NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 226

19 MARCH 2013

16 APRIL 2013

RALEIGH
2016

CITE THIS VOLUME

226 N.C. APP.

TABLE OF CONTENTS

This volume is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

THE COURT OF APPEALS

OF

NORTH CAROLINA

Chief Judge

LINDA M. McGEE

Judges

WANDA G. BRYANT
ANN MARIE CALABRIA
RICHARD A. ELMORE
MARTHA GEER
LINDA STEPHENS
DONNA S. STROUD
ROBERT N. HUNTER, JR.
J. DOUGLAS McCULLOUGH
CHRIS DILLON
MARK DAVIS
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY

Emergency Recall Judges

GERALD ARNOLD
RALPH A. WALKER

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN

Former Judges

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
HARRY C. MARTIN
E. MAURICE BRASWELL
WILLIS P. WHICHARD
DONALD L. SMITH
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
SYDNOR THOMPSON
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
HUGH B. CAMPBELL, JR.
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JOHN S. ARROWOOD
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.[1]

[1] Retired 30 June 2015

Clerk
DANIEL M. HORNE, JR.

Assistant Clerk
SHELLEY LUCAS EDWARDS[2]

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis

Assistant Director
David Lagos

Staff Attorneys
John L. Kelly
Bryan A. Meer
Eugene H. Soar
Nikiann Tarantino Gray
Michael W. Rodgers
Lauren M. Tierney
Justice D. Warren

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Marion R. Warren

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

[2] 1 January 2016

CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

TED L. BISSETTE AND WIFE, MARY HOLLY BISSETTE,
INDIVIDUALLY AND AS CETUIS QUE TRUST, PLAINTIFFS
v.
JENNIFER T. HARROD; BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD,
LLP, A NORTH CAROLINA LIMITED LIABILITY PARTNERSHIP; ALL INDIVIDUALLY AND AS TRUSTEES, AND
SCOTT W. RICH AND WIFE, LAURA K. RICH, DEFENDANTS

No. COA12-921

Filed 19 March 2013

1. Appeal and Error—appellate jurisdiction—attorney fees and sanctions—retained by trial court

The trial court's decision to retain jurisdiction after granting defendants' N.C.G.S. § 1A-1, Rule 12(b)(6) motion for dismissal in order to entertain motions for attorney fees or other sanctions did not deprive the Court of Appeals of the authority to address the issues raised by plaintiffs' appeal. A claim for attorney fees pursuant to N.C.G.S. § 6-21.5 is not part of a plaintiff's underlying substantive claim, and neither the dismissal of a case nor the filing of an appeal deprives the trial court of jurisdiction to hear Rule 11 motions.

2. Appeal and Error—appealability—core of controversy—debated below

The question of whether plaintiffs' complaint stated a claim for breach of an express trust was properly before the Court of Appeals on an appeal from a N.C.G.S. § 1A-1, Rule 12(b)(6) dismissal where the trial court expressly allowed the issue to be debated and the issue appeared to be at the core of the controversy.

3. Trusts—res—not transferred

The trial court did not err by dismissing plaintiffs' complaint for failure to state a claim for relief for breach of an express trust involving real estate. Defendants had no authority to transfer, and did not transfer, the *res* of the alleged trust at the time that the express trust in question was allegedly created. Any claims that plaintiffs were entitled to assert in reliance on the agreement in question were limited to breach of contract, but the statute of limitations on those claims had expired by the time their complaint was filed.

4. Trusts—resulting or constructive—no fraud or wrongdoing

The trial court did not err by dismissing plaintiffs' request for the imposition of a constructive or resulting trust entitling them to an easement in an action arising from the division of a lot within a subdivision without the homeowners associations' approval. Plaintiffs' factual allegations did not suffice to establish that defendants obtained possession of the property as the result of any fraud, wrongdoing, or other circumstance that might support the imposition of a constructive or resulting trust.

Appeal by plaintiffs from order entered 11 May 2012 by Judge Richard L. Doughton in Guilford County Superior Court. Heard in the Court of Appeals 10 December 2012.

Kenneth T. Davies for Plaintiffs.

Tuggle Duggins & Meschan P.A., by Robert C. Cone and Brandy L. Mills, for Defendants.

ERVIN, Judge.

Plaintiffs Ted L. Bissette and Mary Holly Bissette appeal from an order dismissing the complaint that they filed against Defendants Scott W. Rich and Laura K. Rich[1] for failure to state a claim upon which relief could be granted. On appeal, Plaintiffs contend that the trial court erroneously dismissed their complaint on the grounds that they had adequately pled claims sounding in breach of an express trust and for the imposition of a constructive or resulting trust which claims were

1. Plaintiffs originally asserted claims against Jennifer T. Harrod and Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, as well. On 10 May 2012, Plaintiffs voluntarily dismissed their claims against Ms. Harrod and Brooks, Pierce with prejudice. As a result, all references to "Defendants" in this opinion should be understood as referring to Scott W. Rich and Laura K. Rich.

not barred by the applicable statute of limitations. After careful consideration of Plaintiff's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

A. Substantive Facts

Moss Creek is a single-family residential development located in Guilford County. In 1987, the Moss Creek Homeowners Association filed a Declaration of Covenants, Conditions, and Restrictions which provided, in pertinent part, that no lot in the development "may be subdivided by sale or otherwise [so] as to reduce the total area of the Lot" except by written consent of the Association. *Moss Creek Homeowners Ass'n, Inc., v. Bissette*, 202 N.C. App. 222, 225, 689 S.E.2d 180, 183, *disc. review denied*, 364 N.C. 242, 698 S.E.2d 402 (2010) (*Moss Creek I*). As we noted in our opinion in *Moss Creek I*:

> On 23 December 1993, the Bissettes acquired title to Lot 6 in Moss Creek Development, and subsequently built a house on the lot.
>
> On 5 July 2002, the Bissettes acquired title to the parcel of property adjoining their lot known as Lot 8, and on 10 November 2003, the Bissettes recorded an Instrument of Combination combining the two lots formally. The Bissettes thereafter recorded a plat on 5 December 2003 which (1) split former Lot 8 into two pieces and labeled the new parcels Lot 1 and Lot 2, and (2) recombined Lot 6 and Lot 2 to create a new L-shaped Lot 6 which expanded the backyard of the Bissettes. . . . [T]he Bissettes sold Lot 1 to Scott and Laura Rich (the "Riches") on 28 April 2005. . . .

Moss Creek I, 202 N.C. App at 225, 689 S.E.2d at 183. In other words, Plaintiffs originally owned Lot 6; however, after purchasing the adjoining lot, identified as Lot 8, they combined Lot 6 with part of Lot 8 before selling Defendants the remainder of Lot 8. Plaintiffs memorialized these transactions in documents titled Instrument of Combination and Exclusion Map.

On 18 May 2005, the Association and various individual Association members (the *Moss Creek I* plaintiffs) filed a complaint against Plaintiffs and Defendants in which they alleged that the transactions described above violated the restrictive covenant provision barring the subdivision

of individual lots in Moss Creek. *Moss Creek I*, 202 N.C. App at 225-26, 689 S.E.2d at 183. Subsequently, Defendants asserted a cross-claim against Plaintiffs for breach of warranty. On 6 September 2005, the parties to this case executed an agreement which provided, in pertinent part, that:

> . . . If for any reason . . . the actions reflected in the Instrument of Combination and the Exclusion Map are required to be reversed, then the Richs agree to record the Deed of Easement attached hereto as Exhibit A. The Richs agree to sign the Deed of Easement at the same time as this Agreement. The signed Deed of Easement will be held by [the Riches'] attorney, Jennifer T. Harrod, to be recorded with the Guilford County Register of Deeds if and only if the actions reflected in the Instrument of Combination and the Exclusion Map are required to be reversed, and as a result thereof, the Rich's acquire title to the aforesaid Tract II. It is expressly agreed and understood by the Parties that the Richs' actions in signing the Deed of Easement and giving it to their attorney does not constitute delivery of the Deed of Easement to the Bissettes, and that such Deed of Easement shall not become effective and enforceable unless and until the Deed of Easement is recorded with the Guilford County Register of Deeds.

On 21 December 2005, Defendants entered into a consent judgment with the *Moss Creek I* plaintiffs under which the *Moss Creek I* plaintiffs dismissed their claim against Defendants and in which the deed between Plaintiffs and Defendants was declared to be valid and to convey title to the property transferred from Plaintiffs to Defendants in fee simple absolute.

On 7 June 2006, the *Moss Creek I* plaintiffs "filed [an] amended complaint . . . [seeking] declaratory and injunctive relief against [Plaintiffs] . . . for violating the restrictive covenants." *Moss Creek I* at 226, 689 S.E.2d at 183.[2] On 29 December 2006, Judge Ronald E. Spivey entered an order determining that Plaintiffs had violated the restrictive covenants and that none of their defenses had merit. *Id.* On 12 February 2008, Judge James M. Webb entered an order declaring, in pertinent

2. Although the Riches were named as defendants in the amended complaint, the complaint expressly incorporates the consent agreement and acknowledges that the *Moss Creek I* plaintiffs' claims against the Riches had been resolved.

part, that the Instrument of Combination and the Exclusion Map, were "null and void" and directing that the "General Warranty Deed executed by [Plaintiffs] to [Defendants] . . . [be] reformed to include all of Lot 8 . . . to be effective April 28, 2005[.]" As a result, Judge Webb's order awarded Defendants ownership of Lot 8 in its entirety, including the portion that Plaintiffs had added to their lot and that was designated "Tract II" in the September 2005 agreement. On 4 March 2008, Judge Webb entered another order granting summary judgment in favor of the *Moss Creek I* plaintiffs with respect to "any remaining claims not previously resolved or adjudicated." *Id.*

Plaintiffs noted an appeal to this Court from various orders that had been entered during the course of the *Moss Creek I* litigation. On 2 February 2010, this Court filed an opinion in *Moss Creek I* affirming the orders invalidating the Instrument of Combination and Exclusion Map and vesting title in the entirety of Lot 8 in Defendants while overturning certain orders requiring Defendants to pay attorneys' fees to the *Moss Creek I* plaintiffs.

B. Procedural History

On 29 December 2011, more than three years and ten months after Judge Webb ordered that the deed from Plaintiffs to Defendants be reformed in such a manner as to vest title to the original Lot 8 in Defendants, Plaintiffs filed a complaint seeking relief based upon Defendants' refusal to grant Plaintiffs an easement as specified in the 6 September 2005 agreement. In their complaint, Plaintiffs asserted claims sounding in breach of fiduciary duty, constructive fraud, and breach of contract and sought the entry of an order requiring specific performance of the 6 September 2005 agreement. On 4 April 2012, Plaintiffs voluntarily dismissed their complaint against Defendants pursuant to N.C. Gen. Stat. § 1A-1, Rule 41. On 10 April 2012, Plaintiffs filed another complaint against Defendants in which they asserted claims sounding in breach of express trust, constructive fraud, and breach of fiduciary duty and sought the imposition of a resulting or constructive trust on the portion of Defendants' property that would have been subject to an easement in favor of Plaintiffs pursuant to the 6 September 2005 agreement. On 18 April 2012, Defendants filed a motion seeking dismissal of Plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on the grounds that Plaintiffs' claims were barred by the three year statute of limitations applicable to actions arising from contract claims and asserting, in pertinent part, that:

> 1. This action is barred by North Carolina's three-year statute of limitations, N.C. Gen. Stat. §§ 1-15 and 1-52. . . . [F]inal Orders entered by Judge Webb . . . on February 12 and March 4, 2008 . . . reversed the actions of [Plaintiffs] reflected in the "Instrument of Combination" and the "Exclusion Map" . . . and conveyed title to [Defendants] of the property referred to in the so-called Deed of Easement. . . .
>
> 2. . . . [Plaintiffs] could have entered suit on February 12, 2008. On that date the disputed property was transferred to [Defendants]. The transfer was not stayed or held in abeyance. The rights of [Plaintiffs], if any, under the subject agreement, became actionable on February 12, 2008. This action was not deemed commenced until December 29, 2011[.] . . .
>
> 3. The subject contract cannot be enforced due to the running of the statute of limitations, because more than three years' time has elapsed since accrual of [P]laintiffs' right, if any, to sue for enforcement of the subject contract. . . .

A hearing was held with respect to Defendants' dismissal motion on 7 May 2012. During the course of this hearing, Plaintiffs expressly abandoned their constructive fraud and breach of fiduciary duty claims and indicated that they were only pursuing their claims for breach of express trust or the imposition of a constructive or resulting trust. On 11 May 2012, the trial court entered an order dismissing Plaintiffs' complaint for failure to state a claim upon which relief can be granted.[3] Plaintiffs noted an appeal to this Court from the trial court's order.

---

[1] 3. In its order, the trial court stated that "jurisdiction of this matter is retained for purposes of (a) taxing costs, (b) entertaining motions for costs (including claims for attorneys' fees), and (c) motions for sanctions under Rule 11 of the North Carolina Rules of Civil Procedure." However, given that a claim for attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5 is not part of a plaintiff's "underlying substantive claim," *Bumpers v. Cmty. Bank of N. Va.*, 364 N.C. 195, 200, 695 S.E.2d 442, 446 (2010), and that "neither the dismissal of a case nor the filing of an appeal deprives the trial court of jurisdiction to hear Rule 11 motions," *Dodd v. Steele*, 114 N.C. App. 632, 634, 442 S.E.2d 363, 365 (citing *Bryson v. Sullivan*, 330 N.C. 644, 653, 412 S.E.2d 327, 331 (1992)), *disc. rev. denied*, 337 N.C. 691, 448 S.E.2d 521 (1994), the trial court's decision to retain jurisdiction for the purpose of entertaining motions for attorneys' fees or other sanctions does not deprive us of the authority to address the issues raised by Plaintiffs' appeal. *See Dafford v. JP Steakhouse LLC*, __ N.C. App __, __ n.3, 709 S.E.2d 402, 407 n.3 (2011).

II. Legal Analysis

A. Standard of Review

"The standard of review of an order granting a [motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)] is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. 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.' " *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428-29 (citing *Country Club of Johnston Cty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002), and *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001), and quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)), *disc. review denied*, 361 N.C. 425, 647 S.E.2d 98 (2007), *cert. denied*, 361 N.C. 690, 652 S.E.2d 257 (2007). On appeal from an order granting a motion to dismiss for failure to state a claim, 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." *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006) (citation omitted).

"A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim. Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (citing *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994), *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985), and *Little v. Rose*, 285 N.C. 724, 727, 208 S.E.2d 666, 668 (1974)). We will now apply this standard of review to evaluate Plaintiffs' challenges to the trial court's order.

B. Scope of Issues to be Resolved on Appeal

The dispositive issues presented by this appeal are whether Plaintiffs' express trust claim was barred by the statute of limitations and whether Plaintiff sufficiently stated a claim for the imposition of a

constructive or resulting trust. In order to make the first of these two determinations, we are required to decide whether Plaintiffs' complaint stated a valid claim for breach of an express trust or whether, on the other hand, Plaintiffs' complaint merely alleged a breach of contract claim. Although Plaintiffs suggest that the extent to which the 6 September 2005 agreement created a trust was not properly before the trial court and is not properly before us, we cannot agree with this contention.

[2] At the hearing held with respect to their dismissal motion, Defendants argued that "the factual theory upon which the complaint is based, its only factual theory is breach of a contract," and that the "three-year statute of limitations bars any contract claims." In addition, Defendants argued that Plaintiffs had failed to state a valid claim for breach of an express trust, that Defendants had not acted as the settlors with respect to any trust, and that "the law is very clear that you can't have a trust unless . . . the settlor has parted with something to someone as trustee." Finally, Defendants argued that the property in question was not subject to the imposition of a constructive trust or a resulting trust and that, "as far as the claims in issue, express trust, resulting trust, and constructive trust . . . whatever we call it, it's a suit on a contract and a three-year statute [of limitations.]" In response, Plaintiffs argued that Defendants' assertion that they had failed to state a claim for breach of express trust should be ignored, stating that:

> [PLAINTIFFS' COUNSEL]: . . . [T]he Riches filed a Rule 12(b)(6) motion to dismiss. And that was solely on this ground and this ground only. They say the action is barred by the three-year statute of limitations set forth in N.C. [Gen. Stat. §] 1-15 and 1-52. That's the sole ground of their motion under [N.C. Gen. Stat. §§ 1A,] Rule 12(b)(6). So we object to any argument that we have not properly stated claims for resulting trust, constructive trust or on -
>
> THE COURT: In my discretion, I'm going to let him argue that on his 12(b)(6) motion. And he's already argued it.
>
> . . . .
>
> [PLAINTIFFS' COUNSEL]: I would like to object.
>
> THE COURT: [You] didn't object while he was arguing . . . And in my discretion, I'm going to let him argue, and have let him.

Similarly, Plaintiffs suggest in their brief that our review of the trial court's order should be limited to a determination of the date upon which Plaintiffs' claim for breach of express trust accrued, an argument which, if accepted, would require us to overlook the more fundamental issue of whether any sort of trust existed in the first place. In support of this contention, Plaintiffs assert, consistently with the position that they took before the trial court, that Defendants' dismissal motion "was based solely upon their contention that all of the Plaintiffs' claims were barred by the applicable statute of limitations," that "[n]o other ground for dismissal was asserted," that "[t]he parties agree that the three-year statute of limitations applies to Plaintiffs' cause of action to enforce an express trust," but that "the parties differ on when the cause of action for breach of the express trust accrued." We do not find this argument persuasive.

After carefully reviewing the record and the briefs, we conclude that the fundamental dispute between the parties with respect to the validity of Plaintiffs' express trust claim centers on whether the 6 September 2005 agreement served to create a trust, rather than the date upon which any cause of action which Plaintiffs were entitled to assert under the alleged trust accrued. In essence, the reason that Defendants argued that Plaintiffs' breach of express trust claim was time-barred was that Plaintiffs had not really asserted a breach of express trust claim at all. In view of the fact that the trial court expressly allowed this issue to be debated in the court below and the fact that this issue appears to be at the core of the controversy before us in this case, we conclude that the question of whether Plaintiffs' complaint states a claim for breach of an express trust is properly before us and that we should address this issue in the course of reviewing Plaintiffs' challenges to the trial court's order.

C. Breach of Express Trust

[3] " 'An express trust has been defined as a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. . . . To constitute this relationship there must be a transfer of the title by the donor or settlor for the benefit of another. The gift must be executed rather than executory upon a contingency.' " *Bland v. Branch Banking & Tr. Co.*, 143 N.C. App. 282, 287, 547 S.E.2d 62, 66 (2001) (quoting *Wescott v. Bank*, 227 N.C. 39, 42, 40 S.E.2d 461, 462-63 (1946) (internal citation omitted). Thus, "[b]y definition, the creation of a trust must involve a conveyance of property, and before property can

be said to be held in trust by the trustee, the trustee must have legal title[.]" *In re Estate of Washburn*, 158 N.C. App. 457, 461, 581 S.E.2d 148, 151 (2003) (internal citations omitted). In other words, creation of an express trust "presupposes that [the settlor] has control of the subject matter of the trust which he desires to create, and contributes it by conveyance of the land with that intent[.]" *Taylor v. Addington*, 222 N.C. 393, 397, 23 S.E.2d 318, 321 (1942). For that reason, "property which the settlor cannot transfer cannot be held in trust, and where a settlor has no legal authority to convey legal title to property, putting said property into an irrevocable trust is *ultra vires* and the ostensible trust created thereby is consequently void *ab initio*." 76 Am Jur 2d, *Trusts* § 41. As a result, "an interest which has not come into existence or an expectation or hope of receiving property in the future cannot be held in trust." *The Infinity Group, LLC v. Lucas (In re Lucas)*, 477 B.R. 236, 244 (Bankr. M.D. Ala. 2012). In summary:

> By definition, the creation of a trust must involve a conveyance of property. For a settlor to have the power to create a trust, he must own a transferable property interest or have a power of disposition over such property interest[.] . . . Property which the settlor cannot transfer cannot be held in trust. . . . [A] "person lacking capacity to make an ordinary transfer of property has no capacity to create an *inter vivos* trust."

Jewish Community Ass'n v. Community Bank, 6 P.3d 1264, 1266-1267 (Wyo. 2000) (citing *Restatement of Trusts 2d* § 79, and quoting *Hilbert v. Benson*, 917 P.2d 1152, 1156 (Wyo. 1996)).

The 6 September 2005 agreement provided that, in the event that Defendants were to obtain ownership of "Tract II" at some point in the future, they would, at that time, grant Plaintiffs an easement applicable to that tract of property. At the time that the parties executed the 6 September 2005 agreement, Defendants had no interest in the property that was to be the subject of the easement. In light of that fact, Defendants had no power to transfer any right of any nature in Tract II at the time the 6 September 2005 agreement was signed. As a result of the fact that Defendants had no authority to transfer, and did not transfer, the *res* of the alleged trust at the time that the express trust in question was allegedly created, we conclude that the 6 September 2005 agreement did not result in the creation of an express trust, limiting any claims that Plaintiffs were entitled to assert in reliance on that agreement to a garden-variety breach of contract claim.

As Plaintiffs appear to concede, the statute of limitations applicable to breach of contract claims of the nature actually alleged in Plaintiffs' complaint had expired by the time that their complaint was filed. "In general, an action for breach of contract must be brought within three years from the time of the accrual of the cause of action. [N.C. Gen. Stat. §] 1-52(1)[.] A cause of action generally accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises." *Penley v. Penley*, 314 N.C. 1, 19-20, 332 S.E.2d 51, 62 (1985) (citing *Reidsville v. Burton*, 269 N.C. 206, 152 S.E. 2d 147 (1967) (other citation omitted). Plaintiffs' complaint clearly indicates that Defendants obtained their right to see the creation of an easement in their favor applicable to Tract II on or about 12 February 2008, when Judge Webb ordered that the deed from Plaintiffs to Defendants be reformed to include all of Lot 8. However, Plaintiffs did not attempt to enforce any rights that they might have possessed under the 6 September 2005 agreement until 29 December 2011, almost four years after any claim that Plaintiffs might have been able to assert for breach of contract accrued. As a result, Plaintiffs' contract-based claim is clearly barred by the applicable statute of limitations.

In seeking to persuade us that their express trust claim against Defendants was not subject to dismissal, Plaintiffs argue that they adequately stated a claim for breach of an express trust. However, Plaintiffs have neither demonstrated that they are entitled to assert that an express trust can be created in the absence of a transfer of property nor even mentioned this deficiency in attempting to persuade us of the merits of their express trust claim. Instead, Plaintiffs simply "contend [that] the cause of action for breach of the express trust did not accrue until 23 November 2011, when all the Defendants repudiated and disavowed the trust agreement, and otherwise refused to record the Deed of Easement." In light of the fact that the 6 September 2005 agreement constituted a simple contract rather than an express trust, any claim that Plaintiffs might have been able to assert against Defendants under that agreement accrued on the date upon which Judge Webb determined that Defendants owned all of Lot 8 rather than on the date upon which Defendants expressly "repudiated" their obligations under the 6 September 2005 agreement. As a result, the trial court did not err by dismissing Plaintiffs' complaint for failure to state a claim for relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

D. Constructive or Resulting Trust

[4] Secondly, Plaintiffs argue that the trial court erroneously dismissed their request for the imposition of a constructive or resulting trust

entitling them to an easement applicable to Tract II. Once again, we fail to find Plaintiffs' argument persuasive.

The circumstances in which the imposition of a constructive or resulting trust is appropriate are well-established.

> "A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust. . . . [A] constructive trust is a fiction of equity, brought into operation to prevent unjust enrichment through the breach of some duty or other wrongdoing. . . . [T]here is a common, indispensable element in the many types of situations out of which a constructive trust is deemed to arise. This common element is some fraud, breach of duty or other wrongdoing by the holder of the property[.]

Cury v. Mitchell, 202 N.C. App. 558, 560-61, 688 S.E.2d 825, 827 (quoting *Roper v. Edwards*, 323 N.C. 461, 464, 373 S.E.2d 423, 424-25 (1988) (internal quotations and citations omitted), *disc. review denied*, 364 N.C. 434, 702 S.E.2d 300 (2010). Similarly,

> "[a] resulting trust arises 'when a person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of another. . . . A trust of this sort does not arise from or depend upon any sort of agreement between the parties. It results from the fact that one man's money has been invested in land and the conveyance taken in the name of another.' "
>
> The classic example of a resulting trust is the purchase-money resulting trust. In such a situation, when one person furnishes the consideration to pay for the land, title to which is taken in the name of another, a resulting trust commensurate with his interest arises in favor of the one furnishing the consideration. The general rule is that the trust is created, if at all, in the same transaction in which the legal title passes, and by virtue of the consideration advanced before or at the same time the legal title passes.

Cury, 202 N.C. App. at 562-63, 688 S.E.2d at 827 (quoting *Patterson v. Strickland*, 133 N.C. App. 510, 519, 515 S.E.2d 915, 920 (1999) (quoting *Mims v. Mims*, 305 N.C. 41, 46, 286 S.E.2d 779, 783 (1982) (internal citation omitted), and *Cline v. Cline*, 297 N.C. 336, 344, 255 S.E.2d 399, 404-05 (1979)). The allegations set out in Plaintiffs' complaint fail to support the imposition of either a constructive or a resulting trust.

Although Plaintiffs assert that Defendants "acquired title to the balance of the original Moss Creek lot under circumstances which in equity obligate [Defendants] to hold title and exercise ownership for the benefit of [Plaintiffs], consistent with the Deed of Easement" and that "[e]quity should raise a resulting trust by reason of such circumstances," Plaintiffs have failed to allege facts that might support such a conclusion. Instead, the factual allegations set out in Plaintiffs' complaint establish that: (1) Plaintiff purchased an additional lot in the Moss Creek development and subsequently divided it, adding part of the new lot to their original home site and selling the remainder to Defendants; (2) Plaintiffs' actions violated the restrictive covenants applicable to Moss Creek, which explicitly preclude the subdivision of any lots in that development; and (3), as a remedy for Plaintiffs' violation of the Moss Creek restrictive covenants, the documents effectuating and evidencing these transactions were declared null and void and the deed in which Plaintiffs had granted Defendants a portion of the original lot was reformed so that Plaintiffs owned Lot 6 and Defendants owned Lot 8 as originally delineated. As a result, the factual allegations set out in Plaintiffs' complaint do not suffice to establish that Defendants obtained possession of Tract II as the result of any fraud, wrongdoing,[4] or other circumstance that might support the imposition of a constructive or resulting trust.

In attempting to persuade us to reach a different conclusion, Plaintiffs cite *Wilson v. Development Co.*, 276 N.C. 198, 211, 171 S.E.2d

---

4. In their brief, Plaintiffs speculate that the "Moss Creek Homeowners Association would have never agreed to allow [Defendants] to obtain title to all of old Lot 8 in the Moss Creek Litigation had the Moss Creek Homeowners Association been informed of the Deed of Easement," that "[t]he existence of the Agreement and the Deed of Easement between [Plaintiffs] and [Defendants] was withheld in the Moss Creek Litigation settlement discussions," and that, "[b]y withholding such information, [Defendants] were able to acquire property for which they paid no consideration." However, Plaintiffs cite no allegations in their complaint which support these conclusory assertions. In addition, the trial court, rather than the homeowners' association, ordered the reformation of the deed to Lot 8. As a result, the additional arguments advanced by Plaintiffs predicated on the theory that, had the parties' agreement been disclosed during the course of the *Moss Creek I* litigation, the outcome in that proceeding would have been different do not suffice to justify a reversal of the trial court's order.

873, 882 (1970), for the general proposition that a constructive trust may be the "proper remedy to prevent unjust enrichment." However, nothing in *Wilson* in any way suggests that the facts alleged in Plaintiffs' complaint rise to the level necessary to support the imposition of a constructive trust. In addition, Plaintiffs cite *Guy v. Guy*, 104 N.C. App. 753, 757-58, 411 S.E.2d 403, 405-06 (1991), and *Mims*, 305 N.C. at 59, 286 S.E.2d at 791 (1982), in support of their claims for the imposition of a constructive or resulting trust. However, neither *Guy* (holding that a complaint, in which the plaintiff alleged that he had conveyed certain real property to his son in exchange for a promise to reconvey the property after the plaintiff repaid a bank loan and that the defendant had refused to honor their bargain after the plaintiff had repaid the loan, stated a claim for the imposition of a constructive trust), nor *Mims* (holding that, despite the presumption that transfers among spouses are gratuitous, the plaintiff stated a claim for the imposition of a resulting trust where he "supplied the entire purchase price for the property from money he received from his father and grandfather," "at all times intended for the property to be his alone," so "advised the defendant at and before the closing," and "acquiesced ian placing the title in both his and defendant's names only because he was advised by his real estate agent that North Carolina law so required"), appear to have any significant bearing on the proper resolution of this case in light of Plaintiffs' failure to articulate any way in which the facts at issue here are analogous to those at issue in *Guy* and *Mims*. As a result, we conclude that the trial court did not err by dismissing Plaintiffs' request for the imposition of a constructive or resulting trust on Tract II.

III. Conclusion

Thus, for the reasons discussed above, we conclude that the trial court did not err by granting Defendants' dismissal motion. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge McCULLOUGH concur.

MARY GRAY, WIDOW OF DAVID GRAY, DECEASED, EMPLOYEE, PLAINTIFF
v.
UNITED PARCEL SERVICE, INC., EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA12-1029

Filed 19 March 2013

1. Workers' Compensation—heart attack—not an injury by accident arising out of employment

The Industrial Commission did not err in a workers' compensation case by denying plaintiff widow benefits. Numerous findings of fact were made justifying the Commission's conclusion of law that decedent's heart attack was not the result of an accident arising out of his employment.

2. Workers' Compensation—doctor's testimony—Commission the sole judge of credibility of witnesses

The Industrial Commission did not err in a workers' compensation case by concluding a doctor's testimony was speculative. Regardless of whether the Commission deemed it speculative, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.

3. Workers' Compensation—conclusion of law—mischaracterization of conclusion

The Industrial Commission did not err in a workers' compensation case by entering its conclusion of law number five. Plaintiff's argument was a mischaracterization of the Commission's conclusion.

Appeal by plaintiff from Opinion and Award of the Full Commission entered 10 May 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 January 2013.

Teague Rotenstreich Stanaland Fox & Holt, PLLC, by Lyn K. Broom and Kara V. Bordman, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by J. A. Gardner, Jennifer I. Mitchell, and M. Duane Jones, for defendant-appellees.

BRYANT, Judge.

Where competent evidence supports the findings of fact and where the findings of fact justify the conclusions of law, we affirm the opinion and award of the Industrial Commission, denying benefits to plaintiff under the Workers' Compensation Act.

Facts and Procedural History

On 29 November 2001, David D. Gray was working at the United Parcel Service ("UPS") hub in Greensboro, North Carolina. Charles Gregory McDaniel, a fellow employee of Mr. Gray, testified that as he was walking to his truck[1], he observed Mr. Gray standing in front of a row of trucks. McDaniel proceeded to get into his truck and began performing a safety check. As he was performing this check, McDaniel saw the brake lights and back-up lights of Mr. Gray's truck turn on.

McDaniel saw Mr. Gray's truck approaching his truck but did not see anyone in the cab of the truck. McDaniel blew his horn but the truck continued to back up until it struck McDaniel's truck. McDaniel jumped out and saw Mr. Gray lying on the ground. Mr. Gray was lying on his back, his glasses were three to four inches away from his head and they were flattened.

As McDaniel approached Mr. Gray, Mr. Gray attempted to get up and stated that he was cold. McDaniel turned off Mr. Gray's truck and then witnessed Mr. Gray attempt to get up again. McDaniel told Mr. Gray to lie still while he went to get help. Another witness to the incident, who was also an emergency medical technician, began assisting Mr. Gray. McDaniel testified that he heard Mr. Gray take his last breath and proceeded to perform CPR on Mr. Gray.

Mr. Gray was taken to Moses Cone Hospital where he was pronounced dead. Dr. John D. Butts, performed an autopsy on Mr. Gray and listed the cause of death as coronary atherosclerosis.

On 11 December 2001, UPS filed a Form 1A-1, "Workers Compensation – First Report of Injury or Illness," which reported that Mr. Gray "suffered [a] heart attack while backing up [truck] and it rolled into another parked UPS [truck]." On 15 January 2002, the North Carolina Industrial Commission filed a Form 61, "Denial of Workers' Compensation Claim," denying the claim. After an investigation, the Industrial Commission determined that "the cause of death was not the result of an injury by accident. The fatality did not arise out of or in the course and scope of employment. Nor is it listed as an occupational disease."

---

1. The parties, witnesses, and Commission use the terms "truck" and "tractor" interchangeably. For ease of reading, we will use the term "truck."

