's findings of fact, including any supplemental findings prepared by the case manager . . . .
>
> c. The case manager's recommendation as to whether the grounds . . . submitted by the superintendent are substantiated.
>
> d. The superintendent's recommendation and the grounds for the recommendation.

N.C. Gen. Stat. § 115C-325(j2)(2) (2009). The Board shall also consider written statements submitted by the parties at least three days prior to the Board hearing in addition to the parties' oral arguments presented before the Board. N.C. Gen. Stat. § 115C-325(j2)(4)-(5) (2011).

Here, Petitioner offers no evidence in support of his assertion that the Board considered only the superintendent's arguments at the Board hearing in reaching its decision and, indeed, the evidence before us indicates that the Board reviewed the record as required by N.C. Gen. Stat. § 115C-325 in reaching its decision. The Board's 1 June 2010 resolution, for instance, states that the "Board members had the opportunity to review the whole record of the case manager hearing" prior to the Board hearing. Furthermore, the Board reached its decision based upon the "Board Record," which, as detailed in the Board's resolution, consisted of the transcript of the case manager hearing, copies of all exhibits, documents, and records submitted to the case manager, the case manager's findings of fact and recommendation, the superintendent's recommendation, and the testimony presented at the Board hearing. This indicates the Board considered all of the information mandated for consideration by N.C. Gen. Stat. § 115C-325(j2) and Petitioner offers no evidence to the contrary. Petitioner's argument is overruled.

Lastly, we note Petitioner dedicates a substantial portion of the "statement of facts" section of his brief to describing the evidence relevant to his dismissal, but fails to contest the sufficiency of the evidence to support his dismissal in a manner sufficient to preserve the issue for appellate review.[2] Petitioner provides no argument specific to any one of the superintendent's three grounds for dismissal but

2. We decline to address arguments improperly interposed in the facts section of Petitioner's brief. *See* N.C. R. App. P. 28(b)(5).

rather states, in conclusory fashion, that "[t]he record shows that [Petitioner's] actions and performance, taken in the context of the conduct of his peers including his fellow assistant principals was not inadequate, insubordinate, or harassing." Petitioner's recitation of the evidence in the facts section of his brief and failure to present reason or authority in the argument section of his brief is insufficient to preserve this argument for appellate review, and we accordingly deem the issue abandoned. *See* N.C. R. App. P. 28(b)(6).

IV. Conclusion

For the foregoing reasons, the trial court's order is

Affirmed.

Chief Judge MARTIN and Judge ELMORE concur.

STATE OF NORTH CAROLINA v. RICHARD COLT ROLLINS

No. COA11-1437

(Filed 17 July 2012)

1. Constitutional Law—right to public trial—courtroom temporarily closed—insufficient findings of fact

The trial court violated defendant's Sixth Amendment right to a public trial in a non-felonious breaking or entering, first-degree kidnapping, second-degree rape, and resisting a public officer case when the trial judge temporarily closed the courtroom while the victim testified. The trial court failed to make sufficient findings of fact in accordance with *Waller v. Georgia*, 467 U.S. 39, to allow the Court of Appeals to review the propriety of the trial court's decision to close the proceedings. The case was remanded for a hearing on the propriety of the closure.

2. Sentencing—prior record level—out-of-state conviction—not sufficiently similar—prejudicial

The trial court erred in a non-felonious breaking or entering, first-degree kidnapping, second-degree rape, and resisting a public officer case by determining that defendant was a prior record level VI for sentencing purposes. Defendant's Florida conviction

for burglary was not sufficiently similar to the corresponding offense in this state and the error was not harmless since defendant would have been considered a lower level offender.

Appeal by defendant from judgments entered 28 September 2010 by Judge C. Philip Ginn in Henderson County Superior Court. Heard in the Court of Appeals 25 April 2012.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for the State.

Paul F. Herzog for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Richard Colt Rollins appeals from judgments entered 28 September 2010 after a jury found him guilty of non-felonious breaking or entering, first degree kidnapping, second degree rape, and resisting a public officer. Defendant argues that his Sixth Amendment right to a public trial was violated when the trial court temporarily closed the courtroom during the victim's testimony and that the trial court erred in determining that a prior out-of-state conviction was sufficiently similar to the corresponding North Carolina offense when determining defendant's prior felony record level. After careful review, we reverse and remand.

Background

The State's evidence tended to establish the following facts: M.S. and defendant met in June 2007 at a Seventh Day Adventist "camp meeting." Defendant had recently been released from prison. The two began dating and engaging in a sexual relationship. In November 2007, the relationship began to deteriorate. M.S. told defendant that she no longer wanted to have a sexual relationship outside of marriage and that she wanted defendant to do more to reintegrate himself into the community. M.S. and defendant continued to see each other, but defendant began having angry outbursts, after which he would become remorseful and apologize to M.S. On one occasion, defendant threatened to kill M.S., and on another occasion, M.S. feared that defendant would rape her during one of his angry outbursts.

On 3 July 2008, M.S. arrived at her home and found defendant working on a drainage ditch in her yard. She forcefully told defendant to leave and not return to her home. On the evening of 4 July 2008, M.S. went on a long walk, and, when she returned to her home, she

saw defendant's car parked in her yard. M.S. went into the house without encountering defendant in the yard; however, a short while later, defendant called to her from the back of her house. M.S. asked defendant to leave, and he became agitated. M.S. tried to leave the house, but defendant prevented her from doing so. An argument ensued, during which time M.S.'s friend, Tom Sitler, called. Mr. Sitler could tell that M.S. was upset, and he asked her if defendant was there and whether she wanted him to call the police. M.S. responded yes to both inquiries. Mr. Sitler called a mutual friend, Paulette Love, who in turn called the police.

M.S. testified that before the police arrived, defendant ordered her to undress, ripped her shirt, pulled her into the back bedroom, and raped her. When the police arrived, they heard a woman crying and saying " 'don't hurt me.' " The officers knocked on the glass storm door, and defendant approached the door wearing his boxers. Defendant then closed the exterior door and engaged the deadbolt. The deputies knocked down the two doors and took defendant into custody. Defendant claimed that the sexual encounter that took place on 4 July 2008 was consensual and that he bolted the door when he saw the officers because neither he nor M.S. had called the police.

Defendant was charged with burglary, first degree kidnapping, second degree rape, and resisting a public officer. On 28 September 2008, defendant was convicted of non-felonious breaking or entering, first degree kidnapping, second degree rape, and resisting a public officer. The trial court arrested judgment on the first degree kidnapping conviction and entered judgment on second degree kidnapping, sentencing defendant to 48-67 months imprisonment. The charges of second degree rape, non-felonious breaking or entering, and resisting an officer were consolidated and defendant was sentenced to 156-197 months imprisonment. Defendant gave oral notice of appeal.

Discussion

I.

[1] Defendant argues that the trial court violated his Sixth Amendment right to a public trial when the trial judge temporarily closed the courtroom while M.S. testified concerning the alleged rape perpetrated by defendant without engaging in the four-part test set forth in *Waller v. Georgia*, 467 U.S. 39, 81 L. Ed. 2d 31 (1984). We agree.

Prior to M.S.'s testimony, the prosecutor requested that the courtroom be closed, citing N.C. Gen. Stat. § 15-166 (2011), which provides:

> In the trial of cases for rape or sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case.

The prosecutor stated the following rationale for closure:

> Because of the delicacy of the issues regarding rape, force, everything else which is in regards to rape and sex offenses, that's why this type of classification of offenses are included with a specific statute such as this. . . . I would urge the [c]ourt to close the courtroom during [M.S.'s] testimony as it presents an extreme emotional hardship on her to have to testify period. Even in front of the Defendant it presents a very difficult—difficulty for her. Obviously, she knows she has to do it and [the] confrontation clause certainly wouldn't allow for the Defendant not to be present, but for other spectators, other participants in the trial, it's simply not necessary that they be in the courtroom during her testimony.

The prosecution asked that one of M.S.'s supporters be allowed to remain in the courtroom, but the trial court stated that if defendant was not permitted to have a supporter remain in the courtroom, then neither was M.S. The prosecution then moved to remove all spectators, including M.S.'s supporters. The following exchange occurred between the trial court and defense counsel:

> [Defense counsel]: Well, we object. Court should be open. We've heard testimony already from officers who have talked to her, we've heard testimony from her friends who've talked to her. Nothing—we haven't heard anything that's strange or need to be really embarrassing. But I have no case law.
>
> [Trial court]: I don't know that there is any case law, because it's basically—as I understand it . . . a discretionary call . . . . I don't know that . . . a [c]ourt would abuse it's [sic] discretion in either way by ruling either way in this regard.

The trial court subsequently agreed "to exclude all unnecessary parties from the courtroom during the testimony of the alleged victim . . . ."

As a preliminary matter, the State claims that defendant has not preserved his constitutional argument for appeal. We disagree. Defendant objected based on his contention that "[c]ourt should be open." We hold that it was apparent from the context that defendant

was objecting to the prosecution's attempt to close the trial in violation of defendant's constitutional right to a public trial. *See* N.C.R. App. P. 10(a)(1) (2012) (stating that an objection is preserved so long as the specific ground for the objection is "apparent from the context"). Defendant's argument is, therefore, preserved for appellate review.

We now turn to whether the trial court erred in closing the courtroom during M.S.'s testimony. This Court reviews alleged constitutional violations *de novo*. *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007). Pursuant to the Sixth Amendment of the United States Constitution, a criminal defendant is entitled to a "public trial." U.S. Const. amend. VI. "[T]he guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." *In re Oliver*, 333 U.S. 257, 270, 92 L. Ed. 682, 692 (1948).

> "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . ."

Id. at 270 n.25, 92 L. Ed. at 693 n.25 (quoting 1 [sic] Cooley, Constitutional Limitations 647 (8th ed. 1927)). "In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury." *Waller*, 467 U.S. at 46, 81 L. Ed. 2d at 38.

"The violation of the constitutional right to a public trial is a structural error, not subject to harmless error analysis." *Bell v. Jarvis*, 236 F.3d 149, 165 (4th Cir. 2000); *see Waller*, 467 U.S. at 49 n.9, 81 L. Ed. 2d at 40 n.9. However, "the right to an open trial may give way in certain cases to other rights or interests, such as the defend-ant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller*, 467 U.S. at 45, 81 L. Ed. 2d at 38; *see also Bell v. Evatt*, 72 F.3d 421, 433 (4th Cir. 1995) ("Although there is a strong presumption in favor of openness, the right to an open trial is not absolute. The trial judge may impose reasonable limitations on access to a trial in the interest of the fair administration of justice."). "Such circumstances will be rare, however, and the balance of interests must be struck with special care." *Waller*, 467 U.S. at 45, 81 L. Ed. 2d at 38.

Consequently, while N.C. Gen. Stat. § 15-166 permits the trial court to close the courtroom during a rape victim's testimony, the

trial court must balance the interests of the prosecutor with the defendant's constitutional right to a public trial. *Waller*, 467 U.S. at 45, 81 L. Ed. 2d at 38. The Supreme Court in *Waller* set forth the following four-part test that the trial court must engage in while balancing these competing interests: (1) "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced," (2) "the closure must be no broader than necessary to protect that interest," (3) "the trial court must consider reasonable alternatives to closing the proceeding," and (4) "it must make findings adequate to support the closure." *Id.* at 48, 81 L. Ed. 2d at 39.

This Court has recognized the applicability of the *Waller* test when allowing a courtroom closure pursuant to N.C. Gen. Stat. § 15-166. *See, e.g.*, *State v. Smith*, 180 N.C. App. 86, 98, 636 S.E.2d 267, 275 (2006); *State v. Starner*, 152 N.C. App. 150, 154, 566 S.E.2d 814, 816-17, *cert. denied*, 356 N.C. 311, 571 S.E.2d 209 (2002); *State v. Jenkins*, 115 N.C. App. 520, 525, 445 S.E.2d 622, 625, *disc. review denied*, 337 N.C. 804, 449 S.E.2d 752 (1994).

In the present case, defendant claims that the trial court failed to make findings adequate to support the closure—the fourth prong of the *Waller* test. It is undisputed that the trial court made no findings regarding his decision to close the courtroom during M.S.'s testimony, and it appears from his statement to defense counsel that he was not aware of the need to engage in the *Waller* four-part test.

The only North Carolina state court decision on point with regard to findings of fact is *Jenkins*, 115 N.C. App. at 525-26, 445 S.E.2d at 625, where this Court held that the failure to make findings of fact in accordance with the fourth prong of the *Waller* test is error. Prior to addressing the defendant's argument that he was denied his right to a public trial, the Court in *Jenkins* remanded the case for a new trial on another basis; therefore, the Court merely instructed the trial court to follow the mandates of *Waller* if it decided to close the proceedings during the new trial. *Id.* at 526, 445 S.E.2d at 625. The *Jenkins* Court did not provide the trial court with guidance on how detailed the findings of fact must be. Arguably, the holding in *Jenkins* that the failure to make findings is error constitutes dicta since it was not essential to the outcome in that case. *State v. Sanchez*, 175 N.C. App. 214, 218, 623 S.E.2d 780, 782 (2005). Before reaching our decision in the present case, we will examine the holdings in other jurisdictions.

In conducting a survey of how various courts have ruled on the sufficiency of findings of fact, it is apparent that there is no bright-

line rule. Many courts have, like the *Jenkins* Court, held that the failure to make findings is error. *See*, *e.g.*, *Carter v. State*, 738 A.2d 871, 878 (Md. 1999) ("Even if there were a sufficient basis in this case to close the courtroom, ordinarily, the trial judge must have stated the reason or reasons for doing so on the record. Only in that way will the public be able to be aware of the reasons for closure, and an appellate court able to review the adequacy of those reasons."); *Minnesota v. McRae*, 494 N.W.2d 252, 259 (Minn. 1992) ("The record does not disclose evidence or findings of a showing that closure was necessary to protect the witness or ensure fairness in the trial. On the record before us we cannot say that there has been compliance with the requirements set out in *Waller*[.]").

However, some courts have held that the failure to make findings of fact is not reversible error so long as the reviewing court can glean or infer from the record whether the closure was proper. *See*, *e.g.*, *Woods v. Kuhlmann*, 977 F.2d 74, 77-78 (2nd Cir. 1992) ("In light of the information gleaned both from the conference held in chambers with the judge, prosecutor and defense counsel, and from the short exchange between the judge and [the witness], we conclude that the record is sufficient to support the partial, temporary closure of petitioner's trial."); *United States v. Osborne*, 68 F.3d 94, 99 (5th Cir. 1995) (admonishing the trial court for failing to make detailed findings of fact, but holding that the reason behind the closure could be "infer[red]" from the record); *United States v. Farmer*, 32 F.3d 369, 371 (8th Cir. 1994) ("In this circuit, specific findings by the district court are not necessary if we can glean sufficient support for a partial temporary closure from the record.").

Additionally, some courts have required the trial court to enter detailed findings of fact to justify closure. *See*, *e.g.*, *McIntosh v. United States*, 933 A.2d 370, 379-80 (D.C. Cir. 2007) ("In this case, the court's general reference to the child's vulnerability is not sufficient to meet the fourth *Waller* requirement, nor does it show that the trial court adequately considered other important interests before ordering the courtroom closed."); *State v. Klem*, 438 N.W.2d 798, 802 (N.D. 1989) ("*Waller* requires that a hearing be conducted and that findings be made before a trial is closed to the public.").

The Fourth Circuit has also examined this matter and we find its logic to be persuasive. In *Bell*, 236 F.3d at 155, the trial court conducted a hearing on the prosecution's motion to close the courtroom during the minor victim's testimony. The trial court decided to temporarily close the trial, finding that the child's testimony regarding

repeated sexual abuse by a relative was "of an apparent delicate nature." *Id.* at 171. In determining that this finding was sufficient, the court stated:

> In a case involving long-standing sexual abuse of a minor by a family member, when the trial judge has obviously made a particularized determination that closure is appropriate and has articulated the *basic rationale* for closing the courtroom, additional "findings" would be little more tha[n] a statement of the obvious.

Id. at 172 (emphasis added). The court further held that appellate review is not limited to examining the findings; rather, the findings may be "viewed in conjunction with the known circumstances of the case and the record developed[.]" *Id.* at 174. We do not interpret *Bell* to mean that in *every* case the trial court need only state the "basic rationale." The trial judge must "evaluate, on a case-by-case basis, the propriety of a temporary closure." *Id.* at 171. We do interpret *Bell* to mean that there must be adequate findings, coupled with the record evidence, such that a reviewing court can examine the trial court's ruling. As the court noted, "the better course" is for the trial court to make "detailed findings." *Id.* at 174.

Based on our review of the applicable caselaw, we adhere to *Jenkins* and hold that the absence of findings entirely is error. We further hold, based on the logic of the court in *Bell*, that while the trial court need not make exhaustive findings of fact, it must make findings sufficient for this Court to review the propriety of the trial court's decision to close the proceedings. *See also Fayerweather v. Moran*, 749 F.Supp. 43, 46 (D.R.I. 1990) ("All that [the trial judge] was required to do was to articulate those findings in terms specific enough to permit a reviewing court to determine the basis for the order."). We caution trial courts to avoid making "broad and general" findings that impede appellate review. *Waller*, 467 U.S. at 48, 81 L. Ed. 2d at 40.

Having determined that the trial court erred by not entering the *Waller* findings, we must now decide how to remedy this error.[1] In *Waller*, the Supreme Court held that "the remedy should be appropriate to the violation." *Id.* at 50, 81 L. Ed. 2d at 41. There, a suppression hearing was closed to the public, not the trial. *Id.* The Court determined that a new trial would be a "windfall for the defendant" and elected to remand to the trial court for a new suppression hearing in which "significant portions" of the hearing would be open to the pub-

1. We need not address the other three prongs of the *Waller* test.

lic. *Id*. Since *Waller*, there has been a split of authority concerning the remedy in cases such as this where the trial court failed to make findings sufficient to support the closure. In *McRae*, 494 N.W.2d at 260, the court interpreted *Waller* and stated: "If a remand for a hearing on whether there was a specific basis for closure might remedy the violation of closing the trial without an adequate showing of the need for closure, then the initial remedy is a remand, not a retrial."

Given the limited closure in the present case and the fact that the trial court did not utilize the *Waller* four-part test, we hold that the proper remedy is to remand this case for a hearing on the propriety of the closure. The trial court must engage in the four-part *Waller* test and make the appropriate findings of fact regarding the necessity of closure during M.S.'s testimony in an order. If the trial court determines that the trial should not have been closed during M.S.'s testimony, then defendant is entitled to a new trial. If the trial court determines that the trial was properly closed during M.S.'s testimony on remand, then defendant may seek review of the trial court's order by means of an appeal from the judgments that the trial court will enter on remand following the resentencing hearing as set out in the next section of this opinion.

II.

[2] Next, defendant argues that the trial court erred in determining that he was a prior record level VI for sentencing purposes because defendant's Florida conviction for burglary is not sufficiently similar to the corresponding offense in this state. We agree.

"The trial court's assignment of a prior record level is a conclusion of law which we review *de novo*." *State v. Goodwin*, 190 N.C. App. 570, 576, 661 S.E.2d 46, 50 (2008). Pursuant to N.C. Gen. Stat. § 15A–1340.14(e) (2011):

> 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.

A defendant may stipulate that he or she "has been convicted of a particular out-of-state offense and that this offense is either a felony or a misdemeanor under the law of that jurisdiction." *State v. Bohler*,

198 N.C. App. 631, 638, 681 S.E.2d 801, 806 (2009), *disc. review denied*, ____ N.C. ____, 691 S.E.2d 414 (2010). However,

> the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court, and stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.

State v. Moore, 188 N.C. App. 416, 426, 656 S.E.2d 287, 293 (2008) (citation and quotation marks omitted).

Here, contrary to defendant's contention, the trial court did not rely on defendant's stipulation; rather, the trial court explicitly found that the out-of-state convictions were "sufficiently similar in nature to those that would have been of the same nature here in North Carolina . . . ." Still, defendant argues that the crimes are not, in fact, sufficiently similar.

In North Carolina, burglary is defined as "the breaking and entering of the dwelling house or sleeping apartment of another in the nighttime with intent to commit a felony therein, whether such intent be executed or not." *State v. Bumgarner*, 147 N.C. App. 409, 413, 556 S.E.2d 324, 328 (2001); N.C. Gen. Stat. § 14-51 (2011). Florida defines burglary in pertinent part as "[e]ntering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter[.]" Fla. Stat. § 810.02(b)(1) (2011). The Florida statute is broader than the North Carolina statute in that it encompasses more than a dwelling house or sleeping apartment. Significantly, the Florida statute does not require that the offense occur in the nighttime or that there be a breaking as well as an entry. Based on these differences, we hold that the Florida burglary statute is not sufficiently similar to North Carolina's burglary statute; therefore, the trial court erred in assigning four points to the Florida conviction when determining defendant's prior record level.

We find that the Florida statute is sufficiently similar to N.C. Gen. Stat. § 14-54 (2011), felonious breaking or entering, a Class H felony, because it encompasses any building and does not have to occur in the nighttime. *See generally State v. Haymond*, 203 N.C. App. 151, 168, 691 S.E.2d 108, 122 (noting the elements of felonious breaking or entering pursuant to N.C. Gen. Stat. § 14-54(a) as: "(1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein." (internal quotation marks and citation omitted)),

disc. review denied, 364 N.C. 600, 704 S.E.2d 275 (2010). Had the trial court correctly determined that defendant's Florida conviction was sufficiently similar to North Carolina's breaking or entering statute, defendant would have received a total of 17 prior record points, instead of 19 points, which would have made him a Level V offender instead of a Level VI offender for sentencing purposes. Therefore, not only did the trial court err in finding the Florida statute sufficiently similar to North Carolina's burglary statute, but this error was not harmless since defendant would be considered a lower level offender. *See State v. Lindsay*, 185 N.C. App. 314, 315-16, 647 S.E.2d 473, 474 (2007) (noting that this Court applies a harmless error analysis to prior level record points whereby the amount of deducted points must affect the defendant's record level to require a remand for a new sentencing hearing). Therefore, we reverse and remand for a new sentencing hearing.

Conclusion

Because the trial court failed to utilize the *Waller* four-part test, we remand this case for a hearing on the propriety of the closure. Additionally, we reverse and remand for a new sentencing hearing.

Remanded in part; Reversed and Remanded in part.

Judges STROUD and ERVIN concur.

JOHN L. FONTANA, M.D., PLAINTIFF v. SOUTHEAST ANESTHESIOLOGY CONSULTANTS, P.A., DR. RICHARD L. GILBERT, DR. MICHAEL T. GILLETTE, DR. JOSHUA S. MILLER, AND DR. RICHARD YEVAK, AMERICAN ANESTHESIOLOGY OF THE SOUTHEAST, PLLC, MEDNAX SERVICES, INC. AND MEDNAX, INC., DEFENDANTS

No. COA11-1494

(Filed 17 July 2012)

1. Appeal and Error—interlocutory orders and appeals—denial of arbitration—substantial right

Defendant's appeal from the trial court's order denying arbitration in an employment termination case was immediately appealable because it involved a substantial right, the right to arbitrate claims, which might have been lost had appeal been delayed.

2. Arbitration and Mediation—employment termination—scope of arbitration agreement

The trial court erred in an employment termination case by denying arbitration for plaintiff's breach of employment contract claim against defendant Southeast Anesthesiology Consultants. Plaintiff's remaining claims against the various defendants did not pertain to his termination, and therefore, did not fall within the scope of the arbitration clause.

3. Arbitration and Mediation—enforceability—breach of employment contract

The trial court did not err in an employment termination case by failing to find that an arbitration provision was enforceable by all defendants. The only claim subject to the arbitration provision was the breach of employment contract, which was only between defendant Southeast Anesthesiology Consultants and plaintiff.

4. Contracts—breach of employment contract—subject to arbitration—stay

The trial court erred in an employment termination case by failing to stay a breach of employment contract action pending arbitration. The breach of employment contract claim was subject to arbitration while the remaining claims were severable.

Appeal by defendants from order entered 1 June 2011 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 April 2012.

Hamilton Stephens Steele & Martin, PLLC, by Jackson N. Steele and Mark R. Kutny, for plaintiff-appellee.

Ogletree Deakins Nash Smoak & Stewart, by H. Bernard Tisdale III, for defendants-appellants.

HUNTER, Robert C., Judge.