On 30 April 2002, plaintiff Mary Gray, widow of Mr. Gray, filed a Form 18, "Notice of Accident to Employer and Claim of Employee, Representative, or Dependent," stating that Mr. Gray "fell out of [his] truck striking his head which contributed to a heart attack resulting in his death." On 3 May 2007, plaintiff filed a Form 33, "Request that Claim be Assigned for Hearing."

Following a hearing on 29 October 2008, the North Carolina Industrial Commission entered an Opinion and Award on 25 June 2009 awarding benefits to plaintiff. Defendants UPS and Liberty Mutual Insurance Company appealed to the Full Commission. On 10 March 2010, the Full Commission entered an Opinion and Award affirming the award of benefits to plaintiff. On 9 April 2010 defendants appealed to the North Carolina Court of Appeals.

In *Gray v. UPS*, __ N.C. App. __, __, 713 S.E.2d 126 (2011) ("*Gray I*"), our Court reversed and remanded in part and affirmed in part, holding that the Industrial Commission erred in concluding that Mr. Gray's death was a compensable injury. *Id.* at __, 713 S.E.2d at 127-30. We held that the *Pickrell* presumption[2] applied "based upon the fact that plaintiff's intestate died while in the course and scope of his employment, but it was not clear whether his death was the result of an injury by accident arising out of employment." *Id.* at __, 713 S.E.2d at 129. Because the presumption was rebutted by the testimony of defendants' expert witness, Dr. Barry Welborne, we held that "the Commission must consider the issue of compensability as if the presumption did not exist, with the plaintiff having the burden of proof of showing that the death was a result of an accident arising out of the course and scope of employment." *Id.*

Plaintiff filed a petition for discretionary review and petition for writ of certiorari to the North Carolina Supreme Court on 26 July 2011 both of which were denied.

---

2. Pursuant to the *Pickrell* presumption "[w]here the evidence shows an employee died within the course and scope of his employment and there is no evidence regarding whether the cause of death was an injury by accident arising out of employment, the claimant is entitled to a presumption that the death was a result of an injury by accident arising out of employment. In order to rebut the presumption, the defendant has the burden of producing credible evidence that the death was not accidental or did not arise out of employment. In the presence of evidence that death was not compensable, the presumption disappears. In that event, the Industrial Commission should find the facts based on all the evidence adduced, taking into account its credibility, and drawing such reasonable inferences from the credible evidence as may be permissible, the burden of persuasion remaining with the claimant." *Gray I*, __ N.C. App. at __, 713 S.E.2d at 128 (citations omitted).

On 10 May 2012, the Full Commission entered an Opinion and Award, denying plaintiff's claim for benefits[3]. From this Opinion and Award, plaintiff appeals.

Plaintiff presents the following issues on appeal: whether the Full Commission erred (I) in concluding that Mr. Gray's injuries and resulting death were not compensable; (II) in concluding that Mr. Gray's heart attack and death were not the result of an accident arising out of or in the course of his employment; (III) in applying an incorrect medical causation standard; and (IV) in concluding that Dr. Charles Walker Harris, Jr.'s testimony was speculative.

Standard of Review

> On appeal of cases from the Industrial Commission, our review is limited to two issues: Whether the Commission's findings of fact are supported by competent evidence and whether the Commission's conclusions of law are justified by its findings of fact. Because it is a fact-finding body, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. The Commission's findings of fact are conclusive on appeal if they are supported by any competent evidence. Accordingly, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.

Shaw v. US Airways, Inc., __ N.C. App. __, __, 720 S.E.2d 688, 690 (2011) (citation omitted).

I and II

[1] Plaintiff argues the trial court erred by denying her benefits under the Workers' Compensation Act. Specifically, plaintiff asserts that she has met her burden of proof by showing that Mr. Gray's death was the result of an accident arising out of the course and scope of his employment, and therefore, that his injury and resulting death were compensable.

---

3. Commissioners Linda Cheatham and Pamela T. Young issued the Opinion and Award denying plaintiff's claim for benefits. Commission Christopher Scott issued a dissent on 4 May 2012, finding Mr. Gray's injuries and death to be compensable.

At the outset, we note that plaintiff does not challenge any of the Full Commission's findings of fact or conclusions of law. Because plaintiff does not dispute the findings of fact, they are binding on appeal. *See Coffey v. Weyerhaeuser Co.*, __ N.C. App. __, __, 720 S.E.2d 879, 881 (2012). Plaintiff does, however, argue that she has met her burden of persuasion by producing sufficient evidence to demonstrate that Mr. Gray's heart attack was the result of an accident arising out of his employment. In essence, plaintiff is asking our Court to re-weigh the evidence presented before the Full Commission and to assign greater weight to the evidence presented in plaintiff's favor. We reject this argument.

For purposes of our review, we do "not have the right to weigh the evidence and decide the issue on the basis of its weight." *Shaw*, __ N.C. App. at __, 720 S.E.2d at 690 (citation omitted). Because the findings are binding on appeal, our review is limited to whether the Commission's conclusions of law are justified by its findings.

"The North Carolina Workers' Compensation Act [(the Act)] provides that an employee's death is compensable only when such death results from an injury 'arising out of' and 'in the course and scope of' his employment." *Roman v. Southland Transp. Co.*, 350 N.C. 549, 551, 515 S.E.2d 214, 216 (1999) (citation omitted).

> Section 97-2(6) of the North Carolina General Statutes states the definition of injury under the [Act] and articulates the controlling rule in the case *sub judice*: " 'Injury and personal injury' shall mean only injury by accident arising out of and in the course of the employment. . . ." N.C.G.S. § 97-2(6) (2005). " 'Arising out of employment' refers to the manner in which the injury occurred, or the origin or cause of the accident." . . . "Thus the injury must spring from the employment in order to be compensable under the Act."

Frost v. Salter Path Fire & Rescue, 361 N.C. 181, 184-85, 639 S.E.2d 429, 432 (2007) (citations omitted). The claimant has the burden of proving that his claim is compensable. *Henry v. A.C. Lawrence Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950) (citation omitted).

In the case *sub judice*, numerous findings of fact were made justifying the Commission's conclusion of law that "[Mr. Gray's] heart attack was not the result of an accident arising out of his employment." The Commission found that the autopsy of Mr. Gray, performed by Dr. John D. Butts, listed the cause of his death as coronary atherosclerosis.

Dr. Butts also opined that the cause of death was the result of acute cardiac arrhythmia due to severe coronary atherosclerosis. Importantly, the Commission found that there was insufficient evidence to determine whether decedent's death was caused by an injury by accident arising out of his employment. "Specifically, there [was] insufficient evidence of record by which to determine whether [Mr. Gray's] cardiac event occurred prior to and independent of his fall, or whether [Mr. Gray's fall] and the events which following precipitated his cardiac event." The Commission also found that Dr. Welborne "expressed his 'strong' opinion to a reasonable degree of medical certainty that [Mr. Gray's] 'employment had no bearing on his death' and did not in any way contribute to his death." Dr. Welborne "opined that [Mr. Gray's] fall from his truck did not cause or contribute to his heart attack, noting that a fall was not an accepted cause of heart attack." The Commission ultimately found that based upon the preponderance of the evidence in view of the entire record, that plaintiff had failed to carry her burden of proof to show that Mr. Gray's death was the result of an accident *arising out of* the course and scope of his employment.

Based on the foregoing, plaintiff's arguments are overruled.

III

[2] Next, plaintiff argues that the expert testimony of Dr. Charles W. Harris, Jr., pertaining to the causation of Mr. Gray's injuries was to a reasonable degree of medical certainty and was not merely speculative. Plaintiff contends that the mischaracterization of Dr. Harris' testimony "should not undermine Dr. Harris's opinion testimony that the major cardiac event started or was hastened after his fall from the UPS truck, establishing a causal link to the cause of injury."

Here, the Commission found that although Dr. Harris opined that Mr. Gray's heart attack started after he fell from his truck, Dr. Harris eventually admitted that the basis for his opinion was personal experience rather than his knowledge of epidemiology or pathology associated with cardiovascular disease. The Commission also found that Dr. Harris later acknowledged that there was no way to know, "with the evidence or with my experience, whether he was having a heart attack in the truck or after he fell out of the truck" and that "he could not be certain why [Mr. Gray] fell out." Finding of fact number 20 states that "[w]hile he offered several possible scenarios . . . he ultimately agreed that he did not have a medical explanation for why [Mr. Gray] fell out."

However, regardless of whether the Commission deemed Dr. Harris' testimony as speculative or not, our task is limited to determining

whether the findings are supported by competent evidence and whether the conclusions of law are justified by its findings of fact. *Shaw*, __ N.C. App. at __, 720 S.E.2d at 690. "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (citation omitted).

Because we have held in issues *I* and *II* that the findings of fact supported the Commission's conclusion that "[Mr. Gray's] heart attack was not the result of an accident arising out of his employment[,]" plaintiff's argument is overruled.

IV

[3] Plaintiff argues that the Commission erred by entering conclusion of law number five in its Opinion and Award entered 10 May 2012. Plaintiff contends that the "medical certainty" standard applied by the Commission was in error.

First, we note that plaintiff's argument is a mischaracterization of the Commission's conclusion. The Commission's conclusion of law number five provides the following:

> North Carolina law requires that where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury. *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 265 S.E. 2d 389 (1980). Additionally, "the entirety of causation evidence" must "meet the reasonable degree of medical certainty standard necessary to establish a causal link." *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003); *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 538 S.E.2d 912 (2000). "Although medical certainty is not required, an expert's 'speculation' is insufficient to establish causation." *Holley*, 357 N.C. at 234, 581 S.E.2d 754.

A reading of the Commission's conclusion of law number five clearly states that "medical certainty" is *not* required. As noted by the Commission, it is well established that

> [i]n 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 remove possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation.

Hutchens v. Lee, __ N.C. App. __, __, 729 S.E.2d 111, 114 (2012) (citing *Holley*, 357 N.C. at 232, 581 S.E.2d at 753).

Based on the foregoing, plaintiff's arguments are overruled and the Opinion and Award of the Commission is affirmed.

Affirmed.

Judges CALABRIA and GEER concur.

TINA HARDISON AND DALTON HARDISON, PLAINTIFFS
v.
KIA MOTORS AMERICA, INC., DEFENDANT

No. COA12-981

Filed 19 March 2013

1. Motor Vehicles—Lemon Law—disclosure requirement

An automobile company met its disclosure requirement under N.C.G.S. § 20-351.5 (the Lemon Law) where the manual contained a section directed solely at consumers in North Carolina, instructions to notify the company in writing when there is an unresolved problem or nonconformity, and an address to which to send this notice.

2. Motor Vehicles—Lemon Law—notice of nonconformity

There was no genuine issue of fact as to the sufficiency of plaintiffs' notice of the nonconformity to an automobile dealer under N.C.G.S. § 20-351.5 (the Lemon Law) and summary judgment was properly granted. Despite the letter being sent to a different Irvine, California address than the one listed in the owner's manual, defendant responded to plaintiffs' notice by contacting their attorney, making settlement offers, and ultimately setting up an inspection.

3. Motor Vehicles—Lemon Law—reasonable period of nonconformity

There was no genuine issue of material fact in a Lemon Law case as to whether defendant auto company was given a reasonable period in which to repair a nonconformity in a new automobile where plaintiffs notified defendant by letter that plaintiffs should be contacted within fourteen days. Although defendant contended that the fifteen-day time period specified in the statute for making repairs begins when the manufacturer or its agent obtains access to the vehicle for inspection and repair, this interpretation did not comport with the rationale behind the North Carolina Lemon Law.

4. Attorney Fees—Lemon Law—reasonable actions

The trial court erred in a Lemon Law action by awarding plaintiffs attorney fees where, beyond failing to act as quickly as prescribed by statute to fully resolve plaintiffs' concerns, the record was devoid of evidence that defendant did anything but act reasonably from the time it learned of plaintiffs' complaints about their vehicle.

5. Damages and Remedies—Lemon Law—treble damages

The trial court did not err in a Lemon Law action by denying plaintiffs' motion for summary judgment on the issue of treble damages where, although defendant violated N.C.G.S. § 20-351.3 by failing to inspect and repair the auto within the fifteen-day cure period, the evidence did not support a finding that defendant acted unreasonably in its handling of plaintiffs' situation, much less that they "unreasonably refused" to comply with the statute.

Appeal by defendant and cross–appeal by plaintiffs from order entered 17 February 2012 by Judge Kenneth F. Crow in Craven County Superior Court. Heard in the Court of Appeals 11 February 2013.

Luxenburg & Levin, LLC, by Mitchel E. Luxenburg, for plaintiffs–appellees/cross–appellants.

Brown, Crump, Vanore & Tierney, L.L.P., by Andrew A. Vanore, III, for defendant–appellant.

MARTIN, Chief Judge.

Plaintiffs Tina and Dalton Hardison brought this action alleging violations of the New Motor Vehicles Warranties Act, ("the North Carolina Lemon Law"), N.C.G.S. § 20-351, against defendant Kia Motors America, Inc. After a hearing on the parties' cross–motions for summary

judgment, the trial court granted plaintiffs' motion on the issue of liability and awarded attorney's fees, but denied their prayer for treble damages pursuant to N.C.G.S. § 20-351.8(2). Defendant's motion for summary judgment was denied. Defendant appealed from the grant of summary judgment in favor of plaintiffs and the denial of its motion for summary judgment; plaintiffs have cross–appealed the denial of treble damages. We affirm the trial court's order with regard to liability and trebling of damages, but reverse the award of attorney's fees.

The evidence at the hearing tended to show: plaintiffs purchased a Kia Borrego ("the Borrego") at Stevenson Kia in Jacksonville on 15 March 2010. The Borrego is covered by a sixty-month, 60,000-mile Express Limited Warranty, the details of which are located in the Borrego's manual. Shortly thereafter, the Borrego began exhibiting a "no start" condition and needed to be towed to Kia of New Bern ("the dealership"), an authorized agent of defendant, for repair. Plaintiffs' Borrego was ultimately taken to the dealership for repair four times between 12 April and 19 July 2010, each time exhibiting the same "no start" condition. The dealership was unsuccessful in its attempts to identify the cause of the problem or to repair the Borrego.

Plaintiffs obtained counsel, who sent a letter to defendant's National Consumer Affairs Department on 22 July 2010 alleging violations of the North Carolina Lemon Law. Defendant's Consumer Affairs Department received the letter on 27 July 2010, and responded to the letter via email on 5 August and via letter faxed to plaintiffs' counsel on 6 August 2010. The letter instructed plaintiffs to bring the Borrego to the dealership on 30 August 2010 for inspection and repair the following day by a Kia professional.

On 23 August 2010, prior to the 30 August 2010 scheduled drop-off, plaintiffs had to take the Borrego to the dealership when it failed to start again. Plaintiffs were allegedly unaware of the inspection and repair appointment scheduled for 31 August 2010 at that time. On August 31st, because the Borrego remained at the dealership, Mark Ramsey, a Field Technical Representative for defendant, inspected the Borrego, conducted several electrical tests, and discovered that the audio unit was malfunctioning and drawing on the battery when the car was turned off, thereby causing the "no start" condition. Ramsey met with plaintiff Dalton Hardison and explained the problem to him. Thereafter, the dealership ordered a replacement audio unit and Ramsey installed it on or about 1 September 2010. Plaintiffs picked up the Borrego on 3 September 2010 and have not experienced the "no start" condition again.

On appeal, defendant contends the trial court erred by granting plaintiffs' motion for summary judgment, ordering that defendant repurchase the Borrego pursuant to N.C.G.S. § 20-351.3(a) and awarding plaintiffs attorney's fees pursuant to N.C.G.S. § 20-351.8(3)(a). Plaintiffs contend the trial court erred by determining they are not entitled to the trebling of damages under N.C.G.S. § 20-351.8(2).

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows 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.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

I.

[1] North Carolina's New Motor Vehicles Warranties Act, N.C.G.S § 20-351, provides remedies to consumers where a new motor vehicle does not conform to express warranties. N.C. Gen. Stat. § 20-351 (2011). Under N.C.G.S. § 20-351.3, the remedy of repurchase of the vehicle or refund of the purchase price is provided where:

> [T]he manufacturer is unable, after *a reasonable number of attempts*, to conform the motor vehicle to any express warranty by repairing or correcting, or arranging for the repair or correction of, any defect or condition or series of defects or conditions which substantially impair the value of the motor vehicle to the consumer . . . .

N.C. Gen. Stat. § 20-351.3(a) (2011) (emphasis added). N.C.G.S. § 20-351.5 creates a presumption that a "reasonable number of attempts have been undertaken" if "the same nonconformity has been presented for repair to the manufacturer, its agent, or its authorized dealer *four or more times* but the same nonconformity continues to exist." N.C. Gen. Stat. § 20-351.5(a)(1) (2011) (emphasis added). The presumption has been referred to as an "initial eligibility hurdle[]." *Anders v. Hyundai Motor Am. Corp.*, 104 N.C. App. 61, 65, 407 S.E.2d 618, 621, *disc. review denied*, 330 N.C. 440, 412 S.E.2d 69 (1991). For the presumption to apply, the consumer must have notified the manufacturer directly in writing of the defect and allowed the manufacturer a reasonable period, not to exceed fifteen calendar days, in which to make the repairs. N.C. Gen. Stat. § 20-351.5(a). The statute also requires that the manufacturer "clearly and conspicuously disclose to the consumer in the warranty or owners

manual that written notification of a nonconformity is required before a consumer may be eligible for a refund or replacement of the vehicle" and must "include in the warranty or owners manual the name and address where the written notification may be sent." *Id.*

Defendant argues there are genuine issues of material fact as to whether plaintiffs gave notice in accordance with the instructions in the warranty and whether they afforded defendant the requisite reasonable opportunity to repair. Plaintiffs respond that defendant's notice to consumers was defective because it was not "clear and conspicuous," excusing them from the written notice requirement.

Defendant's manual contains a section labeled "When you need to talk to Kia and Roadside Assistance," beginning on page 43, just after the full text of the warranty. Just below the first paragraph in that section, the manual informs the consumer that "[a]lso included [in the manual] are basic requirements established by your state regarding Lemon Laws for your reference." On pages 45–47, defendant outlines various steps for obtaining help when a "situation arises that has not been addressed to your satisfaction." In this section, defendant's manual states, "[t]he following section has been developed with information on contacting Kia and on the basic provisions of your State's 'Lemon Laws.' " On the page labeled, "NOTICE TO CONSUMERS STATE OF NORTH CAROLINA," the manual states that if "Kia or its dealers have not repaired the vehicle after a reasonable number of repair attempts . . . you may be entitled under the provisions of your state 'Lemon Law' to a replacement or repurchase of the vehicle." It directs the consumer to "1) notify Kia at the address below, by certified mail, of the problem with your vehicle at least 10 days before filing suit; and 2) provide Kia an opportunity to repair it." As the manual contained a section directed solely at consumers in North Carolina, instructions to notify Kia in writing when there is an unresolved problem or nonconformity, and gave an address to which to send this notice, we conclude that defendant met its disclosure requirement under N.C.G.S. § 20-351.5. *Cf. Anders*, 104 N.C. App. at 67, 407 S.E.2d at 622 (holding that the manufacturer's disclosure was deficient when its manual made no mention of written notification requirement).

[2] Thus, we must determine whether there are genuine issues of fact as to the sufficiency of plaintiffs' notice to defendant that the Borrego was nonconforming and whether they afforded defendant a reasonable opportunity to repair.

Defendant first argues that plaintiffs' notice was deficient because it was sent to an address different from that listed in the warranty section

of the vehicle manual. Plaintiffs' counsel sent the letter to the Kia Motors America National Consumer Affairs Department in Irvine, California, rather than the "Consumer Assistance Center" at a different post office box in Irvine, California. The letter was stamped by the Consumer Affairs Department as received on 27 July 2010. The letter specified that plaintiffs' vehicle had been taken to the dealership on repeated occasions for "attempted repairs to non-conformities that have caused a substantial impairment to the use, value and/or safety of the vehicle" and notified defendant that the plaintiffs were "revoking acceptance of [the] vehicle." Plaintiffs alleged violations of the North Carolina Lemon Law and demanded that Kia accept return of the vehicle and refund the purchase price. Despite the letter being sent to a different Irvine, California address than the one listed in the manual, defendant responded to plaintiffs' notice by contacting their attorney, making settlement offers, and ultimately setting up an inspection. Therefore, we conclude that there is no genuine issue of fact as to the sufficiency of plaintiffs' notice of the nonconformity under N.C.G.S. § 20-351.5.

[3] However, defendant further contends there is a genuine issue of material fact as to whether it was given a reasonable period in which to repair the nonconformity. Defendant contends the fifteen-day time period specified in the statute for making the repairs begins when the manufacturer or its agent obtains access to the vehicle for inspection and repair. We disagree.

In *Eugene Tucker Builders, Inc.*, 175 N.C. App. 151, 152, 622 S.E.2d 698, 699 (2005), *cert. denied*, 360 N.C. 479, 630 S.E.2d 926 (2006), this Court recognized that "[i]n compliance with the statute, plaintiff requested that defendant cure the alleged defect within 15 days of receipt of the letter" and that defendant repaired the vehicle "[d]uring this cure period." This suggests that the fifteen-day period begins when the manufacturer receives written notice of the nonconformity. Moreover, to interpret the "cure period" as beginning when the manufacturer obtains possession of the car to inspect or repair it could lead to absurd results, i.e., the manufacturer or agent could wait weeks or even months after receiving the notice to set up an inspection or to repair the vehicle, as long as it resolves the problem within fifteen days of receipt of the car. This interpretation does not comport with the rationale behind the North Carolina Lemon Law, which is to provide "private remedies against motor vehicle manufacturers for persons injured by new motor vehicles failing to conform to express warranties," and to set standards that induce manufacturers to be prompt and fair in their resolution of consumer complaints. N.C. Gen. Stat. § 20-351.

Here, plaintiffs' letter closed by stating "if you wish to resolve this matter amicably, please contact us within 14 days . . . . Should you fail to contact us, we will be left with no alternative but to commence legal proceedings." While defendant did contact plaintiffs' attorney within that fourteen-day window, first by email and then via faxed letter, defendant did not actually inspect or repair the vehicle until at least 31 August 2010, more than a month after receiving plaintiffs' letter. Therefore, plaintiffs afforded "a reasonable period, not to exceed 15 calendar days, in which to correct the nonconformity," and defendant failed to timely repair the Borrego.

Defendant has not pointed us to any evidence in the materials before the trial court which would give rise to a genuine issue of fact as to the applicability of the "initial eligibility hurdle" created by the presumption in N.C.G.S. § 20-351.5 or as to the nonconformity of the Borrego. Therefore, the trial court did not err in determining that plaintiffs are entitled to summary judgment requiring defendant to repurchase the vehicle under N.C.G.S. § 20-351.3.

II.

[4] Defendant also contends the trial court erred in awarding plaintiffs attorney's fees because there is no evidence that defendant acted unreasonably in resolving the matter. We agree.

A trial court can award attorney's fees as relief under N.C.G.S. § 20-351.8(3) if "[t]he manufacturer unreasonably *failed or refused* to fully resolve the matter which constitutes the basis of such action." N.C. Gen. Stat. § 20-351.8(3)(a) (2011) (emphasis added). "The statute places an award of attorney's fees within the discretion of the trial court. We will not second-guess a trial court's exercise of its discretion absent evidence of abuse. An abuse of discretion occurs only when a court makes a patently arbitrary decision, manifestly unsupported by reason." *Buford v. Gen. Motors Corp.*, 339 N.C. 396, 406, 451 S.E.2d 293, 298 (1994).

While "[w]e agree that there is a distinction between refusing to comply and failing to comply with the Act," the latter seemingly indicating that attorney's fees can be awarded for an unintentional failure to resolve the consumer's issue, we conclude the evidence presents no issue of fact as to the question of whether defendant unreasonably failed to resolve the matter. *Taylor v. Volvo N. Am. Corp.*, 339 N.C. 238, 256, 451 S.E.2d 618, 627 (1994). Beyond the fact that defendant failed to act as quickly as prescribed by statute to fully resolve plaintiffs' concerns, the record is devoid of evidence that defendant did anything but "[act] altogether reasonably from the time it learned of plaintiffs' complaints about their

vehicle." *Buford*, 339 N.C. at 406–07, 451 S.E.2d at 298. Therefore, because defendant "addressed their concerns in a prompt and honest manner," *see id.* at 405, 451 S.E.2d at 298, we find that the trial court erred in awarding plaintiffs attorney's fees and, accordingly, reverse on this issue.

III.

[5] By their cross-appeal, plaintiffs contend the trial court erred by failing to award treble damages as a matter of law because defendant unreasonably failed to repurchase or replace the Borrego. We disagree.

Under N.C.G.S. § 20-351.8, the trial court may award monetary damages as relief "to the injured consumer in an amount fixed by the verdict." N.C. Gen. Stat. § 20-351.8(2). Further, "[s]uch damages shall be trebled upon a finding that the manufacturer unreasonably *refused* to comply with G.S. 20-351.2 and G.S. 20-351.3." *Id.* (emphasis added).

Although we find that defendant violated N.C.G.S. § 20-351.3 by failing to inspect and repair the Borrego within the fifteen-day cure period, we agree with the trial court that the evidence does not support a finding that defendant acted unreasonably in its handling of plaintiffs' situation, much less that they "unreasonably refused" to comply with N.C.G.S. § 20-351.3 so as to justify the award of treble damages. This Court previously awarded treble damages under N.C.G.S. § 20-351.8(2) in *Taylor*, 339 N.C. at 256, 451 S.E.2d at 628, where the defendant "did nothing more than to attempt to make one phone call to plaintiff's attorney, which failed." Here, after receiving plaintiffs' letter on 27 July 2010, defendant successfully contacted plaintiffs' attorney via faxed letter on 6 August 2010. Defendant made several settlement offers and ultimately set up an inspection and repair, although outside of the fifteen-day cure period. When defendant's representative Mark Ramsey performed the inspection on the Borrego, he was able to identify and resolve the problem within a few days. For this reason, we find the trial court did not err in this case by denying plaintiffs' motion for summary judgment on the issue of treble damages.

Affirmed in part, reversed in part.

Judges McGEE and CALABRIA concur.

HILLSBORO PARTNERS, LLC, PLAINTIFF
v.
THE CITY OF FAYETTEVILLE, DEFENDANT

No. COA12-987

Filed 19 March 2013

1. Civil Procedure—motion to dismiss converted into motion for summary judgment—collaterally estopped from contesting claim

Defendant's motion to dismiss in a condemnation case was converted into a motion for summary judgment. The fact that defendant argued plaintiff was collaterally estopped from contesting the claim related to plaintiff's ability to state a claim, rather than a jurisdictional issue, and it was properly analyzed under N.C.G.S. § 1A-1, Rule 12(b)(6) rather than N.C.G.S. § 1A-1, Rules 12(b)(1) or (2).

2. Appeal and Error—interlocutory orders and appeals—denial of summary judgment—collateral estoppel—substantial right

The trial court's order denying defendant's motion for summary judgment in a condemnation case on the ground of collateral estoppel affected a substantial right and was properly before the Court of Appeals.

3. Cities and Towns—condemnation—collateral estoppel—failure to appeal initial proceeding—just compensation not required for danger to public health or safety—reasonable notice

The trial court erred by denying defendant City's motion to dismiss plaintiff's complaint because plaintiff was collaterally estopped from claiming that its building was safe and structurally sound given its failure to appeal the initial condemnation proceedings. Therefore, plaintiff could not state a claim for just compensation because a subsidiary municipal corporation of the State may order the demolition of property it deems a danger to public health or safety without compensating the property owner after reasonable notice, due process, and an opportunity to remedy the danger.

Appeal by defendant from order entered 7 May 2012 by Judge James F. Ammons, Jr. in Superior Court, Cumberland County. Heard in the Court of Appeals 10 January 2013.

J. Duane Gilliam, Jr. and Coy E. Brewer, Jr., for plaintiff-appellee.

Poyner Spruill LLP by Keith H. Johnson and Andrew H. Erteschik and Office of the Fayetteville City Attorney by Assistant City Attorney Brian M. Meyer, for defendant-appellant.

STROUD, Judge.

The City of Fayetteville ("defendant") appeals from an order entered 7 May 2012 denying its motion to dismiss the complaint filed by Hillsboro Partners, LLC ("plaintiff") on the grounds that the trial court lacked jurisdiction, that the claim was barred by collateral estoppel, and that defendant was immune from suit under sovereign immunity. On appeal, defendant argues only that the trial court erred in denying its motion because plaintiff was collaterally estopped from claiming that its building was safe and structurally sound, given its failure to appeal the initial condemnation proceedings. For the following reasons, we agree and reverse the trial court's order denying defendant's motion to dismiss.

I. Background

Plaintiff purchased a 2.1 acre lot on Hillsboro Street in Fayetteville, North Carolina, on 21 May, 2010. On that lot were several buildings, including a former church building that had been damaged in a fire. On 16 July 2010, Bart Swanson, manager of the Housing and Code Enforcement Division of the City of Fayetteville sent plaintiff a letter alerting it that an inspection found the former church building to be unsafe. On 28 July 2010, Mr. Swanson held a hearing, which plaintiff did not attend, where he found that plaintiff's building posed a "fire, health and safety hazard," and ordered plaintiff to repair or demolish the structure.

On 11 October 2010, the City of Fayetteville passed an ordinance requiring the demolition of plaintiff's building after adopting Mr. Swanson's findings and determining that plaintiff had failed to comply with the order. After the ordinance passed, plaintiff sought a permit to demolish its building and funding from the City to do so.

Plaintiff has alleged that during the asbestos inspections in preparation for demolition, its inspectors found that the fire damage to the former church structure was more superficial than previously thought. Plaintiff alleged that it provided the reports of these inspectors to defendant. Although plaintiff did not state when these reports were provided, the reports were not even provided to plaintiff until 5 February 2011 and 16 February 2011, nearly seven months after the hearing and four months after the demolition ordinance. Defendant proceeded with the demolition despite plaintiff's claims that the structure was in fact safe.

On 3 March 2011, plaintiff filed its first complaint, alleging that defendant had violated its rights to equal protection and due process, that defendant had taken its property without just compensation, and that defendant had acted under the wrong statutory authority. Plaintiff requested a temporary restraining order as well as temporary and permanent injunctions. The Superior Court, Cumberland County, denied plaintiff's motion for a temporary restraining order and temporary injunction. Defendant then moved to dismiss the complaint for lack of subject matter jurisdiction under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), arguing that the Superior Court lacked jurisdiction because plaintiff had failed to exhaust its administrative remedies. The Superior Court granted defendant's motion by order entered 5 April 2011.

Plaintiff filed its second complaint, the subject of the present appeal, on 15 November 2011, alleging only that it was entitled to just compensation for the building defendant ordered demolished.[1] Defendant answered, denying any taking requiring compensation, asserted several affirmative defenses, and moved to dismiss the complaint on the grounds of lack of jurisdiction for failure to exhaust administrative remedies, sovereign immunity, and failure to state a claim. Defendant argued that plaintiff failed to state a claim because of governmental immunity, *res judicata*, and collateral estoppel. The Superior Court held a hearing and denied defendant's motion to dismiss by order entered 7 May 2012. Defendant filed written notice of appeal to this Court on 15 May 2012.

II. Motion to Dismiss

[1] As an initial matter, we must address the question of whether defendant's motion to dismiss was converted into a motion for summary judgment. We note that the motion filed by defendant was entitled a "motion to dismiss" and the trial court's order denying defendant's motion also labeled it as such. The motion to dismiss was brought pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure.

As discussed in detail below, the ground underlying defendant's motion upon which we focus our analysis is collateral estoppel. Because in this case the fact that defendant argues plaintiff is collaterally estopped from contesting relates to plaintiff's ability to state a claim, rather than a jurisdictional issue, it is properly analyzed under Rule 12(b)(6) rather than Rules 12(b)(1) or (2).

As a general proposition, a trial court's consideration of a motion brought under Rule 12(b)(6) is limited to examining the legal sufficiency

1. Plaintiff did not re-allege any of the other claims alleged in its original complaint.

of the allegations contained within the four corners of the complaint. *Newberne v. Department of Crime Control and Public Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005). Here, although the record is unclear, it appears that the trial court received and considered documents at the hearing on the motion to dismiss that had not been incorporated into the complaint or answer. Specifically, the parties submitted all of the pleadings and evidence from the first lawsuit, including the relevant documents regarding the Town's administrative decision and testimony taken at the hearing on defendant's motion to dismiss in the earlier action.

Both parties cited to these documents in their briefs to this Court. Moreover, neither party has asserted that the exhibits filed with this Court were not considered by the trial court or challenged the propriety of the trial court's review of these documents. Nor have any of the parties challenged the inclusion of these materials in the record on appeal.

Rule 12(b) of the North Carolina Rules of Civil Procedure states in pertinent part as follows:

> If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C. Gen. Stat. § 1A-1, Rule 12(b) (2011); *see also DeArmon v. B. Mears Corp.*, 312 N.C. 749, 758, 325 S.E.2d 223, 229 (1985) ("Where matters outside the pleadings are presented to and not excluded by the [trial] court on a motion to dismiss for failure to state a claim, the motion shall be treated as one for summary judgment under Rule 56."); *N.C. Steel, Inc. v. National Council on Compensation Ins.*, 123 N.C. App. 163, 169, 472 S.E.2d 578, 581 (1996) ("When a trial court considers matters outside the pleadings, a motion under Rule 12 is *automatically* converted into a motion for summary judgment." (emphasis added) (citations omitted)), *rev'd in part on other grounds*, 347 N.C. 627, 496 S.E.2d 369 (1998).

In the present case, neither party claims that it did not have a reasonable opportunity to present evidence or was surprised by the introduction of this material. *Cf. Kemp v. Spivey*, 166 N.C. App. 456, 462, 602 S.E.2d 686, 690 (2004) (reversing and remanding an appeal from an order granting a motion to dismiss where the trial court considered matters

outside the pleadings, but the parties were not accorded a reasonable opportunity to present all pertinent material). Therefore, we conclude that defendant's motion to dismiss was converted into a motion for summary judgment.

III. Interlocutory Order

[2] An order denying a motion for summary judgment is an interlocutory order. *DeArmon*, 312 N.C. at 758, 325 S.E.2d at 230.

> Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy. As a general rule, interlocutory orders are not immediately appealable. However, immediate appeal of interlocutory orders and judgments is available in at least two instances: when the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal; and when the interlocutory order affects a substantial right under N.C.G.S. §§ 1-277(a) and 7A-27 (d)(1).

Turner v. Hammocks Beach Corp., 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citations, quotation marks, and ellipses omitted).

Defendant has raised the defense of collateral estoppel before the trial court and on appeal. Our Supreme Court has recognized that an order which denies dismissal of a claim in this situation may affect a substantial right.

> Defendant's argument in favor of appealability is that the denial of a motion to dismiss a claim for relief affects a substantial right when the motion to dismiss makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel. We agree. Under the collateral estoppel doctrine, parties and parties in privity with them are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination. The doctrine is designed to prevent repetitious lawsuits, and parties have a substantial right to avoid litigating issues that have already been determined by a final judgment. We therefore hold that a substantial right was affected by the trial court's denial of defendant's motion to dismiss, and we proceed to the merits of defendant's appeal.

Id.

Here, defendant's motion raised a colorable claim of collateral estoppel, as this is plaintiff's second lawsuit against defendant arising from the demolition of the building. Accordingly, we hold that the trial court's order denying defendant's motion for summary judgment on the ground of collateral estoppel affects a substantial right and is properly before this Court. *Id.*

IV. Motion for Summary Judgment

A. Standard of Review

> The trial court must grant summary judgment upon a party's motion when "there is no genuine issue as to any material fact and ... any party is entitled to a judgment as a matter of law." N.C. Gen.Stat. § 1A-1, Rule 56 (2005). On appeal, an order granting summary judgment is reviewed *de novo*. Summary judgment is appropriate if: (1) the non-moving party does not have a factual basis for each essential element of its claim; (2) the facts are not disputed and only a question of law remains; or (3) if the non-moving party is unable to overcome an affirmative defense offered by the moving party.

Griffith v. Glen Wood Co., Inc., 184 N.C. App. 206, 210, 646 S.E.2d 550, 554 (2007) (citations and footnote omitted).

B. Collateral Estoppel

[3] Defendant argues that plaintiff is estopped from claiming that its building was not a danger to public health and safety because it failed to appeal a quasi-judicial determination of that issue. Thus, defendant claims that the trial court erred in denying its motion because plaintiff "is unable to overcome" the affirmative defense of estoppel.

> Under the doctrine of collateral estoppel, also known as 'estoppel by judgment' or 'issue preclusion,' the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding. Collateral estoppel bars the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim.

Strates Shows, Inc. v. Amusements of America, Inc., 184 N.C. App. 455, 461, 646 S.E.2d 418, 423 (2007). "[C]ollateral estoppel (issue preclusion) is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." *McCallum v. North Carolina Co-op. Extension Service of N.C. State University*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 (citation and quotation marks omitted), *app. dismissed and disc. rev. denied*, 353 N.C. 452, 548 S.E.2d 527 (2001).

The doctrine of collateral estoppel generally applies to administrative decisions. *See Maines v. City of Greensboro*, 300 N.C. 126, 133, 265 S.E.2d 155, 160 (1980) ("[A]n essential issue of fact which has been litigated and determined by an administrative decision is conclusive between the parties in a subsequent action."). Whether the administrative decision is binding in subsequent actions depends on whether it was purely administrative, to which collateral estoppel does not apply, or quasi-judicial, to which it does. *See In re Mitchell*, 88 N.C. App. 602, 605, 364 S.E.2d 177, 179 (1988) (holding that *res judicata* applies only to quasi-judicial administrative decisions). "Though the distinction between a 'quasi-judicial' determination and a purely 'administrative' decision is not precisely defined, the courts have consistently found decisions to be quasi-judicial when the administrative body adequately notifies and hears before sanctioning, and when it adequately provides under legislative authority for the proceeding's finality and review." *Id.* (citations omitted). Thus, we must first determine whether the administrative decision at issue here is quasi-judicial.

On 11 August 2008, plaintiff's structure was condemned as a dangerous building under N.C. Gen. Stat. § 160A-426(a) and notice was posted on the building as required by law. Defendant sent a letter to plaintiff on 16 July 2010 notifying plaintiff that its building had been condemned after an inspection "revealed that [plaintiff's] structure is in a condition that appears to constitute a fire or safety hazard or to be dangerous to life, health or other property." The 16 July letter also notified plaintiff of the hearing date and its opportunity to present arguments and evidence either in person or through counsel, and its right to appeal to the Fayetteville Board of Appeals. The letter also indicated that absent an appeal, "this order shall be final." Plaintiff does not dispute that it received this notice.

The city's Housing and Code Enforcement Division Manager held a hearing on 28 July 2010; no representative of plaintiff attended the hearing. Defendant then sent plaintiff a second letter on 30 July 2010, ordering it to demolish or repair the condemned structure within 60 days after

Mr. Swanson found that the building suffered from a variety of structural defects, and again notifying it of its right to appeal. Plaintiff did not appeal. The city ordered plaintiff's building demolished by ordinance adopted on 11 October, after plaintiff failed to repair or demolish the building within that 60-day period, as authorized by N.C. Gen. Stat. § 160A-432 (2009) ("In the case of a building or structure declared unsafe under G.S. 160A-426 or an ordinance adopted pursuant to G.S. 160A-426, a city may, in lieu of taking action under subsection (a) [abating the violation by other means], cause the building or structure to be removed or demolished."). Thus, Plaintiff had proper notice and a hearing before demolition.

The City of Fayetteville also provided for the proceeding's finality and review under legislative authority. N.C. Gen. Stat. § 160A-430 unambiguously permits the appeal of a condemnation order under N.C. Gen. Stat. § 160A-429 to the city council and states that if the owner fails to appeal, the order is final. *See* N.C. Gen. Stat. § 160A-430 (2009) ("Any owner who has received an order under G.S. 160A-429 may appeal from the order to the city council by giving notice of appeal in writing to the inspector and to the city clerk within 10 days following issuance of the order. In the absence of an appeal, the order of the inspector shall be final."). The notices sent to plaintiff informed it of the opportunity to appeal and the finality of the order absent appeal, pursuant to this statutory authority. The hearing on the condemnation of plaintiff's building met both requirements of a quasi-judicial determination and collateral estoppel, therefore, applies to the findings of that hearing.

Having determined that the hearing was quasi-judicial, we must now decide whether plaintiff is estopped from claiming that its building was not a danger to public health and safety.

> The elements of collateral estoppel are as follows: (1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined.

Royster v. McNamara, ___ N.C. App. at ___, 723 S.E.2d at 126.

First, the prior administrative order was final as to the issues involved after a hearing on the merits. Although plaintiff did not participate in the hearing, the hearing proceeded to decide the substantive issues without plaintiff's input. Plaintiff did not appeal from the hearing that determined its building was a danger to health and safety. The order

was, therefore, final. N.C. Gen. Stat. § 160A-430 ("In the absence of an appeal, the order of the inspector shall be final.").

Second, the issue of whether plaintiff's structure was a fire, health, and safety hazard at the time of the city's demolition order raised in the present action is identical to that decided in the prior administrative determination. The hearing specifically "established that conditions do exist which constitute a fire, health and safety hazard and renders the building dangerous to life, health and other property." The issue in the present case is whether plaintiff's building posed a threat to public health or safety at the time of demolition.

Plaintiff argues that it only discovered that defendant's conclusions regarding its building were wrong after starting the demolition process, that defendant failed to consider new evidence it wanted to present, and that therefore there was a "mutual mistake" rendering collateral estoppel inapplicable. Plaintiff cites no case which recognizes a mutual mistake exception to collateral estoppel. We find this argument unconvincing.

Plaintiff did not independently inspect or otherwise verify that defendant's claims were accurate prior to the hearing. Even taking plaintiff's claims as true, plaintiff cannot now use its own failure to adequately inspect its own property prior to the hearing to avoid the administrative process put in place by the North Carolina legislature and the City of Fayetteville. This case is not one where the situation has changed in such a way as to render the facts at issue in the prior determination inapplicable. *Cf. Montana v. United States*, 440 U.S. 147, 159, 59 L.Ed. 2d 210, 220 (1979) ("It is, of course, true that changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." (citation omitted)). Plaintiff claims only that it did not know the physical state of the building at the time of the hearing, not that the state of the building had actually changed between the time of the hearing and the demolition order.[2] Thus, the facts at issue in the prior determination are identical to those in question here.

Third, the issue of the safety of plaintiff's building was actually litigated in the prior hearing. Indeed, it was the central issue in that hearing. Further, it was necessary to Mr. Swanson's "judgment" because the

---

2. We also note that although plaintiff claims that it "had done everything that could have been done after discovering the real facts," there was no evidence that plaintiff had begun repairing the structure, which was also an option under the July order. Instead, plaintiff waited until the demolition process had already started before raising any objections.

inspector can only order a building demolished or repaired under N.C. Gen. Stat. § 160A-429 if he finds at the hearing that "the building or structure is in a condition that constitutes a fire or safety hazard or renders it dangerous to life, health, or other property." N.C. Gen. Stat. § 160A-429 (2009).

Moreover, plaintiff "enjoyed a full and fair opportunity to litigate that issue in" the earlier proceeding. *Royster*, ___ N.C. App. at ___, 723 S.E.2d at 126 (citation and quotation marks omitted). Plaintiff could have presented evidence, been represented by counsel, and appealed if dissatisfied with the result. The fact that plaintiff failed to avail itself of the opportunity does not change our conclusion. We conclude that plaintiff had a full and fair opportunity to litigate this issue, that the issue of the building's safety was actually litigated in the administrative hearing, and that the issue was necessary to Mr. Swanson's conclusion that the building must be demolished or repaired.

Finally, Mr. Swanson specifically found that the building was "a fire, health and safety hazard" because of various defects, including:

> Ceiling and ceiling joists, Elect wall outlets/ceilings lights/ switches/fuse box, Floor framing and flooring need repair, Interior and exterior doors and frames need repair, Interior and exterior walls need repair, Roof rafters and sheathing need repair, Window frames and window sashes need repair, Window panes need repair.

Thus, this issue was actually determined in the hearing.

The issue of whether plaintiff's building posed a danger to public health and safety meets all four elements of collateral estoppel. There was a final decision on the merits, the current issue of the safety of plaintiff's building is the same issue as that in the prior proceeding, the issue was actually and necessarily litigated in the prior proceeding, and the issue was actually determined in that proceeding. Accordingly, we hold that plaintiff is collaterally estopped from claiming that its building was not a fire, health, and safety hazard.

C. Plaintiff's Taking Claim

Collateral estoppel precludes a party from contesting a previously decided factual issue. *State v. Summers*, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) ("When a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment

or decree stands unreversed." (citation, quotation marks, and brackets omitted)). As we held above, plaintiff is estopped from claiming that its building was not a fire, health, and safety hazard at the time of the demolition order. Thus, in deciding whether summary judgment was properly denied, we must consider whether plaintiff can state a claim for just compensation without that assertion. *See Griffith*, 184 N.C. App. at 210, 646 S.E.2d at 554 (stating that summary judgment must be granted where "the non-moving party does not have a factual basis for each essential element of its claim."); *In re Bear Stearns Companies, Inc. Securities, Derivative, and ERISA Litigation*, 763 F.Supp.2d 423, 547 (S.D.N.Y. 2011) (concluding that the plaintiffs failed to state a claim once the allegations precluded by collateral estoppel were omitted from the complaint).

Plaintiff filed suit demanding just compensation for a governmental taking of its property under the Due Process Clause of the 14th Amendment and the Law of the Land Clause in Article 1, § 19, of the North Carolina Constitution.

> The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides, *inter alia*, "private property [shall not] be taken for public use without just compensation". *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). Similarly, the "law of the land" clause in Article I, § 19 of the North Carolina Constitution has been interpreted by our Supreme Court as providing a fundamental right to just compensation for the taking of private property for a public purpose

Eastern Appraisal Services, Inc. v. State, 118 N.C. App. 692, 695, 457 S.E.2d 312, 313, *disc. rev. denied*, 341 N.C. 648, 462 S.E.2d 509 (1995).

No compensation is required, however, if the property taken is a nuisance threatening public health or safety, as that action is within the proper exercise of the State's police power. *Barnes v. North Carolina State Highway Commission*, 257 N.C. 507, 514, 126 S.E.2d 732, 738 (1962) ("If the act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable." (citation and quotation marks omitted)); *Horton v. Gulledge*, 277 N.C. 353, 362, 177 S.E.2d 885, 891 (1970) ("[T]he police power of the State, which it may delegate to its municipal corporation, extends to the prohibition of a use of private property which may reasonably be deemed to threaten the public

health, safety, or morals or the general welfare and that, when necessary to safeguard such public interest, it may be exercised, without payment of compensation to the owner, even though the property is thereby rendered substantially worthless." (citation omitted)), *overruled on other grounds*, *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982); *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030, 120 L.Ed. 2d 798, 821-22 (1992) ("The use of these properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.").

Thus, plaintiff cannot maintain a claim for just compensation if its building posed a fire or safety hazard to the public when destroyed, consistent with long-established background principles of public nuisance. *See Lucas*, 505 U.S. at 1029, 120 L.Ed. 2d at 821 n.16 (noting that the State's power to abate a public nuisance "absolv[es] the State (or private parties) of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others. *Bowditch v. Boston*, 101 U.S. 16, 18–19, 25 L.Ed. 980 (1880); *see United States v. Pacific R., Co.*, 120 U.S. 227, 238–239, 7 S.Ct. 490, 495–496, 30 L.Ed. 634 (1887).").

Moreover, unlike in *Horton*, where our Supreme Court reversed a demolition order, plaintiff does not claim that it was not given fair notice and a reasonable opportunity to correct the dangerous conditions before the City Council passed the demolition ordinance on 11 October 2010. *See Horton*, 277 N.C. at 363, 177 S.E.2d at 892 ("We do not have before us the question of the authority of the city to destroy this property, without paying the owner compensation therefor, in the event that the owner does not, within a reasonable time allowed him by the city for that purpose, repair the house so as to make it comply with the requirements of the Housing Code."). Here, plaintiff failed to remedy the dangers posed by its building (or even to perform an adequate inspection of the building to discover if the building was actually not dangerous) in the 60 days allotted by the city's final order after being given notice several times and an opportunity to be heard.

Therefore, we hold that the trial court erred in denying defendant's motion for summary judgment. We reverse the order denying defendant's motion and remand to the trial court. We instruct the trial court to enter an order granting defendant's motion for summary judgment and dismissing plaintiff's claims.

V. Conclusion

In conclusion, plaintiff is estopped from claiming that its building is not a danger to public safety because it failed to appeal from the inspector's quasi-judicial determination that the building posed such a danger, making that determination final. Plaintiff, therefore, cannot state a claim for just compensation because a subsidiary municipal corporation of the State may order the demolition of property it deems a danger to public health or safety without compensating the property owner after reasonable notice, due process, and an opportunity to remedy the danger. The trial court should have granted defendant's motion for summary judgment. Therefore, we reverse its contrary order and remand to the trial court with instructions to enter an order granting defendant's motion for summary judgment.

REVERSED and REMANDED.

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

IN THE MATTER OF THE APPEAL OF: BLUE RIDGE HOUSING OF BAKERSVILLE LLC FROM THE DECISION OF THE MITCHELL COUNTY BOARD OF EQUALIZATION AND REVIEW DENYING PROPERTY TAX EXEMPTION FOR CERTAIN PROPERTY EFFECTIVE FOR TAX YEAR 2011.

No. COA12-941

Filed 19 March 2013

1. Taxation—ad valorem—exemption—non-profit status—findings

The North Carolina Property Tax Commission did not err in an action involving the ownership of low-income rental housing in finding that the housing in question qualified for a property tax exemption based on Northwestern Housing Enterprises, Inc.'s status as a non-profit. Upon whole record review, every statement in the disputed finding had a rational basis in the evidence.

2. Taxation—ad valorem—exemption—test for determining ownership

Real property is exempt from *ad valorem* taxation if a 100% ownership interest ultimately vests in an entity otherwise satisfying statutory exemption requirements. When an otherwise qualifying entity

has an ownership interest in less than 100% of the property, the actual ownership interest is balanced with other factors indicative of ownership and, if those other factors strongly suggest ownership, they can outweigh even a diminutive actual ownership interest.

3. Taxation—advalorem—low-income housing—exemption—ownership

Certain low-income housing was exempt from *ad valorem* taxation where a non-profit corporation created to assist a regional housing authority, Northwestern Housing Enterprises, Inc., held a small actual ownership interest in the housing but other substantial factors indicated ownership for tax purposes.

4. Constitutional Law—equal protection—property tax exemption—low-income housing

Neither the Equal Protection Clause of the United States Constitution nor the Uniformity Clause of the North Carolina Constitution were violated by disparate decisions concerning *ad valorem* taxation exemptions for low-income housing where the evidence indicated that all of the counties involved applied a uniform rule. The varied outcomes appeared to result simply from good faith applications of a statutory requirement.

Appeal by Mitchell County from final decision entered 28 February 2012 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 10 January 2013.

David A. Gitlin for taxpayer-appellee.

Hal G. Harrison for Mitchell County-appellant.

HUNTER, JR., Robert N., Judge.

Mitchell County (the "County") appeals from a final decision of the North Carolina Property Tax Commission (the "Commission") reversing the decision of the Mitchell County Board of Equalization and Review (the "County Board"). Upon review, we affirm the Commission's decision.

I. Facts & Procedural History

Blue Ridge Housing of Bakersville, LLC ("Blue Ridge Housing") owns Cane Creek Village, the property at issue. Cane Creek Village is

a 24-unit apartment project in Bakersville that provides rental housing to families whose annual income is less than 50% of the median family income for the region.

Preliminarily, we discuss the administrative framework behind the development of Cane Creek Village. The Northwestern Regional Housing Authority ("NRHA") is a public housing agency organized under N.C. Gen. Stat. Ch. 157. It is headquartered in Boone. The NRHA provides low-income housing for families living in North Carolina's mountainous counties. It also distributes federal rental assistance, funded by the Department of Housing and Urban Development ("HUD"), to the residents of these housing projects.

The Low-Income Housing Tax Credit Program, established by the Internal Revenue Service, provides a federal income tax credit for organizations like the NRHA that develop low-income housing. *See* 26 U.S.C. § 42 (2012). Although this program benefits the NRHA, it would also jeopardize the NRHA's ability to administer rent subsidies from HUD.[1] To avoid this problem, the NRHA oversaw the creation of Northwestern Housing Enterprises, Inc. ("NHE") as a separate entity to collect tax credits for the NRHA's new housing developments.

NHE is a 501(c)(3) non-profit corporation. Edward G. Fowler ("Fowler") is the Executive Director of the NRHA, the Vice President and CEO of NHE, and its sole employee. According to NHE's Articles of Incorporation, its purpose is "to assist the Northwestern Regional Housing Authority within its jurisdictions with its stated goals and purposes" and to "provide for the relief of the poor and distressed . . . through the development, creation, ownership, sponsorship, financing, building and maintenance of low and moderate income housing." NHE has developed seven low-income housing projects in seven North Carolina counties. Despite their shared goals and resources, the NRHA does not own any portion of NHE.

NHE qualifies to receive a federal income tax credit under the Low-Income Housing Tax Credit Program. However, since it is a non-profit organization, it is exempt from federal income tax.[2] Therefore, by

---

1. At the Commission hearing, NRHA's Executive Director testified that direct NRHA sponsorship of housing developments would result in unnecessary federal oversight. Also, he elaborated that logistical difficulties would arise if the NRHA directly sponsored the housing projects because it would then effectively distribute rent subsidies to itself.

2. Non-profit organizations such as NHE still routinely take advantage of the Low-Income Housing Tax Credit Program. In fact, according to North Carolina's Low-Income Housing Tax Credit Qualified Allocation Plan, the North Carolina Housing Finance Agency

itself, NHE does not benefit from the Low-Income Housing Tax Credit Program. To leverage the benefits of this program, NHE partners with investors who have a federal income tax burden. The investors finance NHE's housing developments in exchange for tax credit equity. The investors can then use the federal income tax credits for their own federal tax burden.[3]

In August 1998, NHE established Blue Ridge Housing as the record owner of Cane Creek Village, one such low-income housing project. Blue Ridge Housing does not have non-profit status. The sole purpose of Blue Ridge Housing is to hold legal title of Cane Creek Village for induction of tax credit equity; it does not have any employees or own any other properties.

Blue Ridge Housing, a limited liability company ("LLC"), has two members. Its managing member, NHE, owns 0.1% of Blue Ridge Housing. Its investor member, the North Carolina Equity Fund III Limited Partnership ("NCEFIII") owns 99.9%. The NCEFIII invested $1,164,439 in exchange for its ownership interest.[4] The general partner of the NCEFIII is Carolina Affordable Housing Equity Corporation ("CAHEC"). CAHEC

---

must allocate at least 10% of North Carolina's federal tax credit ceiling to low-income housing projects sponsored by non-profits. *See* North Carolina Housing Finance Agency, *The 2012 Low-Income Housing Tax Credit Qualified Allocation Plan for the State of North Carolina* 6 (2012), *available at* http://www.nchfa.com/Forms/QAP/2012/FinalQAP.pdf.

3. According to the North Carolina Housing Finance Agency, "Low-Income Housing Tax Credits (Housing Credits) now finance virtually all the new affordable rental housing being built in the United States." *Where the Financing Comes From*, North Carolina Housing Finance Agency, http://www.nchfa.com/about/financingfrom.aspx (last visited 7 March 2013); *see also How do Housing Credits Work*, U.S. Dep't of Hous. and Urban Dev., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/training/web/lihtc/basics/work (last visited 7 March 2013). For a contemporary journalistic assessment of low-income housing financing, see Terry Pristin, *Who Invests in Low-Income Housing? Google, for One*, N.Y. Times, 25 January 2011, *available at* http://www.nytimes.com/2011/01/26/realestate/commercial/26credits.html?_r=0.

4. According to HUD:

> Limited liability companies (LLC) are an increasingly common ownership structure for [low-income housing projects]. A typical [low-income housing tax credit] LLC consists of the developer (or an affiliate) as the managing member, and the credit purchaser as an additional (non-managing) member. The managing member has a small percentage ownership interest (often below 1 percent), but has the responsibility to manage the affairs of the partnership, arrange for the management of the property, and make most of the day-to-day operating decisions. The non-managing member has a large percentage ownership interest (often well above 99 percent), and has a passive investor role. All members of an LLC have liability that is limited to the amount invested. That is, if a disaster occurs,

is "a consortium of . . . banks from eight southeastern states, and some insurance funds and other investors." Although the NCEFIII is a for-profit partnership, its general partner CAHEC is a non-profit.

On 17 November 1998, NHE and the NCEFIII entered into an operating agreement (the "Operating Agreement"). The Operating Agreement requires the NCEFIII to maintain its ownership interest in Blue Ridge Housing for 15 years. It also provides NHE with a right of first refusal to purchase the NCEFIII's 99.9% ownership interest at the end of the 15-year term. At the onset of the instant case, four years remained of the 15-year term. NHE has stated it intends to buy the NCEFIII's ownership interest at the end of the 15-year term. NHE is currently in the process of exercising its right of first refusal for another similar low-income housing project in Yancey County.

Blue Ridge Housing employed the NRHA to develop the apartment complex at Cane Creek Village. The project was financed by investors from the NCEFIII. Construction began on 1 November 1998 and finished in December 2000.

Although exempt from federal income taxation, Cane Creek Village is subject to North Carolina *ad valorem* property tax. On 23 August 2000, NHE, as managing member of Blue Ridge Housing, submitted an Application for Property Tax Exemption to the Mitchell County Tax Assessor. It based its application on N.C. Gen. Stat. § 105-278.6(a)(8), which provides that:

> (a) Real or personal property owned by:
>
> . . .
>
> (8) A nonprofit organization providing housing for individuals or families with low or moderate incomes shall be exempted from taxation if: (i) As to real property, it is actually and exclusively occupied and used, and as to personal property, it is entirely and completely used, by the owner for charitable purposes; and (ii) the owner is not organized or operated for profit.

---

the most they can lose is the amount invested. The rights and obligations of the partners are described in an LLC Operating Agreement.

Syndication, U.S. Dep't of Hous. and Urban Dev., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/training/web/lihtc/basics/syndication (last visited 3 March 2013).

N.C. Gen. Stat. § 105-278.6(a)(8) (2011). On 4 October 2000, the Mitchell County Board of Commissioners unanimously voted to grant an *ad valorem* tax exemption to Cane Creek Village. Since October 2000, there has been no change in the use of the property or in Blue Ridge Housing's equity structure.

NHE also applied for *ad valorem* tax exemptions for its six other low-income housing projects in six other North Carolina counties. It received exemptions for four of its other projects, but did not receive exemptions for its projects in Ashe County or Wilkes County. Nothing in the record indicates NHE has contested its two denied applications.

Pursuant to N.C. Gen. Stat. § 105-282.1, each county tax assessor must annually review at least one-eighth of tax-exempt property in the county. Accordingly, around January 2011, Mitchell County Tax Assessor Blair Hyder ("Hyder") reviewed Cane Creek Village's tax-exempt status. On 6 January 2011, Hyder notified NHE that because he believed Cane Creek Village was not tax-exempt, he intended to undertake discovery proceedings pursuant to N.C. Gen. Stat. § 105-312. Hyder cited N.C. Gen. Stat. § 105-277.16 as the controlling statute. The statute, which took effect on 1 July 2009, states:

> A North Carolina low-income housing development to which the North Carolina Housing Finance Agency allocated a federal tax credit under section 42 of the Code is designated a special class of property under Article V, Section 2(2) of the North Carolina Constitution and must be appraised, assessed, and taxed in accordance with this section.

N.C. Gen. Stat. § 105-277.16 (2011). After Hyder initiated discovery proceedings, NHE subsequently provided Hyder with all requested financial information.

Hyder concluded Cane Creek Village should never have received tax-exempt status because NHE did not have a sufficient ownership interest in Blue Ridge Housing to qualify Cane Creek Village for exemption under N.C. Gen. Stat. § 105-278.6(a)(8). On 17 March 2011, Hyder presented NHE with a tax bill for $64,837.72[5] for the preceding five years, composed as follows: $24,066.48 for Mitchell County taxes; $9,922.87

5. The order on final pre-hearing conference erroneously calculated the total amount owed as $60,437.72.

for Mitchell County penalties; $21,749.28 for Town of Bakersville taxes; $9,099.09 for Town of Bakersville penalties.[6]

NHE promptly appealed this decision to the Mitchell County Board. The County Board held a hearing on 11 April 2011. On 10 May 2011, it decided to waive the Mitchell County penalties and only enforce the Mitchell County taxes of $24,066.48.[7] On 6 June 2011, Blue Ridge Housing appealed the County Board's decision and applied for a hearing with the Commission.

The Commission held a hearing on 14 December 2011. On 28 February 2012, it decided Cane Creek Village qualifies for *ad valorem* tax exemption under N.C. Gen. Stat. § 105-278.6(a)(8). Mitchell County filed timely notice of appeal on 19 March 2012.

II. Jurisdiction & Standard of Review

This Court has jurisdiction to hear the instant appeal pursuant to N.C. Gen. Stat. § 7A-29 (2011). When reviewing a decision of the North Carolina Property Tax Commission:

> the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or

---

6. The five-year tax period is based on N.C. Gen. Stat. § 105-312(f), which states: "When property is discovered and listed to a taxpayer in any year, it shall be presumed that it should have been listed by the same taxpayer for the preceding five years unless the taxpayer shall produce satisfactory evidence that the property was not in existence, that it was actually listed for taxation, or that it was not his duty to list the property during those years or some of them." N.C. Gen. Stat. § 105-312(f)(2011).

7. On 10 October 2011, Bakersville's Town Council agreed to delay enforcement of the Town of Bakersville taxes and penalties pending outcome of the Commission hearing.

(4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b) (2011). "In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error." N.C. Gen. Stat. § 105-345.2(c) (2011). The court "may not consider the evidence which in and of itself justifies the [Commission's] decision without [also] taking into account the contradictory evidence or other evidence from which conflicting inferences could be drawn." *In re Moses H. Cone Mem'l Hosp.*, 113 N.C. App. 562, 571, 439 S.E.2d 778, 783 (1994) (quotation marks and citation omitted) (alterations in original). "The taxpayer . . . bears the burden of proving that its property meets the requirements of an *ad valorem* taxation exemption." *In re Appalachian Student Housing Corp.*, 165 N.C. App. 379, 384, 598 S.E.2d 701, 704 (2004).

Therefore, under N.C. Gen. Stat. § 105-345.2(b), "[q]uestions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test." *In re Appeal of Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). Additionally, "[i]ssues of statutory construction are questions of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

"Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the Commission. Under the whole-record test, however, the reviewing court merely determines 'whether an administrative decision has a rational basis in the evidence.' " *Greens of Pine Glen Ltd.*, 356 N.C. at 647, 576 S.E.2d at 319 (internal citations omitted).

III. Analysis

On appeal, Mitchell County makes four arguments: (i) the Commission erred because Finding of Fact No. 15 incorrectly implies government participation in Cane Creek Village's operations; (ii) the Commission erred because Finding of Fact No. 16 incorrectly asserts Cane Creek Village is exempt from *ad valorem* taxation; (iii) the Commission erred because Conclusions of Law 3, 4, and 5 incorrectly apply N.C. Gen. Stat. § 105-278.6(a)(8); and (iv) the Commission violated the Uniformity Clause of the North Carolina Constitution and the Equal

Protection Clause of the U.S. Constitution. Upon review, we affirm the Commission's decision.

A. Implication of Federal Involvement

[1] Mitchell County first argues the Commission erred because Finding of Fact No. 15 incorrectly implies the NRHA, a public agency, participated in the development of Cane Creek Village. We disagree.

Since Mitchell County appeals the Commission's finding of fact, we apply the whole record test. *See id.* ("[I]ssues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test."). Under the whole record test, we decide "whether an administrative decision has a rational basis in the evidence." *Id.* (quotation marks and citation omitted).

In the present case, Finding of Fact No. 15 states, in its entirety:

> 15. NHE is a nonprofit organization that assists Northwestern Regional Housing Authority with providing housing for individuals or families with low or moderate income in Wilkes, Yancey, Avery, Alleghany, Ashe, Watauga and Mitchell Counties. NHE, as managing member of [Blue Ridge Housing], holds a one-tenth percent (.1%) ownership interest in the subject property.

Nothing in this finding of fact implies the NRHA, a public agency, participated in Cane Creek Village's operations. Similarly, nothing in the record indicates the Commission based its decision on a purported legal connection between NHE and the NRHA.[8] In fact, we find no implication by either the Commission or Blue Ridge Housing that Cane Creek Village should receive an *ad valorem* tax exemption based on a purported connection to the NRHA. Rather, the Commission determined Cane Creek Village qualified for property tax exemption based on NHE's status as a non-profit. *See* N.C. Gen. Stat. § 105-278.6(a)(8).