Southeast Anesthesiology Consultants, P.A. ("SAC"), American Anesthesiology of the Southeast, PLLC ("AAS"), Mednax Services, Inc. ("MSI"), Mednax, Inc. ("MDX"), Dr. Richard Gilbert, Dr. Michael Gillette, Dr. Joshua Miller, and Dr. Richard Yevak (collectively "defendants")[1] appeal from the trial court's 1 June 2011 order denying defend-

1. The named physicians were shareholders of SAC.

ants' motion to stay the litigation and compel arbitration. After careful review, we affirm in part and reverse and remand in part.

Background

The record tends to establish the following facts: Dr. John Fontana ("plaintiff") received a letter dated 29 August 2006 which detailed an offer of employment from SAC. The letter contained, *inter alia*, the compensation package plaintiff was to receive, a benefits summary, a non-compete clause, and the following statement: "You will be eligible for consideration as a shareholder solely of Southeast Anesthesiology Consultants, PA after six (6) years." Plaintiff claimed in his complaint that he discussed the six-year "partnership track" in detail with Drs. Gilbert, Gillette, and Yevak prior to receiving the 29 August letter. Plaintiff asserted that he was assured that SAC would not be sold before he became a partner. The 29 August letter was signed by plaintiff, Dr. Gillette, and Dr. Gilbert on 17 September 2006. Plaintiff refers to this letter as the "letter agreement." In his complaint, plaintiff also refers to a "partnership agreement" that was entered into in August 2006. However, the partnership agreement was an oral agreement.

Plaintiff subsequently signed an employment contract ("employment contract") with SAC, which stated that plaintiff's employment with SAC would begin on 1 March 2007 and that the contract of employment would automatically renew for successive one-year terms. The employment contract informed plaintiff that his employment could be terminated "at any time for cause" and that the termination would be effective immediately. The employment contract listed eight nonexclusive reasons for which defendant could be terminated for cause. The contract further stated that plaintiff could be terminated without cause upon 90 days written notice.

The employment contract did not contain the language that was present in the 29 August letter indicating that plaintiff would be eligible for consideration as a shareholder after six years of employment; however, the letter stated plaintiff's salary on an increasing scale for six years. By year six, plaintiff was contracted to receive 70% of full partnership compensation. The contract contained a merger clause stating that the contract "constitute[d] the entire agreement between the parties . . . and supersede[d] any and all other agreements, either oral or in writing[.]"

The contract also contained an arbitration provision which stated, in pertinent part:

> Arbitration. Except as otherwise provided in this Agreement, the parties shall attempt in good faith to resolve any dispute arising out of or relating to the termination of this Agreement promptly by negotiations between representatives of both parties who have authority to settle the controversy. Any party may give the other party written notice of any dispute not resolved in the normal course of the employment relationship.
>
> . . . .
>
> Except as otherwise provided in this Agreement, if the parties are unable to resolve the dispute regarding termination of Employee by negotiations as set forth above, *any and all such disputes regarding termination of Employee*, including any termination dispute concerning any federal or state discrimination, workplace or other law, regulation, or statute, if applicable, shall be settled by binding arbitration, conducted on a confidential basis, under the Rules of Arbitration of the American Arbitration Association by one arbiter appointed in accordance with such rules. *This arbitration shall be solely limited to disputes regarding the termination of employee as described above.* The arbitration shall be held in Charlotte, North Carolina. The parties agree to use reasonable efforts to agree upon an arbiter knowledgeable as to the business of anesthesiology, pain management, physical medicine and rehabilitation, and critical care medicine. (Emphasis added.)

The employment contract was drafted by SAC, and plaintiff was not permitted to make changes to the employment contract. Only the employment contract contained an arbitration clause.

Plaintiff contends that SAC began negotiations in 2008 to sell SAC contrary to assurances made to him that SAC would not be sold before plaintiff achieved partner status. Plaintiff claims that he was not informed in 2008 or 2009 that SAC may be sold and that his ability to achieve partner status was in jeopardy. In 2010, SAC entered into an agreement with MSI and MDX for the sale of 100% of the shares of SAC.[2] The sale was approved by the SAC Board of Directors in August 2010. On 16 September 2010, AAS and MDX sent plaintiff a letter stating that it would be "assuming" plaintiff's employment contract. Plaintiff was asked by AAS to sign a new employment contract under which he would receive a fixed salary, unlike the original con-

2. It appears from the record that MSI is a wholly owned subsidiary of MDX. AAS is a wholly owned subsidiary of MSI.

tract which provided for a six-year graduated salary. On 28 September 2010, plaintiff sent a letter to MDX stating:

> Your proposal is basically unfair to a 4th year partnership track physician such as myself and is contrary to the representations by SAC which led me to join the practice in 2007 and to remain there for the last three and a half years. As a result, I will not be signing anything that changes my and SAC's obligations to each other.

By an undated letter mailed on 6 October 2010, SAC informed plaintiff that his employment with SAC was terminated effective 1 October 2010. The letter did not state the reason for termination. Plaintiff contends that he did not receive 90 days notice and that his "termination was not discussed or approved by SAC's Executive Committee and was never approved by SAC's Board of Directors as was required by Article V, Section I of SAC's Bylaws."

On 19 January 2011, plaintiff filed a complaint alleging the following causes of action: (1) fraudulent inducement against SAC, Dr. Gilbert, Dr. Gillette, Dr. Miller, and Dr. Yevak; (2) actual fraud against SAC, Dr. Gilbert, Dr. Gillette, Dr. Miller, and Dr. Yevak; (3) constructive fraud against SAC, Dr. Gilbert, Dr. Gillette, Dr. Miller, and Dr. Yevak; (4) punitive damages against SAC, Dr. Gilbert, Dr. Gillette, Dr. Miller, and Dr. Yevak; (5) negligent misrepresentation against SAC, Dr. Gilbert, Dr. Gillette, Dr. Miller, and Dr. Yevak; (6) breach of partnership agreement against SAC; (7) breach of letter agreement against SAC; (8) breach of employment agreement against SAC; (9) civil conspiracy against all defendants; (10) tortious interference against AAS, MSI, and MDX; (11) defamation against SAC, AAS, Dr. Gilbert, and Dr. Yevak; (12) unfair and deceptive acts or practices against all defendants; and (13) declaratory judgment against SAC and AAS.

Defendants subsequently filed a motion to dismiss plaintiff's complaint, a motion to strike allegations contained in plaintiff's complaint, and a motion to stay the litigation and to compel arbitration ("motion to compel arbitration"). A hearing was held on the motions on 9 May 2011. In an order filed 1 June 2011, the trial court denied all of defendants' motions. The trial concluded as a matter of law:

> 3. . . . [T]he specific controversy set forth in the Complaint is not the subject of the limited agreement to arbitrate in the Employment Agreement. The arbitration clause in the Employment Agreement, by its terms, is limited to only disputes involv-

> ing the termination of Dr. Fontana's employment with SAC based on his fitness to practice medicine.
>
> . . . .
>
> 7. The Court also concludes that one who is not a party to an arbitration agreement lacks standing to compel arbitration. In so doing, the Court notes that non-signatories to an arbitration agreement may be bound by or enforce an arbitration agreement executed by other parties under theories arising out of common law principles of agency. Under the theory of agency, an agent can assume the protection of the contract which the principal has signed. Courts have applied this principle to allow for non-signatory agents to avail themselves of the protection of their principal's arbitration agreement. Thus, even if the language of the arbitration agreement applied to the claims in the Complaint, only SAC and its agents have standing to enforce the arbitration agreement. MSI and MDX are not the agents of SAC.
>
> 8. The claims set forth in the Complaint are not subject to arbitration given the limited language of the arbitration agreement in the Employment Agreement.

Thus, the trial court stated two bases for denying defendants' motion to arbitrate: (1) plaintiff's claims were not subject to arbitration, and (2) the arbitration provision of the employment contract was not enforceable by MSI and MDX. Defendants gave timely notice of appeal from this order.

Discussion

I. Interlocutory Nature of Appeal

[1] Defendants' appeal is interlocutory. "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. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). A party may properly appeal an interlocutory order under two circumstances:

> First, the trial court may certify that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. N.C.G.S. § 1A–1, Rule 54(b) [2011]. Second, a party may appeal an interlocutory order that "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment."

Dep't of Transp. v. Rowe, 351 N.C. 172, 174–75, 521 S.E.2d 707, 709 (1999) (quoting *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381). This Court has held that "an order denying arbitration is immediately appealable because it involves a substantial right, the right to arbitrate claims, which might be lost if appeal is delayed." *Martin v. Vance*, 133 N.C. App. 116, 119, 514 S.E.2d 306, 308 (1999). Consequently, we review defendants' appeal.

II. Motion to Compel Arbitration

[2] Defendants claim that a right to arbitrate exists as to all claims against all defendants pursuant to the Federal Arbitration Act and the North Carolina Revised Uniform Arbitration Act. We hold that the only claim subject to arbitration is plaintiff's claim for breach of the employment contract against SAC to the extent this claim pertains to plaintiff's termination.[3]

"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." *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001). This Court has held that determining whether a dispute is subject to an arbitration agreement involves "a two-part inquiry: (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement." *Hobbs Staffing Servs., Inc. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 225, 606 S.E.2d 708, 710 (2005) (internal quotation marks omitted). "Strong public policy favoring settlement of disputes by arbitration requires us to resolve any doubts concerning the scope of arbitrable issues in favor of arbitration." *Servomation Corp. v. Hickory Const. Co.*, 316 N.C. 543, 546, 342 S.E.2d 853, 855 (1986). However, "[p]ursuant to well settled contract law principles, the language of the arbitration clause should be strictly construed against the drafter of the clause." *Harbour Point Homeowners' Ass'n, Inc. v. DJF Enters., Inc.*, 201 N.C. App. 720, 725, 688 S.E.2d 47, 51, *disc. review denied*, 364 N.C. 239, 698 S.E.2d 397 (2010). When the language of the arbitration clause is "clear and unambiguous," we may apply the plain meaning rule to interpret its

3. Plaintiff claims for the first time on appeal that defendants have waived their right to arbitrate. However, our Supreme Court has held that the extent to which a party has waived the right to arbitration is a question of fact which must be decided on the basis of the trial court's findings of fact. *Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 229-30, 321 S.E.2d 872, 876-77 (1984). Here, since plaintiff did not argue that defendants waived the right to arbitrate before the trial court, we decline to address this issue and allow the parties to litigate the waiver issue on remand.

scope. *See generally Ragan v. Wheat First Sec., Inc.*, 138 N.C. App. 453, 459, 531 S.E.2d 874, 878, *disc. review denied*, 353 N.C. 268, 546 S.E.2d 129 (2000) (applying the plain meaning rule to interpret the scope of an arbitration clause based on the clear and unambiguous language).

With regards to the first inquiry, there is no dispute in this case that a limited arbitration clause existed in the employment agreement. Contrary to the trial court's findings and conclusions, however, the clause was not "limited to only disputes involving the termination of Dr. Fontana's employment with SAC based on his fitness to practice medicine." The language of the arbitration clause is clear and unambiguous. Thus, in applying the plain meaning rule to determine the scope of the arbitration clause, we find that it includes any dispute regarding plaintiff's termination, not just disputes that relate to his fitness to practice medicine. The types of disputes specifically mentioned in the arbitration clause include ones that are not related to plaintiff's fitness to practice medicine. Furthermore, Section 14 of the employment contract, labeled "Termination," provided that plaintiff could be terminated for cause or without cause and addressed circumstances not related to termination based on plaintiff's fitness to practice medicine. If plaintiff was terminated with cause, his termination was effective immediately. If he was terminated without cause, he was entitled to a 90-day notice. Consequently, we hold that the arbitration clause pertained to any conflicts surrounding the termination of plaintiff's employment.

Next, we must determine whether plaintiff's separate claims against defendants fall within the scope of the arbitration clause. "To determine if a particular dispute is subject to arbitration, this Court must examine the language of the agreement, including the arbitration clause in particular, and determine if the dispute falls within its scope." *In re W.W. Jarvis & Sons*, 194 N.C. App. 799, 803, 671 S.E.2d 534, 536 (2009). Our Court has held that this determination must examine "whether the claim or dispute between the parties falls within the realm of, or has a significant or strong relationship with, the agreed upon arbitration clause." *Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 479, 583 S.E.2d 325, 330-31 (2003), *aff'd per curiam*, 358 N.C. 146, 593 S.E.2d 583 (2004).

Plaintiff's claim against SAC for breach of the employment agreement is subject to arbitration to the extent the claim pertains to his termination. Plaintiff claims that he was not given 90 days notice and that SAC did not comply with its bylaws when it terminated his

employment. The issues of whether plaintiff was terminated with or without cause and whether SAC followed proper procedures, as set forth in the employment contract, constitute controversies involving plaintiff's termination and are soundly within the scope of the arbitration clause. Therefore, the trial court erred in holding that this claim is not subject to arbitration.

Plaintiff's remaining claims against the various defendants do not pertain to his termination, and, therefore, do not fall within the scope of the arbitration clause. In his complaint, plaintiff alleges defendants' false representations or concealments of material facts constituted fraudulent inducement, actual fraud, constructive fraud, negligent misrepresentations, and unfair trade practices and give rise to a claim for punitive damages. Specifically, these claims relate to SAC's alleged assurances that plaintiff would become a partner in six years and that SAC would not be sold before that time. While our Court has held that tort claims may be subject to arbitration, there must be a relationship between the claims and the subject matter of the arbitration clause. *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 25, 331 S.E.2d 726, 732 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986). All the circumstances surrounding these claims relate to why plaintiff entered into the contracts and why he continued to work for SAC, not to his termination. Therefore, these disputes do not concern plaintiff's termination.

While the alleged conduct of defendants that serves as the basis for these claims may have contributed to plaintiff's decision to refrain from signing the new employment contract with AAS, which ultimately led to his termination, they do not have a strong relationship with the arbitration provision. In other words, the facts underlying plaintiff's allegations relating to the tort claims may have contributed to creating the environment which led to plaintiff's termination, but they do not specifically pertain to a dispute concerning plaintiff's termination. Therefore, these claims are outside the scope of the arbitration clause, and the trial court did not err in denying defendants' motion to compel arbitration as it pertains to these claims.

Defendants assert that plaintiff's claims were based on his allegations that defendants "took actions contrary to the representations" they made to plaintiff prior to the signing of the employment agreement. Therefore, these actions resulted in plaintiff's termination. While we agree that the circumstances surrounding plaintiff's decision to not sign the new employment contract with AAS are interwoven with the alleged conduct of defendants that gave rise to plain-

tiff's claims, this is not sufficient enough to establish a significant or strong relationship with the arbitration provision.

With regards to plaintiff's claims for breach of the partnership and letter agreements, the partnership agreement was an oral agreement whereby SAC purportedly agreed to make plaintiff a partner in six years. We find that this dispute does not concern plaintiff's termination. Although plaintiff claims that defendants' failure to comply with the representations made to him in the partnership agreement was a factor in his decision to not sign the new employment contract, this claim does not constitute a dispute regarding plaintiff's termination and does not fall within the scope of the arbitration agreement.

Similarly, in regards to the letter agreement, while we note that it does contain a provision in it that plaintiff "will be eligible for consideration as a shareholder solely of [SAC] after six (6) years[,]" this provision does not specifically relate to whether SAC terminated him with or without cause or whether SAC followed proper termination procedures as stated in the employment contract. Therefore, plaintiff's claim for breach of the letter agreement is not within the scope of the arbitration clause.

Finally, plaintiff's claims of civil conspiracy, defamation, and tortious interference with a contract do not concern plaintiff's termination. In his complaint, plaintiff alleges that defendants committed civil conspiracy by failing to disclose information regarding the sale of SAC. Presumably, as with other claims, although the eventual disclosure of the facts surrounding the sale of SAC did have an impact on plaintiff's decision to not sign the new employment contract with AAS, the alleged acts of defendants are not disputes regarding plaintiff's termination.

Furthermore, with regards to plaintiff's claim that defendants AAS, MSI, and MDX committed tortious interference with his SAC contract, the alleged acts that serve as a basis for the claim occurred prior to plaintiff's termination. Therefore they are not subject to the arbitration clause. Similarly, with regards to the defamation claim, the acts plaintiff alleges in support of this claim occurred after he was terminated. Specifically, plaintiff points to statements made to nurse anesthetists and other medical care providers regarding plaintiff's termination. Thus, plaintiff's defamation claim is not subject to the arbitration provision since it arose after he was terminated.

Finally, plaintiff requests that the restrictive covenant in his employment contract be found unenforceable. Although the restric-

tive covenant only became effective because plaintiff was terminated, it is not part of any dispute surrounding his termination. Therefore, it is outside the scope of the arbitration clause.

Accordingly, the trial court's order should be affirmed in part and reversed and remanded in part. Plaintiff's claim for breach of the employment contract by SAC is subject to arbitration as it relates to plaintiff's termination.

[3] Next, defendants allege that the trial court erred in failing to find that the arbitration provision is enforceable by all defendants. Since we have held that the only claim subject to the arbitration provision is the breach of employment contract, which was only between SAC and plaintiff, we will not address this argument on appeal.

[4] Finally, defendants argue that the trial court erred in failing to stay this action pending arbitration. We agree with regards to plaintiff's claim for breach of the employment contract.

Pursuant to N.C. Gen. Stat. § 1-569.7(g) (2011), if a court orders arbitration, "the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim." Here, since we have held the breach of the employment contract is subject to arbitration, the trial court must stay the proceedings with regard to that claim. Furthermore, since we found that plaintiff's remaining claims, thus, not subject to arbitration, we hold that those remaining claims are severable, and the trial court is not required to stay the proceedings with regard to those claims.

Conclusion

Based on our finding that the arbitration provision pertains to disputes concerning plaintiff's termination, we hold that plaintiff's claim for breach of the employment contract is subject to arbitration. Therefore, the trial court erred by denying defendants' motion to compel arbitration with regard to that claim.

Affirmed in part; reversed and remanded in part.

Judges STROUD and ERVIN concur.

STATE OF NORTH CAROLINA v. WILLIAM YALE MATHER

No. COA11-1393

(Filed 17 July 2012)

Firearms and Other Weapons—carrying a concealed handgun—indictment sufficient—exception defense—no fatal variance

The trial court did not err in a carrying a concealed handgun case by denying defendant's motion to dismiss based on an alleged fatal variance between the allegations in the charging document and the evidence at trial. The indictment was sufficient because the exception in N.C.G.S. § 14-269(a1)(2) is a defense to, not an essential element of, the crime of carrying a concealed weapon. Further, the evidence corresponded to the essential and material allegations of the magistrate's order and the evidence showing that defendant had a concealed handgun permit and consumed alcohol at the bar related only to the defense set forth in the concealed handgun permit exception.

Appeal by defendant from judgment entered 5 April 2011 by Judge William R. Pittman in Moore County Superior Court. Heard in the Court of Appeals 5 April 2012.

Attorney General Roy Cooper, by Assistant Attorney General Nancy E. Scott, for the State.

Geeta Nadia Kapur, for the defendant.

THIGPEN, Judge.

William Yale Mather ("Defendant") appeals from a judgment convicting him of carrying a concealed handgun in violation of N.C. Gen. Stat. § 14-269(a1) (2011). On appeal, Defendant argues the trial court erred in denying his motion to dismiss because there was a fatal variance between the allegations in the charging document and the evidence at trial. After careful review, we conclude the trial court did not err.

The evidence of record tends to show the following: On the evening of 30 May 2009, Defendant, Defendant's girlfriend, and several other people went to the Broad Street Bar and Grill ("Bar and Grill") in Southern Pines, North Carolina. While there, Defendant drank several beers and played pool. After several hours had passed at the Bar and Grill, a bouncer approached Defendant and asked

whether he had a weapon on him. Defendant did not answer, and the bouncer told Defendant to leave. Defendant complied and left the Bar and Grill in a Sandhills Transportation burgundy taxi van.

Later that evening, Defendant returned and attempted to reenter the Bar and Grill. The bouncer told Defendant he could not go inside. Defendant became "agitated[,]" and the bouncer called the Southern Pines Police Department. Defendant walked back to the burgundy taxi van.

Officer Chris Coleman ("Officer Coleman") of the Southern Pines Police Department responded to the call from the Bar and Grill bouncer and saw the burgundy taxi van in the Bar and Grill parking lot. Officer Coleman approached the van. Defendant was standing in the doorway of the van, talking to the cab driver. When Defendant saw Officer Coleman, he told Officer Coleman that he had a permit to carry a concealed weapon. Defendant showed Officer Coleman his concealed weapon permit, and Officer Coleman deemed the concealed weapon permit to be valid. Officer Coleman asked Defendant whether he had been drinking, and Defendant admitted that he had been drinking beer that evening at the Bar and Grill. Officer Coleman removed the concealed weapon from Defendant's pocket and arrested Defendant.

On 9 August 2009, Defendant was charged with carrying a concealed handgun in violation of N.C. Gen. Stat. § 14-269(a1). The magistrate's order charging Defendant alleged that "the defendant . . . unlawfully and willfully did carry concealed about the defendant's person while off the defendant's own premises a gun, .25 CAL BROWNING PISTOL[,]" which is the language of N.C. Gen. Stat. § 14-269(a1)(1).

On 12 November 2009, Defendant was found guilty in District Court of carrying a concealed handgun in violation of N.C. Gen. Stat. § 14-269(a1). Defendant appealed to Superior Court. On 5 April 2011, a jury found Defendant guilty of carrying a concealed handgun in violation of N.C. Gen. Stat. § 14-269(a1). The trial court entered a judgment consistent with the jury's verdict, sentencing Defendant to 30 days incarceration in the Moore County Jail. However, the trial court suspended the sentence and imposed an active sentence of 7 days incarceration and 18 months unsupervised probation. From this judgment, Defendant appeals.

I: Sufficiency of the Indictment and Fatal Variance

On appeal, Defendant argues the trial court erred in denying Defendant's motion to dismiss because the evidence at trial "proved an offense not charged by the criminal pleading[.]" Defendant argues there was a fatal variance between the charging document—in this case, the magistrate's order—and the evidence. Before we reach the question of whether there was a fatal variance between the indictment and the evidence, we believe it is necessary to determine whether the indictment itself was sufficient.

Defendant did not object to the sufficiency of the indictment at trial and does not argue on appeal that the indictment was insufficient. However, we believe an examination of this question is necessary before we determine whether there was a fatal variance, because, in this case, the questions are intertwined.[1] Defendant essentially argues the magistrate's order charged him with the wrong crime, and the State's evidence "focused on the fact that [Defendant] had been drinking [alcohol]." However, Defendant also states in his brief that the "charging document does not allege that [Defendant] had consumed alcohol[.]" Defendant repeats and emphasizes that Defendant was "charged . . . with carrying a concealed gun, not carrying a concealed gun while drinking alcohol." In constructing his argument that there was a fatal variance between the charging document and the proof, Defendant implies that the consumption of alcohol is an essential element of the charge of carrying a concealed weapon, thus interposing the question of the sufficiency of the indictment.

"[W]hen an indictment has failed to allege the essential elements of the crime charged, it has failed to give the trial court subject matter jurisdiction over the matter, and the reviewing court must arrest judgment." *State v. Kelso*, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31-32 (2007) (citation omitted).

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1. This Court may address the question of the sufficiency of an indictment *ex mero motu*. "There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation[;] [i]n the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity." *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966). Pursuant to N.C. Gen. Stat. § 15A-1446(d)(1) (2011), a trial court's lack of jurisdiction over the offense of which the defendant was convicted "may be the subject of appellate review even though no objection, exception or motion has been made in the trial division." *Id.* In fact, "if the offense is not sufficiently charged in the indictment, this Court, *ex mero motu*, will arrest the judgment." *State v. Walker*, 249 N.C. 35, 38, 105 S.E.2d 101, 104 (1958); *see also State v. Cunningham*, 34 N.C. App. 72, 74, 237 S.E.2d 334, 335-36 (1977).

> No indictment, whether at common law or under a statute, is sufficient if it does not accurately and clearly allege all of the constituent elements of the crime sought to be charged. However, there is no requirement that an indictment must follow the precise language of the statute provided that the pleading charges facts which are sufficient to enable the indictment to fulfill its essential purposes.