Moreover, upon our review of the whole record, every statement in Finding of Fact No. 15 has a "rational basis in the evidence." *Greens*

---

8. We note that several cases cited by the taxpayer-appellee, including *In re Appeal of Fayette Place LLC*, 193 N.C. App. 744, 745, 668 S.E.2d 354, 356 (2008), and *Appalachian Student Housing Corp.*, 165 N.C. App. at 384, 698 S.E.2d at 704, deal with properties owned by government entities under N.C. Gen. Stat. § 105-278.1 (2011). We do not believe the taxpayer-appellee intended, nor did the Commission construe, these references as an argument for exemption under N.C. Gen. Stat. § 105-278.1. Rather, we conclude the taxpayer-appellee cited those cases to support its argument that control of legal title is not dispositive of the question of ownership.

of Pine Glen Ltd., 356 N.C. at 647, 576 S.E.2d at 319 (internal citation omitted). NHE is a 501(c)(3) non-profit organization. According to its Articles of Incorporation, NHE's purpose is "to assist the Northwestern Regional Housing Authority within its jurisdictions with its stated goals and purposes." NHE operates in Wilkes, Yancey, Avery, Alleghany, Ashe, Watauga and Mitchell Counties. The Operating Agreement indicates NHE is managing member of Cane Creek Village, while NCEFIII is an investor member. The Operating Agreement further specifies that NHE has a 0.1% ownership interest in Cane Creek Village. The parties do not dispute any of these facts.

Consequently, we conclude the Commission did not err in Finding of Fact No. 15 because its findings had a "rational basis in the evidence." *Id.*

B. Ownership by a Non-Profit

[2] Mitchell County next argues: (i) the Commission erred because Finding of Fact No. 16 incorrectly states NHE's ownership interest exempts Cane Creek Village from *ad valorem* taxation; and (ii) the Commission erred because Conclusions of Law Nos. 3, 4, and 5 incorrectly conclude the exemption was proper and Hyder's discovery proceedings were improper. We do not agree.

In North Carolina, "All property . . . , both real and personal, is subject to property tax unless it was excluded or exempted from taxation by statute or the Constitution." *Edward Valves, Inc. v. Wake County*, 117 N.C. App. 484, 489, 451 S.E.2d 641, 645 (1995); *see also* N.C. Gen. Stat. § 105-274 (2011).

N.C. Gen. Stat. § 105-278.6(a)(8) provides one such exemption:

> (a) Real or personal property owned by:
>
> . . .
>
> (8) A nonprofit organization providing housing for individuals or families with low or moderate incomes shall be exempted from taxation if: (i) As to real property, it is actually and exclusively occupied and used, and as to personal property, it is entirely and completely used, by the owner for charitable purposes; and (ii) the owner is not organized or operated for profit.

N.C. Gen. Stat. § 105-278.6(a)(8) (2011).

Since the relevant statute does not define "ownership" for purposes of tax exemption, *see* N.C. Gen. Stat. § 105-273 (2011), we rely on

canons of statutory construction to define the term, *see Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 295 (1991).

> The principal goal of statutory construction is to accomplish the legislative intent. The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish. If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so.

Lenox, Inc. v. Tolson, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (quotation marks and internal citations omitted).

Additionally, "[w]hen the statute under consideration is one concerning taxation, special canons of statutory construction apply. If a taxing statute is susceptible to two constructions, any uncertainty in the statute or legislative intent should be resolved in favor of the taxpayer." *Id.* (internal citations omitted). "Conversely, a provision in a tax statute providing an exemption from the tax, otherwise imposed, is to be construed strictly against the taxpayer and in favor of the State." *In re Appeal of Clayton-Marcus Co., Inc.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202 (1974).

Still, for purposes of tax exemption, this Court has previously held that "legal title is not determinative as to the question of ownership." *Fayette Place LLC*, 193 N.C. App. at 747, 668 S.E.2d at 357. Instead, "[w]here [an entity qualifying for a tax exemption] possesses a sufficient interest in the property, . . . the property is said to belong to [that entity] even where legal title to the property is held by another party." *Id.* Our holding in *Fayette Place* is binding precedent on this Court. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

In the present case, Mitchell County argues NHE does not own Cane Creek Village because it only has a 0.1% ownership interest in Blue Ridge Housing. Therefore, according to Mitchell County, Cane Creek Village cannot receive a tax exemption under N.C. Gen. Stat. § 105-278.6(a)(8). Mitchell County does not contest that Cane Creek Village meets the other conditions of N.C. Gen. Stat. § 105-278.6(a)(8),

including the "charitable purposes" requirement. Upon review, we disagree with Mitchell County.

Specifically, Mitchell County disputes Finding of Fact No. 16 and Conclusions of Law Nos. 3, 4, and 5. Finding of Fact No. 16 states:

> 16. NHE ownership interest in [Blue Ridge Housing] allows the subject property to qualify for exemption from *ad valorem* taxation such that it should be exempt from ad valorem taxation; and the Mitchell County Assessor's discovery of the subject property, under N.C. Gen. Stat. § 105-312, and the County Board's decision to uphold discovery is not proper under the provisions of the North Carolina Machinery Act and applicable North Carolina Law.

Conclusions of Law Nos. 3, 4, and 5 state:

> 3. The subject property, [Cane Creek Village], is actually and exclusively occupied and used as housing for families with low to moderate incomes; and NHE possesses an ownership interest in [Cane Creek Village] such that the property qualifies for exemption from *ad valorem* taxation as provided in N.C. Gen. Stat. 105-278.6(a)(8).
>
> 4. Since [Cane Creek Village] qualifies for exemption from *ad valorem* taxation pursuant to N.C. Gen. Stat. 105-278.6(a)(8), then the Mitchell County Assessor's discovery and taxation of the subject property, and the County Board's decision to uphold the discovery and taxation is not proper under the provisions of the Machinery Act and applicable North Carolina Law.
>
> 5. The Commission reaches no ruling on the principle of equitable estoppel when [Cane Creek Village] qualifies for exemption under N.C. Gen. Stat. 105-278.6(a)(8); and when the county's discovery and taxation of the subject property was not proper under North Carolina law.

Preliminarily, we determine this argument receives *de novo* review. Although findings of fact normally receive "whole record" analysis, *Greens of Pine Glen Ltd.*, 356 N.C. at 647, 576 S.E.2d at 319 (2003), Finding of Fact No. 16 amounts to a legal conclusion because it determines the applicability of N.C. Gen. Stat. § 105-278.6(a)(8), *see North Carolina State Bar v. Brewer*, 183 N.C. App. 229, 233, 644 S.E.2d 573, 576 (2007) ("Questions of statutory interpretation are questions of law,

which are reviewed *de novo* by an appellate court." (quotation marks and citation omitted)).

The instant case is one of first impression in North Carolina. Still, we are guided by analogous precedent analyzing the state ownership requirement of N.C. Gen. Stat. § 105-278.1 (2011).[9]

For instance, in *Fayette Place LLC*, we considered whether a property satisfied the state ownership requirement for tax exemption under N.C. Gen. Stat. § 105-278.1. 193 N.C. App. at 745, 668 S.E.2d at 356. There, like in the instant case, a limited liability company directly owned the subject property. *Id.* at 745, 668 S.E.2d at 355. A non-profit organization, in turn, owned 99% of the LLC, while a for-profit subsidiary of the non-profit owned the remaining 1%. *Id*. Ownership of the non-profit and its subsidiary ultimately vested 100% in the Housing Authority of the City of Durham (the "Durham Housing Authority"). *Id.* The Durham Housing Authority otherwise met the statutory tax exemption requirements. *Id.* at 748, 668 S.E.2d at 357. In *Fayette Place*, this Court determined the property was exempt because it "belonged to" the Durham Housing Authority for tax exemption purposes. *Id.* at 748, 668 S.E.2d at 357.

Similarly, in *Appalachian Student Housing Corp.*, a non-profit corporation managed an apartment complex in trust for Appalachian State University ("Appalachian State"), pursuant to an explicit trust agreement. 165 N.C. App. at 381, 698 S.E.2d at 702. There, we recognized that as trustee of an active trust, the non-profit held legal title of the property. *Id.* at 387, 698 S.E.2d at 706. Still, we held that as beneficiary of the active trust, Appalachian State had equitable title, satisfying the state ownership requirement of N.C. Gen. Stat. § 105-278.1. *Id.* at 388, 698 S.E.2d at 706.

These precedential cases illustrate that control of legal title is not determinative of ownership. As such, we are bound by that conclusion. *See Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. However, previous case law does not provide a readily-applicable standard for defining "ownership" in the absence of legal title. Therefore, we now establish a test to determine ownership for purposes of tax exemption. If 100% ownership interest ultimately vests in an entity otherwise satisfying statutory exemption requirements, then the property is exempt from taxation. *See Fayette Place*, LLC, 193 N.C. App. at 748, 668 S.E.2d at 357.

---

9. N.C. Gen. Stat. § 105-278.1 provides a tax exemption for real and personal property "owned by the United States" or "belonging to the State, counties, and municipalities." N.C. Gen. Stat. § 105-278.1(a), (b) (2011). The statute explicitly includes property owned by housing authorities. N.C. Gen. Stat. § 105-278.1(c)(3)(d) (2011).

When an otherwise-qualifying entity has an ownership interest in less than 100% of the property, we balance the actual ownership interest with other factors indicative of ownership. If other factors strongly suggest ownership, they can outweigh even a diminutive actual ownership interest. These factors may include, but are not limited to: (i) the entity's control of the venture's operations; (ii) the entity's status as trustee of LLC property; (iii) the possibility of future increased actual ownership interest; and (iv) the intent of the participating parties.

[3] We now apply this test to the instant case. First, we note that NHE does not own 100% of Cane Creek Village. In fact, it has only a 0.1% ownership interest. Still, since NHE maintains some actual ownership interest in Cane Creek Village, we balance this interest with other factors indicative of ownership. Since NHE's actual ownership interest is small, it must present significant evidence of other factors suggesting ownership. We believe NHE meets this burden. Specifically, we consider: (i) NHE's control of Cane Creek Village's operations; (ii) NHE's role as trustee of Blue Ridge Housing's property; (iii) NHE's right of first refusal to purchase the NCEFIII's 99.9% ownership interest; and (iv) the intent of NHE and the NCEFIII.

First, we consider NHE's control of Cane Creek Village's operations. In North Carolina, except as otherwise specified by the parties, "management of the affairs of the limited liability company shall be vested in the managers." N.C. Gen. Stat. § 57C-3-20(b) (2011). In the instant case, the Operating Agreement between NHE and the NCEFIII specifies that NHE is the sole managing member. Since Blue Ridge Housing's creation, NHE has in fact acted as the sole manager, making operational decisions for Blue Ridge Housing and Cane Creek Village. For example, NHE initially applied for Cane Creek Village's *ad valorem* tax exemption on 23 August 2000. NHE also communicated with Hyder throughout his discovery proceedings and gave him all relevant financial documents. Furthermore, at all stages of the instant litigation, NHE has acted on behalf of Blue Ridge Housing. Therefore, we conclude NHE's managerial control of Blue Ridge Housing and Cane Creek Village is one factor indicative of ownership.

Second, we examine NHE's role as trustee of Cane Creek Village. In North Carolina, managing members of LLCs may become trustees of LLC property:

> Except as otherwise provided in the articles of organization or a written operating agreement, every manager must account to the limited liability company and hold as

> trustee for it any profit or benefit derived without the informed consent of the members by the manager from any transaction connected with the formation, conduct, or liquidation of the limited liability company.

N.C. Gen. Stat. § 57C-3-22(e) (2011). Trusts may take several forms. For instance, "an 'active trust' is one where there is a special duty to be performed by the trustee in respect to the estate, such as collecting the rents and profits, or selling the estate, or the execution of some particular purpose." *Finch v. Honeycutt*, 246 N.C. 91, 99, 97 S.E.2d 478, 484–85 (1957) (quotation marks and citation omitted); *see also Appalachian Student Housing Corp.*, 165 N.C. App. at 387, 698 S.E.2d at 706 ("[W]hen any control is to be exercised or any duty performed by the trustee [in relation to the trust property or in regard to the beneficiaries], however slight it may be . . . the trust is active." (alterations in original)(quotation marks and citation omitted)).

In *Appalachian Student Housing Corp.*, we held that when one entity manages an apartment complex for the benefit of another, an active trust arises. 165 N.C. App. at 387, 698 S.E.2d at 706. In that case, we described how "[i]n an active trust, the legal and equitable titles to the trust property do not merge. Property held in an active trust is therefore 'owned' in some sense by both the trustee and the beneficiary." *Id.* at 387–88, 698 S.E.2d at 706; *see also id.* at 387, 698 S.E.2d at 706 ("In an active trust, legal title vests with the trustee of the property."). Here, an active trust exists since NHE manages the ongoing operations of Blue Ridge Housing and Cane Creek Village. Therefore, we weigh NHE's role as trustee of Cane Creek Village as an additional indicia of ownership.

Third, we look at NHE's potential future ownership interest in Cane Creek Village. In the Operating Agreement, NHE has a right of first refusal to purchase the NCEFIII's 99.9% ownership interest at the end of a 15-year term. At the start of the instant litigation, four years remained of this term. NHE routinely uses this type of provision in its operating agreements with investors. In fact, Fowler testified that NHE is currently exercising its right of first refusal for Woodland Hills, a similar NHE project in Yancey County. Fowler predicted the same course of action for Cane Creek Village: "[NHE's Board of Directors] will want to exercise [the right of first refusal] because their mission is to develop affordable housing in the mountain counties. To maintain it affordable to those who need it. [*sic*]" He said NHE's ultimate goal is "that NHE will wind up as 100 percent owner of [Cane Creek Village]." Consequently, although we acknowledge that NHE's future purchase of the NCEFIII's

ownership interest is not certain, the likelihood of the buy-out is one factor suggesting ownership.[10]

Lastly, we analyze the business intent of NHE and the NCEFIII. Here, NHE spearheaded the development of Cane Creek Village and only partnered with the NCEFIII to finance the project. Furthermore, Cane Creek Village directly serves NHE's corporate purpose, as stated in its Articles of Incorporation, "[t]o generally provide for the relief of the poor and distressed . . . through the development, creation, ownership, sponsorship, financing, building and maintenance of low and moderate income housing." To this effect, 100% of the dwelling units in Cane Creek Village qualify for and receive federal low-income tax credits. Additionally, NHE operates similar projects in six other North Carolina counties. In sum, evidence indicates NHE's intent is to own Cane Creek Village.

On the other hand, Mitchell County contends the NCEFIII's 99.9% ownership interest makes the NCEFIII, not NHE, the owner of Cane Creek Village. Nonetheless, evidence suggests the NCEFIII did not primarily seek a typical goal of ownership: profit-sharing. In North Carolina, we recognize that one indicia of "ownership" is profit-sharing between business partners. *See Wilder v. Hobson*, 101 N.C. App. 199, 202, 398 S.E.2d 625, 627 (1990).

Here, the NCEFIII invested in Blue Ridge Housing not to obtain profits from Cane Creek Village's operations, but to utilize tax credits from the Low-Income Housing Tax Credit Program. In fact, the evidence indicates the overall purpose of Cane Creek Village was not to gain profit, but rather to serve the charitable purpose of providing low-income housing. For instance, in 2010, Blue Ridge Housing's statements of cash flow indicated a net loss. Therefore, we determine the business intent of NHE and the NCEFIII suggest NHE has sufficient ownership of Cane Creek Village.

Ultimately, on balance we conclude that although NHE has a small legal percentage interest in Blue Ridge Housing, other substantial

---

10. Neither party has attempted to calculate the monetary value of the interest of the non-member manager during the period of time in which the tax was imposed. Both parties seem to rely on the idea that the value of the property is identical to the percentage of "ownership" established by the instruments. Because the non-member's share can be purchased for the assumption of the remaining mortgage indebtedness on the property after a 15-year period, the limited partner's value is more like a term for years rather than fee simple ownership. The present value of this interest would be necessarily reduced substantially as the 15-year term expires. *See* N.C. Gen. Stat.§§ 8-46, 47 (2011).

factors indicate NHE owns Cane Creek Village for tax purposes. Since the circumstances satisfy the other requirements of N.C. Gen. Stat. § 105-278.6(a)(8), Cane Creek Village is exempt from taxation. Because we determine Cane Creek Village is exempt, we need not further address the portions of Conclusions of Law Nos. 4 and 5 dealing with Hyder's discovery proceedings or equitable estoppel. Therefore, we conclude the trial court did not err in making Finding of Fact No. 16 and Conclusions of Law Nos. 3, 4, and 5.

C. Uniformity Clause and Equal Protection Clause

[4] Lastly, Mitchell County argues the Commission's decision violates the Equal Protection Clause of the United States Constitution and the Uniformity Clause of the North Carolina Constitution. Specifically, it describes how similar NHE projects in two other North Carolina counties did not receive *ad valorem* exemptions. Upon review, we disagree with Mitchell County.

On appeal, alleged violations of constitutional rights receive *de novo* review. *See State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) ("The standard of review for alleged violations of constitutional rights is *de novo*."); *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.").

According to the U.S. Constitution, no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1, cl. 4. Similarly, under the Uniformity Clause of the North Carolina Constitution, "[n]o class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town." N.C. Const. art. V, § 2(2). In this regard, "[e]very exemption shall be on a State-wide basis and shall be made by general law uniformly applicable in every county, city and town, and other unit of local government." N.C. Const. art. V, § 2(3).

Thus, in North Carolina, "[t]he general rule established by the Constitution is that all property in this State is liable to taxation, and shall be taxed in accordance with a uniform rule. Exemption of specific property . . . because of the purposes for which it is held and used, is exceptional." *Appalachian Student Housing Corp.*, 165 N.C. App. at 384, 698 S.E.2d at 704. For purposes of taxation, "the requirements of 'uniformity,' 'equal protection,' and 'due process' are, for all practical purposes, the same under both the State and Federal Constitutions." *Leonard v. Maxwell*, 216 N.C. 89, 93, 3 S.E.2d 316, 320 (1939); *see also*

Edward Valves, Inc., 117 N.C. App. at 489, 451 S.E.2d at 645 ("The rule of uniformity regarding property taxation is coextensive with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.").

"However, occasional inequities resulting from the application of the statute should not defeat the law unless they result from hostile discrimination." *In re Se. Baptist Theological Seminary, Inc.*, 135 N.C. App. 247, 258, 520 S.E.2d 302, 309 (1999) (quotation marks and citation omitted). Additionally,

> [T]he United States Supreme Court has stated that a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution occurs where a lack of uniformity of taxation results from more than mere errors of judgment by officials and amounts to an intentional violation of the essential principle of practical uniformity.

Id. (quotation marks and citation omitted).

In the present case, Mitchell County contends that "an inequitable and non-uniform state of affairs" exists. Specifically, it describes how the Watauga and Ashe County Boards denied *ad valorem* tax exemptions to similar NHE projects, while the County Boards in Wilkes, Yancey, Avery, Alleghany, and Mitchell Counties initially granted exemptions.

First, Mitchell County's argument fails because the evidence indicates all seven counties applied a "uniform rule": N.C. Gen. Stat. § 105-278.6(a)(8). Our Supreme Court has held that "[t]axing is required to be . . . by one and the same unvarying standard." *Hajoca Corp. v. Clayton*, 277 N.C. 560, 569, 178 S.E.2d 481, 487 (1971) (quotation marks and citation omitted); *cf. Anderson v. City of Asheville*, 194 N.C. 117, 118, 138 S.E. 715, 716 (1927) (holding that under the Uniformity Clause, a city could not create a municipal tax structure contradicting state tax laws). This necessitates (i) uniform tax rates and (ii) uniform tax classifications. *See id.* Here, Mitchell County does not contend that any of the seven County Boards implemented a standard conflicting with N.C. Gen. Stat. § 105-278.6(a)(8); instead, it argues they applied the same standard in differing manners.

Still, Mitchell County presents no evidence of "hostile discrimination" in the application of N.C. Gen. Stat. § 105-278.6(a)(8). *See Se. Baptist Theological Seminary, Inc.*, 135 N.C. App. at 258, 520 S.E.2d

at 309. Rather, the varied outcomes appear to result simply from disparate good-faith applications of the "ownership" requirement of N.C. Gen. Stat. § 105-278.6(a)(8).[11] Since "occasional inequities" in a statute's application do not defeat the statute on equal protection or uniformity grounds, we determine no violation of the Uniformity Clause or Equal Protection Clause occurred. *See id.; see also Norfolk S. R.R. Co. v. Lacy*, 187 N.C. 615, 620, 122 S.E. 763, 766 (1924) ("[P]erfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream.").

Lastly, even if we did determine "an inequitable and non-uniform state of affairs" existed in violation of the Uniformity Clause and Equal Protection Clause, our resolution of this issue would not benefit Mitchell County. Since the instant opinion concludes Cane Creek Village is exempt from *ad valorem* property tax under N.C. Gen. Stat. § 105-278.6(a)(8), any disparities in exemption decisions for other similar NHE projects would likely be resolved in favor of exemption.

Therefore, we conclude Mitchell County's argument is without merit. *See id.*

IV. Conclusion

We conclude the Commission did not err in reversing the County Board's determination. First, Finding of Fact No. 15 is rationally based on the evidence presented. Second, NHE's ownership interest in Blue Ridge Housing is sufficient to qualify Cane Creek Village for tax exemption under N.C. Gen. Stat. § 105-278.6(a)(8). Lastly, the Commission's decision does not violate the Equal Protection Clause of the U.S. Constitution or the Uniformity Clause of the North Carolina Constitution. Consequently, the Commission's decision is

AFFIRMED.

Judges STROUD and DAVIS concur.

---

11. Since the instant case clarifies the definition of "ownership" for tax exemption purposes, County Boards shall now apply N.C. Gen. Stat. § 105-278.6(a)(8) accordingly when determining exemptions for Cane Creek Village or other similarly-situated properties.

JOINES v. MOFFITT

[226 N.C. App. 61 (2013)]

JACKIE DALE JOINES, PLAINTIFF
v.
BRITTANY MOFFITT, DEFENDANT

No. COA12-1027

Filed 19 March 2013

1. Evidence—accident report—admissible

The trial court did not err in an automobile accident case by admitting an officer's accident report without first redacting the officer's narrative or his hand-drawn diagram of the collision. The officer prepared the report near the time of the accident, using information from individuals who had personal knowledge of the accident, and accident reports of this type are, according to the officer's testimony, prepared and kept in the regular course of business of the police department. Moreover, plaintiff could not establish that he was actually prejudiced by the admission of the narrative or diagram because the same evidence was introduced at trial through other sources.

2. Appeal and Error—preservation of issues—closing argument—not transcribed

An appellate argument concerning the closing argument in an automobile case was dismissed where the argument was not transcribed nor adequately set out in narrative form.

3. Witnesses—voir dire limited—judge's memory of early testimony

The trial court did not abuse its discretion by limiting the *voir dire* of an officer concerning an accident report. The judge stated that he remembered the officer's testimony from the first trial and did not need to hear the testimony a second time.

4. Evidence—officer's opinion—right of way—excluded

The trial court did not abuse its discretion in an action arising from an automobile accident by excluding an officer's testimony regarding his opinion as to which party had the right of way. The officer did not have the requisite personal knowledge to offer his opinion.

Appeal by plaintiff from judgment entered 19 December 2011 by Judge Theodore S. Royster in Alexander County Superior Court. Heard in the Court of Appeals 10 January 2013.

Homesley, Gaines & Dudley, LLP, by Edmund Gaines and Christina Clodfelter, for plaintiff-appellant.

McAngus, Goudelock & Courie, by Colin E. Scott, for defendant-appellee.

DAVIS, Judge.

Jackie Dale Joines ("plaintiff") appeals from the trial court's entry of judgment upholding a jury verdict denying him recovery from Brittany Moffitt ("defendant") based on contributory negligence. After careful review, we affirm the trial court's judgment.

Factual Background

This case arises out of a motor vehicle collision that occurred at approximately 1:00 p.m. on 5 February 2008 at the intersection of Highway 115 and Plaza Drive in Mooresville, North Carolina. Plaintiff was traveling south on Highway 115 on his motorcycle when he moved into the left turn lane approaching the intersection. Defendant, in her car, was exiting a shopping center parking lot and waiting to enter onto Highway 115. Traffic was stopped, and a truck driver motioned for defendant to leave the parking lot so she could merge onto the highway. As she merged, defendant and plaintiff collided. Defendant's vehicle hit plaintiff in the leg and knocked him off his motorcycle. Plaintiff was hospitalized, and a portion of his right leg below the knee was ultimately amputated as a result of his injuries.

Officer Mike Allen ("Officer Allen") of the Mooresville Police Department investigated the accident and prepared an accident report after interviewing defendant and two witnesses, James Blackwelder ("Blackwelder") and Sherri Jackson ("Jackson"), at the scene. The accident report included a hand-drawn diagram and a narrative of the accident based upon the information he received from defendant, Blackwelder, and Jackson.

On 16 February 2010, plaintiff filed a complaint against defendant, alleging that defendant's negligence was the proximate cause of the injury to his leg. In her answer, defendant denied plaintiff's allegations and asserted the affirmative defense of contributory negligence.

Specifically, defendant alleged that plaintiff had failed to obey traffic markings, improperly changed lanes, unlawfully passed stopped vehicles, unlawfully crossed over the double yellow line, and operated his vehicle left of center.

The case was tried before a jury, which returned a verdict finding defendant negligent but also finding plaintiff contributorily negligent. The Honorable Theodore S. Royster entered judgment on the jury's verdict, and plaintiff gave timely notice of appeal to this Court.

Analysis

I. Admission of Accident Report

[1] Plaintiff initially argues that the trial court erred in admitting the accident report without first redacting Officer Allen's narrative or his hand-drawn diagram of the collision on the theory that these portions of the report contained inadmissible hearsay.[1] We disagree.

The trial court's decision to admit or exclude evidence is generally reviewed under an abuse of discretion standard. *Williams v. Bell*, 167 N.C. App. 674, 678, 606 S.E.2d 436, 439 (2005). An abuse of discretion occurs when the trial judge's decision "lacked any basis in reason or was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (internal quotations marks omitted).

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. R. Evid. 801(c). Although hearsay is generally inadmissible, records of regularly conducted business activities are admissible as an exception to the hearsay rule under Rule 803 of the North Carolina Rules of Evidence. N.C. R. Evid. 803(6). This Court has held that highway accident reports may be admitted under Rule 803(6) if properly authenticated. *Wentz v. Unifi, Inc.*, 89 N.C. App. 33, 39, 365 S.E.2d 198, 201 (1988). Proper authentication requires a showing that the report was (1) "prepared at or near the time of the act(s) reported"; (2) prepared "by or from information transmitted by a person with knowledge of the act(s)"; and (3) "kept in the course of a regularly conducted business activity, with such being a regular practice of that business activity." *Id.* If a document meets these criteria, it is admissible unless the circumstances surrounding the preparation of the report "indicate a lack of trustworthiness." N.C. R. Evid. 803(6).

---

1. The portion of the narrative stating that plaintiff "was charged with left of center" was redacted before the accident report was admitted into evidence at trial.

Here, Officer Allen's testimony authenticated the accident report and laid the proper foundation for the report's admission into evidence under Rule 803(6). Specifically, he testified that: (1) he authored the accident report; (2) the report admitted into evidence was a copy of the report he completed; (3) the report was prepared near the place and time of the accident; (4) it was prepared in the regular course of business; and (5) it was the regular course of practice for the Mooresville Police Department to make such reports. He also testified that he obtained the information he used to prepare his report from defendant, Blackwelder, and Jackson.

Plaintiff contends that the narrative and diagram sections were nevertheless inadmissible because the circumstances surrounding the preparation of those portions of the accident report indicated a lack of trustworthiness. Plaintiff asserts that the narrative was untrustworthy because it was not based on the officer's personal knowledge and did not include a statement from plaintiff. He further argues that the diagram lacked trustworthiness because it was not drawn to scale and incorrectly indicated where the turn lane began.

This Court addressed a similar argument in *Nunnery v. Baucom*, 135 N.C. App. 556, 521 S.E.2d 479 (1999). In *Nunnery*, the defendants conceded that the accident report was admissible as a record of regularly conducted activity, but objected to the introduction of the portion of the report regarding a description of a particular vehicle and the designation on a diagram of that vehicle's location. *Id.* at 565-66, 521 S.E.2d at 486. The defendants argued that these portions of the report were untrustworthy and should have been redacted because the driver of that vehicle was not present at the scene when the officer was preparing the report. *Id.*

In rejecting that argument, this Court noted that the hearsay exception for records of regularly conducted activity "expressly provides for the use of information from those having first-hand knowledge of the incident in question" and found that the officer used information from "several other witnesses 'with knowledge of the act(s)' " to prepare his report. *Id.* The Court thus concluded that these portions of the report did not lack trustworthiness, and the trial court did not err in admitting the report in full. *Id.*

In the present case, the investigating officer prepared both the narrative and diagram using information he received from defendant, Blackwelder, and Jackson as permitted by Rule 803(6). Officer Allen explicitly stated both at trial and in his report that the hand-drawn diagram

was not drawn to scale. Plaintiff has failed to demonstrate that either the narrative or the diagram lacked sufficient trustworthiness to warrant its exclusion.

Plaintiff's attempt to rely on *Wentz* is misplaced. In *Wentz*, this Court held that a trooper's accident report was admissible under the Rule 803(6) business records exception where the trooper interviewed the plaintiff and the defendant at the scene, reported the information given to him by both parties, and did not express an opinion of fault. 89 N.C. App. at 40, 365 S.E.2d at 201-02. Plaintiff misinterprets *Wentz* as standing for the proposition that an accident report is trustworthy – and thus admissible — *only* in those limited circumstances. *Wentz* does not so hold.

Here, as stated above, Officer Allen prepared the report near the time of the accident, using information from individuals who had personal knowledge of the accident. Accident reports of this type are, according to Officer Allen's testimony, prepared and kept in the regular course of business of the Mooresville Police Department. For these reasons, the report met the criteria required by Rule 803(6), and the fact that Officer Allen did not interview plaintiff — who was receiving medical attention at the scene — does not render the report untrustworthy.

Nor does our decision in *Seay v. Snyder*, 181 N.C. App. 248, 638 S.E.2d 584 (2007), mandate a different result. In *Seay*, this Court held that a trooper's diagram of a collision was properly excluded by the trial court because the diagram improperly expressed a conclusion as to the point of impact based on the trooper's physical findings at the scene of the accident. *Id.* at 257-58, 638 S.E.2d at 590-91. The trooper in *Seay* prepared her report solely from the gouge marks in the road, the position of the cars after the collision, and the debris from the accident. *Id.*

Unlike the diagram at issue in *Seay*, Officer Allen's diagram utilized information provided by witnesses who had personal knowledge of the accident. Instead of expressing an improper conclusion or opinion of his own based on physical evidence at the scene, Officer Allen's diagram merely visually depicted the information offered by witnesses who observed the accident. Thus, the diagram in the present case is distinguishable from the one excluded in Seay and was properly admitted under Rule 803(6).

Finally, while plaintiff cites *State v. Castor*, 150 N.C. App. 17, 562 S.E.2d 574 (2002), for the proposition that the trial court erred by failing to make specific findings of fact and conclusions of law regarding the report's trustworthiness, that case is easily distinguishable. In *Castor*,

the hearsay exception at issue was not the business records exception under Rule 803(6) but rather the catch-all exception set out in Rule 803(24). *Id.* at 25-27, 562 S.E.2d at 580-81. It is well established that the "admissibility of evidence under the catch-all exception is proper only after the trial court undertakes a particularized analysis and thereafter enter[s] appropriate statements, rationale, or findings of fact and conclusions of law . . . in the record to support his discretionary decision[.]" *State v. Thomas*, 119 N.C. App. 708, 718, 460 S.E.2d 349, 356 (1995) (citation and quotation marks omitted).

Thus, pursuant to Rule 803(24), the trial court in *Castor* was required to make specific findings of fact and conclusions of law regarding the trustworthiness of the statement at issue. Admissibility of a business record under Rule 803(6), conversely, requires no such particularized findings, and the trial court in the present case was not obligated to make express findings as to why the report was trustworthy.

Finally, even assuming *arguendo* that the accident report should have been redacted in the manner advocated by plaintiff, plaintiff cannot establish that he was actually prejudiced by the admission of the narrative or diagram because the same evidence was introduced at trial through other sources. Blackwelder and Jackson, the two eyewitnesses who provided the information upon which the narrative and diagram were based, both testified at trial. Although Blackwelder stated that he was checking his mirror and did not observe plaintiff's location before the collision, Jackson specifically testified that she saw plaintiff operating his motorcycle left of center and passing stopped vehicles before he collided with defendant's car. Moreover, photographs of the scene were introduced by both parties to show the jury the intersection where the accident occurred. Accordingly, plaintiff has failed to demonstrate reversible error.

II. Statements During Closing Argument

[2] Plaintiff next argues that the trial court erred in overruling his objection to statements in defendant's closing argument in which defense counsel compared the present case to *Fisk v. Murphy*, ___ N.C. App. ___, 713 S.E.2d 100 (2011). Plaintiff correctly states that "[i]t is not permissible argument for counsel to read, or otherwise state, the facts of another case, together with the decision therein, as premises leading to the conclusion that the jury should return a verdict favorable to his client in the case on trial." *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473, 479, 153 S.E.2d 76, 81 (1967). Unlike in *Wilcox*, however, the closing arguments in the present case were neither recorded nor transcribed.

> Appellate review is based solely upon the record on appeal; it is the duty of the appellant[] to see that the record is complete. This Court will not engage in speculation as to what arguments may have been presented . . . . It is not the role of this Court to fabricate and construct arguments not presented by the parties before it.

McKoy v. Beasley, ___ N.C. App. ___, ___, 712 S.E.2d 712, 716-17 (2011) (internal citations and quotation marks omitted).

Here, because the parties' closing arguments were neither transcribed in the record nor adequately set out in narrative form under Rule 9(c) of the North Carolina Rules of Appellate Procedure, plaintiff has failed to provide a complete record to this Court that is sufficient to permit meaningful review on this issue. N.C. R. App. P. 9(c). Plaintiff first submitted a proposed record on appeal to defendant containing a joint stipulation as to the statements made during the challenged portion of defendant's closing argument. Defendant objected to the proposed stipulation, asserting that the arguments were not recorded and that the attorneys' memories of the arguments would be inaccurate. Plaintiff then requested judicial settlement of the record under Rule 11(c). N.C. R. App. P. 11(c).

The trial court heard plaintiff's motion to settle the record and determined that both parties "shall be allowed to submit a statement regarding the use of the case of *Fisk v. Murphy* in closing argument. In the alternative, the Defendant may submit a statement noting the objection to use of the statement in the record."

In accordance with the trial court's order, plaintiff submitted a narration of this portion of defendant's closing argument. Defendant, in turn, submitted a statement asserting the practical difficulty of accurately narrating the unrecorded argument and arguing that plaintiff had failed to properly preserve the issue for appeal.

Therefore, although plaintiff attempted to narrate the relevant portion of defendant's closing argument pursuant to Appellate Rule 9(c) — which allows for narration of portions of the trial proceedings as an alternative to a verbatim transcript — there is no evidence that plaintiff's version of the argument "accurately reflect[s] the true sense of . . . [the] statements made[.]" [2] N.C. R. App. P. 9(c)(1). Instead, the narration

---

2. In its order settling the record, the trial court stated that it "cannot recall the details of the discussion of the case." In addition, defendant's appellate counsel stated in his objection to the narration that because he had not represented defendant at trial, he could not speak as to what had occurred during the closing argument.

included in the record is based solely upon plaintiff's contentions as to what occurred during closing arguments.

When the closing arguments of counsel are not transcribed and included in the record, an appellate court is precluded from addressing issues relating to the content of those arguments. *See Heatherly v. Indus. Health Council*, 130 N.C. App. 616, 624, 504 S.E.2d 102, 108 (1998) (finding that "the closing arguments are not transcribed in the record before this Court, and we are thereby precluded from addressing [the] plaintiff's contention"); *see also State v. Carver*, ___ N.C. App. ___, ___, 725 S.E.2d 902, 906 (2012) ("[B]ecause the closing arguments were not transcribed and are not before this Court on appeal, [defendant] has failed to satisfy his burden of presenting an adequate record to support his contention."). Accordingly, this argument is dismissed.

III. *Voir Dire* of Officer Allen

[3] Plaintiff next contends that the trial court erred by limiting his *voir dire* of Officer Allen. Plaintiff alleges that the trial court abused its discretion by terminating the *voir dire* of Officer Allen before plaintiff had an opportunity to establish that the narrative and diagram in the accident report lacked trustworthiness. A trial court's rulings in connection with *voir dire* examinations are reviewed for abuse of discretion. *State v. Ward*, 354 N.C. 231, 253, 555 S.E.2d 251, 266 (2001) (stating that "the trial court is vested with broad discretion to regulate the extent and manner of questioning by counsel during *voir dire*. . . . [and] [i]n order to demonstrate reversible error in this respect, the defendant must show that the trial court committed a clear abuse of discretion").

"There is ample authority to the effect that the judge presiding at the trial of a law suit may, in his sound discretion, limit the examination and cross-examination of a witness so as to prevent needless waste of the time of the court." *State v. Wright*, 274 N.C. 380, 395, 163 S.E.2d 897, 908 (1968). This case was first tried in July of 2011 and resulted in a mistrial. In the first trial (which was also presided over by Judge Royster) the trial court heard Officer Allen's testimony, admitted the accident report under Rule 803(6), and listened to plaintiff's cross-examination of Officer Allen.

During the second trial, plaintiff sought to conduct a *voir dire* of Officer Allen to establish why the narrative and diagram sections of the report should not be admitted into evidence. After several questions were asked by plaintiff's counsel, Judge Royster stated that he remembered

the officer's testimony from the first trial and did not need to hear the testimony a second time. He then ended the *voir dire* examination.[3]

Plaintiff was given a full opportunity to cross-examine Officer Allen in the jury's presence. During the cross-examination, plaintiff posed numerous questions to Officer Allen regarding the accuracy of the diagram and the reliability of the accident report. Thus, limiting plaintiff's *voir dire* under these circumstances was not an abuse of the trial court's discretion.

IV. Admissibility of Testimony Regarding Whether Plaintiff Had the Right of Way

[4] In his final issue on appeal, plaintiff argues that the trial court erred in sustaining defendant's objection to plaintiff's question to Officer Allen as to whether plaintiff would have had the right of way over a vehicle entering the highway from the shopping center. This contention is also without merit.

A lay witness may testify in the form of 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. R. Evid. 701. "[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Norman*, ___ N.C. App. ___, ___, 711 S.E.2d 849, 854 (2011) (citation and quotation marks omitted).

Plaintiff's argument on this issue relies primarily on *State v. Miller*, 142 N.C. App. 435, 543 S.E.2d 201 (2001). In *Miller*, this Court held that an officer was properly permitted to testify as a lay witness regarding the condition of the tires of a towed vehicle following a collision. *Id.* at 443-44, 543 S.E.2d at 206-07. This Court determined that the officer's testimony was "rationally based on his perception gained through experience as a State Highway Patrolman." *Id.* Here, plaintiff argues by analogy that Officer Allen should have been permitted to testify regarding who had the right of way because such an opinion was "based on his perception gained through his experience as an officer with the Mooresville Police Department for eleven to twelve years."

---

3. Although the trial court's reliance upon personal memory of a prior proceeding can, in some circumstances, render meaningful appellate review impossible, such is not the case here. *See Hensey v. Hennessy*, 201 N.C. App. 56, 68, 685 S.E.2d 541, 549 (2009). ("Appellate review of the sufficiency of the evidence to support the trial court's findings of fact is impossible where the evidence is contained only in the trial judge's memory."). Despite the trial court's reliance upon memory in making the decision to end the *voir dire* examination, Officer Allen's testimony at trial provides a sufficient record for our review of the trial court's ruling that the narrative and diagram in the accident report were admissible.

The facts in *Miller* are distinguishable from those in the present case. In *Miller*, the investigating officer personally observed the tires of the vehicles following the accident and was, therefore, able to testify regarding the tires' condition in accordance with Rule 701. *Id.* at 443-44, 543 S.E.2d at 207 (stating that Rule 701 includes shorthand statements of fact which encompass "a witness' conclusion 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.") (internal quotation marks omitted).

In the present case, conversely, Officer Allen did not have the requisite personal knowledge to offer his opinion on which party had the right of way. Although plaintiff argues that Officer Allen "personally observed the intersection, the location of the lanes, the lines marking the lanes, and the traffic patterns at the intersection," he did not personally witness the accident or observe the placement of the vehicles at the time of the accident.

> "Our State Supreme Court has held in several cases that while it is competent for an investigating officer to testify as to the condition and position of the vehicles and other physical facts observed by him at the scene of the accident, his testimony as to his conclusions from those facts is incompetent."

Blackwell v. Hatley, 202 N.C. App. 208, 213, 688 S.E.2d 742, 746 (2010) (quoting *State v. Wells*, 52 N.C. App. 311, 314, 278 S.E.2d 527, 529 (1981)).

Our Supreme Court expressly addressed the admissibility of an officer's statement regarding which party had the right of way in *Jones v. Bailey*, 246 N.C. 599, 99 S.E.2d 768 (1957). In *Jones*, the plaintiff testified that he heard a conversation between the officer and the defendant where the defendant asked if she had the right of way and the officer replied in the negative. *Id.* at 600-01, 99 S.E.2d at 769-70. The Court ruled that the testimony was inadmissible on two grounds: (1) it was improper hearsay evidence; and (2) "it was a declaration of an opinion or conclusion which [the officer] would not have been permitted to state as a witness." *Id.* at 601, 99 S.E.2d at 770.

The Court determined that the testimony invaded the province of the jury because "[w]hether the plaintiff or the defendant had the right of way at the time they entered the intersection . . . was the crucial question to be resolved by the jury from the evidence before [the jury] could correctly and properly answer the issues submitted to [it]." *Id.* at 602, 99

S.E.2d 770. Therefore, we conclude that the trial court did not abuse its discretion in excluding Officer Allen's testimony regarding his opinion as to which party had the right of way.

Conclusion

For the reasons stated above, we affirm the trial court's judgment.

AFFIRMED.

Judges STROUD and HUNTER, Jr. concur.

PAMELA LYNN BRINN O'NEAL, PLAINTIFF
v.
ADAM WAYNE O'NEAL, DEFENDANT

No. COA12-715

Filed 19 March 2013

Pleadings—Rule 11 sanctions—motion to recuse—amended motion—not well grounded in fact

The trial court did not err in a child custody, child support, post-separation support, alimony, and equitable distribution case by concluding that plaintiff wife violated N.C.G.S. § 1A-1, Rule 11(a) when her motion to recuse and amended motion were not well grounded in fact, warranted by law, or asserted for a proper purpose. The case was remanded for further findings on the issue of the extent of the sanction.

Appeal by plaintiff's attorney from order entered 7 October 2011 by Judge Shelly S. Holt in Pitt County District Court. Heard in the Court of Appeals 9 January 2013.

Jonathan McGirt and Sandlin & Davidian, PA, by Deborah Sandlin for appellant Cynthia A. Mills.

Ward and Smith, P.A., by John M. Martin, for defendant-appellee.

Pritchett & Burch, PLLC, by Lloyd C. Smith, Jr., for plaintiff-appellee.

BRYANT, Judge.

Where the trial court's findings of fact and conclusions of law support its order for Rule 11 sanctions against plaintiff's attorney, we affirm the order of the trial court. However, where the record is insufficient to show how the trial court arrived at the amount of attorneys' fees, we reverse and remand for further findings.

Facts and Procedural History

Plaintiff Pamela Lynn Brinn O'Neal and defendant Adam Wayne O'Neal were married in 1995 and separated in 2009. In May 2009, plaintiff filed a complaint in Beaufort County District Court against defendant for child custody, child support, post-separation support, alimony, and equitable distribution. At the time of the filing of the complaint, plaintiff was represented by Ann H. Barnhill of Mattox, Davis, Barnhill & Edwards, P.A.

In July 2009, the case was transferred to Pitt County District Court and the Honorable P. Gwynett Hilburn was assigned to preside over the action. On 3 December 2009, Cynthia A. Mills of Mills & Economos, L.L.P., entered a notice of appearance on behalf of plaintiff and on 18 December 2009, Ann H. Barnhill was allowed to withdraw as plaintiff's attorney of record.

On 2 March 2011, plaintiff, through Ms. Mills, filed a motion to recuse Judge Hilburn pursuant to Canon 3(C)(1)(a) of the Code of Judicial Conduct. Lloyd C. Smith, Jr., of Pritchett & Burch, PLLC, filed a notice of limited appearance on behalf of plaintiff, limited to matters related to the 2 March 2011 motion to recuse.

On 22 March 2011, defendant filed a motion for sanctions against Ms. Mills pursuant to Rule 11(a) of the North Carolina Rules of Civil Procedure. The motion for sanctions argued that plaintiff's motion to recuse was not well grounded in fact, was not warranted by existing law or a good faith argument or the extension of existing law, and was interposed for an improper purpose.

On 28 March 2011, plaintiff filed an amended and supplemental motion to recuse. On 30 March 2011, defendant filed a motion for Rule 11(a) sanctions against Ms. Mills for the filing of plaintiff's amended and supplemental motion to recuse.

Following a hearing, the trial court entered an order on 7 October 2011, concluding the following:

> 2. The Motion to Recuse and Amended Motion should be dismissed with prejudice.
>
> 3. . . . [T]he material and relevant allegations set forth in the Motion to Recuse and the Amended Motion are not based on reasonable inquiry or investigation, were not well grounded in fact, and were not warranted by existing law or good faith argument for the extension, modification or reversal of existing law. The Motion to Recuse and Amended and Supplemental Motion to Recuse were asserted by Ms. Mills for an improper purpose.
>
> 4. Ms. Mills has violated Rule 11(a) of the North Carolina Rules of Civil Procedure.
>
> 5. Pursuant to Rule 11(a) . . . , the Court should, in its discretion, impose appropriate sanctions. The Court finds that appropriate sanctions based upon the facts are the payment of counsel fees and the costs incurred by the Administrative Office of the Courts for fees resulting from the assignment of the out-of-district judge to hear the Motions.
>
> 6. Ms. Mills has violated Rule 3.3 of the Rules of Professional Conduct.
>
> 7. In the discretion of Court, the sanctions imposed including the amount of attorneys' fees and costs awarded below, are reasonable and fair under the circumstances.

The court ordered Ms. Mills to pay the law firm of Ward and Smith, P.A., as attorneys' fees the sum of $2,500.00 and $400.00 to the Administrative Office of the Courts. From this order, Ms. Mills appeals.

Ms. Mills' sole argument on appeal is that the trial court erred in concluding that she violated Rule 11(a) of the North Carolina Rules of Civil Procedure.

Standard of Review

> This Court exercises de novo review of the question of whether to impose Rule 11 sanctions. . . . When reviewing the decision of a trial court to impose sanctions under Rule 11, an appellate court must determine whether the findings of fact of the trial court are supported by sufficient evidence, whether the conclusions of law are supported

> by the findings of fact, and whether the conclusions of law support the judgment.

Fatta v. M & M Properties Management, Inc., __ N.C. App. __, __, 735 S.E.2d 836, 842 (2012) (citations omitted).

A. Quantum of Proof

First, Ms. Mills argues that because the policy and purpose of Rule 11(a) conflicts with that of Canon 3, subsection C, of the North Carolina Code of Judicial Conduct[1], our Court should

> adopt a standard that allows the imposition of Rule 11 sanctions related to motions to recuse if, and only if, the motion to recuse is shown by clear and convincing evidence to have been filed for an improper purpose (such as delay) or is shown to have absolutely no factual basis[.]

We disagree.

Our Court has previously rejected this argument. In *Adams v. Bank United of Tex. FSB*, 167 N.C. App. 395, 606 S.E.2d 149 (2004), the appellant argued that "the movant should be required to prove a Rule 11 violation by a clear and convincing evidence quantum of proof." *Id.* at 399, 606 S.E.2d at 153. Our Court rejected the appellant's argument and held that

> in North Carolina, a preponderance of the evidence quantum of proof applies in civil cases unless a different standard has been adopted by our General Assembly or approved by our Supreme Court. . . . In those instances where a different standard has been adopted by case law, it was pursuant to an opinion by our Supreme Court. A different standard for Rule 11 motions has not been adopted and we have found no instances where this Court has imposed a different standard on its own. . . . Thus, we conclude the preponderance of the evidence quantum of proof should be utilized in determining whether a Rule 11 violation has occurred.

Id. at 402, 606 S.E.2d at 154 (citation omitted).

---

1. "The Code of Judicial Conduct provides in pertinent part: (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: (a) he has a personal bias or prejudice concerning a party[.]" Code of Judicial Conduct, Canon 3(C)(1)(a) (1993).

Based on the foregoing, Ms. Mills' argument is overruled.

B. Imposition of Sanctions

Next, Ms. Mills argues that the trial court erred by concluding that she violated Rule 11(a) when her motion to recuse and amended motion were not well grounded in fact, warranted by law, or asserted for an improper purpose.

Pursuant to Rule 11(a) of the North Carolina Rules of Civil Procedure,

> [e]very pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2011). "There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose. A violation of any one of these requirements *mandates* the imposition of sanctions under Rule 11." *Batlle v. Sabates*, 198 N.C. App. 407, 425, 681 S.E.2d 788, 800 (2009) (citation omitted) (emphasis added).

Because Ms. Mills does not challenge any of the findings of fact, they are binding on appeal and we will examine whether the trial court's findings support its conclusions of law and whether those conclusions of law support the Rule 11 sanctions. "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citation omitted).

"In analyzing whether the [motion] meets the factual certification requirement, the court must make the following determinations: (1) whether the [party] took a reasonable inquiry into the facts and (2) whether the [party], after reviewing the results of his inquiry, reasonably believed that his position was well-grounded in fact." *McClerin v. R-M Indus.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995) (citation omitted).

Here, Ms. Mills' motion to recuse alleged the following:

> 6. At that Settlement Conference the Honorable P. Gwynett Hilburn [(Judge Hilburn)]
>
> > a. Objected to the undersigned not being personally at the hearing despite the presence of a licensed attorney from Mills & Bryant, LLP.
> >
> > b. Required Plaintiff, but not Defendant, to make a settlement proposal by a set date of February 28, 2011.
> >
> > c. Did not provide any mechanism or date for Defendant to respond to said proposal.
> >
> > d. Required the undersigned to be personally present at future proceedings.
>
> 7. Said conduct raises the appearance that [Judge Hilburn] has a predetermined belief that Plaintiff is responsible for the failure of the parties to resolve this matter, and that as a result Plaintiff's positions must be unreasonable.
>
> 8. acting as a mediator attempting to force the Plaintiff to make concessions rather than as an impartial arbiter in this action.
>
> 9. Plaintiff has a reasonable question concerning the impartiality of [Judge Hilburn] as a result of said conduct.
>
> 10. This conduct causes an appearance of impropriety which is detrimental to the integrity of the Judicial System.
>
> 11. The undersigned sought guidance from the Judicial Standards Commission and as a result of these consultations believes [Judge Hilburn] should recuse herself from further proceedings in this action.

A thorough review of the record indicates that the following findings support the trial court's conclusion that Ms. Mills' motion to recuse and amended motion were not well grounded in fact:

> 8. None of the credible evidence supports the material allegations or conclusions made by Ms. Mills in the Motion to Recuse.
>
> 9. On November 2, 2010, a pre-trial conference was scheduled in the above action. Every Court Calendar issued

by the Family Court in Pitt County for each session contains a Court directive printed in bold letters which reads "PARTIES AND ATTORNEYS ARE EXPECTED TO BE IN THE COURTROOM AT THE TIME SPECIFIED FOR THE CASE UNLESS OTHERWISE EXCUSED BY THE COURT."

10. Rule 7.1 of the Family Court Domestic Rules for Judicial District 3A states, in part as follows:

> 7.1 Participation and Purpose. Attendance at pre-trial conferences is mandatory for all attorneys of record and all parties. The purpose of a pre-trial conference is to assist the attorney, or parties, . . . to set deadlines for completion of discovery, to seriously explore the prospects of settlement of the case. . . . (emphasis added)

Ms. Mills was listed on the November 2, 2010 Court Calendar as attorney of record for the Plaintiff and Mr. Martin was listed as attorney of record for the Defendant. Therefore, pursuant to the published calendar and Rule 7.1, Ms. Mills, Mr. Martin, and the parties were to be present for the scheduled pre-trial conference on November 2, 2010.

. . .

13. Judge Hilburn . . . continued the pre-trial conference to February 14, 2011. . . .

. . .

20. At no time prior to the February 14, 2011 pre-trial conference did Ms. Mills make any attempt, orally or in writing, to notify Judge Hilburn . . . that she would not be present for the pre-trial conference. According to her testimony, Ms. Mills elected not to attend the pre-trial conference because she had to meet with her contractor who was doing some renovations on her home. Ms. Mills was not only aware of the Court directive on the Court Calendar but was also aware of the requirement of attendance and purpose of Rule 7.1[.]

21. . . . Judge Hilburn admonished Ms. Mills (although she was not present) for not attending the pre-trial conference. . . .

22. At no time during her participation in this pre-trial conference did Judge Hilburn instruct or order the Plaintiff or Defendant to make a settlement proposal, and she did not take part in any discussions as to when a settlement proposal would be made or who would make any such proposal.

. . .

24. The Order clearly gave the parties the ability to make a settlement proposal by February 28. It also provided a mechanism for the other party to respond because a settlement conference was scheduled on March 2 (within 48 hours of February 28) at which time the other party would be responding to any settlement proposal. . . .

25. The Order does not single out Ms. Mills as requiring her to be personally present at future proceedings. Rather the Order clearly indicates that "everyone involved shall be present." . . .

26. . . . Notwithstanding Ms. Mills' allegations in the Motion to Recuse, there was no evidence offered at the hearing that at any point in time did Judge Hilburn seek to attempt to mediate this case or to force either Plaintiff or Defendant to make any type of concessions. In fact, Judge Hilburn did not engage in either of these alleged activities.

27. No reasonable person could conclude that anything occurred at the pre-trial conference which would even give the appearance that Judge Hilburn was biased against either party or which would allow anyone to question Judge Hilburn's impartiality. . . .

. . .

30. . . . It was entirely appropriate for Judge Hilburn to admonish Ms. Mills at the pre-trial conference for her violation of the Court's directive and Rule 7.1

Based on the foregoing, we hold that the trial court's findings of fact are sufficient to conclude that Ms. Mills' motion to recuse and amended motion did not meet the factual sufficiency requirement of Rule 11(a). Because we hold that the record supports the conclusion that Ms. Mills

violated the requirements under the factual sufficiency prong of a Rule 11(a) analysis, we find it unnecessary to address either of the other two prongs. *See Battlle*, supra. Thus, the trial court did not err in imposing sanctions pursuant to Rule 11. Ms. Mills' argument is overruled.

Defendant's Writ of Certiorari

On order of the Court on 9 January 2013, we allowed defendant's petition for writ of certiorari to review the portion of the 4 October 2011 Order awarding attorneys' fees. Defendant contends the trial court erred with respect to the amount of sanctions imposed. Defendant argues that the trial court erred in awarding $2,500.00 in attorneys' fees when it was "required to explain *why* it chose the particular dollar amount of sanctions awarded." We agree.

When reviewing the amount or type of sanctions imposed under Rule 11, we apply an abuse of discretion standard. *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989) (citation omitted). "A trial court, in making an award of attorneys' fees [pursuant to Rule 11], must explain why the particular award is appropriate and how the court arrived at the particular amount." *Dunn v. Canoy*, 180 N.C. App. 30, 49, 636 S.E.2d 243, 255 (2006).

Here, the trial court found that as a result of the filing of the motion to recuse and amended motion, defendant had incurred legal fees for services that required extensive time and effort. The trial court also made a finding of fact "[t]he hourly rates . . . are reasonable and customary for similarly situated attorneys based on the training, and experience of [defendant's counsel], and the hourly rates . . . charged by the paralegal are reasonable and customary rates for similarly situated paralegals." Further, the trial court made a finding of fact that the total amount of fees incurred by defendant, which amounted to $20,993.75, were reasonable under the circumstances. The trial court concluded that the amount of attorneys' fees awarded were "reasonable and fair under the circumstances." The trial court then awarded attorneys' fees in the amount of $2,500.00.

Although the 4 October 2011 order explains *why* the particular award is appropriate, it fails to explain how the trial court arrived at the much-reduced figure of $2,500.00 after determining that fees in the amount of $20,993.75 were incurred as a result of the motion to recuse and amended motion. *See Id.* at 50, 636 S.E.2d at 255-56 (stating that "there must still be findings to explain . . . *how* the court arrived at that figure [of attorneys' fees]." (emphasis added)).

We, therefore, affirm the trial court's imposition of sanctions against Ms. Mills. We remand, however, for further findings on the issue of the extent of the sanction.

Affirmed in part; reversed and remanded in part.

Judges CALABRIA and GEER concur.

CHEYENNE SALEENA STARK, A MINOR, AND CODY BRANDON STARK, A MINOR, BY THEIR GUARDIAN AD LITEM, NICOLE JACOBSEN, PLAINTIFFS
v.
FORD MOTOR COMPANY, A DELAWARE CORPORATION, DEFENDANT

No. COA09-286-2

Filed 19 March 2013

1. Appeal and Error—remand—remaining issues

The only issues remaining for the Court of Appeals to address on remand from the N.C. Supreme Court in a defective automobile design case related to the trial court's award of costs.

2. Costs—expert witness fees—witness not under subpoena

The trial court erred in awarding fees for expert witnesses incurred while the expert witnesses were not under subpoena.

3. Costs—taxed against guardian ad litem—no finding of bad faith

Addressed because it was likely to be raised on remand, the taxing of costs against a guardian *ad litem* in a defective design case in the absence of a finding of bad faith was an abuse of discretion. There are significant differences between a general guardian and a guardian *ad litem*.

On remand from the Supreme Court of North Carolina, __ N.C. __, 723 S.E.2d 753, reversing and remanding the decision of the Court of Appeals, 204 N.C. App. 1, 693 S.E.2d 253. Appeal by plaintiffs from judgment entered 15 May 2007 and orders entered 28 April 2008 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 November 2012.

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

Kilpatrick Townsend & Stockton LLP, by Adam H. Charnes and Richard D. Dietz, and Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan L.L.P., by Kirk G. Warner, for defendant-appellee.

HUNTER, Robert C., Judge.

This case is before us on remand from the Supreme Court of North Carolina, *Stark v. Ford Motor Co.*, __ N.C. __, 723 S.E.2d 753 (2012) (hereinafter *"Stark II"*), reversing and remanding our decision in *Stark v. Ford Motor Co.*, 204 N.C. App. 1, 693 S.E.2d 253 (2010) (hereinafter *"Stark I"*). After careful review, we affirm in part and reverse in part the orders of the trial court.

Background

The facts and procedural history of this case is provided in *Stark II* and only the essential details are recited here. In 2004, Cheyenne Saleena Stark ("Cheyenne") and Cody Brandon Stark ("Cody") (collectively "plaintiffs"), through their guardian ad litem filed a complaint against Ford Motor Company ("Ford") seeking recovery for injuries plaintiffs sustained in an automobile collision involving a 1998 Ford Taurus in which plaintiffs were passengers. Plaintiffs alleged the collision was the result of a design defect in the automobile's engine which resulted in the vehicle's unintended acceleration and that they sustained injuries from the automobile's defectively designed seatbelts.

Plaintiffs' claims came on for trial in April 2007. Ford asserted the affirmative defense provided in N.C. Gen. Stat. § 99B-3 that the seatbelt that caused Cheyenne's injuries was altered or modified by a party other than the manufacturer or seller such that Ford was relieved of liability for her injuries. At the close of evidence, Cheyenne moved for a directed verdict. The motion was denied and Ford's affirmative defense was submitted to the jury. The jury returned a verdict finding that Ford acted unreasonably in designing the Taurus but that Cheyenne's enhanced injuries were caused by an alteration or modification to the vehicle. Accordingly, the trial court entered judgment in favor of Ford, dismissed plaintiffs' complaint, and taxed plaintiffs with Ford's costs. Cheyenne then filed motions for a judgment notwithstanding the verdict ("JNOV") and a new trial, and the trial court denied both motions.

In a separate order, the trial court granted Ford's motion for costs, holding Cheyenne, Cody, and their guardian ad litem, Nicole Jacobsen ("Jacobsen"), jointly and severally liable in the amount of $45,717.92 for

Ford's costs for expert witnesses, mediation, and depositions. Plaintiffs and Jacobsen appealed. Cheyenne and Cody also appealed from the trial court's 15 May 2007 judgment dismissing plaintiffs' complaint, and Cheyenne, individually, appealed from the trial court's order denying her motions for a JNOV and a new trial.

On appeal, this Court reversed the trial court's order denying plaintiffs' motion for a directed verdict because, we concluded, in part, that Ford could not establish the affirmative defense under N.C. Gen. Stat. § 99B-3. *Stark I*, 204 N.C. App. at 12, 693 S.E.2d at 260. Central to our holding in *Stark I* was our interpretation of section 99B-3 as requiring that "the entity responsible for the modification or alteration of the product must be a party to the action in order for the defense to apply." *Id.* Because Cheyenne was five years old at the time of the accident, we concluded, she was legally incapable of modifying the seatbelt. *Id.* at 9, 693 S.E.2d at 258. Furthermore, because Cheyenne's parents were not parties to the lawsuit we concluded Ford was unable to assert a defense under section 99B-3. *Id.* at 12, 693 S.E.2d at 260.

On discretionary review, the Supreme Court of North Carolina reversed our decision concluding that the defense provided in N.C. Gen. Stat. § 99B-3 is not limited to those situations in which the entity alleged to have modified the product at issue was a party to the litigation: "The plain language of section 99B–3 says that this defense may be used when anyone other than the manufacturer or seller modifies the product, so long as the remaining requirements of that section are met." *Stark II*, __ N.C. at __, 723 S.E.2d at 761. Additionally, the Supreme Court concluded the evidence at trial was sufficient to support the trial court's denial of Cheyenne's motion for a directed verdict and the jury's verdict. *Id.* The Supreme Court remanded the matter to this Court for additional proceedings consistent with its opinion. *Id.* at __, 723 S.E.2d at 762. We allowed the parties to submit supplemental briefs and make oral arguments for our consideration of the issues on remand.

Discussion

A. Trial Court's Judgment and Denial of Motions for JNOV and New Trial

[1] Plaintiffs argue that our Supreme Court's holding in *Stark II* was a narrow ruling and was limited to the single issue of whether Ford's affirmative defense under N.C. Gen. Stat. § 99B-3 was properly submitted to the jury. Therefore, on remand, plaintiffs contend that the issues remaining to be decided by this Court are whether the trial court erred: (1)

in entering judgment for Ford based on the affirmative defense provided in section 99B-3; (2) in denying Cheyenne's motion for a JNOV; (3) in denying her motion for a new trial; (4) in taxing costs against plaintiffs' guardian ad litem; and (5) awarding certain expert witness fees. We do not agree with plaintiffs' reading of *Stark II*, and we conclude that the only issues remaining for this Court to address are related to the trial court's award of costs.

Despite plaintiffs' contention that *Stark II* only addressed whether Ford's affirmative defense was properly submitted to the jury, the Supreme Court addressed the sufficiency of the evidence "to resolve the directed verdict inquiry," and concluded:

> The trial court's decision on plaintiffs' *motion for directed verdict*, as well as the *jury's verdict and the trial court's judgment applying section 99B–3 to relieve Ford of liability* for the injury proximately caused by the design of its product, *can therefore be sustained on the basis of this evidence*, and we need not consider evidence of other potential modifications or modifiers.

Id. at __, 723 S.E.2d at 761 (emphasis added). That the Supreme Court decided these issues, in addition to its interpretation of the meaning of "party" as used in section 99B-3, is evidenced by the dissenting opinion:

> Our proper role, in my opinion, is to ask the Court of Appeals to review the sufficiency of the evidence whether Gordon Stark modified the Taurus before we undertake that matter. *Nonetheless*, *because the majority decided to engage in that analysis*—incorrectly, in my view, *holding the evidence sufficient*—I include the following discussion of why I conclude the opposite.

Id. at __, 723 S.E.2d at 763 (Hudson, J., concurring in part and dissenting in part) (emphasis added). We are " 'not at liberty to revisit' issues previously decided by our Supreme Court." *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 667, 554 S.E.2d 356, 363 (2001) (quoting *State v. Stephenson*, 144 N.C. App. 465, 478, 551 S.E.2d 858, 867 (2001)), *appeal dismissed and disc. review denied*, 355 N.C. 348, 563 S.E.2d 562 (2002); *see Goldston v. State*, 199 N.C. App. 618, 624, 683 S.E.2d 237, 242 (2009) ("[T]he law of the case applies . . . to issues that were decided in the former proceeding, whether explicitly or by necessary implication[.]"), *aff'd*, 364 N.C. 416, 700 S.E.2d 223 (2010). Thus, whether the trial court's denial of the motion for a JNOV is properly before us, our

Supreme Court's holding that the trial court properly denied the motion for directed verdict necessarily implies that the motion for a JNOV was also properly denied, and it precludes our inquiry into the matter. *See Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002) ("The test for determining whether a motion for directed verdict is supported by the evidence is identical to that applied when ruling on a motion for judgment notwithstanding the verdict.").