State v. Hunter, 299 N.C. 29, 41, 261 S.E.2d 189, 197 (1980) (internal citations omitted). Two purposes of an indictment are "to make clear the offense charged so that the investigation may be confined to that offense, that proper procedure may be followed, and applicable law invoked; [and] . . . to put the defendant on reasonable notice so as to enable him to make his defense." *State v. Leonard*, ____ N.C. App. ____, ____, 711 S.E.2d 867, 872, *disc. review denied*, 365 N.C. 353, 717 S.E.2d 746 (2011) (quotation omitted). "A[n] . . . indictment [m]erely charging in general terms a breach of the statute and referring to it in the indictment is not sufficient." *State v. McBane*, 276 N.C. 60, 65, 170 S.E.2d 913, 916 (1969) (quotation omitted); *see also State v. Billinger*, ____ N.C. App. ____, ____, 714 S.E.2d 201, 207 (2011) ("[I]t is well established that [m]erely charging in general terms a breach of [a] statute and referring to it in the indictment is not sufficient to cure the failure to charge the essentials of the offense in a plain, intelligible, and explicit manner").

In this case, the magistrate's order charged Defendant with a violation of N.C. Gen. Stat. § 14-269(a1), alleging that "the defendant . . . unlawfully and willfully did carry concealed about the defendant's person while off the defendant's own premises a gun, .25 CAL BROWNING PISTOL."

The statute defining the crime of carrying a concealed weapon, N.C. Gen. Stat. § 14-269(a1), provides the following:

> It shall be unlawful for any person willfully and intentionally to carry concealed about his person any pistol or gun except in the following circumstances:
>
> (1) The person is on the person's own premises.
>
> (2) The deadly weapon is a handgun, the person has a concealed handgun permit issued in accordance with Article 54B of this Chapter or considered valid under G.S. 14-415.24, and the person is carrying the concealed handgun in accordance with the scope of the concealed handgun permit as set out in G.S. 14-415.11(c).

> (3) The deadly weapon is a handgun and the person is a military permittee as defined under G.S. 14-415.10(2a) who provides to the law enforcement officer proof of deployment as required under G.S. 14-415.11(a).

Id. Our Supreme Court, citing an earlier version of N.C. Gen. Stat. § 14-269, has stated the following: "The essential elements of the statutory crime of carrying a deadly weapon are these: (1) The accused must be off his own premises; (2) he must carry a deadly weapon; (3) the weapon must be concealed about his person." *State v. Williamson*, 238 N.C. 652, 654, 78 S.E.2d 763, 765 (1953) (citations omitted).

On appeal, Defendant posits that the evidence produced by the State at trial disproved that Defendant violated N.C. Gen. Stat. § 14-269(a1), because the uncontroverted evidence shows that Defendant had a concealed handgun permit. However, the State's evidence also shows that Defendant was not "carrying the concealed handgun in accordance with the scope of the concealed handgun permit as set out in G.S. 14-415.11(c)[.]" N.C. Gen. Stat. § 14-269(a1). N.C. Gen. Stat. § 14-415.11(c)(1) (2011) provides that "a permit does not authorize a person to carry a concealed handgun in . . . [a]reas prohibited by G.S. . . . 14-269.3[.]" *Id.* N.C. Gen. Stat. § 14-269.3(a) (2011) provides that "[i]t shall be unlawful for any person to carry any gun, rifle, or pistol into any assembly where a fee has been charged for admission thereto, or into any establishment in which alcoholic beverages are sold and consumed. Any person violating the provisions of this section shall be guilty of a Class 1 misdemeanor." *Id.* Moreover, N.C. Gen. Stat. § 14-415.11(c2) (2011), provides the following:

> It shall be unlawful for a person, with or without a permit, to carry a concealed handgun while consuming alcohol or at any time while the person has remaining in the person's body any alcohol or in the person's blood a controlled substance previously consumed, but a person does not violate this condition if a controlled substance in the person's blood was lawfully obtained and taken in therapeutically appropriate amounts or if the person is on the person's own property.

Id.

In determining whether the indictment is sufficient in this case, we must examine N.C. Gen. Stat. § 14-269(a1) and the law regarding exceptions to crimes. N.C. Gen. Stat. § 14-269(a1) defines the crime of carrying a concealed weapon as "willfully and intentionally . . . carry[ing] concealed about his person any pistol or gun[.]" *Id.* N.C.

Gen. Stat. § 14-269(a1) then sets forth three exceptions, one of which is that the person has a valid concealed handgun permit and is carrying the concealed handgun in accordance with the scope of the permit. *See* N.C. Gen. Stat. § 14-269(a1)(2). The evidence in this case shows that Defendant was carrying a concealed handgun off his own premises; the evidence also shows that Defendant had a concealed handgun permit, but he was not carrying the concealed handgun in accordance with the scope of the concealed handgun permit. Based on the foregoing, we believe the crux of the issue in this case is whether the exception provided in N.C. Gen. Stat. § 14-269(a1)(2) is an essential element of the crime defined by N.C. Gen. Stat. § 14-269(a1). If the exception is an essential element of the crime of carrying a concealed weapon, the indictment here is insufficient because it does not charge that Defendant was drinking alcohol at the Bar and Grill; however, if the exception is not an essential element, the indictment sufficiently charges the crime of carrying a concealed weapon.

Whether an exception to a statutorily defined crime is an essential element of that crime has been addressed by our Supreme Court in *State v. Connor*, 142 N.C. 700, 55 S.E. 787 (1906), which stated the following:

> It is well established that when a statute creates a substantive criminal offense, the description of the same being complete and definite, and by subsequent clause, either in the same or some other section, or by another statute, a certain case or class of cases is withdrawn or excepted from its provisions, these excepted cases need not be negatived in the indictment, nor is proof required to be made in the first instance on the part of the prosecution.

Id. at 701, 55 S.E. at 788. The *Connor* Court also explained the nature of "qualifications" versus "exceptions" in statutorily defined crimes:

> We find in the acts of our Legislature two kinds of provisos—the one in the nature of an exception, which withdraws the case provided for from the operation of the act, the other adding a qualification, whereby a case is brought within that operation. Where the proviso is of the first kind it is not necessary in an indictment, or other charge, founded upon the act, to negative the proviso; but if the case is within the proviso it is left to the defendant to show that fact by way of defense. But in a proviso of the latter description the indictment must bring the case within the proviso. For, in reality, that which is provided for, in what is called a proviso to the act, is part of the enactment itself.

Id. at 703, 55 S.E. at 788-89. "The general rule is that what is necessary to be charged as a descriptive part of the offense is required to be proved; and all of the decisions in this State which we have noted, or which have been called to our attention where the rule has been changed and the burden put on defendant, have been cases where the burden was changed by the statute, or the facts referred to in the exception or proviso related to the defendant personally, or were peculiarly within his knowledge." *Connor*, 142 N.C. at 704, 55 S.E. at 789. The test the *Connor* Court set forth for determining whether an exception in a statutorily defined crime must be alleged in a bill of indictment is the following:

> The test here suggested, however, is not universally sufficient, and a careful examination of the principle will disclose that the rule and its application depends not so much on the placing of the qualifying words, or whether they are preceded by the terms, 'provided' or 'except;' but rather on the nature, meaning and purpose of the words themselves. And if these words, though in the form of a proviso or an exception, are in fact, and by correct interpretation, but a part of the definition and description of the offense, they must be negatived in the bill of indictment. In such case, this is necessary, in order to make a complete statement of the crime for which defendant is prosecuted.

Connor, 142 N.C. at 702, 55 S.E. at 788.

The North Carolina Appellate Courts have followed and explained *Connor* in numerous opinions, reiterating the importance of being mindful when drawing the distinction between elements of an offense and exceptions to that offense, due to implications regarding the burden of proof:

> When one thinks in terms of circumscribing the parameters of criminal liability, disregarding for the moment the allocation of the burden of proof, there is little difference between requiring the State to show that an individual's actions are within the circumscribed area, and requiring the defendant to show that his actions are without the circumscribed area: in either case the prohibited range of conduct is the same. The procedural implications with respect to the burden of proof are, however, quite serious. As Mr. Justice Powell, in his dissent in *Patterson* . . . explains: "For example, a state statute could pass muster . . . if it defined murder as mere physical contact between the defendant and the victim leading to the victim's death, but then set up an

> affirmative defense leaving it to the defendant to prove that he acted without culpable mens rea. The State, in other words, could be relieved altogether of responsibility for proving *anything* regarding the defendant's state of mind, provided only that the face of the statute meets the Court's drafting formulas."

State v. Trimble, 44 N.C. App. 659, 665 n.2, 262 S.E.2d 299, 303 n.2 (1980) (quoting *Patterson v. New York*, 432 U.S. 197, 224 n.8, 97 S. Ct. 2319, 2334, 53 L. Ed. 2d 281, 301 n.8 (1977) (Powell, J., dissenting)) (emphasis in original).

In *State v. Brown*, 56 N.C. App. 228, 287 S.E.2d 421 (1982), this Court analyzed an exception in N.C. Gen. Stat. § 14-74, which defines the crime of larceny by an employee. The defendant in *Brown* argued that the indictment charging larceny by an employee was inadequate because it failed to allege that he was at least sixteen years old. The defendant cited the statutory phrase, "[p]rovided, that nothing contained in this section shall extend to . . . servants within the age of 16 years." *Brown*, 56 N.C. App. at 230, 287 S.E.2d at 423 (quoting N.C. Gen. Stat. § 14-74 (1982)). The defendant contended that "age is an essential element of G.S. 14-74, which must be alleged, proven and charged." *Id.* The *Brown* Court cited *Connor*, stating "there are no magic words for creating an exception to an offense. Neither is placement of a phrase controlling. The determinative factor is the nature of the language in question. Is it part of the definition of the crime or does it withdraw a class from the crime?" *Brown*, 56 N.C. App. at 230, 287 S.E.2d at 423. The *Brown* Court concluded that the indictment was not insufficient for failing to charge that the defendant was over sixteen years old:

> Upon examining G.S. 14-74, we conclude that the phrase in question *withdraws* a class of defendants from the crime of larceny by an employee. The language before the phrase completely and definitely defines the offense. Servants within 16 years of age are excepted from that definition. Because the phrase creates an exception to G.S. 14-74, we hold that age is not an essential element which the indictment must allege and the State initially prove.

Brown, 56 N.C. App. at 230-31, 287 S.E.2d at 423. (emphasis in original). The *Brown* Court explained that "[a]ge . . . is a fact particularly within defendant's knowledge[,] [and] [t]o place the burden on defendant to raise the exception to G.S. 14-74 and to prove that he comes within it does not exceed the constitutional limits established." *Brown*, 56 N.C. App. at 231, 287 S.E.2d at 423-24.

In *State v. Hinkle*, 189 N.C. App. 762, 659 S.E.2d 34 (2008), this Court analyzed N.C. Gen. Stat. § 14-399, which defines the crime of littering. Specifically, the *Hinkle* Court addressed the question of whether the phrase "except . . . into a litter receptacle," was part of the statutory definition of littering or an exception to the crime of littering. The *Hinkle* Court came to the following conclusion:

> It is clear that "[i]nto a littering receptacle" is part of the definition of the crime. If we read section (a) up to the word "except," then section (a) does not describe the complete crime of littering. Without the "except . . . [i]nto a litter receptacle" language, placing a broken rubber band into a trash can at our Court would be littering. Likewise, throwing a spent coffee cup into a trash can at the mall would be littering. Such a reading of the statute is inconsistent with both the plain language of the statute and common sense. Essential to the crime of littering is that the litter be placed somewhere other than a litter receptacle.

Hinkle, 189 N.C. App. at 769, 659 S.E.2d at 38.

In *State v. Trimble*, 44 N.C. App. 659, 262 S.E.2d 299 (1980), this Court considered whether an exception to a criminal statute should be regarded as an element of the offense or as an affirmative defense. The *Trimble* Court analyzed N.C. Gen. Stat. § 14-401, a criminal statute against putting poisonous foodstuffs in certain public places, which provided that the statute "shall not apply" to poisons used for protecting crops and gardens and for rat extermination. *Id.* The *Trimble* Court applied the following standard in its determination:

> [W]here, as in the instant case, the General Assembly has left open the question of whether a factor is to be an element of the crime or a defense thereto, it is more substantively reasonable to ask what would be a "fair" allocation of the burden of proof, in light of due process and practical considerations, and then assign as "elements" and "defenses" accordingly, rather than to mechanically hold that a criminal liability factor is an element without regard to the implications in respect to the burden of proof.

Trimble, 44 N.C. App. at 666, 262 S.E.2d at 303. Applying the forgoing standard, the Court made the following conclusion:

> [W]e hold that the insect control and rat extermination exception in N.C. Gen. Stat. § 14-401 is neither an element of the crime nor an affirmative defense thereto but is instead a "hybrid" factor in determining criminal liability: the State has no initial burden of

> producing evidence to show that defendant's actions do not fall within the exception; however, once the defendant, in a non-frivolous manner, puts forth evidence to show that his conduct is within this exception, the burden of persuading the trier of fact that the exception does not apply falls upon the State. In sum, we are not convinced that the exception is a sufficiently "independent, distinct substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself," to put all the "onus" of proof on the defendant[.]

Trimble, 44 N.C. App. at 666, 262 S.E.2d at 303-04. (internal citations omitted). The *Trimble* Court further concluded, "it follows from this reasoning that an indictment or warrant for an arrest need not set forth a charge that defendant's conduct is not within the exception to the statute." *Trimble*, 44 N.C. App. at 666, 262 S.E.2d at 304.

We believe the present case is most analogous to *Trimble*. The State has no initial burden of producing evidence to show that Defendant's action of carrying a concealed weapon does *not* fall within an exception to N.C. Gen. Stat. § 14-269(a1); however, once Defendant puts forth evidence to show that his conduct is within an exception—that he had a concealed handgun permit—the burden of persuading the trier of fact that Defendant's action was outside the scope of the exception falls upon the State. Based on the Court's holding in *Trimble*, we conclude that the exception in N.C. Gen. Stat. § 14-269(a1)(2) is a defense, not an essential element of the crime of carrying a concealed weapon, and therefore, the indictment was not insufficient for failing to charge it.

We must now determine whether there was a fatal variance between the indictment and the evidence.

"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. Lee*, ____ N.C. App. ____, ____, 720 S.E.2d 884, 889 (2012) (quotation omitted). "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." *Id.* (quotation omitted). "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.* (quotation omitted).

"The essential elements of the statutory crime of carrying a deadly weapon are these: (1) The accused must be off his own

premises; (2) he must carry a deadly weapon; (3) the weapon must be concealed about his person." *Williamson*, 238 N.C. at 654, 78 S.E.2d at 765 (1953) (citing N.C. Gen. Stat. § 14-269). Here, the magistrate's order charging Defendant with a violation of N.C. Gen. Stat. § 14-269(a1) alleged that "the defendant . . . unlawfully and willfully did carry concealed about the defendant's person while off the defendant's own premises a gun, .25 CAL BROWNING PISTOL."

The evidence in this case shows that Defendant left his home and entered the Bar and Grill with a handgun concealed about his person. This evidence alone corresponds with the allegations of the indictment which are essential and material to charge the offense of carrying a concealed handgun. *See Lee*, ____ N.C. App. at ____, 720 S.E.2d at 889. The evidence showing that Defendant had a concealed handgun permit and consumed alcohol at the Bar and Grill relate only to the defense set forth in the concealed handgun permit exception to the crime of carrying a concealed handgun and to Defendant's exceeding the scope of that exception. N.C. Gen. Stat. § 14-269(a1)(2).

Because the evidence in this case corresponds to the essential and material allegations of the magistrate's order charging that Defendant carried a concealed handgun in violation of N.C. Gen. Stat. § 14-269, and because the magistrate's order was not insufficient for failing to charge that Defendant was drinking alcohol at the Bar and Grill, we conclude the trial court did not err.

NO ERROR.

Judges ELMORE and GEER concur.

STATE OF NORTH CAROLINA v. HENRY LEWIS COLLINS

No. COA12-19

(Filed 17 July 2012)

1. Criminal Law—guilty plea—assault on handicapped person—sufficient factual basis

The trial court did not err in a felony assault on a handicapped person case by determining that there was a factual basis to support defendant's guilty plea to felony assault on a handicapped person. The summary of the facts presented by the prosecutor along with defendant's stipulations were sufficient to establish a factual basis for defendant's guilty plea.

2. Criminal Law—guilty plea—assault on handicapped person—informed choice

The trial court did not err by accepting defendant's guilty plea to felony assault on a handicapped person. The trial court's colloquy, defendant's signature on the transcript of plea, and the trial court's statement was sufficient to show that defendant's plea was a product of his informed choice.

3. Indictment and Information—assault on a handicapped person—indictment sufficient

Defendant's indictment for felony assault on a handicapped person was sufficient to confer jurisdiction on the trial court. The indictment tracked the relevant language of the felony assault on a handicapped person statute, listed the essential elements of the offense, and provided defendant with enough information to prepare a defense. Further, although the indictment did not specifically allege that defendant knew or had reason to know that the victim was handicapped, the fact that the indictment stated that defendant "willfully" assaulted a handicapped person indicated defendant knew that the person he was assaulting was handicapped. Finally, the indictment's failure to reference the correct statute did not, by itself, amount to a fatal defect.

Appeal by defendant from judgment entered 4 August 2011 by Judge James Floyd Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 26 April 2012.

Roy Cooper, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Hannah Hall, Assistant Appellate Defender, for the defendant.

THIGPEN, Judge.

Henry Lewis Collins ("Defendant") appeals from a judgment entered on his guilty plea to felony assault on a handicapped person. We must determine whether (I) the State failed to present a sufficient factual basis to support his guilty plea; (II) the terms of his plea agreement are sufficiently clear to constitute a valid plea agreement; and (III) the indictment is sufficient to confer jurisdiction on the trial court. After review of the record and applicable law, we affirm the judgment of the trial court.

I. Factual and Procedural History

On 9 October 2009, Defendant pled guilty to felony assault on a handicapped person, communicating threats, and carrying a concealed weapon. Pursuant to his plea arrangement, the trial court imposed a suspended sentence of 120 days on the charge of communicating threats, imposed a suspended sentence of 60 days on the charge of carrying a concealed weapon, and placed Defendant on supervised probation for 24 months. On the charge of felony assault on a handicapped person, the trial court continued judgment "day to day and session to session until the [S]tate prays [for] judgment. This is cont[inued] for 24 [months] to review the [Defendant's] status."

On 9 August 2010, a probation revocation hearing was held, and the trial court revoked Defendant's probation and activated the suspended sentences for communicating threats and carrying a concealed weapon. On 4 August 2011, the State prayed for judgment on the charge of felony assault on a handicapped person. The trial court reviewed Defendant's status and determined that he "[d]id not successfully complete the probation that he was sentenced to in the two misdemeanors." The trial court then entered judgment on felony assault on a handicapped person and sentenced Defendant to 23 to 28 months imprisonment to run concurrently with the misdemeanor judgments entered on 9 August 2010. Defendant appeals.

We note first that Defendant does not have an appeal as a matter of right to challenge the trial court's acceptance of his guilty plea or the indictment. *See* N.C. Gen. Stat. § 15A-1444 (2011) (listing the issues

that a defendant who has pled guilty is entitled to appeal as a matter of right); *see also State v. Absher*, 329 N.C. 264, 265 n. 1, 404 S.E.2d 848, 849 n. 1 (1991) ("While it is true that a defendant may challenge the jurisdiction of a trial court, such challenge may be made in the appellate division only if and when the case is properly pending before the appellate division."). Accordingly, we grant the State's motion to dismiss Defendant's appeal. However, pursuant to N.C. Gen. Stat. § 15A–1444(e) and N.C. R. App. P. 21, Defendant has petitioned this Court for a writ of certiorari. We elect to grant Defendant's petition and review the issues. *See State v. Keller*, 198 N.C. App. 639, 641, 680 S.E.2d 212, 213 (2009) (holding that "[a]lthough defendant is not entitled to appeal from his guilty plea as a matter of right," his arguments challenging the factual basis for his guilty plea are reviewable pursuant to a petition for writ of certiorari) (citations omitted); *see also State v. Demaio*, ____ N.C. App. ____, ____, 716 S.E.2d 863, 866 (2011) (stating that "our Supreme Court has held that when a trial court improperly accepts a guilty plea, the defendant may obtain appellate review of this issue only upon grant of a writ of certiorari") (citations and quotation marks omitted).

II. Factual Basis to Support Guilty Plea

[1] Defendant first contends the trial court erred by determining that there was a factual basis to support his guilty plea to felony assault on a handicapped person because the State failed to show that the victim was handicapped or that Defendant used a crutch in a manner that was likely to cause death or serious injury. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1022(c) (2011), a trial court "may not accept a plea of guilty . . . without first determining that there is a factual basis for the plea." This determination may be based upon information including, but not limited to, a statement of the facts by the prosecutor, a written statement of the defendant, an examination of the presentence report, sworn testimony, which may include reliable hearsay, or a statement of facts by the defense counsel. *See id.* "The five sources listed in the statute are not exclusive, and therefore the trial judge may consider any information properly brought to his attention." *State v. Agnew*, 361 N.C. 333, 336, 643 S.E.2d 581, 583 (2007) (citation and quotation marks omitted).

Defendant pled guilty to felony assault on a handicapped person, a crime which is defined by N.C. Gen. Stat. § 14-32.1(e) (2011) as follows:

> A person commits an aggravated assault or assault and battery upon a handicapped person if, in the course of the assault or assault and battery, that person:
>
> (1) Uses a deadly weapon or other means of force likely to inflict serious injury or serious damage to a handicapped person; or
>
> (2) Inflicts serious injury or serious damage to a handicapped person; or
>
> (3) Intends to kill a handicapped person.

A "handicapped person" is defined as a person who has a physical or mental disability or infirmity "which would substantially impair that person's ability to defend himself." N.C. Gen. Stat. § 14-32.1(a) (2011).

Here, Defendant stipulated to the existence of facts to support his plea in his Transcript of Plea and at his plea hearing. Furthermore, the prosecutor made the following statement summarizing the evidence at Defendant's plea hearing:

> On December 12th of 2007, the victim in this case, Carol Bradley Collins, who's the mother of the defendant, is crippled in her knees with arthritis and requires a crutch to walk. The defendant, Henry Lewis Collins, is one of Ms. Carol Collins's sons. As a result, Carol Collins is 80 years of age. The defendant Henry was intoxicated and on unknown drugs at the time. The defendant told his mother that he would kill her and cut her heart out. He grabbed the victim Carol as she sat in the chair in her living room, slung her across the room twice and then hit her with her crutch that she uses for walking. This was witnessed by Shontelle Bradley, who called the police, Danny Hayes and Deana Collins and the three of them witnessed the assault.

When asked by the trial court if he "desire[d] to make any corrections[,]" to the prosecutor's summary, defense counsel responded, "No, sir." The trial court thereafter found that "upon consideration of the record proper, evidence or factual presentation offered, answers of the defendant, statement for the lawyer for the defendant and the prosecutor, the Court finds, one, there is a factual basis for the entry of the plea[.]"

We conclude that the summary of the facts presented by the prosecutor and Defendant's stipulations are sufficient to establish a factual basis for Defendant's guilty plea. Specifically, the prosecutor's statements that the victim "is 80 years of age" and "is crippled in her

knees with arthritis and requires a crutch to walk" and that Defendant "told his mother that he would kill her and cut her heart out[,]" "grabbed the victim[,]" and "slung her across the room twice and then hit her with her crutch" provided a sufficient factual basis to support Defendant's guilty plea. *See* N.C. Gen. Stat. § 14-32.1(a) & (e); *see also State v. May*, 159 N.C. App. 159, 166, 583 S.E.2d 302, 306 (2003) (holding that "[b]ased on the facts presented by the State and the defendant's stipulation [to the existence of a factual basis for his plea], the court properly determined a factual basis for the plea existed"). Accordingly, we conclude this argument has no merit.

III. Terms of Plea Agreement

[2] Defendant next argues the terms of his plea agreement were not sufficiently clear to constitute a valid plea agreement because he was not fully aware of the consequences of his plea, thereby rendering the plea involuntary and depriving Defendant of his constitutional rights. Specifically, Defendant contends he "was not made aware of all of the direct consequences of his guilty plea since neither the plea arrangement nor the order continuing judgment" explained that judgment would be entered on the offense of felony assault on a handicapped person if Defendant did not successfully complete probation for the two misdemeanors that he also pled guilty to. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1022(b) (2011), "[t]he judge may not accept a plea of guilty . . . from a defendant without first determining that the plea is a product of informed choice." "Although a defendant need not be informed of all possible indirect and collateral consequences, the plea nonetheless must be entered by one fully aware of the direct consequences[.]" *State v. Bozeman*, 115 N.C. App. 658, 661, 446 S.E.2d 140, 142 (1994) (citations and quotation marks omitted) (emphasis omitted). "Direct consequences have been defined as those which have a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Id.* (citation and quotation marks omitted).