Plaintiffs also argue that the jury's verdict is irreconcilably inconsistent regarding the location of Cheyenne's seatbelt at the time of the accident, and, consequently, the trial court's denial of Cheyenne's motion for a new trial should be reversed. Our deliberation of plaintiffs' verdict inconsistency argument, however, would require us to impermissibly ignore our Supreme Court's conclusion that the jury's verdict and the trial court's judgment could be upheld by the evidence. *Stark II*, __ N.C. at __, 723 S.E.2d at 761. Accordingly, we must affirm the 15 May 2007 judgment dismissing plaintiffs' complaint and the 28 April 2008 order denying Cheyenne's motion for a JNOV and a new trial.

B. Award of Costs

The only matter remaining before this Court is the appeal from the trial court's 28 April 2008 order taxing plaintiffs and their guardian ad litem with Ford's costs for expert witnesses, mediation, and depositions. We review the trial court's award of costs to a prevailing party for abuse of discretion. *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 646, 643 S.E.2d 28, 34 (2007), *disc. review denied*, 361 N.C. 694, 652 S.E.2d 647 (2007). It is an abuse of discretion for a trial court to base its decision on an error of law. *United States v. Ebersole*, 411 F.3d 517, 526 (4th Cir. 2005), *cert. denied*, 546 U.S. 1139, 163 L. Ed. 2d 1003 (2006).

1. Expert Witness Fees

[2] First, plaintiffs contend that the trial court erred in awarding fees for expert witnesses incurred while the expert witnesses were not under subpoena. Ford concedes this was error in light of *Jarrell v. Charlotte-Mecklenburg Hosp. Auth.*, 206 N.C. App. 559, 563, 698 S.E.2d 190, 193 (2010) (concluding that N.C. Gen. Stat. § 7A–314 "limits the trial court's broader discretionary power under § 7A–305(d)(11) to award expert fees as costs only when the expert is under subpoena"). Accordingly, the trial court's order awarding costs must be reversed to the extent it awarded costs for expert witnesses when the witnesses were not under subpoena. We remand for the trial court's determination of an award consistent with this decision.

2. Liability of Guardian ad Litem

[3] Although we reverse the trial court's order taxing plaintiffs with Ford's costs, we address the liability of the guardian ad litem for the costs awarded as the issue is likely to be raised before the trial court on remand. Plaintiffs and Jacobsen argue that it was error for the trial court to tax costs against plaintiffs' guardian ad litem without a finding of bad faith. We agree.

Prior to the filing of the underlying complaint, an order was entered by the Clerk of Superior Court of Mecklenburg County appointing a guardian ad litem for Cheyenne and Cody. The order noted that the minor plaintiffs were "without general or testamentary guardian" and a relative, Ruby Stark, was appointed as their guardian ad litem. On 15 March 2006, Jacobsen filed a motion seeking appointment as substitute guardian ad litem for Cheyenne and Cody, pursuant to Rule 17(b) of the North Carolina Rules of Civil Procedure. The motion was granted.

In support of their argument that Jacobsen should not be held liable for costs, plaintiffs cite N.C. Gen. Stat. § 6-31 (2011), which provides in part:

> In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right; *but such costs shall be chargeable only upon* . . . the . . . *party represented*, *unless the court directs the same to be paid by the plaintiff or defendant*, *personally*, *for mismanagement or bad faith* in such action or defense.

(Emphasis added). The trial court's order contained no finding of bad faith on the part of plaintiffs' guardian ad litem. Ford contends, however, that the trial court was authorized to tax plaintiffs' guardian ad litem pursuant to N.C. Gen. Stat. § 6-30: "When costs are adjudged against an infant plaintiff, the *guardian* by whom he appeared in the action shall be responsible therefor." (Emphasis added). Plaintiffs counter that section 6-30 is not applicable to a guardian ad litem because N.C. Gen. Stat. § 1A-1, Rule 17(b)(1) distinguishes a "guardian" and a guardian ad litem: "[W]hen any of the parties plaintiff are infants . . . they must appear by *general or testamentary guardian*, if they have any within the State *or* by *guardian ad litem* appointed as hereinafter provided[.]" (Emphasis added). We conclude plaintiffs' reasoning is supported by our caselaw.

In *Smith v. Smith*, 108 N.C. 365, 369-70, 13 S.E. 113, 114 (1891), our Supreme Court concluded it was error for the trial court to tax costs against "next friends" appointed by the court to represent the real party in interest where there was no finding of bad faith in bringing the action. Applying the predecessor of N.C. Gen. Stat. § 6-31 (The Code of North Carolina § 535 (1883)), the *Smith* Court concluded that "[w]hile 'next friends' may not be embraced in the strict letter of The Code, sec. 535, they come within the purview of that section." 108 N.C. at 369, 13 S.E. at 114. As it is improper to tax costs against a trustee without a finding of mismanagement or bad faith, the *Smith* Court held, "it is error to tax 'next friends' who are not parties, without at least a similar finding." *Id.* "Indeed, the presumption, by virtue of their appointment by the court, is that they acted in good faith, and they cannot be liable to costs, unless there is an express finding against them of the facts requisite to tax them with costs." *Id.*

Recently, this Court recognized that "next friends," appointed to represent an infant plaintiff, are "the equivalent of the modern-day guardian ad litem." *Stern v. Cinoman*, __ N.C. App. __, __, 728 S.E.2d 373, 376 (citing *Lawson v. Langley*, 211 N.C. 526, 528, 191 S.E. 229, 231 (1937)), *disc. review denied*, __ N.C. __, 731 S.E.2d 145 (2012). In *Cinoman*, we cited *Roberts v. Adventure Holdings, LLC*, 208 N.C. App. 705, 708, 703 S.E.2d 784, 787 (2010), *disc. review denied*, 365 N.C. 187, 707 S.E.2d 241 (2011), in which we noted "the significant differences between a general guardian" and a guardian ad litem:

> A general guardian is responsible for the entirety of one's person and/or estate and maintains such responsibility beyond the context of the courtroom. A general guardian is one "who has general care and control of the ward's person and estate." In contrast, a [guardian ad litem] is "appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party." "Ad litem" is a Latin phrase that means "[f]or the purposes of the suit[.]"

(quoting Black's Law Dictionary 774 (9th ed. 2009)) (internal citations omitted). In light of this caselaw, we conclude that the taxing of costs against the guardian ad litem in the absence of a finding of bad faith was an abuse of discretion.

Conclusion

For the reasons stated above:

The trial court's 15 May 2007 judgment dismissing plaintiffs' complaint is AFFIRMED.

The trial court's 28 April 2008 order denying Cheyenne's motion for a judgment notwithstanding the verdict and motion for a new trial is AFFIRMED.

The trial court's 28 April 2008 order granting Ford's motion for costs is REVERSED to the extent it awarded costs for expert witnesses when the witnesses were not under subpoena and is REMANDED for the trial court to calculate an award consistent with this opinion.

Judges CALABRIA and ROBERT N. HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
RAY DEAN COMBS, DEFENDANT

No. COA12-1008

Filed 19 March 2013

1. Rape—rape of a child—sufficient evidence—motion to dismiss properly denied

The trial court did not err by denying defendant's motion to dismiss the charges against him for rape of a child as there was substantial evidence of all the elements of the offense and that defendant was the perpetrator.

2. Jury—instructions—not additional instructions

The trial court did not err in a rape of a child case by failing to give additional jury instructions in open court and failing to make them a part of the record. The written instructions given to the jury by the trial court were not additional instructions within the meaning of the statute.

3. Jury—instructions—theory not supported by the evidence—no prejudice

The trial court did not commit plain error in instructing the jury on a theory of sexual offense that was not supported by the evidence. Even assuming the trial court's instructions were in error, there was overwhelming evidence that defendant performed

various sexual acts on the victim such that the jury probably would not have reached a different verdict under proper instruction.

Appeal by defendant from judgments entered on or about 15 March 2012 by Judge Anderson Cromer in Superior Court, Ashe County. Heard in the Court of Appeals 14 February 2013.

Attorney General Roy A. Cooper, III by Assistant Attorney General David Gordon, for the State.

William D. Spence, for defendant-appellant.

STROUD, Judge.

Ray Dean Combs ("defendant") appeals from judgments entered on or about 15 March 2012. He argues that the trial court erred in denying his motion to dismiss the child rape charges against him, and in providing written instructions to the jury when one juror was illiterate. Defendant further argues that the trial court committed plain error by instructing the jury on theories of culpability that the evidence did not support. We disagree.

I. Background

Sometime during 2008, defendant moved in with his girlfriend and his girlfriend's daughter Tiffany.[1] In May 2010, when Tiffany was eleven years old, she disclosed to her teacher that defendant had raped her. At the time of trial, Tiffany was thirteen years old, and defendant was fifty eight years old.

Defendant was indicted on ten counts of rape of a child and ten counts of first-degree sexual offense. Defendant pleaded not guilty and the case went to a jury trial. During jury selection, a jury member informed the court that he was unable to read and had difficulty writing. Defendant's attorney requested the trial court excuse the juror for cause, but the trial court denied this request.

At the close of the State's evidence, the trial court dismissed two of the two-count indictments of rape of a child and first-degree sexual offense because Tiffany only testified about the period of abuse beginning after the time specified in those indictments. The case went to a

1. To protect the identity of the juvenile and for ease of reading we will refer to her by pseudonym.

jury verdict on eight counts of rape of a child and eight counts of sexual offense with a child. The evidence presented at trial showed that over the course of the two years that defendant lived with Tiffany and her mother, defendant sexually abused Tiffany by engaging in vaginal intercourse, anal intercourse, fellatio, and digital penetration.

At the conclusion of the evidence presented, the trial court orally instructed the jury on the charges. The oral instructions for first-degree sexual offense included five acts that could constitute a sexual act. Upon request for clarification from the jury, the trial court gave written instructions of these charges. The jury found defendant guilty of all charges. The trial court consolidated the convictions into four judgments and sentenced him to four consecutive terms of 300-369 months confinement in the Division of Adult Correction. Defendant gave timely notice of appeal in open court.

II. Sufficiency of the Evidence

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charges against him for rape of a child. Defendant contends that there was insufficient evidence presented at trial for a reasonable juror to find defendant guilty of these charges. For the following reasons, we disagree.

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

State v. Teague, ___ N.C. App. ___, ___, 715 S.E.2d 919, 923 (2011) (citation and quotation marks omitted), *disc. rev. denied*, ___ N.C. ___, 720 S.E.2d 684 (2012).

Defendant was convicted of eight counts of rape of a child under N.C. Gen. Stat. § 1427.2A. Under this statute, the State must prove that defendant "is at least 18 years of age and engage[d] in vaginal intercourse with a victim who is a child under the age of 13 years." N.C. Gen. Stat. § 14-27.2A (2009).

Defendant only contends that there is insufficient evidence that he engaged in vaginal intercourse with Tiffany.[2] Vaginal intercourse is defined as "penetration, however slight, of the female sex organ by the male sex organ." *State v. Fletcher*, 322 N.C. 415, 424, 368 S.E.2d 633, 638 (1988) (finding no error in a jury instruction with such wording). Generally, a jury may find a defendant guilty of an offense based solely on the testimony of one witness. *State v. Vehaun*, 34 N.C. App. 700, 704, 239 S.E.2d 705, 709 (1977) (citation omitted), *disc. rev. denied*, 294 N.C. 445, 241 S.E.2d 846 (1978); *see, e.g.*, *State v. Quarg*, 334 N.C. 92, 100, 431 S.E.2d 1, 5 (1993) ("The uncorroborated testimony of the victim is sufficient to convict under N.C.G.S. § 14-202.1 [taking indecent liberties with children] if the testimony establishes all of the elements of the offense." (citation omitted)).

Here, there was substantial testimony to establish that defendant engaged in vaginal intercourse with Tiffany. Tiffany testified at trial that defendant put his "manhood inside her middle hole." She testified that this insertion had occurred more than five times and pointed to defendant in court as the person who had hurt her.

Defendant argues this testimony is vague and ambiguous. A witness does not have to "use any particular form of words to indicate that penetration occurred." *State v. Kitchengs*, 183 N.C. App. 369, 375, 645 S.E.2d 166, 171, *disc. rev. denied*, 361 N.C. 572, 651 S.E.2d 370 (2007). Nevertheless, where the only evidence of penetration is uncorroborated, ambiguous testimony, our Supreme Court has held that there is insufficient evidence to withstand a motion to dismiss. *State v. Hicks*, 319 N.C. 84, 90, 352 S.E.2d 424, 427 (1987). In *State v. Hicks*, our Supreme Court held that the witness' "ambiguous testimony" that the defendant had " 'put his penis in the back of [her]' " was insufficient to support a jury finding of anal penetration without "corroborative evidence (such as physiological or demonstrative evidence)." *Id.*

In *State v. Estes*, although the prosecuting witness used ambiguous terms, we distinguished *Hicks* because she clarified her use of ambiguous terms by other testimony. *State v. Estes*, 99 N.C. App. 312, 315-16, 393 S.E.2d 158, 160 (1990). In *Estes*, the witness testified that "the defendant put his penis in the 'back' and then explained that she meant 'where I go number two.' " *Id.* at 316, 393 S.E.2d at 160. We held that the "testimony, taken as a totality, is sufficient evidence that the defendant penetrated the anal opening." *Id.*

---

2. At trial, defendant admitted that it is likely Tiffany had been the victim of sexual abuse.

The present case is more analogous to *Estes*. While Tiffany did use potentially ambiguous terms such as "middle hole" and "bottom hole," her testimony was far from ambiguous. Like the witness in *Estes*, she explained these ambiguous terms. Tiffany distinguished between a middle hole "where babies come from," a bottom hole where things come out of that go in the toilet, and a third hole from which she urinates. She also described defendant's manhood as "down at the bottom but on the front" and not a part a woman has. Tiffany's testimony made clear what parts she was referring to during her descriptions of sexual abuse, unlike *Hicks*. Given her explanation of these body parts, her statement that defendant put his "manhood inside her middle hole" clearly describes vaginal penetration by the male sex organ.

Defendant further argues that Tiffany's testimony is overly contradictory, though he fails to highlight any specific contradiction in the record. It is well established that "contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 843 (2011) (citation and quotation marks omitted). Thus, this argument is unavailing.

In fact, there was a great deal of other evidence to support Tiffany's testimony. The State introduced a drawing that she made in her diary after an incident of vaginal intercourse. The drawing showed Tiffany and defendant on her bed with "his manhood going inside of [her]." *Cf. State v. Mueller*, 184 N.C. App. 553, 568-69, 647 S.E.2d 440, 451-52 (finding evidence sufficient to support a conviction for second-degree forcible sexual offense based on the minor child's testimony and her diary entries describing the defendant choking and threatening her), *disc. rev. denied*, 362 N.C. 91, 657 S.E.2d 24 (2007). Her testimony is further supported by sperm found on her bed that matched the defendant's DNA.

A medical expert also testified that she found signs of vaginal penetration during an examination of Tiffany. Tiffany disclosed to a detective that defendant had raped her on 24 May 2010. A general family practitioner, admitted as an expert, testified that she saw Tiffany on 25 May and observed redness around her vaginal opening consistent with vaginal penetration. Another medical expert, who examined Tiffany on 1 June, testified that Tiffany showed signs of chronic penetration over at least a six-month period because she had a thickened, rolled hymen and a notch in the posterior of her hymen indicating a tear.

Taken in the light most favorable to the State, Tiffany's testimony, supported by her contemporaneous diary drawing, defendant's sperm in an area of abuse, and the medical testimony provide substantial evidence of all elements of the offense of rape of a child and to identify defendant as the abuser. Therefore, we hold that the trial court did not err in denying defendant's motion to dismiss the charge of rape of a child.

III. Written Jury Instructions

[2] Defendant next argues that the trial court erred in failing to give additional jury instructions in open court and failed to make them a part of the record as required by N.C. Gen. Stat. § 15A-1234(d). We hold that the trial court did not err because these jury instructions were not "additional jury instructions" within the meaning of the statute.

"[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (quotation marks and citation omitted). Thus, although defendant failed to object to the trial court's procedure, this issue is preserved for our review.

Defendant argues that the trial court violated N.C. Gen. Stat. § 15A-1234(d) by sending the jury written copies of the jury instructions during deliberations. N.C. Gen. Stat. § 15A-1234(d) mandates that "[a]ll additional instructions must be given in open court and must be made a part of the record." N.C. Gen. Stat. § 15A-1234(d) (2011).

This Court has previously held that "[w]here the trial judge simply repeats or clarifies instructions previously given and does not add substantively to those instructions, the latter instructions are not 'additional instructions' as that term is contemplated in section 15A–1234(c)." *State v. Rich*, 132 N.C. App. 440, 448, 512 S.E.2d 441, 447 (1999) (citation, quotation marks, and brackets omitted), *aff'd*, 351 N.C. 386, 527 S.E.2d 299 (2000); *State v. Smith*, 188 N.C. App. 207, 212-13, 654 S.E.2d 730, 735 ("A careful review of the court's instructions in response to the jury questions reveals that they were simply a reiteration of the court's original instructions and cannot be characterized as additional instructions. We therefore hold that it was unnecessary for the court to inform the parties of the supplemental instructions it intended to give." (citation omitted)), *app. dismissed and disc. rev. denied*, ___ N.C. ___, 667 S.E.2d 274 (2008). Additionally, we note that "[a] trial court has inherent authority, in its discretion, to submit its instructions on the law to the jury in writing." *State v. McAvoy*, 331 N.C. 583, 591, 417 S.E.2d 489, 494 (1992) (citation omitted).

Here, the trial court did not violate N.C. Gen. Stat. § 15A-1234(d) because it was simply repeating previously given instructions. During jury deliberations, the jury requested that the court "please clarify the definition of the second charge on the verdict sheet." In response to this request and with the consent of both defendant and the State, the judge made six copies of the original charge on rape of a child and first-degree sexual offense with a child.

Defendant has not alleged that the trial judge "add[ed] substantively to those instructions" read in open court. *Rich*, 132 N.C. App. at 448, 512 S.E.2d at 447. In fact, defendant does not allege that the written instructions differed at all from the instructions read in open court, and defendant did not submit as part of the record the copies given to the jury. Therefore, we conclude that the pattern jury instructions given to the jury did not add substantively to the instructions read in open court. Because the written instructions given to the jury by the trial court were not "additional instructions" within the meaning of the statute, the trial court did not err and violate N.C. Gen. Stat. § 15A-1234(d) by submitting them in writing after a jury question requesting clarification. *See Smith*, 188 N.C. App. at 212-13, 654 S.E.2d at 494.

IV. Jury Instructions

[3] Finally, defendant argues that the trial court committed plain error in instructing the jury on a theory of sexual offense that was not supported by the evidence. We hold that even assuming the trial court's instructions were in error, the error was not so fundamental as to entitle defendant to a new trial.

Where a defendant fails to object to jury instructions at trial, the defendant is entitled to relief only if the instructions constitute "plain error." *State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 75 (1990). Here, defendant did not object to the jury instruction at trial and is entitled only to plain error review.

> The 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.

State v. Lawrence, ___ N.C. ___, ___, 723 S.E.2d 326, 333 (2012) (citation, quotation marks, brackets, and ellipses omitted). To determine if the error constitutes fundamental error, we must decide whether "the error had a probable impact on the jury verdict." *Id.* at ___, 723 S.E.2d at 334.

The trial court charged the jury in relevant part as follows:

> For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt.
>
> First, that the defendant engaged in a sexual act with the victim. A sexual act means, cunnilingus, which is any touching, however slight, by the lips or tongue of one person to any part of the female sex organ of another; fellatio, which is any touching by the lips or tongue of one person and the male sex organ of another; analingus, which is any touching by the lips or tongue of one person and the anus of another; anal intercourse, which is any penetration, however slight, of the anus by any person by the male sexual organ of another; and any penetration, however slight, by an object into the genital or anal opening of a person's body.

The disjunctive instructions at issue here would not permit the jury to convict defendant of different offenses. *See*, *e.g.*, *State v. Diaz*, 317 N.C. 545, 554, 346 S.E.2d 488, 494 (1986) (ordering a new trial where it was impossible to tell whether the jury convicted defendant of possession or transportation of marijuana as trafficking), *abrogated in part by State v. Hartness*, 326 N.C. 561, 564-65, 391 S.E.2d 177, 179 (1990) (abrogating the overruling of *State v. Foust*, 311 N.C. 351, 317 S.E.2d 385 (1984)). The alleged error here was in the trial court's definition of what constitutes a sexual act. The statutory definition of "sexual act" does not create separate offenses, but "enumerates the methods by which the single wrong of engaging in a sexual act with a child may be shown." *State v. Petty*, 132 N.C. App. 453, 462, 512 S.E.2d 428, 434 (quotation marks omitted), *disc. rev. denied*, 350 N.C. 598, 537 S.E.2d 490 (1999). Nevertheless, we have ordered a new trial where the trial court defined "sexual act" to include acts for which there was no evidence. *See*, *e.g.*, *State v. Hughes*, 114 N.C. App. 742, 746, 443 S.E.2d 76, 79, *disc. rev. denied*, 337 N.C. 697, 448 S.E.2d 536 (1994). "A trial judge should never give instructions to a jury which are not based upon a state of facts presented

by some reasonable view of the evidence." *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 699 (1973).

It is uncontested that there was no evidence of cunnilingus, but that the trial court nevertheless included that act in its definition of sexual act.[3] Defendant is not entitled to a new trial, however, because we conclude that there is no probability that the error affected the verdict.

We have found that there is no probable impact on the jury verdict where there is "overwhelming evidence" of the element to which the erroneous instruction related. *See Lawrence*, ___ N.C. at ___, 723 S.E.2d at 334-35. In *Lawrence*, the trial court entirely omitted the element of agreement in instructing the jury on the elements of conspiracy to commit robbery, but the Supreme Court found no probable impact from the error because multiple co-conspirators testified of the plan of the group, that the defendant knew of this plan, and after hearing of the plan "volunteered" his gun for the crime. *Id.*

Here, Tiffany testified that defendant "would stick his manhood up inside [her] or his fingers." Tiffany related a specific incident of digital penetration. Tiffany described a time on her dog's birthday when she was locked in her bedroom and upon being released by defendant, "he stuck his finger up inside me" and then made her watch a video of people "getting their freak on." She did not specify on how many occasions defendant had digitally penetrated her. The detective who investigated this case testified without timely objection that Tiffany told her that at times defendant "would use his finger to sort of open her up before the vaginal sex and the anal . . . ."

Tiffany also described an incident of anal intercourse. Tiffany testified in response to how often the defendant had "put his manhood in [her] bottom hole" that she could only "remember him doing that once in the bottom hole." She was also able to describe this incident. The prosecutor asked Tiffany, "Now, when he would put his manhood in your back or bottom hole, where would you be on your bed?" She replied, "I would be laying on my stomach." Finally, Tiffany had stated to

---

3. Defendant also contends that there was no evidence of fellatio. Tiffany had previously stated to a detective that defendant had required Tiffany on multiple occasions to put his "wee wee" in her mouth. Defendant's objection to this testimony was overruled by the trial court because the objection was not made "contemporaneously with the question and the answer." "[E]vidence admitted without objection, though it should have been excluded had proper objection been made, is entitled to be considered for whatever probative value it may have." *Hill*, 365 N.C. at 278, 715 S.E.2d at 844 (citation and quotation marks omitted). Defendant fails to note that there was also no evidence presented concerning analingus, which was also included in the trial court's definition of sexual act.

a detective that on multiple occasions the defendant had put his "wee wee" in her mouth. This testimony was introduced by the detective at trial, again without timely objection.

We conclude that there was overwhelming evidence that defendant performed various sexual acts on Tiffany such that the jury probably would not have reached a different verdict under proper instruction. Therefore, defendant is not entitled to a new trial on the charge of first-degree sexual offense.

V. Conclusion

We hold that the trial court did not err in denying defendant's motion to dismiss the charge of rape of a child, nor in sending written instructions to repeat the oral instructions given in court. Finally, we conclude that the court did not commit plain error in instructing the jury on acts, unsupported by the evidence, which could constitute a sexual act as an element of sexual offense with a child.

NO ERROR; NO PLAIN ERROR.

Judges STEPHENS and DILLON concur.

STATE OF NORTH CAROLINA
v.
GARY L. DAVIS

No. COA12-1054

Filed 19 March 2013

1. Criminal Law—instruction—flight

The trial court did not err in a second-degree murder case by instructing the jury on flight. Given that the shooting occurred after 2:30 am, defendant's decision to leave the state and return to Florida at such an early and unusual hour was an action outside of his likely normal pattern of behavior.

2. Sentencing—prior record level—improper assessment of out-of-state conviction

The trial court erred in a second-degree murder case in its consideration of defendant's Georgia conviction when assessing his prior record level. The case was remanded for resentencing.

Appeal by defendant from judgment entered 30 March 2012 by Judge Bradley B. Letts in Henderson County Superior Court. Heard in the Court of Appeals 27 February 2013.

Michael E. Casterline, attorney for defendant.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel Snipes Johnson, for the State.

ELMORE, Judge.

Gary L. Davis (defendant) appeals from a judgment entered upon a jury conviction of second-degree murder, sentencing him to 220 to 273 months imprisonment. After careful consideration, we conclude that defendant received a trial free from error, but we remand for resentencing.

I. Background

On 5 December 2008, defendant and a group of men were gathered at a house rented by Richard Shaw, located at 116 Jones Street in Hendersonville. Defendant was visiting from Florida and staying next door at his aunt Eve Jewel's house. At some point in the evening, defendant began arguing with one of the other men. The argument quickly escalated, and the group disbanded. Most of the men left, including defendant who went back to his aunt's house next door. However, Shaw and his friend Chris Jones remained in Shaw's house.

Some time later, defendant returned to Shaw's house and began knocking on the front door. When no one opened the door, defendant ran around to the back of the house, and kicked the back door open. Shaw and Jones then ran out of the house, and defendant fled in a white car.

Then, around 2:30 AM, Shaw and Jones heard two men arguing outside. Shaw recognized one of the voices as Keith Collins (the victim), a friend of both Shaw and Jones. Jones then exited the house and observed the victim arguing with defendant. Defendant then fired several shots, killing the victim. After the shooting, officers were unable to locate defendant, but he was arrested three months later in Florida.

Defendant was charged with first-degree murder and tried on 26 March 2012. At trial, the State presented evidence tending to show that defendant returned to Florida immediately after shooting the victim.

Accordingly, the trial court instructed the jury on flight. Defendant was then convicted of second-degree murder and sentenced to 220-273 months imprisonment. At the sentencing hearing, the trial court found defendant to have a prior record level of III, based in part upon a Georgia conviction for theft by taking. Defendant now appeals, arguing 1) that the trial court erred in instructing the jury on flight and 2) that the trial court erred in assessing his prior record level.

II. Analysis

A. Jury instruction on flight

[1] Defendant first argues that the trial court erred in its jury instructions, because the State presented no evidence tending to show that he took steps to avoid apprehension. We disagree.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial. *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974).

> This Court has held that an instruction on flight is justified if there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged. Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension.

State v. Blakeney, 352 N.C. 287, 314, 531 S.E.2d 799, 819 (2000)(quotations and citations omitted).

Here, the State presented evidence tending to show that officers were unable to locate defendant for several months following the shooting. Specifically, the lead detective on the case testified that on the night of the shooting officers searched for defendant at his aunt's house but were unable to locate him there. Officers continued to search for defendant throughout the neighborhood, but he was nowhere to be found. Rather, officers received word that defendant had left the state, at which point they "enlisted the help of the U.S. Marshals." According to the lead detective, the U.S. Marshals found defendant three months later in Florida.

However, defendant contends that his presence in Florida, the state where he lived, is not indicative of whether he avoided apprehension. Again, we disagree.

This Court has held that an action "not part of Defendant's normal pattern of behavior . . . could be viewed as a step to avoid apprehension." *State v. Hope*, 189 N.C. App. 309, 319, 657 S.E.2d 909, 915 (2008) (quotations and citation omitted). Here, the State offered evidence showing that defendant "had resided at [his aunt's] residence before the shooting," but that after the shooting he did not return to his aunt's house but returned to Florida instead. Given that the shooting here occurred after 2:30 AM, we conclude that defendant's decision to leave the state and return to Florida at such an early and unusual hour is an action outside of his likely normal pattern of behavior. As such, we conclude that the trial court did not err in instructing the jury on flight.

B. Prior record level

[2] Defendant's second argument is that the trial court erred in considering his Georgia conviction when assessing his prior record level. Defendant contends that his Georgia conviction for theft by taking is not substantially similar to the offense of misdemeanor larceny. We agree, and we note that the State has conceded this issue on appeal.

> The standard of review relating to the sentence imposed by the trial court is whether the sentence is supported by evidence introduced at the trial and sentencing hearing. [T]he 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 requiring *de novo* review on appeal.

State v. Sanders, __ N.C. App __, __, 736 S.E.2d 238 (2013) (quotations and citation omitted) (alteration in original).

> Generally, a conviction occurring in a jurisdiction other than North Carolina . . . is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. No sentencing points are assigned for Class 3 misdemeanor convictions. However, [i]f the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is *substantially similar* to an offense classified as a Class A1 or Class 1 misdemeanor in North

> Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

Id.

Here, the State bore the burden of proving that defendant's Georgia conviction for theft by taking counted towards his prior record level. However, the record indicates that the trial court erroneously assigned defendant one prior record point for the conviction without any argument from the State. Further, we conclude that the Georgia offense is not substantially similar to misdemeanor larceny.

Under Georgia law, "[a] person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated." O.C.G.A. § 16-8-2 (2012). Under the statute it is "irrelevant whether the deprivation . . . [is] permanent or temporary." *Smith v. State*, 172 Ga. App. 356, 357, 323 S.E.2d 257, 258 (1984) (quotations and citations omitted)(alterations in original). In contrast, "temporary deprivation will not suffice" for misdemeanor larceny. *State v. Watts*, 25 N.C. App. 194, 198, 212 S.E.2d 557, 559 (1975).

As such, we conclude that the two offenses are not substantially similar. Accordingly, we remand for resentencing.

No trial error, remanded for resentencing.

Judges BRYANT and ERVIN concur.

STATE OF NORTH CAROLINA
v.
MICHAEL WAYNE GALLOWAY

No. COA12-1049

Filed 19 March 2013

1. Indictment and Information—insufficient—discharging a firearm into an occupied vehicle in operation—sufficient to support lesser offense

An indictment charging defendant with discharging a firearm

into an occupied vehicle in operation was insufficient to support his conviction. The indictment failed to allege that the vehicle was "in operation" and was sufficient only to support a conviction as to the lesser offense of discharging a firearm into an occupied vehicle.

2. Crimes, Other—discharging a firearm into an occupied vehicle in operation—sufficient evidence

The trial court did not err in a discharging a firearm into an occupied vehicle in operation case by denying defendant's motion to dismiss. The State presented sufficient evidence of each element of the offense and that defendant was the perpetrator.

Appeal by Defendant from judgment entered 13 April 2012 by Judge William Z. Wood, Jr., in Stokes County Superior Court. Heard in the Court of Appeals 14 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General Kevin G. Mahoney, for the State.

Bushnaq Law Office, PLLC, by Faith S. Bushnaq, for Defendant.

DILLON, Judge.

On 13 April 2012, Michael Wayne Galloway (Defendant) was convicted by a jury of discharging a firearm into an occupied vehicle in operation, a Class D felony pursuant to N.C. Gen. Stat. § 14-34.1(b), in addition to three other charges. Defendant appeals only from his conviction for discharging a firearm into an occupied vehicle in operation. Defendant contends (1) that the indictment was insufficient to support his conviction because it failed to allege that the vehicle was "in operation"; and (2) that the trial court erred in denying his motion to dismiss this charge for insufficiency of the evidence. We hold that the indictment was sufficient only to support a conviction as to the lesser offense of discharging a firearm into an occupied vehicle, a Class E felony under N.C. Gen. Stat. § 14-34.1(a), and we accordingly vacate and remand to the trial court for entry of judgment as to this lesser offense. We find no error in the trial court's denial of Defendant's motion to dismiss.

I. Factual & Procedural Background

The evidence at trial tended to show the following: On 18 August 2011, Bradley Heath (Mr. Heath) was driving home from work in Walnut

Cove, North Carolina, when he observed a dog in the middle of the intersection of Dodgetown Road and Highway 89. Both his driver side and passenger windows were open. Mr. Heath stopped at the intersection and waited for the dog to move out of the road. Mr. Heath then observed Defendant walking along the side of the road with a grocery bag in one hand. Defendant "said something to the dog and the dog came off the side of the road towards him." Defendant then looked at Mr. Heath and said, "You run over that . . . dog, I'll kill you." Mr. Heath responded that he wasn't going to hit the dog, but that he was merely "waiting on the dern thing to get out of the road so [that he could] go home." Mr. Heath testified that as he proceeded through the intersection, he "look[ed] back" and, "out of the corner of [his] eye[,]" observed Defendant pull "a small object . . . out of his pocket [which] he [then] shot" in the direction of Mr. Heath's vehicle, producing a visible "flame." Mr. Heath further testified that he knows "what a gun sounds like" based upon his experience with firearms and that he believed that Defendant had fired "a small caliber type gun because of the flash" and because of the sound emitted from the object. Defendant testified that he had set off a bottle rocket, not a firearm, and that he did not even own a firearm.