In this case, the Transcript of Plea lists the plea arrangement as follows:

> Pursuant to a pretrial conference, the defendant is to plead as charged and receive a sentence of 23 months minimum and 28 months maximum on the Felony Assault on a Handicap Person; however, *the Court agrees to continue judgment for 24 months to review the defendant's status.* As to the misdemeanors, the

> defendant is to receive consecutive sentences of 120 days plus 60 days for a total of 180 days to be suspended for a period of 24 months with supervised probation to include, but not limited to drug and alcohol conditions, not to assault the prosecuting witness, Carol Collins, and any other conditions deemed appropriate by the Court.

(Emphasis added). Furthermore, at Defendant's plea hearing, the trial court summarized Defendant's plea arrangement as follows:

> It says pursuant to pretrial conference, the defendant to plead as charged and you may—and underscore the word may—receive a sentence of 23 months minimum, 28 months maximum for felony assault on a handicap person *contingent upon your performance on the misdemeanors.* As to the misdemeanors, the Court agrees to continue judgment for 24 months to review the defendant's status on that charge.

(Emphasis added). After this summary by the trial court, Defendant responded, "Right."

Additionally, the transcript of Defendant's plea hearing reveals that the trial court personally addressed Defendant and inquired as to whether Defendant (1) understood the nature of the charges, (2) understood that he had the right to plead not guilty, (3) was satisfied with his lawyer's services, (4) was aware of the maximum possible sentence, and (5) understood that he was waiving his right to trial by jury. *See* N.C. Gen. Stat. § 15A-1022(a). Defendant answered affirmatively to all of these questions. The trial court further inquired as to whether Defendant was threatened by anyone, or promised anything other than the plea agreement that caused him to enter the pleas against his wishes, to which Defendant answered, "No, sir." Finally the trial court asked if Defendant entered the pleas of his own free will, fully understanding what he was doing. Defendant answered, "Yeah, I do." In light of this colloquy, Defendant's signature on the Transcript of Plea, and the trial court's statement that Defendant's sentence for felony assault on a handicapped person was "contingent upon your performance on the misdemeanors[,]" we hold the trial court did not err by accepting Defendant's guilty plea to felony assault on a handicapped person as a product of his informed choice. *See State v. Salvetti*, 202 N.C. App. 18, 29, 687 S.E.2d 698, 705 (holding that in light of the trial court's inquiry, the defendant's verbal responses, and the defendant's answers to the questions on the Transcript of Plea "the trial court did determine that defendant was

fully informed of the consequences of his choice to enter an *Alford* plea"), *disc. review denied*, 364 N.C. 246, 699 S.E.2d 919 (2010); *State v. Daniels*, 114 N.C. App. 501, 503, 442 S.E.2d 161, 162 (1994) ("This Court has held that evidence that defendant signed a plea transcript and that the judge made careful inquiry of the defendant concerning his plea is sufficient to show that the plea was entered into freely, understandingly and voluntarily.") (citations omitted).

IV. Sufficiency of Indictment

[3] Defendant lastly contends the indictment for felony assault on a handicapped person is not sufficient to confer jurisdiction on the trial court because the indictment (A) failed to specify the nature of the victim's handicap and did not contain either of the statutory alternatives describing the nature of the victim's handicap as set forth in N.C. Gen. Stat. § 14-32.1(a); (B) did not allege that Defendant knew or reasonably should have known of the victim's handicap; and (C) did not provide a reference to the statute allegedly violated, as required by N.C. Gen. Stat. § 15A-924(a).

"[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000) (citations omitted). "On appeal, we review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (citation omitted), *appeal dismissed and disc. review denied*, 363 N.C. 586, 683 S.E.2d 215 (2009).

An indictment must "charge all the essential elements of the alleged criminal offense." *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 241 (2002) (citation and quotation marks omitted). "If the charge is a statutory offense, the indictment is sufficient when it charges the offense in the language of the statute." *Id.* (citations and quotation marks omitted). The two purposes of an indictment are "to make clear the offense charged so that the investigation may be confined to that offense, that proper procedure may be followed, and applicable law invoked; [and] . . . to put the defendant on reasonable notice so as to enable him to make his defense." *State v. Leonard*, ____ N.C. App. ____, ____, 711 S.E.2d 867, 872 (2011) (citation omitted).

In this case, the indictment at issue states as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 12th day of December, 2007, in the County

named above the defendant named above unlawfully, willfully and feloniously did assault and strike a handicapped person by throwing Carol Bradley Collins across a room and onto the floor and by striking her with a crutch on the arm. In the course of the assault the defendant used a deadly weapon, a crutch. This act was in violation of North Carolina General Statutes section 14-17.

A. Nature of Victim's Handicap

Defendant first argues the indictment is not sufficient because it failed to specify the nature of the victim's handicap. Defendant also contends the indictment is not sufficient because it did not contain either of the statutory alternatives describing the nature of the victim's handicap as set forth in N.C. Gen. Stat. § 14-32.1(a). We disagree.

Here, Defendant's indictment tracks the relevant language of the felony assault on a handicapped person statute and lists the essential elements of the offense. *See* N.C. Gen. Stat. § 14-32.1(e); *see also Floyd*, 148 N.C. App. at 295, 558 S.E.2d at 241 ("If the charge is a statutory offense, the indictment is sufficient when it charges the offense in the language of the statute.") (citations and quotation marks omitted). The fact that "handicapped person" is defined in another section of the statute, N.C. Gen. Stat. § 14-32.1(a), does not make the definition an essential element of the crime pursuant to N.C. Gen. Stat. § 14-32.1(e). Therefore, we reject Defendant's argument that it is not sufficient for the indictment to "merely state that the victim was 'handicapped.' "

Furthermore, the indictment provided Defendant with enough information to prepare a defense for the offense of felony assault on a handicapped person. *See Leonard*, ____ N.C. App. at ____, 711 S.E.2d at 873 (rejecting the defendant's argument that the indictment was not sufficient because the indictment tracked the relevant language of the statute, listed "the essential elements of the offense[,]" and provided the defendant "with enough information to prepare a defense"); *State v. Crisp*, 126 N.C. App. 30, 36, 483 S.E.2d 462, 466 (holding that although the indictment did not track the exact language of the statute, "[t]he indictment, when read as a whole, sufficiently stated facts which support every element of the crime charged and apprised defendant of the specific charge against him"), *appeal dismissed and disc. review denied*, 346 N.C. 284, 487 S.E.2d 559 (1997). Accordingly, we conclude this argument is without merit.

B. Knowledge of the Victim's Handicap

Defendant next contends the indictment for felony assault on a handicapped person is not sufficient because it did not allege that Defendant knew or reasonably should have known of the victim's handicap. We disagree.

Defendant recognizes that N.C. Gen. Stat. § 14–32.1(e) does not require knowledge of the victim's handicap, but he cites *State v. Singletary*, 163 N.C. App. 449, 594 S.E.2d 64 (2004), in support of his argument that knowledge is an essential element of the crime that must be alleged in the indictment. In *Singletary*, this Court held that although N.C. Gen. Stat. § 14–32.1(e) "does not specifically require that defendant know his victim is handicapped," "in order to convict an individual under N.C. Gen. Stat. § 14–32.1(e), the jury must find that defendant knew or had reasonable grounds to know the victim was a handicapped person." *Id.* at 456, 594 S.E.2d at 70. In reaching its holding, this Court looked for guidance "from examination of N.C. Gen. Stat. § 14–34.2 (2003), which defines the charge of assault with a firearm on a law enforcement officer."[1] *Id.* at 457, 594 S.E.2d at 70. Assault with a firearm on a law enforcement officer is another statutory offense in which "[t]he knowledge requirement [that the defendant knew or should have known that the victim was an officer performing his official duties] has been imposed although the underlying statute is silent on the question of knowledge." *Id (citation omitted)*.

Neither party cites, nor does our review of North Carolina law reveal, a case interpreting the sufficiency of an indictment under N.C. Gen. Stat. § 14–32.1(e) since *Singletary* addressed the additional knowledge requirement. However, we find *State v. Thomas*, 153 N.C. App. 326, 570 S.E.2d 142, *appeal dismissed and disc. review denied*, 356 N.C. 624, 575 S.E.2d 759 (2002), instructive. In *Thomas*, the defendant argued that his conviction for assault with a firearm on a law enforcement officer pursuant to N.C. Gen. Stat. § 14-34.5(a), "must be vacated because the indictment failed to allege that he knew or had reasonable grounds to know that Officer Hall was a law enforcement officer." *Id.* at 335, 570 S.E.2d at 147. This Court held that although the indictment does not specifically allege "that defendant knew Officer Hall was a law enforcement officer, the indictment does allege defendant 'willfully' committed an assault on a law enforcement offi-

1. We note that the offense of assault with a firearm on a law enforcement officer is currently defined in N.C. Gen. Stat. § 14–34.5 (2011).

cer, which, as with the term 'intentionally,' indicates defendant knew that the person he was assaulting was a law enforcement officer." *Id.* at 336, 570 S.E.2d at 148 (citations omitted).

Like in *Thomas*, the indictment in the instant case alleged that Defendant "unlawfully, *willfully* and feloniously did assault and strike a handicapped person[.]" (Emphasis added). Following *Thomas*, we conclude that although the indictment does not specifically allege that Defendant knew or had reason to know that the victim was handicapped, the fact that the indictment states that Defendant "willfully" assaulted a handicapped person "indicates [D]efendant knew that the person he was assaulting was" handicapped. *See id.*; *see also Akzona, Inc. v. Southern Railway. Co.*, 314 N.C. 488, 495, 334 S.E.2d 759, 763 (1985) ("An act is done wilfully when it is done purposely and deliberately in violation of law, or when it is done knowingly and of set purpose") (citation omitted). Thus, this argument has no merit.

C. Incorrect Reference to Statute

Defendant lastly contends the indictment is not sufficient because it did not provide a reference to the statute allegedly violated, as required by N.C. Gen. Stat. § 15A-924(a) (2011). We disagree.

Defendant correctly contends the indictment for felony assault on a handicapped person "erroneously cited N.C. Gen. Stat. § 14-17, the statute governing murder." However, Defendant also recognizes that the indictment's failure to reference the correct statute, "did not, by itself, amount to a fatal defect." *See* N.C. Gen. Stat. § 15A-924(a)(6) (stating that a criminal pleading must contain "a citation of any applicable statute . . . alleged therein to have been violated. [However,] [e]rror in the citation or its omission is not ground for dismissal of the charges or for reversal of a conviction."). Because we conclude the indictment for felony assault on a handicapped person is otherwise sufficient, this argument has no merit.

AFFIRMED.

Judges ELMORE and GEER concur.

STATE OF NORTH CAROLINA v. JONATHAN EUGENE BRUNSON

No. COA12-85

(Filed 17 July 2012)

1. Appeal and Error—preservation of issues—failure to argue constitutional issue at trial—not proper for plain error review

Defendant failed to preserve for appellate review the argument that his constitutional rights to confrontation, a fair trial, and due process were violated in a child sex offenses case when the trial court failed to conduct an *in camera* review of certain Department of Social Services and medical documents. Defendant failed to request a judicial hearing on this matter and the issue of whether the trial court should have conducted an *in camera* review in this situation was not proper for plain error analysis.

2. Constitutional Law—effective assistance of counsel—pro se defendant—no error

Defendant's claim for ineffective assistance of counsel in a child sex offenses case had no merit where defendant dismissed all of his attorneys and chose to represent himself.

3. Constitutional Law—due process—probable cause hearing—probable cause established—discovery violation speculative

The trial court in a child sex offenses case did not violate defendant's constitutional rights to due process, a fair trial and confrontation by not holding a probable cause hearing. As defendant was arrested upon warrants and tried upon indictments, probable cause was twice established. Further, defendant's speculative argument regarding potential discovery and impeachment evidence was overruled as defendant failed to show a reasonable possibility that a different result would have been reached in this trial had he been given a preliminary hearing.

4. Evidence—witness testimony—no probable impact on jury's finding of guilt

The trial court did not commit plain error in a child sex offense case by allowing the victim's mother to testify that a physician diagnosed her daughter's joint disease as caused by trauma. Assuming *arguendo* that the evidence was inadmissible due to the victim's extensive, detailed testimony regarding the

numerous offenses defendant committed against her, the error did not have a probable impact on the jury's finding that defendant was guilty.

5. Sexual Offenses—against child—prosecutor questioning—no limiting instruction requested

Defendant's argument that the trial court erred in a child sex offenses case by allowing the State to question the victim again about the offenses defendant had committed against her was rejected. Defendant did not ask for a limiting instruction and did not argue that the trial court erred in not issuing one.

Appeal by defendant from judgments entered on or about 17 June 2011 by Judge Mary Ann Tally in Superior Court, Cumberland County. Heard in the Court of Appeals 24 May 2012.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Sherri G. Horner, for the State.

Marilyn G. Ozer, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgments convicting him of numerous sexual offenses. For the following reasons, we find no error.

I. Background

This case involves the long-term sexual abuse of Jane[1] perpetrated by her stepfather, defendant. The State's evidence tended to show that over the course of a few years defendant perpetrated multiple sexual acts upon Jane, his minor stepdaughter, including showing Jane pornography; shaving Jane's pubic hair; attempting to insert objects, his fingers, and his penis into Jane's vagina; encouraging Jane to experiment sexually with another; sending Jane explicit text messages; having Jane perform oral sex on him; and performing oral and anal sex on Jane. In August of 2005, Jane's mother found explicit text messages from defendant to Jane.

After a trial by jury, on or about 17 June 2011, the jury found defendant guilty of attempted statutory rape of a thirteen year old; eight counts of sexual activity by a substitute parent by cunnilingus and fellatio; seven counts of taking indecent liberties with a child; statutory sexual offense of a fourteen year old by cunnilingus, fella-

1. A pseudonym will be used to protect the identity of the minor child.

tio, and penetration; four counts of committing a crime against nature by cunnilingus and fellatio; four counts of statutory sexual offense of a fifteen year old by cunnilingus, fellatio, and penetration; and attempted statutory rape of a fifteen year old. The trial court entered judgments on defendant's various offenses. Defendant appeals.

II. *In Camera* Review

[1] Defendant first contends that his constitutional rights to confrontation, a fair trial, and due process were violated when the trial court failed to conduct an *in camera* review of certain Department of Social Services ("DSS") and medical documents. Defendant directs this Court's attention to *Pennsylvania v. Ritchie* which stated "that [the defendant's] interest . . . in ensuring a fair trial can be protected fully by requiring that the [Children and Youth Services] files be submitted . . . to the trial court for *in camera* review." 480 U.S. 39, 60, 94 L.Ed. 2d 40, 59 (1987).

However, defendant fails to direct this Court's attention to where he preserved this issue for appeal. Defendant instead states that "[t]o the extent this error was not properly preserved, defendant raises it as plain error." However, "[p]lain error analysis applies to evidentiary matters and jury instructions." *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634, *cert. denied*, ____ U.S. ____, 175 L.Ed. 2d 362 (2009).

Defendant's argument here is not regarding jury instructions or evidentiary matters. Hypothetically, if the trial court had conducted an *in camera* review it *may* have found some "evidence" which was helpful to defendant. However, the issue before us is not regarding what the trial court *may* have discovered, but instead about whether the trial court should have conducted an *in camera* review. Furthermore, defendant's failure to request the trial court to review the documents *in camera* was not an "evidentiary" failure as when a defendant fails to object to inadmissible testimony; rather it is a failure to request a judicial ruling on a matter. Defendant argues only that the trial court failed to review certain documents and that this failure resulted in the possibility that defendant was unaware of material evidence. As this issue does not arise from "evidentiary matters [or] jury instructions[,]" the issue of whether the trial court should have conducted an *in camera* review in this situation is not proper for a plain error analysis. *Id.* As such, we will not review this issue.[2]

2. Defendant has also filed a motion for appropriate relief requesting that this Court "[v]acate his convictions and sentence and order that a new trial be conducted" or "[r]emand the case to the Superior Court of Cumberland County so that the perti-

III. Ineffective Assistance of Counsel

[2] Defendant argues that he "is entitled to a new trial because he did not receive effective assistance of counsel[.]" (Original in all caps.) Defendant was represented by four different attorneys. Throughout the course of the case, defendant repeatedly requested that his various attorneys be discharged from his case, filed over 70 *pro se* motions or documents, and ultimately chose to represent himself at trial. "[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel." *State v. Petrick*, 186 N.C. App. 597, 605, 652 S.E.2d 688, 694 (2007) (citation and quotation marks omitted), *disc. review denied and appeal dismissed*, 362 N.C. 242, 660 S.E.2d 540 (2008); *see State v. Rogers*, 194 N.C. App. 131, 141, 669 S.E.2d 77, 84 (2008) ("Four times the trial court appointed counsel for defendant, one time counsel was required to withdraw on account of a conflict of interest, defendant fired the other three for no good reason appearing in the record. Defendant made his choice, as was his constitutional right. He is entitled to no special exception for the quality of his particular self-representation or his lack of access to legal materials. *See Brincefield*, 43 N.C. App. at 52, 258 S.E.2d at 84 ('Whatever else a defendant may raise on appeal, when he elects to represent himself he cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel.'). Accordingly, this argument is overruled." (quotation marks omitted)), *disc. review denied*, 363 N.C. 136, 676 S.E.2d 305 (2009). Defendant chose to dismiss all of his attorneys, some before they likely even had a reasonable opportunity to research his case fully, develop a legal strategy, and make effective motions and requests. As defendants' plethora of *pro se* motions and documents and his decision to represent himself at trial demonstrate, defendant's only true "counsel" was himself; accordingly, we find defendant's claim for ineffective assistance of counsel to have no merit. *See id.* at 141, 669 S.E.2d at 84; *Petrick*, 186 N.C. App. at 605, 652 S.E.2d at 694.

IV. Probable Cause Hearing

[3] Defendant next contends that he was denied "his statutory right to a probable cause hearing . . . [which] resulted in a violation of [his]

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nent records may be ordered and reviewed *in camera* and a determination made as to whether failure to produce these records at trial resulted in a violation of Due Process[.]" As we are unable to address this motion based upon the record before us, defendant's motion is dismissed without prejudice to his right to file a motion for appropriate relief with the trial court.

constitutional rights to due process, a fair trial and confrontation." (Original in all caps.) Defendant argues that he was deprived "of discovery and impeachment evidence at a time that was critical to preparation to defend against the charges." However, in *State v. Hudson*,

> [the] [d]efendant contend[ed] that the State deliberately prevented him from having a probable cause hearing thereby depriving him of a valuable tool of discovery.
>
> A probable cause hearing may afford the opportunity for a defend-ant to discover the strengths and weaknesses of the State's case. However, discovery is not the purpose for such a hearing. The function of a probable cause hearing is to determine whether there is probable cause to believe that a crime has been committed and that the defendant committed it. The establishment of probable cause ensures that a defendant will not be unjustifiably put to the trouble and expense of trial.
>
> In the case *sub judice*, probable cause that a crime was committed and that defendant committed it was twice established. Defendant was arrested upon warrants, and the magistrate issuing these warrants was required by statute to first determine the existence of probable cause. Further, defendant was tried upon indictments returned by a grand jury and that body had the function of determining the existence of probable cause.
>
> There is no constitutional requirement for a preliminary hearing, and it is well settled that there is no necessity for a preliminary hearing after a grand jury returns a bill of indictment.
>
> We are aware of the provisions of G.S. 15A-605 which provide, in part, that the judge must schedule a preliminary hearing unless the defendant waives in writing his right to such a hearing and absent such waiver the district court judge must schedule a hearing not later than fifteen working days following the initial appearance before him. We are also aware of the provisions of G.S. 15A-1443 which apparently codifies existing case law. We quote a portion of that statute:
>
> > (a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is

> upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.
>
> Here defendant has failed to carry the burden of showing a reasonable possibility that a different result would have been reached in this trial had he been given a preliminary hearing.

295 N.C. 427, 430-31, 245 S.E.2d 686, 689-90 (1978) (citations omitted); *see State v. Wiggins*, 334 N.C. 18, 27-28, 431 S.E.2d 755, 760-61 (1993) (applying *Hudson* to N.C. Gen. Stat. § 15A-606, the applicable statute here).

Here, defendant was arrested upon warrants and tried upon indictments, thus probable cause "was twice established." *Hudson*, 295 N.C. at 430-31, 245 S.E.2d at 689. Based on defendant's argument regarding his speculations regarding potential discovery and impeachment evidence, we too conclude that "defendant has failed to carry the burden of showing a reasonable possibility that a different result would have been reached in this trial had he been given a preliminary hearing." *Id.* at 431, 245 S.E.2d at 689-90. This argument is overruled.

V. Hearsay

[4] Defendant next contends that "the trial court erred when it allowed . . . [Jane's mother] to tell the jurors a physician diagnosed her daughter's joint disease as caused by trauma." (Original in all caps.) Defendant failed to object at trial and thus argues plain error.

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

State v. Lawrence, ____ N.C. ____, ____, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, and brackets omitted).

Assuming *arguendo*, that Jane's mother's testimony regarding "trauma" was hearsay and therefore inadmissible, due to Jane's extensive, detailed testimony regarding the numerous offenses defendant committed against her, we cannot see how "the error had a probable impact on the jury's finding that the defendant was guilty." *Id.*

VI. Quashed Subpoena

[5] On 15 August 2008, the district court entered an ex parte domestic violence order of protection ("ex parte DVPO") pursuant to North Carolina General Statutes §§ 50B-2, -3, -3.1, against defendant in an action brought by Jane's mother as the petitioner/plaintiff. In the ex parte DVPO, the district court found that defendant had committed first degree rape, first degree sexual offense, and sexual battery. During the trial, the trial court allowed defendant to question Jane's mother about "whether or not she told Judge Franks that on 8/14/08 the defendant committed first-degree rape and first-degree sex offense because that was a finding of the Court." Jane's mother denied telling Judge Franks that defendant had committed first-degree rape or first-degree sex offense and stated that she had tried to convey to Judge Franks her understanding of the pending charges against defendant which were the same charges as noted above arising from the sexual abuse of Jane. The trial court eventually quashed defendant's subpoena for Judge Franks. Defendant argues that the trial court erred in ordering the subpoena be quashed. Defendant contends that "[i]f Judge Franks had testified [that Jane's mother] told him the defendant committed rape, it would have gone to the credibility of [Jane's mother's] allegations at trial."

We believe that this case is similar to *State v. House*, in which after the State had rested, the defendant requested that he be allowed to subpoena certain witnesses. 295 N.C. 189, 205, 244 S.E.2d 654, 662 (1978). The trial court denied the request. *Id.* This Court found no error in denying the request in part because the defendant had waited so long to make the request, but also in part because the defendant did not show that the testimony was material. *Id.* at 206, 244 S.E.2d at 663. *House* stated,

> G.S. 15A-801 provides for the issuance of subpoenas for proposed witnesses in a criminal proceeding and provides that these shall be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure, G.S. 1A-1, for the issuance and service of subpoenas in civil actions. That rule provides for the issuance of subpoenas by the Clerk of the Superior Court, but also provides for the issuance of subpoenas over the signature of the party or his counsel. . . .
>
> . . . .
>
> . . . [I]t does not appear that the testimony which the defendant hoped to elicit from any of these proposed witnesses

> would have been material in the trial of this action. According to the defendant's responses to the inquiries of the court, two of them were men whom he suspected of having committed adultery with his wife. Assuming, which seems unlikely, that these men, if called to the witness stand, would acknowledge such conduct, it would not be material to the trial of the present action in view of the fact that it occurred, if at all, ten and eleven years prior to the defendant's shooting of his wife and after he, with knowledge thereof, condoned the misconduct and he and his wife became reconciled and renewed their marital relations. Another was a minister, not shown to have any knowledge of any circumstance related to the shooting, or of the defendant's mental or emotional condition, or of his character or reputation.

Id. at 205-06, 244 S.E.2d at 663.