Mr. Heath contacted the police upon returning home that day to report the incident. Deputy Samuel Pegram (Deputy Pegram) of the Stokes County Sheriff's Office responded to Mr. Heath's 911 call and subsequently located Defendant "sitting off the side of the road beside a large flower pot" by a residence near where the alleged shooting had occurred. Deputy Pegram recovered a .22 caliber pistol from the flower pot and noted that one round had been fired. However, no bullet holes were found in Mr. Heath's vehicle or in the area where Defendant had purportedly fired a weapon.

At the close of all the evidence, Defendant moved to dismiss the charge of discharging a firearm into a vehicle in operation, arguing that even if the windows in Mr. Heath's vehicle had been down at the time of the alleged shooting, it would have been "virtually impossible" for a bullet to have passed through the cabin of the vehicle — based upon where Defendant was standing — without making contact with either Mr. Heath or the vehicle. However, the trial court concluded that there was sufficient evidence to submit the charge to the jury and denied the motion.

After the jury returned guilty verdicts on all charges, the trial court sentenced Defendant for each conviction, including a sentence within the presumptive range of 103 months to 133 months for discharging a firearm into an occupied vehicle in operation. Defendant appeals.

II. Analysis

A. Jury Instructions/Indictment

[1] Defendant first contends that the trial "court erred by instructing the jury, and accepting its verdict of guilty, for the offense of shooting into an occupied vehicle *in operation*, a crime for which [Defendant] was not indicted." (Emphasis added).

N.C. Gen. Stat. § 15A-924(a)(5) requires that an indictment set forth the following:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2011); *see also State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) ("An indictment charging a statutory offense must allege all of the essential elements of the offense."). "It is well settled that 'a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony.' " *State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143 (1994) (citation omitted). Lack of jurisdiction in the trial court due to a fatally defective indictment requires " 'the appellate court . . . to arrest judgment or vacate any order entered without authority.' " *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 836 (1993) (citation omitted).

Here, Defendant was charged with the offense of discharging a firearm into an occupied vehicle under N.C. Gen. Stat. § 14-34.1, which consists of three subsections:

> (a) Any person who willfully or wantonly discharges or attempts to discharge any firearm or barreled weapon . . . into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.
>
> (b) A person who willfully or wantonly discharges a weapon described in subsection (a) of this section into an occupied dwelling or into any occupied vehicle, aircraft, watercraft, or other conveyance that is *in operation* is guilty of a Class D felony.

> (c) If a person violates this section and the violation results in serious bodily injury to any person, the person is guilty of a Class C felony.

N.C. Gen. Stat. § 14-34.1 (2011) (emphasis added). The trial court instructed the jury on the offense of discharging a firearm into a vehicle "that is in operation" under subsection (b), *supra*, and the jury returned a verdict convicting Defendant of that offense. Defendant now argues, in substance, that this conviction cannot stand because the charging indictment failed to specify that the vehicle was "in operation" at the time in question. We agree.

The indictment at issue reads as follows:

> THE JURORS FOR THE STATE upon their oath present that on or about the 18th day of August, 2011 in the county named above, [Defendant] unlawfully, willfully, and feloniously did discharge a .22 caliber revolver, a firearm, into a 2000 Ford F-350 pick-up truck, a vehicle, at the intersection of Dodgetown Road and Highway 89 East in Walnut Cove, North Carolina, while it was actually occupied by Bradley Austin Heath."

The indictment is captioned "DISCHARGING INTO OCCUPIED DWELLING/CONVEYENCE (CL.D)" and describes the charged offense as an "Offense in Violation of G.S. 14-34.1."

We conclude that the indictment failed to properly allege the offense described under N.C. Gen. Stat. § 14-34.1(b), as it failed to specify that the vehicle was "in operation" at the time in question. The critical distinction between the Class E felony offense described under N.C. Gen. Stat. § 14-34.1(a) and the Class D felony offense described under N.C. Gen. Stat. § 14-34.1(b) is that the latter, elevated offense requires an additional element, namely that the vehicle be "in operation" at the time of the shooting. Here, the indictment's failure to draw this distinction by including the requisite "in operation" element rendered it insufficient to charge the elevated offense. Neither the language of the indictment – for instance, its placement of the vehicle "at the intersection of Dodgetown Road and Highway 89 East" – nor the caption's reference to a Class D felony with the notation "CL.D" cures this defect. Thus, the trial court's instruction on the charge of discharging a firearm into a vehicle in operation was error.

This Court's prior ruling in *State v. Rodriguez*, 192 N.C. App. 178, 664 S.E.2d 654 (2008), dictates our disposition of this issue. In *Rodriguez*,

the defendant appealed from his two first degree kidnapping convictions, contending that the indictments were insufficient to support those convictions because they lacked the language required to elevate a kidnapping charge from second degree to first degree. *Id.* at 184-85, 664 S.E.2d at 658-59. This Court agreed and held as follows:

> Because the indictments did not clearly allege the essential elements of first degree kidnapping - that the victims were seriously injured or not released in a safe place - they are insufficient to charge kidnapping in the first degree. *However, the indictments are valid for second degree kidnapping. Because the jury found all of the elements of second-degree kidnapping beyond a reasonable doubt by virtue of its guilty verdict of first degree kidnapping, defendant stands convicted of second degree kidnapping under this indictment.*

Id. at 185, 664 S.E.2d at 659 (emphasis added).

Here, the jury found all of the elements for the Class E felony offense of discharging a firearm into an occupied vehicle by virtue of its guilty verdict on the Class D felony charge of discharging a firearm into an occupied vehicle in operation. Thus, we conclude that the indictment at issue was sufficient to convict Defendant of the offense of discharging a firearm into a vehicle under N.C. Gen. Stat. § 34-14.1(a). We accordingly hold that the judgment for discharging a firearm into an occupied vehicle in operation under N.C. Gen. Stat. § 34-14.1(b) must be arrested, and we remand to the trial court for resentencing on the lesser offense of discharging a firearm into an occupied vehicle under N.C. Gen. Stat. § 14-34.1(a).[1] *See State v. Moore*, 316 N.C. 328, 336-37, 341 S.E.2d 733, 739 (1986); *Rodriguez*, 192 N.C. App. at 185, 664 S.E.2d at 659.

---

1. We note Defendant's contention that the trial court committed plain error by instructing the jury that it could find Defendant guilty of discharging a firearm into a vehicle in operation and that, as a result, this Court is required to vacate his conviction. Defendant relies primarily upon *State v. Williams*, 318 N.C. 624, 350 S.E.2d 353 (1986), and *State v. Bowen*, 139 N.C. App. 18, 533 S.E.2d 248 (2000), in support of this contention. However, both *Williams* and *Bowen* involved instances where the offenses for which the defendant had been indicted consisted of elements distinct from the elements of the offenses for which the trial court instructed the jury. *Williams*, 318 N.C. at 624, 631-32, 350 S.E.2d at 354, 357-58 (finding plain error and vacating forcible rape conviction where the jury was erroneously instructed on statutory rape, an offense which was unsupported by the indictment); *Bowen*, 139 N.C. App. at 23-24, 533 S.E.2d at 252 (vacating first-degree sexual offense convictions where the trial court committed plain error by instructing the jury on statutory sexual offense, instead of first degree sexual offense, as charged in the indictments). The guilty verdicts returned by the juries in those

B. Sufficiency of the Evidence

[2] Defendant next contends that the trial court erred in denying his motion to dismiss for insufficiency of the evidence because "it was physically impossible for [Defendant] to have fired the shot as [Mr. Heath] speculated." We disagree.

"When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The trial court should grant the defendant's motion to dismiss "[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982).

"The elements of discharging a firearm into occupied property are '(1) willfully and wantonly discharging (2) a firearm (3) into property (4) while it is occupied.' " *State v. Dubose*, 208 N.C. App. 406, 409-10, 702 S.E.2d 330, 333 (2010) (quoting *State v. Rambert*, 341 N.C. 173, 175, 459 S.E.2d 510, 512 (1995)); *see also* N.C. Gen. Stat. § 14–34.1. In determining whether substantial evidence of each element exists, we must view the evidence "in the light most favorable to the State[,] . . . [and] the State is entitled to . . . every reasonable inference to be drawn therefrom[.]" *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Conflicting testimony, contradictions, and discrepancies are factual determinations to be resolved by the jury and do not require dismissal. *State v. Prush*, 185 N.C. App. 472, 478, 648 S.E.2d 556, 560 (2007). However, whether substantial evidence exists as to each element of the charged offense is a question of law. *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 433 (1956). Accordingly, we review the trial court's denial of Defendant's motion to dismiss *de novo*. See *State v. McNeil*, 209 N.C. App. 654, 659, 707 S.E.2d 674, 679 (2011).

Here, viewing the evidence in the light most favorable to the State, we conclude that there existed substantial evidence of each of the

---

cases were thus unsupported by the indictments. Here, in contrast, the jury found all of the elements of the Class E felony offense of discharging a firearm into an occupied vehicle, and the indictment upon which Defendant was charged supported the jury's guilty verdict. As such, the proper remedy is to vacate the existing judgment and remand to the trial court for entry of judgment convicting Defendant of this lesser offense.

elements of the charged offense. Defendant contends that it would have been physically impossible for him to shoot into Mr. Heath's vehicle based upon where he was standing at the time of the shooting; however, based on the evidence in the record, Defendant's position relative to the vehicle at the time of the shooting was a factual determination reserved for the jury. *See State v. Miller*, 289 N.C. 1, 4, 220 S.E.2d 572, 574 (1975) ("What the evidence proves [or] fails to prove is a question of fact for the jury."). While it is true, as Defendant points out, that "no bullet holes were found anywhere in the vehicle" and that no "[b]ullet casings [or] bullets were [] found in nearby trees or on the road[,]" Defendant's argument ignores evidence from which a reasonable jury could conclude that Defendant fired into Mr. Heath's vehicle. *See State v. Hines*, 166 N.C. App. 202, 205, 600 S.E.2d 891, 894 (2004) (holding that the trial court correctly denied defendant's motion to dismiss charge of robbery with a dangerous weapon where the "testimony would permit a reasonable jury to infer the existence of a dangerous weapon"). For instance, citing his experience with firearms, Mr. Heath testified unequivocally that, on the date in question, Defendant removed a "small caliber gun" from his pocket and fired it in the direction of his vehicle:

> [Prosecutor:] So with your experience in guns, you know what it was.
>
> [Mr. Heath:] Yes, sir.
>
> [Prosecutor:] And what was it?
>
> [Mr. Heath:] It was [a] pistol; a small, small caliber gun.
>
> [Prosecutor:] And it was shot at you.
>
> [Mr. Heath:] Correct. The flame, I seen the flame out of the barrel into my direction.

Mr. Heath also testified that the windows in his vehicle were down at the time of the incident. Moreover, one round had been fired from the firearm — a .22 caliber pistol — recovered near Defendant at the time of his arrest. Based on this evidence, a jury could reasonably infer that Defendant discharged a firearm into Mr. Heath's vehicle; and, having reached this determination, we again stress that whether the bullet fired actually passed through the cabin of Mr. Heath's vehicle was a question for the jury. *See Withers v. Lane*, 144 N.C. 184, 187, 56 S.E. 855, 856 (1907) (explaining that it is "the true office and province of the jury to weigh the testimony and decide upon its adequacy to establish any issuable fact").

Defendant does not contend that the State failed to meet its burden in establishing the remaining elements of the charged offense.[2] *See* N.C. R. App. P. 28(b)(6) (2013) (providing that "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned"). Accordingly, we hold that the trial court did not err in denying Defendant's motion to dismiss.

III. Conclusion

For the foregoing reasons, we vacate the judgment convicting Defendant of discharging a firearm into an occupied vehicle in operation and remand to the trial court for entry of judgment as to the lesser offense of discharging a firearm into an occupied vehicle, as described in N.C. Gen. Stat. § 14-34.1(a). Furthermore, we find no error in the trial court's denial of Defendant's motion to dismiss.

VACATED and REMANDED in part; NO ERROR in part.

Judges STEPHENS and STROUD concur.

STATE OF NORTH CAROLINA
v.
TYSHAWN HINTON, DEFENDANT

No. COA12-796

Filed 19 March 2013

1. Evidence—gang-related testimony—irrelevant—prejudicial—plain error

The trial court erred in an attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon with intent to kill case by allowing irrelevant gang-related testimony. Furthermore, in view of the entire record, the admission of the testimony had a probable

---

2. Defendant's contention on this issue focuses upon the "physical impossibility" of Defendant shooting into Mr. Heath's vehicle. Defendant does not challenge the State's evidence with respect to the remaining elements of the offense, i.e., whether the shooting was "willful and wanton," whether Defendant in fact discharged a "firearm," or whether the vehicle was occupied at the time of the shooting. *See State v. Rambert*, 341 N.C. at 175, 459 S.E.2d at 512; N.C. Gen. Stat. § 14–34.1. With respect to whether Defendant discharged a firearm, we note Defendant's statement in his brief that "[t]aken in the light most favorable to the State, . . . [Defendant] shot a handgun rather than setting off a bottle rocket[.]"

impact on the jury's finding that defendant was guilty and thus constituted plain error.

2. Judges—discretionary ruling—jury request—prejudicial

The trial court erred in an attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon with intent to kill case when it failed to exercise its discretion in denying the jury's request to review testimony. As the testimony related to issues which were likely material to the determination of defendant's guilt or innocence, the trial court's failure to exercise discretion was prejudicial to defendant.

Appeal by defendant from judgment entered 9 December 2011 by Judge Walter H. Godwin, Jr., in Pasquotank County Superior Court. Heard in the Court of Appeals 13 December 2012.

Roy Cooper, Attorney General, by Tina L. Hlabse, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Kristen L. Todd and Hannah Hall, Assistant Appellate Defenders, for defendant–appellant.

MARTIN, Chief Judge.

Defendant Tyshawn Hinton was charged in a true bill of indictment with attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon with intent to kill. A jury acquitted defendant of the attempted first-degree murder charge, but found defendant guilty of both assault charges. Judgment was entered upon the jury's verdict sentencing defendant to not less than 25 months and not more than 39 months of imprisonment for assault with a deadly weapon with intent to kill, and a consecutive term of not less than 73 months and not more than 97 months of imprisonment for assault with a deadly weapon with intent to kill inflicting serious injury. He appeals.

The State's evidence at trial tended to show that on or about the night of 22 February 2009, Myquetta McPherson was alerted by a neighbor's screams to call 911. Ms. McPherson telephoned 911 and told the dispatcher that someone had been shot and was lying in the road on Pritchard Street. The individual was later identified as Daniel Lindsey. Mr. Lindsey had been shot in the neck and was lying in a large pool of blood. Mr. Lindsey was taken to Albemarle Hospital where he was

diagnosed as paralyzed below his chest due to a spinal cord injury from the gunshot. Mr. Lindsey was ultimately airlifted to Norfolk General Hospital because of the seriousness of his injuries.

Officer Leroy Owen, a crime scene investigator for the Elizabeth City Police Department, was called to the scene of the Pritchard Street shooting. From the scene, Officer Owen collected the victim's cell phone and a nine-millimeter shell casing with a Winchester headstamp. Though the fired bullet exited the victim's body, Officer Owen was unable to locate the projectile at the scene.

Officer Owen left the scene of the Pritchard Street shooting to investigate an earlier shooting at the Sunoco gas station located at the intersection of Halstead Boulevard and Hughes Boulevard, commonly referred to as "H&H." In the Sunoco parking lot, Officer Owen found another nine-millimeter shell casing with a Winchester headstamp and a red bandana. Officer Owen also discovered that an alarm had been triggered at the Ruby Tuesday's restaurant across the intersection from the Sunoco. Officer Owen observed that one of the restaurant's windows had been shattered. After a search of the interior of the restaurant, Officer Owen found a fragment of a bullet's copper jacket and testified at trial that it had likely been fired from the direction of the Sunoco. Officer Owen also testified that the shell casing he recovered from Pritchard Street was "consistent" with the shell casing found at the Sunoco and that they would both "fit in the same gun." However, the trial court did not allow an SBI agent to testify as to whether the two casings Officer Owen recovered were fired from the same weapon. The court ruled the testimony inadmissible because the SBI agent could not identify one of the two casings entered into evidence as having her markings and therefore could not say whether it was the casing she actually tested in the lab. A gun was never introduced into evidence nor connected to defendant.

Sergeant P.W. Perry obtained a statement from a woman who said she saw a short, black male about 5' 4" tall wearing a dark jacket and jeans leaving Pritchard Street after the gunshot. This description was never connected to defendant.

About a month later, Detective Barbara Morgan and Sergeant Gary Bray interviewed Mr. Lindsey at Norfolk General Hospital. Due to his injuries, Mr. Lindsey's speech was impaired and the officers could not hear him, but he was able to make facial expressions and shake his head. Mr. Lindsey told the officers that it was defendant who had shot him. Mr. Lindsey made a second consistent statement to the officers the

following month. He also told the officers he had been at the Sunoco station ten minutes before the incident on Pritchard Street and that defendant had shot at him and missed. Detective Morgan testified that "[Mr. Lindsey] knew exactly what he was talking about."

Sergeant Bray testified that he has special training in narcotics and gang investigations. In February 2009, he was the commander of the drug and gang unit with the Elizabeth City Police Department. Over the years, he has been involved in hundreds of gang-related investigations, including numerous gang-related shootings. Sergeant Bray testified that Bloods and Crips[1] are the predominant gangs in Elizabeth City. Sergeant Bray testified regarding the subsets of the Bloods organization in Elizabeth City. Sergeant Bray also discussed the rivalries and conflicts between gangs and their subsets. Sergeant Bray maintains a database of gang members. The individuals in the database are either self-admitted gang members or persons who meet certain criteria, including associating with known gang members, engaging in criminal activity with a gang, or having tattoos, markings, and clothing consistent with gang membership. Sergeant Bray discussed the leadership and hierarchy of gangs as well.

As the commander of the drug and gang unit, Sergeant Bray was required to investigate all "shots-fired" calls in Elizabeth City, including the shooting on Pritchard Street. Pritchard Street, according to Sergeant Bray, is not a known gang area. Sergeant Bray testified that the red bandana recovered at H&H was "consistent with" what the Bloods would wear. H&H is a place where people often congregate after the clubs close, and has been the scene of numerous shootings, but Detective Bray did not testify that it was a known gang area. When the State asked if anyone connected to the events at issue was a known member of a gang, defense counsel objected. After a lengthy *voir dire* and arguments to the trial court, the trial court excluded the State's proffered evidence that defendant was a self-admitted gang member, due to a violation of his juvenile *Miranda* rights when he made the statement.

Mr. Lindsey testified with difficulty despite the aid of an interpreter to verbalize his testimony. His testimony was also interrupted numerous times by objections for leading and the trial court's reprimands to the State. At times, the interpreter resorted to the use of a legal pad with the alphabet written on it, reading each letter and judging Mr. Lindsey's response, attempting to spell out the answer. Through the interpreter, Mr. Lindsey testified that he was at the Sunoco station at Hughes and

1. While the trial transcript uses the spelling "Crypts," the generally accepted spelling of this gang's name is "Crips."

Halstead and saw defendant there. He testified that defendant shot at him at the gas station. Mr. Lindsey testified that after he left the gas station, he was later shot in the neck. Mr. Lindsey again identified defendant as the shooter at this second location. Mr. Lindsey was unable to testify as to the street on which the second shooting occurred. Mr. Lindsey testified that defendant and another individual named "Joey" then left in a pink car. Joey was the driver. Mr. Lindsey believed defendant shot him because he was in a sexual relationship with defendant's aunt. Defendant presented no evidence.

After the jury retired for deliberations, it sent a note to the trial judge, asking to review the testimony of Detective Morgan and Sergeant Bray concerning their interview of Mr. Lindsey in the hospital. The jury also wanted to review the SBI agent's testimony about the shell casings and asked if the casings matched. The trial court read the note to counsel for the State and counsel for defendant, and indicated that the court was going to give Pattern Jury Instruction 101.50, "Duty to Recall the Evidence." The trial court then asked counsel whether the court should tell the jury "that the information that they have requested has already been presented and is not in a form which can be presented to them, or just leave it at the instruction?" When the jury was brought in, the court simply read the instruction.

After further deliberations, the jury found defendant not guilty of attempted first-degree murder, but found defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon with intent to kill. Though the State gave notice of intent to prove several aggravating factors, among them that defendant committed the crime for the benefit of or at the direction of a criminal street gang, or with the intent to promote, further, or assist in the criminal activities of a criminal street gang, the State ultimately did not pursue an aggravated sentence.

---

[1] Defendant first argues the trial court erred by allowing testimony from Sergeant Bray regarding gang activity in Elizabeth City. Specifically, defendant contends the testimony was irrelevant and highly inflammatory when no evidence was presented to the jury that the offense in question was gang related. Defendant did not object to the testimony at trial; thus, the standard of review is plain error. *See* N.C.R. App. P. 10(a)(4); *see also State v. Rourke*, 143 N.C. App. 672, 675, 548 S.E.2d 188, 190, *cert. denied*, 354 N.C. 226, 553 S.E.2d 396 (2001).

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). A fundamental error is one where "after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (internal quotation marks omitted). The burden of demonstrating the existence of this prejudice is on the defendant. *Id.* at 516, 723 S.E.2d at 333 (citing *State v. Melvin*, 364 N.C. 589, 593–94, 707 S.E.2d 629, 632–33 (2010)).

North Carolina courts have long held that membership in an organization may only be admitted if relevant to the defendant's guilt. *State v. Privette*, __ N.C. App. __, __, 721 S.E.2d 299, 314–15 (excluding membership in the Bloods as to one defendant), *disc. review denied sub nom. State v. Smith*, __ N.C. __, 724 S.E.2d 532 (2012); *State v. Freeman*, 313 N.C. 539, 548, 330 S.E.2d 465, 473 (1985) (excluding, in part, membership in the Southern Cross motorcycle gang); *State v. Lynch*, 279 N.C. 1, 18, 181 S.E.2d 561, 572 (1971) (excluding membership in the Black Panthers), *superseded on other grounds by rule as stated in State v. Stager*, 329 N.C. 278, 316, 406 S.E.2d 876, 898 (1991). The United States Supreme Court has opined that evidence of gang membership may be relevant to prove an aggravating factor. *Dawson v. Delaware*, 503 U.S. 159, 166, 117 L. Ed. 2d 309, 318 (1992). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2011). "[E]vidence that has not been connected to the crime charged and which [has] no logical tendency to prove any fact in issue [is] irrelevant and inadmissible." *Privette*, __ N.C. App. __, 721 S.E.2d at 314 (second and third alterations in original) (internal quotation marks omitted). Relevant evidence may also be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (2011).

This Court has recognized that admission of gang-related testimony tends to be prejudicial: In *Privette*, we stated that "[t]he only effect of the trial court's decision to allow the admission of this evidence was to depict a 'violent' gang subculture of which [the defendant] was a part and to impermissibly portray [the defendant] as having acted in accordance with gang-related proclivities." __ N.C. App. at __, 721 S.E.2d at 314–15.

In this case, Sergeant Bray's testimony in front of the jury spanned twenty-nine pages of trial transcript, fifteen of which referenced gangs or gang-related activity. The words "gang," "gangster," "Bloods," and

"Crypts [sic]" were used a combined total of ninety-one times. The trial court erred in allowing this gang-related testimony because it had no tendency to make any fact of consequence more likely than not. Nor did this testimony tend to prove an aggravating factor that the crimes were gang-related. Rather, the motive offered by the State in this case was Mr. Lindsey's sexual relationship with defendant's aunt, not gang violence. Thus, the State's proffered evidence that defendant was a self-admitted gang member, had it been admitted, was neither relevant to the alleged criminal act nor to the aggravating factor of which the State had given notice of its intent to show. Therefore, the gang-related testimony was never "connected to the crime charged" and was thus "irrelevant and inadmissible." *See Privette*, __ N.C. App. __, 721 S.E.2d at 314.

In addition to being irrelevant, the extensive gang-related testimony carried the danger of unfair prejudice that substantially outweighed its non-existent probative value. *See* N.C. Gen. Stat. § 8C-1, Rule 403. While no one was allowed to testify before the jury that defendant was an actual gang member, we believe the extensive gang-related testimony permitted the jury to assume that defendant was a gang member and draw the inference feared in *Privette*. *See Privette*, __ N.C. App. at __, 721 S.E.2d at 314–15. Therefore, we hold that this testimony was erroneously admitted.

Having concluded that the admission of the gang-related testimony was error, we must decide whether the error rises to the level of plain error. We have not found plain error in admitting gang-related testimony where other sufficient evidence tends to implicate the defendant in the crime. *State v. Dean*, 196 N.C. App. 180, 195, 674 S.E.2d 453, 463–64 (finding no plain error where witnesses' testimonies, though contradictory, tended to place the defendant at the scene of the shooting and firing the gun in question), *appeal dismissed and disc. review denied*, 363 N.C. 376, 679 S.E.2d 139 (2009); *State v. Hightower*, 168 N.C. App. 661, 667, 609 S.E.2d 235, 239 (finding no plain error where "numerous eyewitnesses" provided "overwhelming evidence" of defendant's guilt), *disc. review denied*, 359 N.C. 639, 614 S.E.2d 553 (2005).

In this case, however, only one eyewitness, Mr. Lindsey, implicated defendant in the commission of the crime. Mr. Lindsey's testimony was halting, awkward, and incomprehensible at times due to his physical disability.[2] Mr. Lindsey's interpreter often resorted to asking him to

2. That Mr. Lindsey's speech is impaired due to the crimes defendant is alleged to have committed against Mr. Lindsey is a fact not lost on this Court. However, that fact does not mitigate the erroneous admission of inadmissible evidence.

spell what he was attempting to convey by going through each letter of the alphabet and asking, "A? No. B? No. C? No. D? No. . . ." Frequently when asked a question, the transcript indicates Mr. Lindsey attempted to respond, but the interpreter was presumably unable to understand Mr. Lindsey and so said nothing. And while Detective Morgan testified that Mr. Lindsey told her that defendant was the shooter and was consistent in this statement, such testimony was merely corroborative of Mr. Lindsey and was not substantive evidence that defendant was the shooter. *See State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 340 ("It is well established that a witness'[s] prior consistent statements may be admitted to corroborate the witness'[s] sworn trial testimony but prior statements admitted for corroborative purposes may not be used as substantive evidence."), *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000). In fact, Detective Morgan's testimony may also be construed as improper vouching for Mr. Lindsey's account.

Additionally, no evidence apart from Mr. Lindsey's testimony was introduced linking defendant to the scene of either crime. No evidence was introduced linking defendant to a nine-millimeter firearm or even linking the two nine-millimeter shell casings to the same firearm. And no evidence was introduced linking defendant to the red bandana found at the scene.

The State argues, citing *State v. Gayton*, 185 N.C. App. 122, 126, 648 S.E.2d 275, 279 (2007), that ignoring all evidence related to gangs and gang activity, the unchallenged evidence presented by the State at trial showed that defendant shot at Mr. Lindsey at the Sunoco gas station on 22 February 2009, and later shot Mr. Lindsey in the neck while he was walking on Pritchard Street that same night. However, the State's evidence may be challenged by cross-examination of its witnesses. *State v. Smith*, 290 N.C. 148, 168, 226 S.E.2d 10, 22, *cert. denied*, 429 U.S. 932, 50 L. Ed. 2d 301 (1976).

In this case, defendant cross-examined Mr. Lindsey, pointing out that Mr. Lindsey had to leave a club on the evening of the shooting because of an altercation, suggesting someone other than defendant may have had a motive to commit the crime. Defendant also questioned Mr. Lindsey about his prior convictions, challenging his credibility. *See* N.C. Gen. Stat. § 8C-1, Rule 609(a) (2011). Therefore, the evidence that defendant committed the crime was not "unchallenged."

In view of the entire record, we hold the admission of extensive gang-related testimony "had a probable impact on the jury's finding that

defendant was guilty," *see Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334, and thus constitutes plain error.

[2] Defendant next argues the trial court erred when it failed to exercise its discretion in denying the jury's request to review testimony. Specifically, defendant argues the statement made by the trial court to counsel indicates the trial court believed that "it either did not have the ability to produce a transcript or that a transcript simply was not available."

N.C.G.S. § 15A-1233 concerns the "[r]eview of testimony" and "use of evidence by the jury." N.C. Gen. Stat. § 15A-1233 (2011). It provides:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

Id. The statute imposes a duty upon a trial court to "exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury together with other evidence relating to the same factual issue." *State v. Ashe*, 314 N.C. 28, 34, 331 S.E.2d 652, 656 (1985). If a trial court fails in its duty "by denying the jury's request to review the transcript upon the ground that the trial court has no power to grant the motion in its discretion, the ruling is reviewable, and the alleged error is preserved by law even when the defendant fails to object." *State v. Starr*, 365 N.C. 314, 317, 718 S.E.2d 362, 365 (2011) (internal quotation marks omitted). Our appellate courts will find error "when the trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented." *State v. Lang*, 301 N.C. 508, 510, 272 S.E.2d 123, 125 (1980). It is "the well-settled rule that a trial court does not exercise its discretion when, as evidenced by its response, it believes it cannot comply with the jury's transcript request." *Starr*, 365 N.C. at 318, 718 S.E.2d at 366. In these cases, "the court's additional instruction that the jurors rely on their memory will not render the response discretionary."[3] *Id.* at 318–19, 718 S.E.2d at 366.

---

3. A trial court may avoid this situation altogether and simply state, "In the exercise of my discretion, I deny the request," and instruct the jury to rely on its own recollection.

If the trial court fails to exercise its discretion, the defendant then has the burden to show "that he has been prejudiced by the trial court's error . . . ." *Id.* at 319, 718 S.E.2d at 366. This prejudice may be shown by demonstrating "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2011). Often this will take the form of showing the requested testimony "was material to the determination of [the] defendant's guilt or innocence," *Lang*, 301 N.C. at 511, 272 S.E.2d at 125, or showing "such testimony or evidence 'involved issues of some confusion and contradiction' [for the jury.]" *State v. Johnson*, 164 N.C. App. 1, 20, 595 S.E.2d 176, 187 (citing *State v. Johnson*, 346 N.C. 119, 126, 484 S.E.2d 372, 377 (1997)), *appeal dismissed and disc. review denied*, 359 N.C. 194, 607 S.E.2d 658–59 (2004).

In this case, after the jury retired to deliberate, it sent a note to the trial court:

> The Court: All right. Ladies and gentlemen, I have received a note from the jurors. It reads, ['C]an we see or hear the testimony from Officer Morgan and Sargent [sic] Bray about when they questioned [Mr. Lindsey] at the hospital and the S.B.I. testimony about the bullet casings? Did they match?[']
>
> Give me just a minute. I am going to bring the jury back in and read to them 101.50, duty to recall the evidence. [']It is your duty to recall and consider all of the evidence introduced during this trial. If your recollection of the evidence differs from that from which the attorneys argued to you, you should be guided by your own recollection in your deliberations.[']
>
> Anything from the State?
>
> [The State]: No, sir.
>
> The Court: Anything from the Defendant?
>
> [Defendant]: No, sir. Judge.

See Starr, 365 N.C. at 319, 718 S.E.2d at 366 (citing 1 Super. Court Subcomm., Bench Book Comm. & N.C. Conf. of Super. Court Judges, *North Carolina Trial Judges' Bench Book* § III, ch. 38, at 2 (Inst. of Gov't, Chapel Hill, N.C., 3d ed. 1999)).

> The Court: Should I tell them that the information that they have requested has already been presented and is not in a form which can be presented to them or just leave it at the instruction?
>
> [The State]: I think I would probably want to know — to just explain why it's not available. I mean, I don't know if we could do it. We would have to do a transcript and it will take too long.
>
> The Court: Well, I am just going to read the instruction.
>
> [Defendant]: The instruction, Judge.
>
> The Court: All right. That's what I am going to do. Will you bring the jury in?

The jury was returned to the courtroom and the trial court addressed them:

> The Court: Ladies and gentlemen, I have received your question and/or questions. I instruction [sic] you that it is your duty to recall the evidence and consider all of the evidence that's been introduced during this trial. If your recollection of the evidence differs from that from which the attorneys argued to you, you should be guided by your own recollection in your deliberations.
>
> I instruct you that you may now return to the jury room to continue your deliberations.