In this case, Judge Franks filed an affidavit and it appears that he had no independent recollection of Jane's mother's case. But even if we were to assume *arguendo* that Judge Franks could have testified that Jane's mother told him that defendant had committed first degree rape and/or first-degree sex offense, this testimony would not have made any difference to defendant's case. Jane's mother's testimony made it clear that she informed Judge Franks regarding the acts that she understood defendant to be charged with, although she may have been unaware of the exact legal terminology for these acts. Assuming Judge Franks could testify that Jane's mother was wrong about the legal name of the crimes she told Judge Franks defendant had been charged with or committed, at most this shows a lay person's confusion with legal terms such as "first degree sexual offense" rather than an attempt to convey false information. Also, the majority of the evidence upon which defendant was convicted came from Jane, and we do not believe defendant's inability to attempt to attack Jane's mother's credibility through Judge Franks resulted in any prejudicial error. *See State v. Hurst*, 127 N.C. App. 54, 61, 487 S.E.2d 846, 852 ("[T]o obtain reversal based on any error in the trial court's ruling, the defendant must show prejudicial error. The test for prejudicial error is whether there is a reasonable possibility that a different result would have been reached at trial had the error not been committed." (citation and quotation marks omitted)), *disc. review denied and appeal dismissed*, 347 N.C. 406, 494 S.E.2d 427 (1997), *cert denied*, 523 U.S. 1031, 140 L.Ed. 2d 486 (1998); *see also State v. Valentine*, 20 N.C. App. 727, 729, 202 S.E.2d 496, 498 (1974) ("In order

to entitle defendant to a new trial, the error complained of must be prejudicial to him."). Accordingly, this argument is overruled.

VII. Redirect Examination

[5] Lastly, defendant contends that the trial court erred when on redirect examination it allowed the State to question Jane again about the offenses defendant had committed against her as this had not been raised on cross-examination. However, at one point during the redirect examination, the trial court specifically stated, "All right. That's outside. We're not gonna keep repeating things. That's outside the scope of cross-examination." Thus, the trial court did eventually forbid the prosecution from impermissible re-questioning. Defendant now contends that by the time the trial court intervened "the prejudice had already occurred." As to any potential prejudice that might have occurred before the trial court stopped the State's re-questioning, defendant could have requested a limiting instruction or other remedy. However, defendant did not nor does the defendant argue that the trial court erred in not issuing one here. Accordingly, this argument is overruled.

VIII. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges CALABRIA and McCULLOUGH concur.

JAMES HUTCHENS, EMPLOYEE, PLAINTIFF v. ALEX LEE, EMPLOYER, SELF-INSURED (BROADSPIRE, A CRAWFORD CO., SERVICING AGENT), DEFENDANT

No. COA12-112

(Filed 17 July 2012)

1. Workers' Compensation—findings of fact—supported by competent evidence—credibility and weight of evidence—reserved to Commission

Findings of fact challenged by defendant employer in a workers' compensation case were supported by competent evidence. Rather than the competence of the evidence, defendant

employer's argument raised issues of credibility and weight, which are reserved to the Commission.

2. Workers' Compensation—disability—findings of fact not supported by evidence—conclusion of disability not supported

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff-employee established disability. There was no evidence about plaintiff's education, experience, training, or vocational skills to support finding of fact 33. Absent this finding, the Commission's conclusion of law that plaintiff met his burden of establishing ongoing disability was not supported.

3. Workers' Compensation—opinion and award—order—not in conflict

The Industrial Commission did not err in a workers' compensation case by issuing an October 2011 opinion and award which allegedly conflicted with the Commission's 6 January 2010 order. There was no "direct conflict" (or indeed, any conflict) between the Commission's order and its opinion and award.

Appeal by Defendant-employer from opinion and award filed 5 October 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 June 2012.

Franklin Smith for Plaintiff.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by J.A. Gardner, III, M. Duane Jones, and Dana Moody Leonard, for Defendant.

STEPHENS, Judge.

Procedural History

Plaintiff-employee James Hutchens ("Employee") contends he sustained an injury by accident on 12 December 2006 while working as a delivery driver for Defendant-employer Alex Lee ("Employer"). Employer denied that Employee's injury was compensable, and in July 2007, Employee requested that his claim be assigned for hearing. On 15 May 2009, a deputy commissioner issued an opinion and award denying Employee's claim. Specifically, the deputy commissioner concluded that Employee had shown that he sustained an injury to his back, to wit, a back strain, as a result of a specific traumatic incident occurring on 12 December 2006 in the course of his work-

related duties, but that Employee's back strain had resolved. The deputy commissioner further concluded that Employee had experienced the onset of a different back condition sometime prior to 10 April 2007.

Employee appealed to the Full Commission, which on 6 January 2010 issued an order remanding the matter to the chief deputy commissioner "for the taking of evidence on whether [Employee] sustained a specific traumatic incident of the work assigned during a cognizable period of time on or about April 6, 2007." Employer filed a motion to reconsider, arguing that the Industrial Commission lacked jurisdiction to consider any workers' compensation claim purportedly arising from any incident on 6 April 2007 because Employee had failed to timely file a claim for any such alleged injury pursuant to N.C. Gen. Stat. § 97-24. On 28 June 2011, the Full Commission granted the motion, such that no further evidence was taken.

On 5 October 2011, the Full Commission issued an opinion and award concluding that Employee sustained a compensable injury by accident to his lower back on 12 December 2006 and that the medical treatment Employee sought beginning in April 2007 was causally related to the December 2006 injury. Employee was awarded temporary total disability and medical expenses. Employer appeals.

Factual Background

One of Employee's duties was unloading food items from his truck at customers' business locations. On 12 December 2006, while making a delivery to a customer, Employee found that boxes of frozen foods had shifted in transit. As Employee bent over and attempted to pick up a box of frozen turkeys weighing approximately 40 pounds, he felt a sharp pain in his low back radiating down into his right leg. Employee reported the incident to Employer, but completed his deliveries for the day.

Employee sought medical attention that day at Catawba Valley Medical Center and was diagnosed with a lumbar strain and released to work with restrictions. After a follow-up medical appointment with Dr. Albert Osbahr on 15 December 2006, Employee was released to work without restrictions and assigned a zero percent permanent partial impairment rating to his back. Employee continued regular work duties for Employer and did not seek any further medical treatment for his back until 10 April 2007. On that date, Employee saw Phillip Killian, a physician's assistant in Dr. Osbahr's office, complaining of

soreness in his groin and low back and shooting pain in his right leg. Employee was assigned work restrictions of lifting no more than ten pounds. Following another appointment with Dr. Osbahr's clinic on 17 April 2007, Killian continued Employee's work restrictions. After another visit in May 2007, Dr. Osbahr completed a workers' compensation medical status questionnaire on which he noted that Employee's 12 December 2006 back injury had completely resolved as of 15 December 2006, and that the new back symptoms were unrelated to the workplace injury.

On 1 June 2007, Employee saw Dr. Richard Adams, an orthopedic surgeon. Dr. Adams recorded a different history from Employee, in particular that the back pain which began after the 12 December 2006 workplace injury had continued to radiate down Employee's leg until 7 April 2007 when Employee reinjured his back while lifting at work. Following an MRI and physical examination, Dr. Adams diagnosed an extruded disk fragment to the right of midline at L4-L5, with probable right nerve impingement. Dr. Adams opined that Employee's April 2007 symptoms likely related back to the 12 December 2006 injury.

Standard of Review

> The Workers' Compensation Act provides that the Industrial Commission is the sole judge of the credibility of the witnesses and the weight of the evidence. We have repeatedly held that the Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary. Further, the evidence tending to support [the] plaintiff's claim is to be viewed in the light most favorable to [the] plaintiff, and [the] plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence. Appellate review of an opinion and award from the Industrial Commission is generally limited to determining (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.

Davis v. Harrah's Cherokee Casino, 362 N.C. 133, 137-38, 655 S.E.2d 392, 394-95 (2008) (citations, quotation marks, and brackets omitted).

Discussion

On appeal, Employer argues that: (1) findings of fact 28 and 29 are not supported by competent evidence, and that, without those findings of fact, there is no support for the Commission's conclusion

of law that the symptoms and conditions for which Employee sought treatment beginning in April 2007 relate back to the compensable 12 December 2006 injury by accident; (2) the conclusion of law that Employee has been disabled since June 2007 is not supported by the findings of fact; and (3) the October 2011 opinion and award conflicts with the Commission's 6 January 2010 order. We affirm in part and reverse in part.

Findings of Fact 28 and 29

[1] Employer first contends that findings of fact 28 and 29 are not supported by competent evidence. We disagree.

Employer challenges the following portions of these two findings of fact:

> 28. . . . [Employee] sustained a compensable injury on December 12, 2006 resulting in a disc injury, which caused sharp pain in his lower back that went down his right leg for which he sought medical treatment in December 2006, that after he returned to work in approximately a week he continued to have intermittent, nagging type pain in his right lower back, and that his disc injury progressed to a disc herniation at L4-L5, causing a flare-up of severe pain in April 2007 and continuing.
>
> 29. . . . [T]he medical treatment [Employee] received in April 2007 and thereafter from Dr. Adams and Catawba Valley Medical Center for his lumbar spine condition was causally related to his December 12, 2006 injury and was reasonably required to effect a cure, provide relief and/or lessen his disability.

Specifically, while Employer acknowledges that Dr. Adams gave testimony that would support these findings of fact, it asserts that his testimony was "based upon speculation" and the "faulty" history Employee gave to Dr. Adams, which Employer contends "is not supported by the competent evidence in the Record."

> In cases involving complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury. However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation. The evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must

be sufficient competent evidence tending to show a proximate causal relation.

Holley v. ACTS, Inc., 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003) (citations, quotation marks, and brackets omitted). In sum, while a reasonable degree of medical certainty is required to establish causation, absolute certainty is not. *Id.* at 234, 581 S.E.2d at 754.

Our review of the record reveals that, when asked how Employee's disc herniation related to Employee's work, Dr. Adams testified, "[M]y opinion is that . . . the strain on his back [from December 2006] was the problem that resulted in the disc herniating." Later, on cross-examination, Dr. Adams agreed that there was "no way [to] 100% know that [the December 2006 injury caused the symptoms which led to Employee's need for medical treatment in April 2007]" and that "[t]here's no way of being sure [about causation]." However, as noted *supra*, absolute certainty is not required to establish causation. Further, Dr. Adam's opinion that Employee's disc herniation was the result of his December 2006 compensable injury by accident was not "based merely upon speculation and conjecture[,]" but rather was based upon, *inter alia*, an MRI, Employee's medical records and history, Dr. Adams' examination of Employee, and Dr. Adams' expertise in orthopedic medicine.

Employer also contends that Dr. Adams' opinion was not competent because it was based in part on the history Employee gave Dr. Adams, which Employer asserts omitted important information Employee provided to Dr. Osbahr, especially regarding the onset of Employee's symptoms in April 2007. We are not persuaded. At a 15 December 2006 visit with Dr. Osbahr, Employee rated his back pain level as one out of ten and reported feeling almost back to normal, suggesting that his injury had resolved. Employee then received no medical treatment until his 10 April 2007 visit to Dr. Osbahr's clinic, at which time Employee reported increased soreness the prior Friday, with a severe shooting pain from his groin into his right leg as he attempted to get out of bed. In contrast, during his 1 June 2007 appointment with Dr. Adams, Employee reported that the pain radiating down his right leg had never resolved, but rather had continued from December 2006 until April 2007. In forming his opinion about the causal connection between Employee's compensable injury and his April 2007 symptoms, Dr. Adams did not review records of Employee's prior medical treatment or consider the medical history Employee gave Dr. Osbahr.

"The opinion of a physician is not rendered incompetent merely because it is based wholly or in part on statements made to him by the patient in the course of treatment or examination." *Adams v. Metals USA*, 168 N.C. App. 469, 476, 608 S.E.2d 357, 362, *affirmed*, 360 N.C. 54, 619 S.E.2d 495 (2005); *see also Jenkins v. Pub. Serv. Co. of N.C.*, 134 N.C. App. 405, 410, 518 S.E.2d 6, 9 (1999) ("A physician's diagnosis often depends on the patient's subjective complaints, and this does not render the physician's opinion incompetent as a matter of law."), *reversed in part on other grounds*, 351 N.C. 341, 524 S.E.2d 805 (2000). Employer cites no authority that, in forming an expert medical opinion, a physician *must* consider or rely upon the medical records of another treating physician, and we know of none.

Rather than the *competence* of the evidence, Employer's argument raises issues of *credibility and weight*, which are reserved to the Commission. *See, e.g.*, *Davis*, 362 N.C. at 137, 655 S.E.2d at 394 ("[T]he Industrial Commission is the sole judge of the credibility of the witnesses and the weight of the evidence."). In determining causation, the Commission had before it testimony from Employee and both doctors, including testimony highlighting the differences in the histories Employee gave to each physician and the bases of each physician's opinion regarding causation. In light of the Commission's findings of fact and conclusions of law, it apparently determined that Dr. Adams' opinion regarding causation was the most credible, even with full knowledge that (1) Employee gave Dr. Adams a medical history that differed in relevant respects from that given to Dr. Osbahr and (2) Dr. Adams had declined to consider these inconsistencies in forming his expert opinion. We may not second-guess the Commission on this point. *Hill v. Hanes Corp.*, 319 N.C. 167, 172, 353 S.E.2d 392, 395 (1987). Employer's arguments are overruled.

Conclusion of Ongoing Disability

[2] Employer also argues that Employee failed to meet his burden of proof in establishing his disability. We agree.

Employer contends that no competent evidence supports the Commission's finding of fact 33 "that due to [Employee]'s medical condition which may require surgery, his physical limitations and his work restrictions resulting from his workplace injury and his past work history and vocational skills, it would have been futile for [Employee] to seek employment since the date he left work."[1]

1. Employee's *only* response to Employer's argument on this issue is that the Commission "properly" made this finding of fact. Employee cites no authority in sup-

To establish disability,

> [t]he burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden [by, *inter alia*,] the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment[.]

Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted).

Here, the record contains competent evidence that Employee, who was forty-two years old at the time of the Commission's decision, would likely need surgery and had physical limitations and work restrictions. However, the record contains almost no evidence about Employee's work history and none about his vocational skills. Employee did testify that, before working for Employer, he worked at Pilgrim's Pride of North Wilkesboro, but there are no details about what type of work he performed there. Beyond testimony from Employer's loss prevention and safety manager that Employee performed filing and paperwork duties after his December 2006 injury (suggesting he may have some basic clerical skills), our review reveals no evidence about Employee's education, experience, training, or vocational skills. Accordingly, the above-quoted portion of finding of fact 33 is not supported by competent evidence. *Compare*, *e.g.*, *Bridges v. Linn-Corriher Corp.*, 90 N.C. App. 397, 400-01, 368 S.E.2d 388, 390-91 (holding evidence that the employee was sixty-one years old with a fifth-grade education, skilled only in work he was physically unable to perform, afflicted with an easily aggravated breathing condition, and had attempted but was unable to obtain employment sufficient to show the employee's impaired earning capacity), *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988). Absent this finding of fact, the Commission's conclusion of law that Employee met his burden of establishing ongoing disability is not

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port of his lone statement that the Commission's finding of disability was "proper[.]" Indeed, Employee's entire brief is no more than a recitation of the Commission's findings and conclusions. Employee's brief woefully fails to comply with our Rules of Appellate Procedure. N.C.R. App. P. 28(a) ("The function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and *to present the arguments and authorities upon which the parties rely* in support of their respective positions thereon.") (emphasis added). As such, Employee's brief offers no assistance to this Court in the resolution of the issues raised by this appeal.

supported, and accordingly, the Commission's award of temporary total disability is reversed.

6 January 2010 Order

[3] In its final argument, Employer contends that the October 2011 opinion and award conflicts with the Commission's 6 January 2010 order. We disagree.

In its 6 January 2010 order, the Commission found that good grounds existed to remand to the deputy commissioner section for gathering "evidence on whether [Employee] sustained a specific traumatic incident of the work assigned . . . on or about April 6, 2007." The order also noted that such incident "could be" a specific traumatic event and the cause of Employee's subsequent disc herniation and medical symptoms. However, as noted *supra*, the Full Commission granted Employer's motion to reconsider, based on Employer's position that the Commission lacked jurisdiction to hear any claim involving an April 2007 injury, and no additional evidence was taken. In its 5 October 2011 opinion and award, the Commission found and concluded that Employee's disc herniation and other symptoms beginning in April 2007 were caused by the 12 December 2006 compensable injury by accident.

We see no "direct conflict" (or indeed, any conflict) between the Commission's order and its opinion and award. The order only noted that an incident in April 2007 "*could be*" the cause of Employee's medical condition; the opinion and award reflects the Commission's ultimate determination that it was not. We reject this argument.

The Commission's 5 October 2011 opinion and award is

AFFIRMED IN PART; REVERSED IN PART.

Judges BRYANT and THIGPEN concur.

SISK v. SISK

[221 N.C. App. 631 (2012)]

KATHY LYNN SISK, PLAINTIFF v. GLENN L. SISK, SR., DEFENDANT

No. COA11-1320

(Filed 17 July 2012)

1. Jurisdiction—subject matter—motion for new trial—judge did not preside over original trial

The trial court erred in an equitable distribution case by entering an order for a new trial. The trial judge was without jurisdiction to hear plaintiff's Rule 59 motion for a new trial where that judge did not preside over the original trial.

2. Divorce—equitable distribution—motion for new trial—no grounds

The trial court erred in an equitable distribution case by entering an order for a new trial. Plaintiff was not entitled to a new trial pursuant to N.C.G.S. § 1A-1, Rule 59 as the conduct of the trial judge and counsel for defendant did not constitute grounds for a new trial.

Appeal by defendant from an order directing a new trial entered 2 March 2011 by Judge Larry J. Wilson in Lincoln County District Court. Heard in the Court of Appeals 22 March 2012.

Crowe & Davis, P.A., by H. Kent Crowe, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, and The Jonas Law Firm, P.L.L.C., by Johnathan L. Rhyne, Jr., for defendant-appellant.

STEELMAN, Judge.

A judge who did not preside at trial had no jurisdiction to rule on a Rule 59 motion for new trial. We consider the motion for a new trial *de novo* on appeal, and hold it to be without merit.

I. Factual and Procedural Background

Kathy Lynn Sisk (plaintiff) and Glenn L. Sisk (defendant) were once married, but are now divorced. On 17 January 2006, plaintiff filed a complaint, which asserted several claims for relief, including a claim for equitable distribution of marital property. On 26 January 2006, defendant filed an answer and counterclaim, which also sought equitable distribution of marital property. These claims were tried before Judge K. Dean Black in June and July of 2008.

On 9 April 2009, Judge Black met with both parties' counsel at the Court Street Grille to discuss the case. Subsequently, counsel for defendant submitted to the court an additional memorandum of law and a proposed judgment of equitable distribution. Copies of these documents were sent to plaintiff's counsel, who objected to them. At a hearing on 2 June 2009, Judge Black indicated that he had not reviewed the proposed judgment and invited plaintiff's counsel to submit additional law contrary to that submitted by defendant. On 5 June 2009, counsel for plaintiff made such a submission. At a conference with the parties and counsel on 1 July 2009, the court advised that it was working on a judgment, and that it had considered the proposed judgment and other submissions of the parties.

On 13 July 2010, nearly two years after trial, Judge Black entered a written Equitable Distribution Judgment. On 22 July 2010, plaintiff filed a motion for a new trial pursuant to Rule 59 of the Rules of Civil Procedure. This motion alleged that Judge Black acted improperly in using the proposed judgment submitted by counsel for defendant. On 5 August 2010, plaintiff filed a motion pursuant to Rule 62 of the Rules of Civil Procedure seeking a stay of Judge Black's judgment of 13 July 2010.

These motions came on for hearing before Judge Larry J. Wilson at the 18 August 2010 session of District Court. Judge Wilson declined to hear the motions and ordered that they be scheduled for hearing before Judge Black. Judge Wilson found that no motion had been made for Judge Black to be recused from hearing the case. On 13 September 2010, plaintiff filed a motion to recuse Judge Black, asserting that there were "reasonable questions as to Judge Black's partiality and bias against the Plaintiff." On 10 November 2010, Judge Black filed an order that recused him from hearing further matters in the case. The order contained no explanation for the recusal, and it continued the case to be scheduled for hearing before Judge Wilson.

On 3 March 2011, Judge Wilson filed an order setting aside the Judgment of Equitable Distribution dated 13 July 2010 and granting a new trial.

Defendant appeals.

II. Jurisdiction of Judge Wilson to Order a New Trial

[1] Defendant contends that Judge Wilson had no jurisdiction to enter an order granting a new trial. We agree.

A. Standard of Review

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted).

B. Analysis

In *Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co.*, 192 N.C. App. 376, 665 S.E.2d 505 (2008), we held that a judge who did not try a case may not rule upon a motion for a new trial. *Id.* at 388–90, 665 S.E.2d at 513–14 (citing *Hoots v. Callaway*, 282 N.C. 477, 193 S.E.2d 709 (1973) and *Graves v. Walston*, 302 N.C. 332, 275 S.E.2d 485 (1981)). Judge Wilson was without jurisdiction to hear plaintiff's Rule 59 motion for a new trial. The order filed on 3 March 2011 granting a new trial is hereby vacated.

III. Plaintiff's Motion for a New Trial

[2] In his second argument on appeal, defendant contends that plaintiff is not entitled to a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. We agree.

A. Standard of Review

"[I]t is not appropriate for a superior court judge who did not try a case to rule upon a motion for a new trial, and in that situation, an appellate court should conduct the review of errors to determine if the party is entitled to a new trial." *Gemini*, 192 N.C. App. at 390, 665 S.E.2d at 514.

B. Analysis

Plaintiff's motion for a new trial recites that it is made pursuant to Rule 59(a)(1) (irregularity by which a party was prevented from having a fair trial); 59(a)(2) (misconduct of the prevailing party); 59(a)(3) (surprise which ordinary prudence could not have guarded against); and 59(a)(9) (other reason heretofore recognized as grounds for a new trial). Plaintiff's factual allegations supporting the motion are that defendant's counsel submitted an additional memorandum of law and proposed judgment to the court on 14 April 2009; that at a status conference on 2 June 2009, Judge Black stated that he had not considered defendant's proposed judgment; that at a hearing on 1 July 2009, Judge Black acknowledged that, in preparing a judgment, he was working from both a pretrial affidavit and defendant's proposed judgment; that the judgment entered by Judge Black on 13 July 2010 was based upon defendant's proposed judgment; that the

use of defendant's proposed judgment by Judge Black constituted grounds for a new trial pursuant to Rule 59(a)(1), (2), (3), and (9); and that an additional basis for new trial was the submission by defendant's counsel of a memorandum of law containing law not submitted at trial.

We have carefully reviewed plaintiff's motion for a new trial, the transcripts of the hearings, and each of the documents referenced therein. We hold that plaintiff's motion is based primarily upon the lifting of selected portions from the transcript, out of context, and upon innuendo. Plaintiff asserts that it was improper for counsel for defendant to submit to the court a proposed judgment and memorandum of authority on 14 April 2009. Yet the record discloses that copies of these documents were sent to plaintiff's counsel at the same time that they were sent to the court. On 15 April 2009, counsel for plaintiff responded to defendant's 14 April 2009 submission as follows:

> In our recent meeting, you asked Mr. Warren and me to point to any testimony given in court or any cases presented at trial with regard to classification of marital and separate property. It was my understanding you did not invite the parties to provide any additional Memorandum of Law not presented in court at the trial last July, nor did you invite the parties to provide further argument beyond what was presented at trial. Furthermore, at no time did you request either party to present a court order for signature.

We further note that the transcript of the hearing on 2 June 2009 reveals that defendant's counsel was not present during the hearing because he was on military reserve duty. Yet despite the absence of defendant's counsel, plaintiff's counsel insisted upon discussing the case with the court. Judge Black stated that he had not reviewed or considered the proposed judgment submitted by defendant. He also made it abundantly clear that if plaintiff had any law that contradicted defendant's submission, "that's what I want you to hit me with." At the hearing on 1 July 2009, Judge Black outlined the basic structure of his ruling. Defendant's counsel was instructed to modify the draft judgment to comport with his rulings, and then to forward it to plaintiff's counsel for his review.

We will now discuss each of plaintiff's grounds for a new trial under Rule 59.

1. Rule 59(a)(1): Irregularity Preventing a Fair Trial

"New trials are not awarded because of technical errors. The error must be prejudicial." *Dixon v. Weaver*, 41 N.C. App. 524, 528, 255 S.E.2d 322, 325 (1979). "[T]he party asserting the error must demonstrate that he has been prejudiced thereby." *Robinson v. Seaboard Sys. R.R.*, 87 N.C. App. 512, 528, 361 S.E.2d 909, 919 (1987).

The irregularity alleged by plaintiff is that of Judge Black "viewing, using and adopting the uninvited Order" submitted by defendant's counsel. We hold that this did not constitute an irregularity. The proposed judgment was submitted nearly a year after trial, and after a conference where Judge Black asked counsel for additional support on the crucial question in the equitable distribution proceeding: whether certain property was marital or separate property. The communication was not *ex parte*, as copies were sent to counsel for plaintiff. The cover letter from defendant's counsel stated: "In our meeting on Thursday, April 9, one of the things you asked us to do was to present cases on the issue of whether putting personal property in joint names made it marital for the purposes of equitable distribution." The submissions by defendant's counsel were responsive to that request. Plaintiff's assertion that defendant's counsel acted wrongfully by submitting cases not considered at trial, which occurred nearly a year earlier, is disingenuous.

We further note that while Judge Black stated that he had not reviewed defendant's proposed judgment at the 2 June 2009 *ex parte* hearing, it was clear by the 1 July 2009 hearing that he was using the proposed judgment as a starting point. It is also clear that Judge Black made his own independent determinations of the relevant legal issues, and he directed that the proposed judgment be so modified. The final order was entered over a year after the 1 July 2009 hearing. At the 2 June 2009 hearing, it was made clear to the plaintiff that she was invited to rebut the submissions by defendant. This was in fact done by a submission to the court on 5 June 2009.

We further hold that plaintiff has failed to demonstrate prejudice under Rule 59(a)(1). Plaintiff states in her brief to the Court that she was "left to question" whether prejudice occurred. This allegation is not sufficient to demonstrate prejudice. Plaintiff makes no argument, either in her motion for a new trial or her brief to this Court, as to how this alleged irregularity affected the equitable distribution judgment of Judge Black. "It is not the duty of this Court to peruse through the record, constructing an argument for appellant." *Pers.*

Earth Movers, Inc., v. Thomas, 182 N.C. App. 329, 333, 641 S.E.2d 751, 754 (2007).

This argument is without merit.

2. Rule 59(a)(2): Misconduct by the Prevailing Party

Since the proceedings at issue were non-jury, the only ground applicable to this case under Rule 59(a)(2) is alleged misconduct by a party. Plaintiff contends that the submissions of defendant's counsel on 14 April 2009 constituted misconduct. As noted above, this submission was responsive to the court's request, and was not an *ex parte* communication. Further, as noted above, plaintiff has failed to demonstrate prejudice.

This argument is without merit.

3. Rule 59(a)(3): Surprise

We fail to see how plaintiff could possibly have been surprised by a submission dated 14 April 2009, to which she responded in detail on 15 April 2009 and 5 June 2009. Further, the court conducted several hearings after the submission and prior to the entry of the judgment on 13 July 2010.

This argument is without merit.

4. Rule 59(a)(9): Other Reason

Rule 59(a)(9) provides that a new trial may be granted for "[a]ny other reason heretofore recognized as grounds for new trial." N.C. Gen. Stat. § 1A-1, Rule 59(a)(9). Plaintiff's motion for a new trial references the submission of the "uninvited Order" as being "good reason and cause for granting to the Plaintiff a new trial on the issues of Post Separation Support, Alimony, and Equitable Distribution, within the meaning of Rule 59(a)(9) of the Rules of Civil Procedure." Plaintiff's brief makes no reference to Rule 59(a)(9) and makes no argument as to why that rule would be applicable to this case.

Based upon our discussion of the other subparts of Rule 59, we hold any argument made by plaintiff under Rule 59(a)(9) to be without merit.

IV. Conclusion

Judge Wilson was without jurisdiction to enter an order on plaintiff's motion for new trial. We have held that the conduct of Judge Black and counsel for defendant did not constitute grounds for a new

trial under Rule 59. This does not mean that Judge Black is totally blameless in this matter. The trial was held in June and July of 2008, and the judgment was not filed until 13 July 2010. This delay clearly contributed to the germination of the issues raised by this appeal. The record reveals that Judge Black was assigned to hold court in another county shortly after trial in this matter was conducted. However, this is not an uncommon problem in multi-county judicial districts. It cannot excuse a two-year delay in the entry of the judgment in this case. Our State Constitution provides that "right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18.

ORDER VACATED.

MOTION FOR NEW TRIAL DENIED.

Judges ELMORE and STROUD concur.

IN THE MATTER OF V.A

No. COA12-170

No. COA11-1431

(Filed 17 July 2012)

1. Child Abuse, Dependency, and Neglect—Interstate Compact for the Placement of Children—home study required

The trial court erred in a child neglect case by placing a minor child with her maternal great-grandmother when the great-grandmother's home had not been approved for placement by South Carolina authorities. This placement violated the Interstate Compact for the Placement of Children ("ICPC") as a child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study.

2. Child Abuse, Dependency, and Neglect—custody review—permanency planning—insufficient findings of fact

The trial court erred in a custody review and permanency planning order when it failed to make the written findings of fact required by N.C.G.S. § 7B-906(b), which were needed before the court could waive further hearings.

IN RE V.A.

[221 N.C. App. 637 (2012)]

Appeal by petitioner from orders entered 20 September and 14 November 2011 by Judge Kimberly Best-Staton in Mecklenburg County District Court. Heard in the Court of Appeals 25 June 2012.

Kathleen Marie Arundell, for petitioner-appellant Mecklenburg County Department of Social Services, Youth and Family Services.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, for respondent-appellee mother.

Pamela Newell, for guardian ad litem.

MARTIN, Chief Judge.

In two separate appeals, the Mecklenburg County Department of Social Services, Youth and Family Services ("YFS") appeals from the trial court's adjudication and dispositional order (COA11-1431) and custody review and permanency planning order (COA12-170) placing the juvenile V.A. in the custody of her maternal great-grandmother in South Carolina.

The legal issues in these two appeals are closely related and involve the same material facts; thus, upon our own initiative, we consolidate these appeals for the purpose of rendering a single opinion on all issues properly before the Court. *See* N.C.R. App. P. 40 ("Two or more actions that involve common issues of law may be consolidated for hearing . . . upon the initiative of th[e appellate] court."). After careful consideration, we reverse the dispositional portion of the trial court's adjudication and dispositional order and the subsequent custody review and permanency planning order, and remand for further proceedings consistent with this opinion.

YFS became involved with V.A.'s family in July 2010 when it received a referral alleging domestic violence, substance abuse, and mental health issues. V.A. was voluntarily placed with her maternal grandmother ("Ms. J") in February 2011, but V.A.'s mother was concerned that Ms. J was unable to care for V.A. because of her own health problems and history with child protective services. Mother was raised by V.A.'s maternal great-grandmother ("Ms. G") and preferred that V.A. be placed with her rather than Ms. J.

On 15 April 2011, YFS filed a petition alleging that V.A. was neglected and dependent. During the dispositional phase of the hearing, YFS informed the trial court that South Carolina authorities had

not approved Ms. G's home for placement. YFS argued that, because Ms. G's home had not been approved, placing V.A. in Ms. G's custody in South Carolina would violate the Interstate Compact for the Placement of Children ("ICPC") and would create additional financial burden and potential liability for YFS. Ms. G testified that South Carolina had not approved her home because of a previous child protective services case involving her daughter, Ms. J.

On 16 August 2011, the trial court entered a written adjudication and dispositional order adjudicating V.A. neglected and placing her with Ms. G in South Carolina, although YFS retained legal custody. The trial court ordered YFS to continue to make reasonable efforts toward reunification of V.A. with her mother and set a concurrent plan of reunification and adoption. The trial court also ordered YFS to obtain ICPC paperwork from South Carolina addressing placement with Ms. G. If YFS could not obtain the paperwork, the trial court ordered YFS to conduct its own home study of Ms. G's home within ten days and to place V.A. in Ms. G's home within fourteen days, if appropriate.

YFS filed a motion to reconsider and to stay the trial court's dispositional order, alleging that V.A.'s placement with Ms. G violated the ICPC. On 20 September 2011, the trial court entered an amended adjudication and dispositional order reaching the same disposition, but emphasizing that YFS should conduct its own home study if it does not receive ICPC paperwork approving the home as a placement for V.A. YFS appealed the amended order. This Court allowed YFS's motion for temporary stay and petition for writ of supersedeas, staying the trial court's 20 September 2011 adjudication and dispositional order pending the outcome of the appeal.

On 2 November 2011, the trial court held a custody review hearing. YFS informed the trial court that the amended dispositional order placing V.A. with Ms. G had been stayed by this Court. The trial court, apparently frustrated that YFS had not conducted a home study of Ms. G's home, conducted a colloquy with Ms. G in which she stated her willingness and ability to accept custody or guardianship of V.A. In response to a request from mother's attorney, the trial court ultimately placed V.A. in Ms. G's custody rather than in a guardianship to allow mother the opportunity to regain custody of V.A. more easily in the future.

In its written review order, entered 14 November 2011, the trial court changed V.A.'s permanent plan to custody with a relative,

placed her in Ms. G's legal custody, and suspended further custody review hearings. YFS filed notice of appeal, a motion for a temporary stay, and a petition for writ of supersedeas. This Court granted the temporary stay pending the outcome of YFS' petition for writ of supersedeas, but later dissolved the stay when it denied supersedeas.

I.

[1] In its appeal from the 20 September 2011 adjudication and dispositional order (COA11-1431), YFS argues that the trial court violated the ICPC by placing V.A. with Ms. G when her home had not been approved for placement by South Carolina authorities. We agree.

In entering a dispositional order that places a juvenile in out-of-home care:

> [T]he court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. . . . *Placement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact on the Placement of Children.*

N.C. Gen. Stat. § 7B-903(a)(2)(c) (2011) (emphasis added). Under the ICPC,

> [n]o sending agency shall send, bring, or cause to be sent or brought into any other party state any child for *placement in foster care or as a preliminary to a possible adoption* unless the sending agency shall comply with each and every requirement set forth in this Article and with the applicable laws of the receiving state governing the placement of children therein.

N.C. Gen. Stat. § 7B-3800, Article III(a) (2011) (emphasis added). The ICPC requires that before a juvenile can be placed with an out-of-state relative "the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child." N.C. Gen. Stat. § 7B-3800, Article III(d). This Court has previously interpreted the statutory preference for relative placements in harmony with the ICPC, and held that "a child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study." *In re L.L.*, 172 N.C. App. 689, 702, 616 S.E.2d 392, 400 (2005) (holding that the statutory preference for relative placement and compliance with the ICPC are not mutually exclusive).

In the 20 September 2011 adjudication and dispositional order, the trial court ordered YFS to place V.A. with Ms. G., her maternal great-grandmother, and set the permanent plan to a concurrent one of reunification and adoption. Accordingly, the placement ordered by the trial court falls under either category listed in N.C.G.S. § 7B-3800, which explicitly requires compliance with the ICPC: placement preliminary to a possible adoption or foster care.[1]

Here, South Carolina authorities did not approve of V.A.'s placement with Ms. G due to Ms. G's history with child protective services in that state; YFS informed the trial court of this at the dispositional hearing. In its dispositional order, the trial court made a finding to this effect, yet still ordered YFS to place V.A. with Ms. G in South Carolina. Therefore, the trial court failed to comply with the ICPC in its dispositional order. Accordingly, we reverse the dispositional portion of the trial court's 20 September 2011 adjudication and dispositional order and remand for further proceedings consistent with this opinion. Because we reverse the dispositional portion of the order and neither party raises issues related to the court's adjudication, we need not address the other arguments raised in appeal COA11-1431.

II.

[2] In its appeal from the 14 November 2011 custody review and permanency planning order (COA12-170), YFS argues that the trial court erred when it failed to make the written findings of fact required by N.C.G.S. § 7B-906(b), which are needed before a court can waive further hearings. We agree.

N.C.G.S. § 7B-906(b) requires that the court find by "clear, cogent, and convincing evidence that:

> (1) The juvenile has resided with a relative or has been in the custody of another suitable person for a period of at least one year;
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests;

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1. According to Regulation 3(4)(26), "foster care" is "24-hour substitute care for children placed away from their parents or guardians and for whom the state agency has placement and care responsibility . . . [which] includes . . . foster homes of relatives" "regardless of whether the foster care facility is licensed and payments are made by the state or local agency for the care of the child." Ass'n of Adm'rs of the ICPC (AAICPC), Reg. No. 3 (amended May 1, 2011). The ICPC defines "placement" as "the care of a child in a family free or boarding home . . . ." N.C. Gen. Stat. §7B-3800, Article II(d). A "family free" home, counter intuitively, is "the home of *a relative or unrelated individual* whether or not the placement recipient receives compensation for care or maintenance of the child." AAICPC, Reg. No. 3(4)(24) (emphasis added).

> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months;
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion; and
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent caretaker or guardian of the person."

N.C. Gen. Stat. § 7B-906(b) (2011). "Failure to find all of these criteria constitutes reversible error." *In re L.B.*, 184 N.C. App. 442, 447, 646 S.E.2d 411, 413 (2007). This Court has previously held that a trial court must make *written* findings of fact to satisfy "each of the five enumerated factors in [§] 7B-907(b)." *See id.* at 447, 646 S.E.2d at 413-14.

In its order, the trial court did not check the box next to any of the facts listed in § 7B-906(b) to indicate that it found the condition satisfied. Specifically, the trial court did not find that V.A. has resided with a relative or has been in the custody of another suitable person for a period of at least a year, as is required by § 7B-906(b)(1). The record reveals that V.A. began living with her maternal grandmother in February 2011, and was first placed in nonsecure custody on 14 April 2011. The order being appealed in this case was entered on 14 November 2011. Therefore, it would be impossible for the court to make a finding that V.A. resided with a relative or another suitable person for at least one year. The trial court also failed to find that neither V.A.'s interests nor the rights of any party required the continued holding of review hearings as required in § 7B-906(b)(3). The court noted in its order that the mother "has not fully addressed the issues that brought the child into YFS custody," that visitation with the mother should be supervised "until mother addresses issues," and that "neither parent has acted consistent with their parental rights." This Court found in *L.B.* that findings to this effect, even if supported by competent evidence, are insufficient to satisfy § 7B-906(b)(3) because the court must make a written finding explicitly stating that neither the child nor any other party's rights would require future review hearings. *Id.* at 448-49, 646 S.E.2d at 414-15. Furthermore, with regard to § 7B-906(b)(4), the court only stated at the hearing, "no further reviews," and its order stated that "no further reviews [are] necessary." The court failed to make all parties aware that a review may be held anytime or upon the court's own motion, and rather, seemed to indicate the contrary by relieving counsel, DSS, and GAL of respon-

sibility. *See id.* at 449, 646 S.E.2d at 415. Consequently, we hold that the trial court committed reversible error by failing to satisfy the requirements of § 7B-906(b), and therefore, we need not address other arguments raised in the appellant's brief.

In sum, in appeal COA11-1431, we reverse the dispositional portion of the trial court's 20 September 2011 adjudication and dispositional order because the trial court failed to comply with the ICPC by placing V.A. in an out-of-state placement that had not been approved by South Carolina authorities. In addition, in appeal COA12-170, we reverse the trial court's 14 November 2011 custody review and permanency planning order because the trial court's order failed to make the required findings of fact. We remand this matter for further proceedings consistent with this opinion.

Reversed and remanded.

Judges HUNTER and STEPHENS concur.

STATE OF NORTH CAROLINA v. ERICA DENISE KELLY

No. COA12-49

(Filed 17 July 2012)

1. Homicide—first-degree murder—defendant perpetrator—sufficient evidence – motion to dismiss properly denied

The trial court did not err in a first-degree murder case by denying defendant's motion to dismiss the charges at the close of all the evidence where the State produced sufficient evidence through defendant's confession and other evidence that defendant was the perpetrator of the offense.

2. Constitutional Law—effective assistance of counsel—failure to call certain witnesses—record did not disclose strategy—dismissed without prejudice

Defendant's argument in a murder case that her trial counsel was ineffective by failing to call certain witnesses at her trial was dismissed without prejudice to her right to file a motion for appropriate relief in the trial court. The Court of Appeals was limited to the record before it to determine whether trial counsel's decision constituted a trial strategy and the record did not disclose whether that decision was a strategy.

3. Jury—first-degree murder—jury instructions—jury nullification—no error

Defendant's argument in a first-degree murder case that the trial court erred by failing to instruct the jury on jury nullification was dismissed where defendant failed to object to the jury instructions at trial, failed to argue plain error on appeal, and no case authority existed for such instruction.

4. Sentencing—mitigating factors—presumptive range—no findings of fact required

The trial court did not err in a first-degree murder case by failing to consider factors in mitigation of defendant's sentence. As the trial court sentenced defendant in the presumptive range, the trial court was not required to make findings of mitigating factors, even if evidence of mitigating factors was presented at sentencing.

Appeal by defendant from judgment entered 13 July 2011 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 5 June 2012.

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

Mary March Exum for defendant-appellant.

STEELMAN, Judge.

The State presented sufficient evidence to survive a motion to dismiss. We dismiss without prejudice defendant's ineffective assistance of counsel claim. The trial court did not err in sentencing defendant. Appellate counsel exceeded the limits of zealous advocacy for her client.

I. Factual and Procedural History

On 6 April 2009, Erica Kelly (defendant) was indicted for first-degree murder and concealing the birth of a child. On 13 July 2011, a jury found defendant guilty of second-degree murder and not guilty of concealing the birth of a child. Defendant was sentenced to an active term of imprisonment of 157 to 198 months. The underlying facts of this case will be discussed in detail in Section II of this opinion.

Defendant appeals.

II. Motion to Dismiss

[1] In her first argument, defendant contends that the trial court erred by denying her motion to dismiss at the close of all the evidence. We disagree.

A. Standard of Review

> Since defendant offered evidence following the denial of his motion to dismiss at the close of the State's evidence, we only review his motion to dismiss made at the close of all the evidence. *State v. Bruce*, 315 N.C. 273, 280, 337 S.E.2d 510, 515 (1985). "[I]n ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the crime and whether the defendant is the perpetrator of that crime." *State v. Ford*, 194 N.C. App. 468, 472-73, 669 S.E.2d 832, 836 (2008) (quoting *State v. Everette*, 361 N.C. 646, 651, 652 S.E.2d 241, 244 (2007)). On appellate review, this Court "must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988) (citing *State v. Williams*, 319 N.C. 73, 79, 352 S.E.2d 428, 432 (1987)). "If 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." *Locklear*, 322 N.C. at 358, 368 S.E.2d at 383 (citation omitted). Further, "[t]he defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)).

State v. Banks, ____ N.C. App. ____, ____, 706 S.E.2d 807, 812 (2011).

B. Analysis

"Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Page*, 346 N.C. 689, 698, 488 S.E.2d 225, 231 (1997). Defendant argues that the State failed to produce sufficient evidence that defendant was the perpetrator of the offense.

In 2006, defendant and David White (White) had a son. In May 2008, defendant became pregnant with a child by Thomas Dean Smith (Smith). Defendant hid this pregnancy from family and friends. Defendant did not seek prenatal medical care.

In February 2009, defendant and White moved into the residence of Ellen Jackson (Jackson). The residence was surrounded by woods and was on four acres of land at the end of a 2,000-foot gravel driveway. The residence was barely visible from the nearest paved road, and the closest neighbor was about 2,000 feet away.

On 24 February 2009, Jackson saw something that looked like a baby doll on a burn pile, located about 25 feet from the residence. Upon closer examination, she realized that it was a human baby. The baby was naked. One of her legs and one of her arms had been partially chewed off. Jackson owned two Shih Tzu dogs that were lying on the ground, eyeing the baby. Jackson called 911. Defendant stood on the steps of the residence, put her head down, and said, "I think I'm going to be sick."

When the police arrived, the baby was about eight to ten feet from the burn pile. Also in the burn pile were a metal frame, some couch springs, and a blood-stained towel. The baby was on her right side in the fetal position, with the umbilical cord and placenta attached. The baby appeared partially burned.

On 25 February 2009, Jackson and defendant provided police with DNA samples. Defendant repeatedly denied being the mother of the baby. On 31 March 2009, DNA test results confirmed that defendant was the mother. Forensic testing also confirmed that defendant's blood was on the towel found on the burn pile. Subsequent testing confirmed that Smith was the baby's father.

On 2 April 2009, defendant waived her *Miranda* rights and answered questions at the Union County Sheriff's Office. Defendant initially denied that she had been pregnant. Defendant later admitted that she was pregnant and gave birth to the child in the bathroom of Jackson's residence. Defendant wrapped the baby in one of her shirts and placed the baby on the side of the road in the hopes that someone would find her. Defendant used the towel that was found in the burn pile to clean herself after the birth. At trial, defendant recanted her statement and testified that White took the baby from her and that she never saw the baby again.

On 25 February 2009, Dr. Thomas Owens performed an autopsy on the baby. He concluded that she was born alive because she had air in her lungs and intestines. The animal-inflicted injuries were post-mortem. The lack of carbon dioxide in the baby's lungs indicated that she did not inhale smoke. He concluded that the cause of death was "lack of appropriate newborn care."

Defendant contends that her confession of 2 April 2009 was false. Defendant argues on appeal that the trial court should have ignored her confession to law enforcement and all of the State's evidence, found that her trial testimony was true, and dismissed all of the charges against her. In making this argument, defendant ignores the applicable law that, in ruling on a motion to dismiss at the close of all of the evidence, the trial court and the appellate courts can consider only the portions of defendant's evidence favorable to the State. *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971). Thus, we cannot consider defendant's recantation of her confession at trial.

Further, questions regarding the credibility and weight of the evidence are for the jury to resolve and not for the trial court. *State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002). The State presented sufficient evidence through defendant's confession and other evidence that defendant was the perpetrator of the offense. The trial court did not err in denying defendant's motion to dismiss.

This argument is without merit.

III. Ineffective Assistance of Counsel

[2] In her second argument, defendant contends that her trial counsel was ineffective by failing to call White and Smith as witnesses at her trial. We dismiss this argument without prejudice to the right of defendant to file a motion for appropriate relief in the trial court.

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). "Our Supreme Court has instructed that should the reviewing court determine the IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's rights to reassert them during a subsequent MAR proceeding." *Stroud*, 147 N.C. App. at 554, 557 S.E.2d at 547 (internal quotation marks omitted).

In the instant case, we are limited to the record before us to determine whether trial counsel's decision not to call certain witnesses constituted a trial strategy. The record does not disclose whether this decision was a trial strategy. We therefore dismiss these issues without prejudice to the right of defendant to file a motion for appropriate relief.

[3] In a detour within her ineffective assistance of counsel argument, defendant contends that the trial court erred by failing to instruct the jury on jury nullification. Defendant did not object to the jury instructions at trial or request an instruction on jury nullification. Defendant does not argue plain error on appeal. If a defendant fails to "specifically and distinctly argue in his brief that the trial court's instructions amounted to plain error, this Court will not conduct plain error review." *State v. Parks*, 147 N.C. App. 485, 490, 556 S.E.2d 20, 24 (2001).

We know of no case authority for the trial court to instruct the jury on jury nullification, which is the jury's "knowing and deliberate rejection of the evidence or refusal to apply the law[.]" Black's Law Dictionary 936 (9th ed. 2009). It is the duty of the trial court to correctly charge the jury on the law. The Pattern Jury Instructions suggest that the trial court instruct the jury that "[i]t is absolutely necessary that you understand and apply the law as I give it to you, and not as you think it is, or as you might like it to be. This is important because justice requires that everyone tried for the same crime be treated in the same way and have the same law applied." N.C.P.I.—Crim. 101.05 (2011). If defendant's argument were to be adopted in our criminal justice system, it would lead to chaos and an absence of justice in North Carolina.

This argument is dismissed.

IV. Sentencing

In her final argument, defendant contends that the trial court erred in failing to consider factors in mitigation of her sentence. We disagree.

[4] The trial court is required to make findings regarding aggravating and mitigating factors if the court, in its discretion, departs from the presumptive range of sentences. N.C. Gen. Stat. § 15A-1340.16(c) (2011). If the trial court sentences a defendant in the presumptive range, the trial court is not required to make findings of mitigating factors, even if evidence of mitigating factors is presented at sentencing. *State v. Hagans*, 177 N.C. App. 17, 31, 628 S.E.2d 776, 785-86 (2006).

Defendant was convicted of a Class B2 felony. *See* N.C. Gen. Stat. § 14-17 (2011). The trial court sentenced defendant to a minimum of 157 months and a maximum of 198 months imprisonment, which is within the presumptive range. *See* N.C. Gen. Stat. § 15A-1340.17(c) (2011). The trial court did not err in sentencing defendant.

This argument is without merit.

V. Admonition of Counsel

Counsel should be zealous advocates for their clients. However, this zealous advocacy does have limits. Appellate counsel for defendant has exceeded these limits in the instant case. She vigorously attacked the professionalism and ethics of the prosecutors for failing to believe defendant's recantation of her confession and proceeding with the murder prosecution in this case. Some of the language used by counsel to describe the conduct of the prosecutor was: (1) "failed to investigate the truth[;]" (2) "distorting the truth[;]" (3) "misled and misrepresented facts[;]" (4) "subverted the truth by presenting false evidence in the form of [defendant's] confession[;]" (5) "suppressed the truth by failing to disclose potentially truth-enhancing evidence[;]" and (6) "dominated the fact-finding process all led directly to [defendant's] conviction for a crime she did not commit." Appellate counsel for defendant went on to assert that "[a] prosecutor should be professionally disciplined for proceeding with prosecution if a fair-minded person could not reasonably conclude, on the facts known to the prosecutor, that the accused is guilty beyond a reasonable doubt."

We hold these comments to be unsupported by the record in this case and highly inappropriate and urge counsel to refrain from making such comments in the future.

NO ERROR IN PART; DISMISSED IN PART.

Judges McGEE and ERVIN concur.

STATE OF NORTH CAROLINA v. DAVID ELDON TALBERT

No. COA12-240

(Filed 17 July 2012)

Probation and Parole—violation—approved residence—not willful

The trial court abused its discretion in a probation revocation case by finding that defendant had willfully violated the terms of his probation by failing to supply an approved residence. Defendant was unable to obtain suitable housing before his release from incarceration because of circumstances beyond his control.

Appeal pursuant to writ of certiorari by defendant from judgment entered 3 November 2011 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 21 May 2012.

Attorney General Roy Cooper, by Assistant Attorney General Phyllis A. Turner, for the State.

Daniel F. Read for defendant.

ELMORE, Judge.

David Eldon Talbert (defendant) appeals from a judgment and commitment revoking his probation and activating his sentence. We reverse the judgment because defendant did not willfully violate the terms of his probation.

On 20 September 2010, defendant pled guilty to one count of felony failure to register as a sex offender. The trial court imposed an intermediate punishment, sentencing defendant as a Level III offender to a term of 19 to 23 months. The sentence was suspended, and defendant was placed on supervised probation for 24 months, subject to several special conditions of probation, including that defendant "abide by all terms of the sex offender control program." The first special condition of the sex offender control program, as set out by the Division of Community Corrections (DCC), is that defendant "[r]eside at a residence to be approved by the supervising officer."

On 4 October 2010, defendant was also convicted of felony larceny after breaking and entering in Yancey County. He received an active sentence of ten to twelve months' imprisonment. He was scheduled to be released from prison on 29 April 2011. That day, defendant's probation officer met defendant in prison. However,

defendant had not yet obtained a place to live following his release. While still in prison, defendant had worked with his case worker to find a place to live, but they had been unsuccessful. Defendant could not stay with family members because he was adopted but had been removed from his adoptive family's care at the age of 15 because of physical and sexual abuse. He also had no money, as indicated by his affidavit of indigency. In addition, the probation officer explained, it is sometimes difficult for convicted sex offenders to find residences after they are released from prison because they cannot live near schools or daycares and "just the fact that they are a sex offender limits their possibilities of having a residence." Although defendant contacted several shelters and rescue missions, they all turned him down because he was a convicted sex offender.

On 29 April 2011, before he was released from jail or ever "touched outside," defendant's probation officer filed a violation report and took defendant into custody for violating the terms of his probation. The violation report asserted: "[D]efendant has willfully violated sex offender special condition no. 1 that he reside at a residence to be approved by the supervising officer, in that as of 4/29/11, [defendant] doesn't have an approved residence." Defendant professed to both his probation officer and his attorney that he would be willing to live on the streets and provide his probation officer with coordinates, and his attorney even proposed that "the sidewalk out in front of the federal courthouse" could be a suitable residence. However, the probation officer opined that, pursuant to DCC policy, registered sex offenders cannot live on the streets while they are on probation; being homeless is not a "suitable residence."

At the hearing, defendant's attorney asked the court to give his client 24 or 48 hours to find a suitable residence, explaining:

> It seems just illogical, I suppose, to allow an individual to be released from DOC custody, but at the very moment he is to be released from DOC custody, and find an appropriate place to reside, that you take him into custody and put him in the Buncombe County Detention Facility where the opportunities to make phone calls and contact individuals, including shelters, is basically nil. He just doesn't have this opportunity to get out there and find a place to stay.

Defendant's probation officer recommended revocation because he did not believe that defendant would be able to find a suitable residence: "I don't see anything else we can offer the gentleman. I mean,

he's given us residences. We've checked them out. And I just don't see any light at the end of the tunnel, Your Honor." Though defense counsel asked that defendant be released for 24 or 48 hours to call friends and ask if he could stay with them, which he had been unable to do while incarcerated, the trial court revoked defendant's probation and activated his sentence. The trial court found that defendant had willfully violated the terms of his probation, "without valid excuse," by failing to find a suitable residence.

Defendant now appeals, pursuant to a petition for writ of certiorari, which we grant. Defendant argues that his failure to find a suitable residence was not a willful violation of his probation. He argues that he had no "meaningful opportunity" to find a residence while he was incarcerated. Defendant also points to N.C. Gen. Stat. § 14-208.7, which requires a registered sex offender to register his address within three business days of his release from a penal institution. N.C. Gen. Stat. § 14-208.7 (2011). Defendant contends that he was entitled to this three-day period to find a suitable residence before having his probation revoked, arguing that the DCC policy of requiring an offender to obtain a suitable residence *before* he is released "impos[es] a penalty the legislature did not envision."

We first address whether defendant's violation was willful and hold that it was not and that the trial court erred by so finding. Because we reverse on the basis that the trial court erred by finding that defendant's violation was willful, we do not reach defendant's argument that DCC's policy is incompatible with N.C. Gen. Stat. § 14-208.7.

We review a trial court's decision to revoke probation only for "manifest abuse of discretion." *State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) (quotation and citation omitted). To revoke a defendant's probation, the trial court need only find that the defendant has "willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967). "Additionally, once the State has presented competent evidence establishing a defendant's failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms." *State v. Terry*, 149 N.C. App. 434, 437-38, 562 S.E.2d 537, 540 (2002) (citation omitted). "If the trial court is then reasonably satisfied that the defendant has violated a condition upon which a prior sentence was suspended, it may within its sound discretion

revoke the probation." *Id.* at 438, 562 S.E.2d at 540 (citation omitted). Though trial judges have discretion in probation proceedings, that discretion " 'implies conscientious judgment, not arbitrary or willful action. It takes account of the law and the particular circumstances of the case, and is directed by the reason and conscience of the judge as to a just result.' " *State v. Hill*, 132 N.C. App. 209, 212, 510 S.E.2d 413, 415 (1999) (quoting *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967)). Thus, "fairness dictates that in some instances a defendant's probation should not be revoked because of circumstances beyond his control." *Id.*

Here, defendant's probation was revoked because of circumstances beyond his control. Evidence presented at the hearing showed that defendant's lack of personal resources—social, familial, and financial—severely limited his ability to obtain a suitable residence while incarcerated. According to the State, the special condition that defendant "[r]eside at a residence to be approved by the supervising officer" is a pre-condition to release, and any failure to satisfy this pre-condition results in probation revocation. This interpretation resulted in the odd situation here, that defendant did not "reside" at an approved residence even though his residence was prison and he never "touched outside." The State asserts that defendant "exerted minimal effort" to satisfy this condition; we cannot agree. At ten, defendant was adopted into a sexually abusive family from which he was removed when he was a teenager. He then lived in foster care until he turned 21, staying in the foster system for three additional years because of a mental illness. This situation obviously limited his ability to stay with family until he found a more permanent residence. As indicated by his affidavit of indigency, defendant had no assets and no job, which alone presents a very real obstacle to renting a hotel room or apartment. Because he is a sex offender, defendant could not stay in the shelters and missions he contacted; because many shelters and missions either house children or have children's programs, it was unlikely that contacting additional shelters or missions would have produced a different result. Defendant was willing to live on the streets, reporting his coordinates to his probation officer, even living on the "steps of the federal courthouse"; however, according to DCC, homelessness would not satisfy the suitable residence requirement, though the State has not pointed to any authority or internal rules to support this stance. Despite the State's suggestion to the contrary, defendant's ability to communicate with friends or potential employers from inside prison was not unfettered. Although the statutes permit an offender to serve a term of probation

concurrently with a term of incarceration, *see* N.C. Gen. Stat. § 15A-1346(b) (2011), offenders who are incarcerated do not have the same opportunities to satisfy certain terms of their probation as offenders who are not incarcerated. They have limited means with which to investigate and contact prospective residences. In addition, registered sex offenders are quite limited by residency restrictions. *See* N.C. Gen. Stat. § 14-208.16 (2011) (setting out residential restrictions); *see also* N.C. Gen. Stat. § 14-208.18 (2011) (setting out locations at which registered sex offenders cannot "knowingly be"). The trial court heard all of this evidence at the hearing, and it abused its discretion by concluding that defendant's failure to secure suitable housing before his release was willful. Accordingly, we reverse the judgment revoking defendant's probation and activating his sentence.

Vacated.

Chief Judge MARTIN and Judge HUNTER, JR., Robert N., concur.

DARYL D. BRYSON AND DENISE BRYSON, PLAINTIFFS v. COASTAL PLAIN LEAGUE, LLC, GASTON BASEBALL, INC., MARTINSVILLE MUSTANGS, LLC AND THE CITY OF GASTONIA, AND THE CITY OF MARTINSVILLE, VIRGINIA, DEFENDANTS

No. COA12-65

(Filed 17 July 2012)

Premises Liability—baseball park—injury—no duty owed—summary judgment proper

The trial court did not err in a negligence action arising out of plaintiff's injury as the result of being hit in the face by a baseball at a baseball game by granting defendants' motion for summary judgment. Defendants, in their capacities as owner and operator, respectively, of the baseball park, owed no duty to plaintiff. Therefore plaintiff could not meet his burden of proving a *prima facie* case of negligence.

Appeal by plaintiffs from orders entered 18 August 2011 and 14 September 2011 by Judge Forrest D. Bridges in Gaston County Superior Court. Heard in the Court of Appeals 21 May 2012.

The Olive Law Firm, P.A., by Lee Olive, for plaintiffs.

Clawson & Staubes, PLLC, by Andrew J. Santaniello, for defendants The City of Martinsville, Virginia, and the Martinsville Mustangs, LLC.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Luke P. Sbarra and M. Duane Jones, for defendants Coastal Plain League, LLC, Gaston Baseball, Inc., and City of Gastonia.

Stott, Hollowell, Palmer, and Windham, L.L.P., by Martha Raymond Thompson, for defendant City of Gastonia.

ELMORE, Judge.

Daryl D. Bryson and Denise Bryson (together, plaintiffs) appeal from an order of summary judgment in favor of Coastal Plain League, LLC (Coastal Plain League), Gaston Baseball, Inc. (Gaston Baseball), Martinsville Mustangs, LLC (Martinsville Mustangs), the City of Gastonia, and the City of Martinsville, Virginia.

Plaintiffs have presented no arguments seeking to overturn summary judgment in their claims against the Martinsville Mustangs and the City of Martinsville. Because plaintiffs do not argue that the trial court's grant of summary judgment as to these defendants was improper, plaintiffs are deemed to have abandoned this issue. *See Harty v. Underhill*, ____ N.C. App. ____, 710 S.E.2d 327, 332 (2011); N.C.R. App. P. 28(b)(6) (2012).

Defendant Gaston Baseball operates the Gaston Grizzlies baseball team. Defendant City of Gastonia owns Sims Legion Park and leases it to Gaston Baseball. Defendant Coastal Plain League organizes and promotes baseball games between its member baseball teams, including the Gastonia Grizzlies and the Martinsville Mustangs.

On 16 June 2009, plaintiff Daryl Bryson (Mr. Bryson) attended a baseball game between the Gastonia Grizzlies and the Martinsville Mustangs at Sims Legion Park in Gastonia. Mr. Bryson's ticket was for "general admission" and allowed him to sit anywhere in Sims Legion Park. The park has several different seating areas, including an area screened by nets behind home plate, seating along the baselines that was not screened by nets, and a "beer garden" along the third base line near the bullpen, which was also not screened by nets. Mr. Bryson and his companions chose to sit in the beer garden.

The game on the day of the incident was delayed due to rain, and prior to the start of the game Martinsville Mustangs pitcher Trent Rothlin was warming up in the bullpen by throwing pitches to catcher Tyler Smith. Mr. Bryson, standing near a fence adjacent to the bullpen, was struck in the face by a "wild pitch" thrown by Rothlin. The impact of the baseball caused Mr. Bryson significant injuries, which form the basis of his complaint. His wife, co-plaintiff Denise Bryson, alleged loss of consortium against the same defendants.

Defendants moved for summary judgment, which the trial court granted. Plaintiffs now appeal, arguing that the trial court erred by granting defendants' motion for summary judgment. We disagree.

Our standard of review of a trial court's order granting or denying summary judgment is *de novo*. *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Id.* (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). Summary judgment is appropriate "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) (2011). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense[.]" *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citation omitted).

> "The elements of a cause of action based on negligence are: a duty, breach of that duty, a causal connection between the conduct and the injury and actual loss. A duty is defined as an 'obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.' "

Davis v. N.C. Dep't of Human Resources, 121 N.C. App. 105, 112, 465 S.E.2d 2, 6 (1995) (quoting W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 30, at 164-65 (5th ed. 1984)).

Like all landowners in North Carolina, operators of baseball parks and stadiums owe a "duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998).

However, with regard to thrown or batted balls, operators "are held to have discharged their full duty to spectators in safeguarding them from the danger of being struck by thrown or batted balls by providing adequately screened seats for patrons who desire them, and leaving the patrons to their choice between such screened seats and those unscreened." *Cates v. Cincinnati Exhibition Co.*, 215 N.C. 64, 66, 1 S.E.2d 131, 133 (1939) (citations omitted). Our Supreme Court has further held that it is not necessary to provide screened seats for all patrons who desire them, but rather, "[i]t is enough to provide screened seats, in the areas back of home plate where the danger . . . is greatest, in sufficient number to accommodate as many patrons as may reasonably be expected to call for them on ordinary occasions." *Erickson v. Lexington Baseball Club*, 233 N.C. 627, 628, 65 S.E.2d 140, 141 (1951).

Additionally, this Court has held that a baseball park operator's duty is discharged even when a plaintiff is injured in an unusual way by a thrown or batted ball. *Hobby v. City of Durham*, 152 N.C. App. 234, 236–37, 569 S.E.2d 1, 2 (2002). In *Hobby*, the plaintiff chose a seat that was not behind netting and was injured when a foul ball bounced off a support beam of the stadium and struck her head. *Id.* at 235, 569 S.E.2d at 1. We held that, "[a]lthough a front protective screen might not have protected Ms. Hobby from the injury alleged here, defendants nonetheless discharged their duty to Ms. Hobby by providing a screened section." *Id.* at 237, 569 S.E.2d at 2.

Here, Sims Legion Park did provide screened seats behind home plate, yet Mr. Bryson chose to sit in the unscreened beer garden. Therefore, the duty required of defendants Gaston Baseball and City of Gastonia as owner and operator, respectively, was discharged by providing seats screened with netting behind home plate.

Plaintiffs argue that Mr. Bryson's injury is distinguishable from those in *Cates*, *Erickson*, or *Hobby* because he was struck by a wild pitch from the bullpen rather than a foul ball. We disagree. *Cates* specifically indicates that a stadium or park operator's duty is discharged with regard to "wildly thrown or foul balls," as these are hazards incident to the game. *Cates*, 215 N.C. at 66, 1 S.E.2d at 133 (quoting *Crane v. Kansas City Baseball & Exhibition Co.*, 153 S.W. 1076, 1077 (Mo. 1913)).

> Persons familiar with the game of softball or baseball, both as spectators at ball parks and as viewers on television are well aware that a "bull pen" or warm-up area is as integral a part of the

> game as the players who are performing on the field. There is seldom a ball game completed where there is not activity in the warm-up areas both before and during a ball game. . . . It should also be readily obvious to any person who is familiar with the game that such warm-up areas or bullpens are quite often not screened in any manner from patrons sitting in certain areas of the ball park and it should also be apparent to persons familiar with the game that on occasions a pitcher will lose control and throw a "wild pitch" from the warm-up or the person to whom he is throwing will miss the ball and the same may go in any direction either onto the playing field or into the stands occupied by the paying customers.

Lang v. Amateur Softball Ass'n of America, 520 P.2d 659, 661 (Okla. 1974).

Plaintiffs additionally argue that *Erickson* established an "extraordinary hazard" exception to the no-duty rule for operators of baseball parks. We disagree. Much as it is here, the alleged exception was simply an alternate theory presented by the plaintiff in *Erickson*, which the Court rejected. *Erickson*, 233 N.C. at 630, 65 S.E.2d at 142. No subsequent case citing *Erickson*, in North Carolina or any other jurisdiction, has referenced an "extraordinary hazard" as a valid exception to the no-duty baseball rule.

We conclude that defendants City of Gastonia and Gaston Baseball, in their capacities as owner and operator, respectively, of Sims Legion Park, owed no duty to Mr. Bryson. Therefore plaintiffs cannot meet their burden of proving a prima facie case of negligence. Accordingly, we do not address plaintiffs' joint enterprise argument regarding Coastal Plain League, nor do we address Denise Bryson's loss of consortium claim as it is derivative of Mr. Bryson's negligence claim.

We hold that summary judgment in favor of defendants was appropriate and affirm the order of the trial court.

Affirmed.

Chief Judge MARTIN concurs.

Judge HUNTER, JR., Robert N., concurs in result only.

STATE OF NORTH CAROLINA v. KEVIN ASKEW

No. COA11-1598

(Filed 17 July 2012)

Probation and Parole—violation—approved residence—not willful

The trial court manifestly abused its discretion in a probation revocation case by finding that defendant had willfully violated the terms of his probation by failing to supply an approved residence. Defendant was unable to obtain suitable housing before his release from incarceration because of circumstances beyond his control.

Appeal by defendant from judgments entered 28 July 2011 by Judge Milton F. Fitch, Jr., in Pasquotank County Superior Court. Heard in the Court of Appeals 21 May 2012.

Attorney General Roy Cooper, by Assistant Attorney General Bethany A. Burgon, for the State.

Wait Law, P.L.L.C., by John L. Wait, for defendant.

ELMORE, Judge.

On 16 June 2005, a jury found Kevin Askew (defendant) guilty of two counts of indecent liberties with a child. The trial court sentenced defendant to two terms of 21 to 26 months' imprisonment, to be served consecutively. The trial court suspended both sentences and placed defendant on 36 months of supervised probation, beginning when defendant was "released from incarceration" in another case (04 CRS 1542). As part of his intermediate sentence, defendant was ordered to "report to his probation officer within 24 hours of his release of serving his active sentences" and to "[c]omply with the Special Conditions of Probation—Intermediate Punishments—Contempt which" were set forth on page two of AOC-CR-603. Defendant was also placed on nine months of intensive supervision and ordered to "comply with the rules adopted by that program," which is administered by the Division of Community Corrections (DCC).

On 1 July 2011,[1] defendant's probation officer filed a violation report, alleging that defendant had willfully violated the terms of his probation by failing to have an approved residence plan. An order for defendant's arrest was issued, and defendant was arrested. However, defendant was still in custody at the time of his alleged violation and when he was arrested.

On 1 July 2011, defendant was transported from prison to the Sheriff's Office in Elizabeth City for release following his incarceration for 04 CRS 1542. However, defendant's probation officer arrested defendant for violating his probation while defendant was in the custody of the Pasquotank Sheriff's Department. He was then transported back to prison.

At the revocation hearing, Judge Milton F. Fitch, Jr., questioned this turn of events, asking how defendant could have been in willful violation of his probation terms "when the State of North Carolina did not allow him to do what [the] order said to do." Judge Fitch observed, "If you pick him up, you don't turn him a loose, he can't go nowhere unless he's got the key to the jail house."

Defendant's probation officer explained that DCC policy requires offenders on intensive probation to provide a suitable residence before they are released. When Judge Fitch asked if DCC had given defendant "an opportunity to get a house"—specifically the 24 hours that he had ordered in the judgment—the probation officer answered, "No." Judge Fitch replied,

> I don't see how I can find that he's in willful violation of my order when you brought him from prison to jail and he's been in jail ever since he was brought from prison. If you-all can tell me how I can do that, tell me how he is in willful violation, I will be glad to send him on. If you can't tell me that then I'm going to give him at least 24 hours to get a place to stay. That is what everybody else has when you give that order.

In response, the probation officer explained

> When a person is placed on—as far as intensive probation, we have got to go to a house to check him. He did not provide us the house. The program person, we spoke to that person, we tried to find a place for him to stay, they tried to find a place

1. The file stamp states that the violation report was filed on 31 June 2011, which is not a day; text within the report states that the probation officer reviewed the alleged violations on 1 July 2011.

> for him to stay, couldn't find a place. Since he's been here I have called seven different numbers to try to find a place. No one will let him stay there. While someone is on intensive probation we have to go check him that night, due to a curfew check. When he couldn't provide us a residence, so we at that time locked him up, Your Honor.

Defendant's relatives also refused to allow him to live with them.

Judge Fitch noted that defendant had found himself in a Catch-22 but ultimately found that defendant was in willful violation of the terms and conditions of his probation, revoked defendant's probation, and activated his sentence.

On appeal, defendant argues that the trial court erred by finding that he had willfully violated the terms of his probation by failing to supply an approved residence. We agree.

We review a trial court's decision to revoke probation only for "manifest abuse of discretion." *State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) (quotation and citation omitted). To revoke a defendant's probation, the trial court need only find that the defendant has "willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967). "Additionally, once the State has presented competent evidence establishing a defendant's failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms." *State v. Terry*, 149 N.C. App. 434, 437-38, 562 S.E.2d 537, 540 (2002) (citation omitted). "If the trial court is then reasonably satisfied that the defendant has violated a condition upon which a prior sentence was suspended, it may within its sound discretion revoke the probation." *Id.* at 438, 562 S.E.2d at 540 (citation omitted). Though trial judges have discretion in probation proceedings, that discretion " 'implies conscientious judgment, not arbitrary or willful action. It takes account of the law and the particular circumstances of the case, and is directed by the reason and conscience of the judge as to a just result.' " *State v. Hill*, 132 N.C. App. 209, 212, 510 S.E.2d 413, 415 (1999) (quoting *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967)). Thus, "fairness dictates that in some instances a defendant's probation should not be revoked because of circumstances beyond his control." *Id.*

Here, defendant's probation was revoked for reasons beyond his control. Defendant's probation officer testified that he called seven different numbers in his unsuccessful efforts to secure defendant a suitable place to reside. In addition, his family members refused to allow him to live with them. Defendant's probation officer also testified that DCC did not give defendant an "opportunity to get a house," an opportunity the trial judge clearly expected defendant to have. Although the statutes permit an offender to serve a term of probation concurrently with a term of incarceration, *see* N.C. Gen. Stat. § 15A-1346(b) (2011), offenders who are incarcerated do not have the same opportunities to satisfy certain terms of their probation as offenders who are not incarcerated. They have limited means with which to investigate and contact prospective residences. In addition, registered sex offenders are quite limited by residency restrictions. *See* N.C. Gen. Stat. § 14-208.16 (2011) (setting out residential restrictions); *see also* N.C. Gen. Stat. § 14-208.18 (2011) (setting out locations at which registered sex offenders cannot "knowingly be"). Accordingly, we hold that defendant has demonstrated that he was unable to obtain suitable housing before his release from incarceration because of circumstances beyond his control. The trial court abused its discretion by finding otherwise. We reverse the judgment revoking defendant's probation and activating his sentence.

Reversed.

Chief Judge MARTIN and Judge HUNTER, JR., Robert N., concur.

RICHARD A. BIGGER, JR., EXECUTOR OF THE ESTATE OF ROY ARNOLD, PLAINTIFF v. KAREN ARNOLD; DANIEL ARNOLD; JOHNSON C. SMITH UNIVERSITY, INCORPORATED; AND MICHELLE RYDER, DEFENDANTS

No. COA11-1604

(Filed 17 July 2012)

Parties—standing—executor of estate—not aggrieved party

Plaintiff executor lacked standing to appeal an order of the trial court declaring that the assets in a joint brokerage account of plaintiff's decedent and defendant widow passed solely to defendant. Plaintiff was not a party aggrieved by the trial court's

order and plaintiff could not appeal from an order that only affected the distribution rights of the beneficiaries.

Appeal by plaintiff from judgment entered 2 August 2011 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 May 2012.

Wishart, Norris, Henninger & Pittman, P.A., by June K. Allison, for plaintiff-appellant.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by James F. Wood, III, for defendant-appellee.

STEELMAN, Judge.

Where the trial court's ruling did not injuriously prejudice the executor of the estate, and the beneficiary affected by the order failed to appeal, we dismiss the appeal.

I. Factual and Procedural Background

Roy Arnold (Arnold) died testate on 24 December 2007. His will bequeathed all of his tangible personal property to his wife, Karen Arnold (defendant). The remainder of the estate was bequeathed to a revocable trust. This trust provided for cash gifts of $50,000 to Arnold's nephew and $150,000 to his wife's daughter, and it specified that Arnold's art collection was to be delivered to Johnson C. Smith University (JCSU). The remaining trust assets were to be divided into two equal shares, the Karen Arnold share and the Arnold Scholarship share. The Karen Arnold share would pay its income to defendant until her death, and at her death distribute the principal to the Arnold Scholarship fund. The Arnold Scholarship share was to be distributed to JCSU to establish a scholarship fund. The will and revocable trust were executed in 2003.

Arnold suffered from a brain tumor that led to his death on 24 December 2007. There was some evidence that his mental function was impaired. The vast bulk of his property was held in a brokerage account. Prior to his death, Arnold executed documents creating a joint brokerage account with his wife and transferring his wealth to that account. The joint brokerage account agreement provided that upon the death of one of the joint tenants, the entire account would pass to the survivor.

On 10 June 2009, the executor of Arnold's estate (plaintiff) filed a complaint seeking a declaratory judgment from the court as to whether the joint brokerage account was properly created; whether defendant was entitled to the assets in the joint brokerage account; and whether the executor had a duty to file a legal action to determine if there was wrongdoing in the transfer of assets into the joint brokerage account. JCSU, a beneficiary of the revocable trust, was joined as a party defendant to the action. JCSU filed an answer denying the allegations pertaining to the formation of the joint brokerage account for lack of information, and requested that the court not award plaintiff anything from JCSU.

On 9 June 2011, defendant filed a motion for summary judgment. On 2 August 2011, the trial court granted defendant's summary judgment motion, holding that the assets in the joint brokerage account passed solely to defendant.

Plaintiff appeals. JCSU does not appeal.

II. Plaintiff's Standing to Appeal Order

Defendant contends that plaintiff lacks standing to appeal the order of the trial court. We agree, and hold that this issue is dispositive of plaintiff's appeal.

A. Standard of Review

"[O]nly a 'party aggrieved' may appeal a trial court order or judgment, and such a party is one whose rights have been directly or injuriously affected by the action of the court." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) (citation omitted). "Where a party is not aggrieved by the judicial order entered, . . . his appeal will be dismissed." *Gaskins v. Blount Fertilizer Co.*, 260 N.C. 191, 195, 132 S.E.2d 345, 347 (1963) (per curiam) (citations omitted).

B. Analysis

An executor cannot appeal from an order that only affects the distribution rights of the beneficiaries. "Where there is a controversy between legatees under a will, in which controversy the executor, as such, has no interest, such executor is not a party aggrieved by a decree of distribution and may not appeal therefrom." *Dickey v. Herbin*, 250 N.C. 321, 326, 108 S.E.2d 632, 636 (1959); *see also Ferrell v. Basnight*, 257 N.C. 643, 645, 127 S.E.2d 219, 221 (1962) (ruling that an executor cannot appeal from a decision affecting the rights of the beneficiaries).

An appeal is not necessary because "the court has answered the questions which [the executor] wanted answered and which are determinative of the rights of the parties." *Ferrell*, 257 N.C. at 645, 127 S.E.2d at 221. If the parties were dissatisfied with the outcome, they could file their own appeals. *Id.* at 645, 127 S.E.2d at 221.

The order of the trial court affects the rights of the beneficiaries under the will and the revocable trust. The trial court held that the joint brokerage account was legally created by Arnold, and that its assets passed directly to defendant, and not through the pour-over will into the revocable trust. We further note that the trust created in 2003 was a revocable trust. The trial court's holding answers plaintiff's request that the court determine whether defendant was entitled to the assets in the joint brokerage account. Plaintiff as executor of Arnold's estate has not been injuriously prejudiced by this ruling. JCSU, the party prejudiced by the ruling, failed to appeal.

III. Conclusion

Plaintiff lacks standing to appeal because he is not a party aggrieved by the trial court's order. Accordingly, we do not reach the other issues in the case.

APPEAL DISMISSED.

Judges McGEE and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 JULY 2012)

BROWN v. CITY OF BURLINGTON No. 11-1406	Indust. Comm. (151055) (151364) (207006)	Affirmed
BROWN v. LINGAFELT No. 12-66	Cabarrus (10CVS3232)	Dismissed
ESCARRAMAN v. NORTHWOODS AT COULWOOD HOMEOWNERS No. 11-1386	Mecklenburg (10CVS7571)	Vacated and Remanded
GRECO v. GRECO No. 11-1396	Johnston (02CVD1843)	Vacated and Remanded
IN RE A.M.M. No. 12-195	Alamance (10JA168)	Affirmed
IN RE CARPENTER No. 11-1459	Avery (11CVS149)	Affirmed
IN RE E.A.C. No. 12-9	Martin (07JT18-20)	Reversed
IN RE L.L.W. No. 12-239	Wilkes (10JT101-103)	Affirmed
IN RE S.N.G. No. 12-55	Stokes (10JT64)	Affirmed
MCMILLAN v. RYAN JACKSON PROPS., LLC No. 11-1318	Guilford (10CVS7595)	Affirmed
MEEKER v. MEEKER No. 11-1217	Durham (10CVD3278)	Vacated and Remanded
NEW HANOVER REG'L MED. CTR. v. CROSS COUNTRY TRAVCORPS No. 11-1095	New Hanover (10CVS4205)	Dismissed
PHELPS v. STABILUS No. 11-1589	Indust. Comm. (563760)	Affirmed

SMITH v. BAXTER INT'L, INC. No. 11-552	Indust. Comm. (799904)	Affirmed
SPENCER v. N.C. BD. OF NURSING No. 11-1361	Wake (11CVS5364)	Affirmed
STATE v. ADAMS No. 11-1379	Moore (06CRS54531-32) (07CRS3003)	No Error
STATE v. AHMED No. 12-27	Pitt (06CRS55020-21)	Affirmed
STATE v. BERRUM No. 11-1440	Guilford (10CRS88928-29)	No Error
STATE v. BRIDGES No. 11-1196	Cleveland (06CRS52585) (10CRS3523)	No Error
STATE v. BUNCH No. 12-4	Wake (10CRS219552)	Affirmed
STATE v. CASLER No. 11-1142	Onslow (08CRS50511)	No Error
STATE v. COBB No. 11-1586	Haywood (10CRS54105) (11CRS76-77)	No Error
STATE v. CRANK No. 12-101	Mecklenburg (09CRS246330)	No Prejudicial Error.
STATE v. EDWARDS No. 12-143	Carteret (96CRS13158-59) (96CRS13426) (96CRS7465-67)	Affirmed
STATE v. HIGHT No. 11-1533	Vance (08CRS54163)	No Error
STATE v. JONES No. 11-1317	Mecklenburg (09CRS249927) (11CRS23264)	No Error
STATE v. LOFTIN No. 12-154	Craven (10CRS53173-74) (11CRS97)	No Error

STATE v. LONG No. 11-1363	Guilford (10CRS96290)	Dismissed
STATE v. MCGILL No. 12-116	Catawba (05CRS52366)	Affirmed
STATE v. RIDDLE No. 11-1345	Buncombe (10CRS1497)	Affirmed
STATE v. SCOTT No. 11-1063	Robeson (02CRS51644) (04CRS57128)	Vacated and Remanded
STATE v. SLADE No. 12-92	Guilford (10CRS91160)	Affirmed
STATE v. VASQUEZ No. 11-1162	Mecklenburg (08CRS241133)	No Error
STATE v. WILLIAMS No. 11-1326	Haywood (10CRS52672) (10CRS52685) (10CRS52686) (10CRS52689) (10CRS52693)	No prejudicial error
STATE v. ZINKAND No. 12-60	Macon (06CRS50610) (06CRS50612) (06CRS50617)	Affirmed
THOMAS v. STATE No. 12-184	Mecklenburg (11CVS3414)	Affirmed
TREVARTHEN v. TREADWELL No. 12-11	Wake (11CVS2880)	Dismissed
WILKINS v. FARAH No. 11-1543	Guilford (08CVS3835)	Affirmed

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 JULY 2012)

COLE v. ERWIN No. 11-798	Guilford (10CVS6322)	Affirmed
IN RE F.H.R.P-H. No. 12-95	Pender (10JT70)	Reversed and Remanded
IN RE FORECLOSURE OF JOHNSON No. 11-1529	Moore (11SP116)	Affirmed
IN RE FOX No. 11-1585	Buncombe (11SPC1260)	Reversed and Remanded
IN RE J.X.B. No. 12-231	Vance (08J68) (08J89)	Affirmed
IN RE RICHARDSON No. 12-119	Granville (11SPC3017)	Reversed
IN RE S.T. No. 12-350	Mecklenburg (08JT629)	Affirmed
IN RE Z.S. No. 12-297	Mecklenburg (11J576-579)	Affirmed in Part and Reversed in Part
JOHNSON v. AVERY CNTY. BD. OF EDUC. No. 11-1538	Avery (10CVS131)	Reversed and Remanded
KIELL v. KIELL No. 11-1400	Catawba (04CVD2494)	Affirmed in Part, Reversed in Part and Remanded
LIVINGSTON v. ROBESON CNTY. No. 11-1521	Robeson (09CVS935)	Reversed and remanded with instructions
MATTHIEU v. MILLER No. 11-1287	Rockingham (09CVS2731)	Affirmed
MEADLOCK v. AM. FAMILY LIFE ASSURANCE CO. No. 11-1009	Caldwell (09CVS1774)	Affirmed
METTS v. NEW HANOVER REG'L MED. CTR. No. 12-149	New Hanover (11CVS1677)	Affirmed

MURPHY-SMITH v. N.C. DEP'T OF CORR. No. 11-1137	Indust. Comm. (977761) (W12720)	Remanded
PARKER v. BIG ROCK TRANS. No. 11-1603	Indust. Comm. (709432) (888417)	Affirmed
SOUTHLAND DISTRIBUTORS OF N.C., LLC v. HAMILTON No. 11-1218	Henderson (09CVD427)	Vacated and Remanded
STARCHER v. KEA No. 11-601	Duplin (08CVS927)	Affirmed
STATE v. ARMSTRONG No. 11-1013	Mecklenburg (07CRS239577)	Reversed
STATE v. BRIM No. 12-20	Rockingham (10CRS51230)	No Error
STATE v. BROWN No. 11-622	Bertie (04CRS51602-08) (05CRS50031) (05CRS50040)	Vacated in part, no prejudicial error in part
STATE v. CREEF No. 11-1516	Orange (09CRS54172)	No Error
STATE v. DAVIS No. 11-1336	Forsyth (10CRS31069) (10CRS61853-54)	Reversed and Remanded
STATE v. EASON No. 11-1436	Northampton (10CRS50678)	Remanded for resentencing
STATE v. FRIEND No. 11-1454	Mecklenburg (10CRS211197-99)	Dismissed
STATE v. FRIEND No. 11-1442	Watauga (10CRS2007-09) (10CRS50023) (10CRS50039)	Vacated and Remanded
STATE v. GALVIN No. 11-1112	Mecklenburg (09CRS233058) (09CRS235413) (09CRS235416)	No Error

STATE v. GUILFORD No. 11-1367	Martin (10CRS50140)	No Error
STATE v. GUY No. 12-197	Mecklenburg (08CRS242797-99)	No error in part, vacated in part, and remanded in part.
STATE v. JOHNSON No. 11-834	Cabarrus (09CRS53665-66)	New Trial
STATE v. KEARNEY No. 11-992	Durham (09CRS49845)	Vacated and Remanded
STATE v. KINCAID No. 11-1539	Haywood (08CRS52842-44) (10CRS728)	No Error
STATE v. PARKER No. 11-1413	Durham (10CRS56280) (11CRS9)	No Error
STATE v. PEMBERTON No. 11-1555	Guilford (05CRS87363) (10CRS23354)	No Error
STATE v. PRICE No. 12-14	Rowan (09CRS56186) (09CRS56194) (09CRS56202) (09CRS56210) (09CRS56218)	Affirmed
STATE v. RAY No. 12-155	Buncombe (10CRS289) (10CRS292) (10CRS51025-26) (10CRS52884)	Affirmed
STATE v. WADDELL No. 12-200	Pender (09CRS52613)	Reversed and Remanded
STATE v. WILLIAMS No. 12-22	Edgecombe (09CRS53373) (09CRS53374)	Vacated and Remanded
STATE v. WILLIAMSON No. 11-1282	Onslow (07CRS53257) (07CRS53392)	Affirmed

STATE v. WRIGHT No. 12-48	Bladen (06CRS3692) (06CRS50243)	Remand for resentencing.
STEVENS v. U.S. COLD STORAGE, INC. No. 11-1000	Indust. Comm. (661260)	Affirmed in Part and Reversed and Remanded in Part
TASZ, INC. v. WILLIAMS No. 12-36 Dismissed	Caldwell (10CVS1526)	Dismissed
ZANKEY v. RISELVATO No. 12-146	Wake (06CVD12939)	Dismissed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

CONSTITUTIONAL LAW

Double jeopardy—Convicted Sex Offender Permanent No Contact Order—civil remedy—Defendant's right to be free from double jeopardy in a statutory rape and sexual offense case was not violated when the trial court sentenced him to a term of imprisonment and subjected him to a Convicted Sex Offender Permanent No Contact Order. N.C.G.S. § 15A-1340.50 constitutes a civil remedy and the imposition of a No Contact Order does not implicate the constitutional protection against double jeopardy. **State v. Hunt, 48.**

Due process—Convicted Sex Offender Permanent No Contact Order—notice not required—Defendant's constitutional right to due process of law was not violated in a statutory rape and sexual offense case where the State did not provide him with notice that it intended to seek a Convicted Sex Offender Permanent No Contact Order. Assuming, *arguendo*, that a protected liberty interest was at stake, N.C.G.S. § 15A-1340.50 does not require the State to give defendant notice that it intended to seek the No Contact Order. **State v. Hunt, 48.**

Due process—competency to stand trial—evidence did not support determination—no prejudice—The trial court abused its discretion in a first-degree murder case by denying defendant's motion to be evaluated by a mental health professional to determine his competency to proceed with trial. The trial court conducted a proper competency hearing but the evidence did not support its determination that defendant was competent to proceed with trial. However, in light of a medical expert's testimony for the defense at trial that he was not concerned about defendant's current competency, the trial court's error did not prejudice defendant. **State v. Robinson, 509.**

Due process—probable cause hearing—probable cause established—discovery violation speculative—The trial court in a child sex offenses case did not violate defendant's constitutional rights to due process, a fair trial and confrontation by not holding a probable cause hearing. As defendant was arrested upon warrants and tried upon indictments, probable cause was twice established. Further, defendant's speculative argument regarding potential discovery and impeachment evidence was overruled as defendant failed to show a reasonable possibility that a different result would have been reached in this trial had he been given a preliminary hearing. **State v. Brunson, 614.**

Effective assistance of counsel—counsel's performance below objective standard—opened door to testimony—no prejudice—Defendant did not receive ineffective assistance of counsel in a trial for second-degree sexual offense and crime against nature where trial counsel opened the door to testimony about other sexual offense charges pending against defendant. Although trial counsel's performance fell below an objective standard of reasonableness because there was no strategic benefit in opening the door to this testimony, the evidence about the other pending sexual offense charges did not likely affect the jury's verdicts, and defendant was not prejudiced by his trial counsel's error. **State v. Hunt, 489.**

Effective assistance of counsel—double jeopardy—second-degree sexual offense—crime against nature—lesser-included offense—Defendant received ineffective assistance of counsel in a trial for second-degree sexual offense and crime against nature to the extent that his trial counsel failed to argue double jeopardy. On the particular facts of defendant's case, crime against nature was a lesser-included offense of second-degree sexual offense, and entry of judgment on both convictions subjected defendant to unconstitutional double jeopardy. **State v. Hunt, 489.**

DECLARATORY JUDGMENTS—Continued

defendant's motion for a new trial or relief from judgment pursuant to N.C.G.S. § 1A-1, Rule 60 even though plaintiff contended defendants committed fraud by asserting that Fuddruckers was in default under the contract. The Court of Appeals had already concluded that Fuddruckers was in default. **Epes v. B.E. Waterhouse, LLC, 422.**

No subject matter jurisdiction—lack of actual controversy—anticipated future actions—premature claim—The trial court did not abuse its discretion by dismissing under N.C.G.S. 1A-1, Rule 12(b)(6) plaintiff's claim for declaratory judgment unrelated to the right of first refusal against the Martin defendants. The lack of an actual controversy between the parties deprived the trial court of subject matter jurisdiction. Plaintiff merely anticipated future actions that might damage it. **New Bar P'ship v. Martin, 302.**

DIVORCE

Alimony—dependent spouse—accustomed standard of living—no error— The trial court in a divorce case did not erroneously fail to find that defendant was a "dependent spouse" for alimony-related purposes. Even if the trial court erred, defendant was still not entitled to an award of alimony given the complete absence of any indication that plaintiff was in a position to make alimony payments to defendant. **Bodie v. Bodie, 29.**

Equitable distribution—distribution of property—no abuse of discretion— Plaintiff's argument in an equitable distribution case that the trial court erred by "failing to distribute" certain properties and that certain conditions placed on the sale of these properties imposed "improper burdens" on plaintiff was meritless. Plaintiff failed to explain how the trial court's decision with respect to this issue rested upon an error of law and plaintiff failed to advance any argument tending to support a determination that the trial court abused its discretion in the course of deciding to allocate these responsibilities to plaintiff. **Bodie v. Bodie, 29.**

Equitable distribution—divisible property—additional findings necessary— The trial court erred in an equitable distribution case by failing to make adequate findings of fact and conclusions of law regarding $216,000.00 in post-separation debt payments made by defendant. The trial court's equitable distribution order was reversed and remanded for additional findings of fact concerning the existence or distribution of any divisible property and an amended distributional decision. **Bodie v. Bodie, 29.**

Equitable distribution—divisible property—increase in value of marital home—The trial court did not err in an equitable distribution case by failing to classify, value, and distribute as divisible property the alleged increase in the net value of the parties' marital homes as proposed by plaintiff. The trial court was not required to accept and make findings of fact based upon the testimony of plaintiff's real estate expert and the trial court's order specified that the properties in question should be sold, with the proceeds to be divided equally between the parties. The case was remanded for the trial court to determine the source of funds used to make post-separation debt payments and plaintiff's credit for those payments. **Bodie v. Bodie, 29.**

Equitable distribution—marital debt—insufficient findings—The trial court's findings of fact in an equitable distribution case concerning the classification, value, and distribution of certain items of marital debt were insufficient for the Court of Appeals to determine whether the judgment reflected a correct application of the

SEARCH AND SEIZURE—Continued

Consent—voluntary—motion to suppress—properly denied—The trial court did not err in a first-degree burglary, robbery with a dangerous weapon, first-degree sexual offense, first-degree kidnapping, and second-degree kidnapping of a person under the age of 16 case by denying defendant's motion to suppress evidence obtained as a result of a search of his apartment. As there was no dispute in the evidence regarding voluntariness, it can be inferred that the trial court found the consent to be voluntary from its conclusion that defendant gave valid oral consent. **State v. Bell, 535.**

Motion to suppress drugs—single pat-down search conducted in fluid manner—The trial court did not err in a felonious possession of cocaine case by denying defendant's motion to suppress even though defendant contended the detective conducted two separate searches of his person with the second search allegedly violating his rights. The detective's testimony described a single pat-down search conducted in a fluid manner following defendant's removal from the car. **State v. Robinson, 266.**

Obtained after illegal seizure of person—plain error—The trial court committed plain error in a drugs case by admitting evidence obtained after defendant was seized without the necessary reasonable, articulable suspicion. Defendant's statement and his consent to a search of his residence resulted directly from the officer's decision to detain him and, without the evidence obtained as a result of that unlawful detention, the record would probably not have contained sufficient evidence to establish defendant's guilt. **State v. Harwood, 451.**

Probable cause—possession of drugs—hiding evidence between buttocks—suspicious behavior—The trial court did not err in a felonious possession of cocaine case by concluding that probable cause arose when the detective felt something hard between the defendant's buttocks outside of defendant's clothing. The circumstances surrounding the detective's encounter with the suspicious behaving defendant would warrant a man of reasonable caution to believe that defendant was in possession of drugs and was hiding evidence which would incriminate him. **State v. Robinson, 266.**

Search of defendant's buttocks—not a strip search—exigent circumstances not required—steps to protect privacy—The trial court did not err in a felonious possession of cocaine case by concluding that the search of defendant's buttocks was not a strip search and that exigent circumstances were not required. The detective had ample basis for believing that contraband would be discovered beneath defendant's underclothing, and the detective took certain steps to protect defendant's privacy. **State v. Robinson, 266.**

Seizure of defendant—basis—anonymous tip—not sufficient—Investigating officers lacked a sufficient basis for seizing defendant where the justification was provided by an anonymous tip that contained limited details and the officers did not corroborate the tip's allegations of illegal activity. **State v. Harwood 451.**

Seizure of defendant—not a traffic stop—insufficient grounds—There was a seizure of defendant rather than a traffic stop where officers followed defendant as he drove away from a suspected drug sale, defendant pulled into the driveway of a residence not his own, the officers parked behind him, and the officers removed defendant from the car at gunpoint, placed him on the ground, and handcuffed him. The officers needed a reasonable and articulable suspicion of criminal activity. **State v. Harwood, 451.**

SENTENCING

Aggravating and mitigating factors—weight attached to one factor—The trial court did not abuse its discretion by attaching more weight to the one aggravating factor over the mitigating factors and sentencing defendant to consecutive terms greater than the presumptive range where the one aggravating factor was that defendant had prior convictions resulting in sentences of more than sixty days. A trial court's weighing of aggravating and mitigating factors will not be disturbed on appeal unless it is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasonable decision. **State v. Morston, 464.**

Attempted bribery of juror—incorrect classification—Class G rather than Class F—The trial court erred by classifying attempted bribery of a juror as a Class F felony rather than a Class G felony. The matter was remanded for reclassification of the offense for which defendant was convicted and imposition of an appropriate sentence. **State v. Ross, 185.**

Mitigating factors—presumptive range—no findings of fact required—The trial court did not err in a first-degree murder case by failing to consider factors in mitigation of defendant's sentence. As the trial court sentenced defendant in the presumptive range, the trial court was not required to make findings of mitigating factors, even if evidence of mitigating factors was presented at sentencing. **State v. Kelly, 643.**

Prior record level—one point added—offense committed while serving prison sentence—no Blakely error—The trial court did not err by adding one point to defendant's prior record level worksheet pursuant to N.C.G.S. § 15A-1340.14(b)(7). Defendant himself testified that he was serving a prison sentence for second-degree murder and several other crimes at the time the assault occurred, which allowed the trial court to add one point to his prior record level without submitting this fact to the jury. Accordingly, no *Blakely* error occurred. **State v. Miles, 211.**

Prior record level—out-of-state conviction—not sufficiently similar—prejudicial—The trial court erred in a non-felonious breaking or entering, first-degree kidnapping, second-degree rape, and resisting a public officer case by determining that defendant was a prior record level VI for sentencing purposes. Defendant's Florida conviction for burglary was not sufficiently similar to the corresponding offense in this state and the error was not harmless since defendant would have been considered a lower level offender. **State v. Rollins, 572.**

Resentencing—failure to find same mitigating factor—The trial court did not err by declining to find the limited mental capacity mitigating factor at a resentencing hearing, even though the same judge had found that factor at a prior sentencing hearing on what defendant contends was the same evidence. The evidence at the resentencing did not substantially show that defendant had a limited capacity at the time of the offenses. **State v. Morston, 464.**

Resentencing—same sentence—no failure to exercise discretion—The resentencing court properly conducted a *de novo* resentencing hearing and did not abuse its discretion or act under a misapprehension of the law where the court clearly considered new evidence and made new determinations. Resentencing a defendant to the same sentence is not *ipso facto* evidence of any failure to exercise independent decision-making or to conduct a *de novo* review. **State v. Morston, 464.**

WORKERS' COMPENSATION—Continued

WORKERS' COMPENSATION—Continued