Here the trial court indicated on the record that the requested information was "not in a form which can be presented to [the jury.]" This statement concerning the jury's request is indistinguishable from other cases where we have found error. *See*, *e.g.*, *Starr*, 365 N.C. at 317–19, 718 S.E.2d at 365–66 (holding the trial court's statement, "we don't have the capability . . . so we cannot provide you with that," an erroneous failure to exercise discretion); *State v. Barrow*, 350 N.C. 640, 647, 517 S.E.2d 374, 378 (1999) (holding as erroneous the statement by the trial court that it "doesn't have the ability to now present to you the transcription of what was said during the course of the trial"); *Ashe*, 314 N.C. at 35, 331 S.E.2d at 656 (holding that it was error for the trial court to respond to the jury's request simply by saying "[t]here is no transcript at this point"); *Lang*, 301 N.C. at 510–11, 272 S.E.2d at 125 (holding the trial court's answer that "the transcript is not available to the jury" was a failure to exercise discretion and was erroneous as a matter of law).

In this case, the statement by the trial court demonstrated a belief that it was not capable of complying with the jury's transcript request. *See Starr*, 365 N.C. at 318, 718 S.E.2d at 366. Therefore, we hold the trial court failed in its statutory duty to exercise discretion in responding to the jury's request.

We must now determine whether this error prejudiced defendant. The evidence the jury asked to review concerned Detective Morgan and Sergeant Bray's interviews with Mr. Lindsey in the hospital. Through this testimony, the State presented its version of what happened to Mr. Lindsey on the night of the shooting. With both Detective Morgan and Sergeant Bray, the trial court sustained objections to questions about whether Mr. Lindsey identified defendant as the shooter. However, Detective Morgan later volunteered Mr. Lindsey's identification of defendant as the shooter in response to another question. The State used the testimony of Detective Morgan and Sergeant Bray to offer a more direct account of what allegedly occurred than Mr. Lindsey was able to give in court. The testimony was also used to portray Mr. Lindsey as giving consistent statements as to who shot him and where.

The jury also asked to review the testimony by the SBI agent concerning the fired shell casings and specifically inquired whether the shell casings matched. While Officer Owen testified the shell casing he recovered from Pritchard Street was "consistent" with the shell casing found at the Sunoco and that they would both "fit in the same gun," the trial court did not allow the SBI agent to testify as to whether the two casings Officer Owen recovered were fired from the same weapon.

Both areas of testimony requested by the jury likely involved issues of "confusion and contradiction" in its deliberations. *See Johnson*, 164 N.C. App. at 20, 595 S.E.2d at 187. That during both Detective Morgan and Sergeant Bray's testimony, the trial court sustained objections to the question of whom did Mr. Lindsey identify as the shooter, yet Detective Morgan later gave the information in the answer to a separate question, possibly created issues of confusion with the jury. Due to his disability, Mr. Lindsey's own testimony may have created the same issues of confusion and contradiction with the jury. And the jury was plainly confused by the testimony of the SBI agent, as noted by its question of whether the shell casings matched.

These issues were also likely "material to the determination of defendant's guilt or innocence." *See Lang*, 301 N.C. at 511, 272 S.E.2d at 125. Confusion over the identification of defendant as the shooter certainly bears on his guilt or innocence. Confusion over whether the shell

casings were fired from the same gun would likely influence the jury's deliberations concerning whether the same individual committed both assaults. Therefore, we hold the trial court's failure to exercise discretion in this case was prejudicial to defendant.

Because of the aforementioned errors, we vacate the judgment of the trial court and remand for a new trial. As defendant is entitled to a new trial, we decline to address the remaining issue defendant raised on appeal.

New Trial.

Judges STROUD and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
NAJEE JAMES, DEFENDANT

No. COA12-1089

Filed 19 March 2013

1. Kidnapping—second-degree—sufficient evidence—acting in concert

The trial court did not err in a second-degree kidnapping case by denying defendant's motion to dismiss. There was sufficient evidence that defendant acted in concert with his cousin to perpetrate the charged crimes and was not merely present.

2. Robbery—with a dangerous weapon—sufficient evidence—use of a firearm

The trial court did not err in a robbery with a dangerous weapon case by denying defendant's motion to dismiss. There was sufficient evidence that defendant or his cousin used a firearm to induce one of the victims to give up her purse.

3. Appeal and Error—preservation of issues—juror's inappropriate comment

Defendant's argument that the trial court abused its discretion in a second-degree kidnapping and robbery with a dangerous weapon case by failing to dismiss a juror after he made an inappropriate

comment outside of the jury room after deliberations had started was not preserved for appellate review and was dismissed.

4. Sentencing—failure to consider mitigating factors—presumptive range

The trial court did not err or abuse its discretion by failing to consider evidence supporting the mitigating factors of age, immaturity or limited mental capacity when sentencing defendant. Defendant was sentenced within the presumptive range for each conviction.

5. Appeal and Error—insufficient record on appeal—ineffective assistance of counsel—dismissed without prejudice

The evidence in the record on appeal was insufficient to support defendant's claim that he received ineffective assistance of counsel when his trial counsel failed to procure the assistance of an expert psychologist. The claim was dismissed without prejudice to defendant's right to reassert it through a motion for appropriate relief.

Appeal by defendant from judgments entered 11 January 2012 by Judge Stuart Albright in Superior Court, Guilford County. Heard in the Court of Appeals 28 February 2013.

Attorney General Roy A. Cooper, III by Assistant Attorney General Ward Zimmerman, for the State.

Unti & Lumsden LLP by Sharon L. Smith, for defendant-appellant.

STROUD, Judge.

Najee James ("defendant") appeals from judgments entered on 11 January 2012. He argues that the trial court erred in denying his motion to dismiss the charges against him because there was insufficient evidence that he acted in concert with Ray Stimpson, defendant's cousin, to commit armed robbery and kidnapping, as well as insufficient evidence as to one of the counts of armed robbery. Defendant further argues that the trial court erred in not dismissing a juror who made an inappropriate remark during deliberations and in not making findings as to a proposed mitigating factor. Defendant finally contends that he received ineffective assistance of counsel. For the following reasons, we find no error at defendant's trial and dismiss his ineffective assistance claim without prejudice.

I. Background

On 28 January 2010, Sara Gallman, Tim Herberg, and Kiri Jefferson were at a nightclub in downtown Greensboro. All three were students at University of North Carolina-Greensboro. They left the club around midnight and walked back toward Ms. Gallman's car in a nearby parking lot. As they walked through the lot, Mr. Herberg noticed two people standing at the far end of the lot. When the students approached Ms. Gallman's car, one of the individuals, later identified as Stimpson, walked up to the students, drew a handgun, and cocked it. He ordered the students into the car and demanded that they turn over their phones, wallets, and purses. Ms. Gallman got in the driver's seat, Mr. Herberg was in the front passenger's seat, and Ms. Jefferson went in the back seat. Defendant and Stimpson got into the back seat with Ms. Jefferson between them. As he was getting into the car, defendant shoved Ms. Jefferson to the ground and held her down until Stimpson told him to stop.

After everyone was in the car, Stimpson ordered Ms. Gallman to drive to an ATM. Stimpson threatened to hurt Ms. Jefferson if they did not follow his instructions. Ms. Gallman turned out of the parking lot onto a one-way street going the wrong direction. A police officer on patrol in an unmarked vehicle noticed the car and turned on his emergency lights. Stimpson ordered Ms. Gallman not to stop, so she drove around the unmarked car and ran several red lights. After several blocks, Ms. Gallman stopped and defendant and Stimpson jumped out of the car and fled on foot. Both were apprehended shortly thereafter. When defendant was apprehended, the police discovered Ms. Jefferson's purse in his pocket. Police recovered a gun from underneath the porch where they discovered Stimpson.

Defendant was indicted on three counts of second-degree kidnapping and three counts of robbery with a dangerous weapon. Defendant pleaded not guilty and proceeded to jury trial. The jury returned verdicts of guilty on all counts. The trial court sentenced him to consecutive terms of 64 to 86 months confinement for each of the three robbery convictions and a consecutive term of 24 to 38 months confinement for the three consolidated kidnapping convictions. Defendant gave oral notice of appeal in open court.

II. Motion to Dismiss

Defendant first argues that the trial court erred in denying his motion to dismiss all of the charges against defendant because there was insufficient evidence that he acted in concert with his cousin. Defendant

further argues that the trial court erred in denying his motion to dismiss the charge of armed robbery as to Ms. Jefferson because there was insufficient evidence that he induced the victim to part with her property by use of a dangerous weapon.

A. Standard of Review

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.

State v. Lopez, ___ N.C. App. ___, ___, 723 S.E.2d 164, 171-72, *disc. rev. denied*, ___ N.C. ___, 726 S.E.2d 850 (2012).

B. Acting in Concert

[1] Defendant first argues that the trial court erred in denying his motion to dismiss because there was insufficient evidence that he acted in concert with his cousin to perpetrate the charged crimes. Defendant contends that the evidence showed that he was merely present at the scene.

> The mere presence of the defendant at the scene of the crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense. To support a conviction, the State's evidence must be sufficient to support a finding that the defendant was present, actually or constructively, with the intent to aid the perpetrators in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual perpetrators. The communication or intent to aid, if needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators.

State v. Sanders, 288 N.C. 285, 290-91, 218 S.E.2d 352, 357 (1975) (citations omitted), *cert. denied*, 423 U.S. 1091, 47 L.Ed. 2d 102 (1976).

It is undisputed that defendant was actually present at the scene of the crime. Further, the evidence here supports a reasonable conclusion that defendant was not only present with intent to aid, but that he actually aided in the kidnapping and robbery. "[C]oncert of action may . . . be shown by circumstances accompanying the unlawful act and conduct of the defendant subsequent thereto." *State v. Westbrook*, 279 N.C. 18, 42, 181 S.E.2d 572, 586 (1971), *death penalty vacated sub nom*, *Westbrook v. North Carolina*, 408 U.S. 939, 33 L.Ed. 2d 761 (1972).

Defendant was waiting in the parking lot with his cousin when the students walked by. He and his cousin went separate directions while his cousin brandished the gun. They then both approached the car as his cousin forced the students into the car at gunpoint. One of the students testified that while the police were chasing the car defendant would also yell at them to keep driving. Additionally, Ms. Jefferson testified that defendant was pushing her to the floor of the backseat until his cousin told him to stop. When the car eventually stopped, defendant fled from the police and took Ms. Jefferson's purse with him.[1]

This evidence, taken in the light most favorable to the State, supports a reasonable conclusion that defendant acted in concert with his cousin and was not "merely present." Defendant argues that there was evidence that his cousin pressured him into participating and that he was high on cocaine during the entire transaction. Indeed, his cousin told police that defendant had nothing to do with it. All of these issues, however, are "contradictions and discrepancies . . . for the jury to resolve and do not warrant dismissal." *State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 843 (2011) (citation and quotation marks omitted).

C. Armed Robbery

[2] Defendant also argues that there was insufficient evidence that he or his cousin used a firearm to induce Ms. Jefferson to give up her purse and therefore the trial court should have granted his motion to dismiss as to that charge. We find defendant's argument unconvincing.

> Armed robbery is defined as the taking of the personal property of another in his presence or from his person without his consent by endangering or threatening his life with a firearm or other deadly weapon with the taker

1. We note that "evidence of flight does not create a presumption of guilt but is only some evidence of guilt which may be considered with the other facts and circumstances in the case in determining guilt." *State v. Stitt*, 201 N.C. App. 233, 251, 689 S.E.2d 539, 553 (2009) (citation and quotation marks omitted), *disc. rev. denied*, 364 N.C. 246, 699 S.E.2d 920 (2010).

> knowing that he is not entitled to the property and the taker intending to permanently deprive the owner of the property. To be found guilty of robbery with a dangerous weapon, the defendant's threatened use or use of a dangerous weapon must precede or be concomitant with the taking, *or be so joined by time and circumstances with the taking as to be part of one continuous transaction. Where a continuous transaction occurs, the temporal order of the threat or use of a dangerous weapon and the taking is immaterial.*

Stitt, 201 N.C. App. at 249, 689 S.E.2d at 552 (citations, quotation marks, and brackets omitted) (emphasis added).

Defendant, citing *State v. Richardson*, 308 N.C. 470, 302 S.E.2d 799 (1983), contends that there was insufficient evidence that defendant used force concomitantly with his taking of Ms. Jefferson's belongings because the evidence showed that she dropped her purse when she "got into the car, and therefore did not have anything to turn over when Stimpson ordered the students to give up their belongings."

In *Richardson*, the Supreme Court held that there was insufficient evidence of armed robbery because the alleged victim threw his bag at the defendant during an altercation between the two of them, and then when he went to retrieve it defendant threatened him. *Richardson*, 308 N.C. at 472-73, 477, 302 S.E.2d at 801-02, 803-04. The present case is distinguishable from *Richardson*, however, because

> [t]he evidence [in *Richardson*] conclusively showed that the defendant had no intent at that time to deprive the victim of his property and did not at that time "take" the property from him. It was only later after the victim had left the scene that the defendant went through the duffle bag and discovered the wallet. At that time, well after his use of a dangerous weapon, he first formed the intent to permanently deprive the owner of his property.

State v. Hope, 317 N.C. 302, 307, 345 S.E.2d 361, 364 (1986). Thus, in *Richardson*, the taking was not concomitant with use of a deadly weapon.

Here, by contrast, Ms. Jefferson dropped her purse in the car only after she was forced into the backseat at gunpoint. Stimpson ordered Ms. Jefferson to find the items they wanted and she handed over the belongings of Mr. Herberg and Ms. Gallman. There was no evidence that defendant directly took Ms. Jefferson's purse from her person. When he

was apprehended, however, the police discovered Ms. Jefferson's purse in defendant's pocket. The only logical inference from this evidence was that defendant took the purse and carried it away from the vehicle, which Ms. Jefferson was forced into at gunpoint. The kidnapping and the robbery were all part of one continuous transaction that began when Stimpson pointed a gun at the students and continued through the removal of the students' property from the car. Therefore, "the temporal order of the threat or use of a dangerous weapon and the taking is immaterial." *Stitt*, 201 N.C. App. at 249, 689 S.E.2d at 552.

We hold that the evidence, taken in the light most favorable to the State, was sufficient to support a reasonable conclusion that defendant took Ms. Jefferson's purse from her presence after his cousin threatened her with a firearm. Therefore, the trial court did not err in denying defendant's motion to dismiss this charge.

III. Juror Misconduct

[3] Defendant next argues that the trial court "grossly abused its discretion" in failing to dismiss a juror after he made an inappropriate comment outside of the jury room after deliberations had started.

As the jurors were exiting the jury room for a break, juror 1 stated something to the effect of "Maybe I should bring my gun so that everyone feels what it would feel like, and I've got it in my car." Juror 10 notified the bailiffs about the statement. The trial court called juror 10 into the courtroom and asked him about the statement and whether he felt that he could remain fair and impartial. Juror 10 indicated that he could and the trial court so found, without objection. Juror 10 also mentioned that he thought juror 6 may also have overheard the comment. Next, the trial court called juror 6 into the courtroom and asked him whether he had overheard any inappropriate comments outside of the jury room. He said that he had not heard any such comments.

Finally, the trial court called juror 1 into the courtroom to ask him about the comment. The juror admitted making the comment and that he was responding to something that had been mentioned in deliberations. The trial court reiterated its instructions not to discuss the case or anything relating to the case outside of the jury room. The trial court then asked whether juror 1 felt that he could remain fair and impartial. Juror 1 said that he could, and the trial court so found, again without objection. After juror 1 returned to the jury room, the trial court made its findings of fact and concluded that the comments did not affect the ability of the jury to render a fair and impartial verdict. Defendant did not

object either to the findings or to the conclusion. Defendant also made no motion for a mistrial.

Both defendant and the State briefed this issue under the plain error standard. Defendant argues that the possibility of a biased juror implicates his right to due process. "It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal." *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002), *cert. denied*, 537 U.S. 1117, 154 L.Ed. 2d 795 (2003). Moreover, "plain error review in North Carolina is normally limited to instructional and evidentiary error." *State v. Lawrence*, ___ N.C. ___, ___, 723 S.E.2d 326, 333 (2012) (citation omitted).

Defendant did not move for a mistrial after the trial court's investigation into the juror's conduct, nor did he object to any of the court's findings or conclusions. The alleged error does not concern either evidence or jury instructions. Defendant points to no case holding that this kind of error is automatically preserved. Therefore, this issue has not been properly preserved for our review and we do not address it.

IV. Sentencing

[4] Defendant further argues that the trial court erred and abused its discretion in failing to consider evidence supporting the mitigating factor of age, immaturity or limited mental capacity. Defendant concedes that he was sentenced within the presumptive range for each conviction. "Since the court may, in its discretion, sentence defendant within the presumptive range without making findings regarding proposed mitigating factors, this Court has found no error in the failure to make such findings." *State v. Allah*, 168 N.C. App. 190, 197, 607 S.E.2d 311, 316 (citation and quotation marks omitted), *disc. rev. denied*, ___ N.C. ___, 618 S.E.2d 232 (2005. Because defendant "was sentenced for all offenses in the presumptive range, the trial court did not err in failing to make findings as to [the] mitigating factor[]" of age, immaturity or limited mental capacity. *Id.*

V. Ineffective Assistance of Counsel

[5] Finally, defendant argues that he received ineffective assistance of counsel when his trial counsel failed to procure the assistance of an expert psychologist even after the trial court granted his motion for funds to do so. Nevertheless, defendant contends that the record on appeal is insufficient to determine whether he was prejudiced by the alleged failure because there is no evidence regarding what such an expert might

have said, why the trial counsel did not procure the help of the expert, or how such evidence would have impacted his ability to suppress statements he made to police.

> Ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Therefore, on direct appeal we must determine if these ineffective assistance of counsel claims have been prematurely brought. If so, we must dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent motion for appropriate relief proceeding.

State v. Campbell, 359 N.C. 644, 691, 617 S.E.2d 1, 30 (2005) (citations, quotation marks, and brackets omitted), *cert. denied*, 547 U.S. 1073, 164 L.Ed. 2d 523 (2006).

Defendant argues that he received ineffective assistance of counsel, yet concedes that the evidence in the record on appeal is insufficient to support such a claim. Thus, defendant effectively concedes that his ineffective assistance claim was brought prematurely. Accordingly, we dismiss this claim without prejudice to his right to reassert it through a motion for appropriate relief. *See id.*

VI. Conclusion

We hold that the trial court did not err in denying defendant's motion to dismiss as to any of the charges. We further hold that the trial court did not err in sentencing defendant within the presumptive range for all of his convictions without addressing the proposed mitigating factors. We did not address defendant's arguments concerning juror misconduct because he failed to preserve that issue for our review and we dismiss his ineffective assistance claim without prejudice.

NO ERROR, in part; DISMISSED, in part.

Judges STEPHENS and DILLON concur.

STATE OF NORTH CAROLINA
v.
MICKEY VONRICE ROLLINS

No. COA12-552

Filed 19 March 2013

1. Evidence—hearsay—prior testimony—confrontation rights not violated

The trial court did not err in a first-degree murder, attempted robbery with a dangerous weapon, and felony breaking and entering case by admitting into evidence a witness's prior testimony from defendant's *Alford* plea hearing under N.C.G.S. § 8C-1, Rule 804(b)(1), and defendant's confrontation rights were not violated.

2. Evidence—steak knife—relevant—not unduly prejudicial

The trial court did not err in a first-degree murder, attempted robbery with a dangerous weapon, and felony breaking and entering case by admitting into evidence a steak knife. The knife was relevant under N.C.G.S. § 8C-1, Rule 401 and not unduly prejudicial under N.C.G.S. § 8C-1, Rule 403.

3. Confessions and Incriminating Statements—motion to suppress—voluntary statements to spouse while incarcerated

The trial court did not err in a first-degree murder, attempted robbery with a dangerous weapon, and felony breaking and entering case by denying defendant's motion to suppress the statements he made to his wife while defendant was incarcerated at various correctional facilities due to an unrelated conviction. Defendant's confession to his wife was voluntarily made, and thus, admissible at trial.

Judge HUNTER, Jr., Robert N. concurring in result only.

Appeal by defendant from judgments entered 2 May 2011 by Judge Wayland J. Sermons, Jr. in Martin County Superior Court. Heard in the Court of Appeals 24 October 2012.

Attorney General Roy Cooper, by Special Deputy Attorneys General Steven M. Arbogast and William P. Hart, Sr., for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate

Defender Barbara S. Blackman, for defendant-appellant.

CALABRIA, Judge.

Mickey Vonrice Rollins ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of first degree murder, attempted robbery with a dangerous weapon, and felony breaking and entering. We find no error.

I. Factual and Procedural Background

On 11 June 2002, eighty-eight-year-old Harriet Brown Roberson Highsmith ("Highsmith") was discovered dead in her home in Robersonville, North Carolina. Highsmith's front door was found ajar, with her keys still in the lock. She had been stabbed twelve times in her neck, chest and stomach. The stab wounds had a blunt edge and a sharp edge, consistent with a knife. Although Highsmith's undergarments were pulled down to her thighs, there was no evidence of sexual assault.

Defendant was identified by law enforcement as a person of interest because he was in the area of Highsmith's home at the time of the murder. On 12 June 2003, defendant was voluntarily interviewed by the Robersonville Police Department ("RPD") in connection with the murder. During the interview, defendant admitted to being in Highsmith's neighborhood on the day of the murder. He stated that he had had an argument with his wife and spent the day at the home of his aunt, Mary Durham ("Durham"). Durham lived next door to Highsmith.

In March 2003, defendant confessed to his wife, Tolvi Rollins ("Tolvi"), that he had murdered Highsmith. He warned Tolvi not to share this information with anyone else. In October 2003, Tolvi contacted RPD Chief Darrell Knox and told him that she had information about Highsmith's murder. On 14 October 2003, Tolvi met with Agent Walter Brown ("Agent Brown") of the State Bureau of Investigation and provided him with details of Highsmith's murder which were consistent with the evidence found at the crime scene.

At the time Tolvi met with Agent Brown, defendant was incarcerated on unrelated charges. Tolvi agreed to wear a recording device and visit defendant in prison. Over the next two months, Tolvi visited defendant on five occasions. At each visit, defendant discussed details of the murder. According to the recordings and summaries provided by Tolvi, defendant entered Highsmith's home through an open door. When

Highsmith saw defendant, he decided to kill her because he would be "looking at 30 years" if Highsmith contacted law enforcement. Defendant told Tolvi that he stabbed Highsmith "about twelve or thirteen times" with two different knives. Defendant claimed he had attempted to make the murder look like a sexual assault in order to "throw the cops off."

On 2 February 2004, defendant was indicted for first degree murder, robbery with a dangerous weapon, felony breaking and entering, and first degree kidnapping. Agent Brown continued to investigate the murder and interviewed several inmates who were incarcerated with defendant. Based upon interviews with inmate Harris Ford ("Ford"), law enforcement searched a field near the Andrews Terrace projects ("Andrews Terrace") in Robersonville on 4 October 2006. The search uncovered a black-handled steak knife.

Prior to trial, defendant filed a motion to suppress the statements he made to Tolvi regarding Highsmith's murder while he was incarcerated. After a hearing, the trial court entered an order denying defendant's motion on 19 August 2005.

On 6 October 2006, defendant entered an *Alford* plea to the offense of first degree murder, reserving his right to appeal the denial of his motion to suppress. Durham testified at defendant's plea hearing in order to establish a factual basis for his plea. She testified that defendant had approached her house shortly after 4:00 p.m. on the day of the murder. Durham and defendant talked on her porch for a few minutes, and then defendant left to make a phone call. Defendant walked in the direction of Highsmith's house. A short time later, defendant returned to Durham's porch and asked for a glass of water. Defendant again left Durham's house, and "five or ten minutes" later, Durham saw him standing by a fence at the back of Highsmith's property.

Defendant appealed the denial of his motion to suppress his statements to Tolvi to this Court. On 8 March 2008, the Court issued an opinion reversing the trial court's denial of defendant's motion and granting defendant a new trial. *State v. Rollins*, 189 N.C. App. 248, 658 S.E.2d 43 (2008)("*Rollins I*"). The *Rollins I* Court held that defendant's statements to Tolvi were protected by the marital privilege. *Id.* at 260, 658 S.E.2d at 50-51.

The State petitioned our Supreme Court for discretionary review, which was granted on 26 August 2008. On 1 May 2009, the Court issued an opinion reversing the opinion of this Court. *State v. Rollins*, 363 N.C. 232, 675 S.E.2d 334 (2009)("*Rollins II*"). The *Rollins II* Court held that

defendant's statements to Tolvi were not protected by the marital privilege because defendant had no reasonable expectation of privacy in the conversations he had with his wife while in prison. *Id.* at 241, 675 S.E.2d at 340. The Court remanded the case to this Court for consideration of defendant's remaining assignments of error which had not been previously addressed in *Rollins I*. *Id.*

On remand, this Court issued an opinion which again granted defendant a new trial. *State v. Rollins*, 200 N.C. App. 105, 682 S.E.2d 411 (2009) ("*Rollins III*"). The *Rollins III* Court held that the trial court failed to make necessary findings on the voluntariness of defendant's statements to Tolvi when it denied his motion to suppress. *Id.* at 112, 682 S.E.2d at 416. Defendant's case was remanded for a new suppression hearing. *Id.*

After the new suppression hearing, the trial court entered an order which again denied defendant's motion to suppress his statements to Tolvi on 19 July 2010. Defendant's case then proceeded to trial. Beginning 25 April 2011, defendant was tried by a jury in Martin County Superior Court.

At trial, the court admitted, over defendant's objection, testimony by Agent Brown that he had interviewed defendant's fellow inmates during the course of his investigation. Agent Brown specifically noted that he had met several times with Ford, and that as a result of those conversations, he conducted a search in a field near Andrews Terrace and discovered a black-handled steak knife. The trial court overruled defendant's Confrontation Clause and relevance objections to Agent Brown's testimony and the knife.

Durham was called to testify at trial. However, prior to her testimony, the parties conducted a *voir dire* examination during which Durham stated that she could not currently identify defendant, that she did not remember knowing Highsmith, that she did not remember the events of the day of the murder, and that she could not remember previously testifying. As a result, the trial court admitted, over defendant's objection, a transcript of Durham's testimony as a recorded recollection under North Carolina Rule of Evidence 803(5), as former testimony of an unavailable witness under Rule 804(b)(1), and under the residual hearsay exception, Rule 803(24).

At the conclusion of the evidence, the trial court dismissed the kidnapping charge. On 2 May 2011, the jury returned verdicts finding defendant guilty of first degree murder, based upon the theories of both felony murder and premeditation and deliberation, attempted robbery

with a dangerous weapon, and felony breaking or entering. For the first degree murder conviction, the trial court sentenced defendant to life imprisonment without the possibility of parole. For the attempted robbery conviction, defendant was sentenced to a minimum of 103 months to a maximum of 133 months. Finally, for the felony breaking or entering conviction, defendant was sentenced to a minimum of 10 months to a maximum of 12 months. These sentences were to be served consecutively in the North Carolina Department of Correction. Defendant appeals.

II. Durham's Prior Testimony

[1] Defendant argues that the trial court erred when it admitted into evidence Durham's prior testimony from his *Alford* plea hearing in 2006. Defendant contends that Durham's testimony was inadmissible hearsay and violated his rights under the Confrontation Clause. We disagree.

A. Hearsay

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2011). While hearsay is typically inadmissible as evidence under N.C. Gen. Stat. § 8C-1, Rule 802 (2011), the Rules of Evidence provide a number of exceptions to this general rule. *See* N.C. Gen. Stat. § 8C-1, Rules 803-04 (2011). "When preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *State v. Johnson*, ___ N.C. App. ___, ___, 706 S.E.2d 790, 797 (2011).

In the instant case, the trial court concluded that Durham's former testimony was admissible under multiple exceptions to the hearsay rule, including the exception for the former testimony of an unavailable witness under N.C. Gen. Stat. § 8C-1, Rule 804 (b)(1) (2011). Under this exception to the hearsay rule,

> [t]estimony taken at a prior proceeding is admissible when (1) the witness is unavailable;[1] (2) the proceeding at which the former testimony was given was a former trial of the same cause, or a preliminary stage of the same cause, or the trial of another cause involving the issue and

1. Defendant does not challenge the trial court's conclusion that Durham was an unavailable witness.

> subject matter at which the testimony is directed; and (3) the current defendant was present at the former proceeding and was represented by counsel.

State v. Chandler, 324 N.C. 172, 181, 376 S.E.2d 728, 734 (1989).

At trial, the trial court conducted a *voir dire* examination of Durham and concluded that her prior testimony was admissible because it took place during

> a hearing in the same case. ... [I]t was a hearing upon a plea pursuant to State V. Alford in which the defendant did not admit his guilt and also after the defendant's motion to suppress his statements made during visits with his wife at a department of correction facility were denied by the trial court and the defendant gave notice of appeal to that denial reserving the right to take that to the appellate courts and entered the Alford guilty plea pursuant to that procedure. The Court is going to find that the issue of the motion to suppress and the defendant's guilt or innocence was still pending and is a similar motive, and the lawyers for the defendant possessed similar motive to develop the testimony by direct cross or redirect-examination.

Defendant contends that the trial court's conclusion was erroneous because he had no motive to cross-examine Durham during his *Alford* plea hearing. He argues that "[i]t is a matter of common sense that a defendant does not ordinarily participate in plea negotiations, waive a jury trial, tender a guilty plea, and then take affirmative steps at the plea hearing to undermine acceptance of a plea hearing affording him substantial benefits." Defendant does not cite any cases to support his "common sense" assertion.

As the trial court correctly noted in its oral ruling, defendant, by entering an *Alford* plea in the earlier proceeding, did not admit his guilt. *See State v. Chery*, 203 N.C. App. 310, 314, 691 S.E.2d 40, 44 (2010)("A defendant enters into an *Alford* plea when he proclaims he is innocent, but intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." (internal quotations and citation omitted)). Moreover, defendant specifically reserved the right to appeal his guilty plea based upon the denial of his motion to suppress. Thus, defendant was aware that further proceedings regarding his guilt for Highsmith's murder were possible, and he had a motive to cross-examine Durham for purposes of these future

proceedings. *See State v. Ramirez*, 156 N.C. App. 249, 257-58, 576 S.E.2d 714, 720-21 (2003)(Testimony of the defendant's former girlfriend given at his bond hearing was properly admitted against him at trial because the defendant had the same motive to cross-examine the witness at the bond hearing as he would have at his future trial, "to expand upon and possibly discredit [her] testimony."). Although defendant now claims that he had no motive to cross-examine the State's witnesses at the plea hearing, his claim cannot be reconciled with the fact that defendant did, in actuality, cross-examine another one of the State's witnesses who testified during the hearing. Ultimately, we agree with the trial court's conclusion that, under the specific circumstances of this case, defendant possessed a similar motive to cross-examine Durham during his *Alford* plea hearing as he would have had at trial. Thus, the trial court properly determined that Durham's testimony was admissible under N.C. Gen. Stat. § 8C-1, Rule 804(b)(1). Since we have determined that Durham's testimony was admissible under this exception, we do not address defendant's arguments regarding the remaining hearsay exceptions which were found to be applicable by the trial court.

B. Confrontation Clause

Defendant also argues that the admission of Durham's former testimony violated his rights under the Sixth Amendment's Confrontation Clause. However, our Supreme Court has stated that "[t]he Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify *and the accused has had a prior opportunity to cross-examine the declarant.*" *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009)(emphasis added). In the instant case, defendant definitively had a prior opportunity to cross-examine Durham during his 2006 *Alford* plea hearing, and, as previously noted, had a similar motive to cross-examine Durham as he would have had at trial. Since defendant was afforded a prior opportunity to cross-examine Durham, under *Locklear*, defendant's confrontation rights were not violated. *Id.* This argument is overruled.

III. Admission of Knife

[2] Defendant argues that the trial court erred by admitting into evidence a black-handled steak knife that was discovered in a field near Andrews Terrace in 2006. We disagree.

A. Confrontation Clause

Defendant first argues that the trial court erred by permitting Agent Brown to testify regarding his discovery of the knife after he had

interviewed some of defendant's fellow inmates. Defendant contends that his constitutional right to confront witnesses against him was violated by Agent Brown's testimony.

As previously noted, the Confrontation Clause bars the admission of testimonial evidence unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Locklear*, 363 N.C. at 452, 681 S.E.2d at 304. However, "[t]he Sixth Amendment's Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' " *State v. Mason*, ___ N.C. App. ___, ___, 730 S.E.2d 795, 801 (2012)(quoting *Crawford v. Washington*, 541 U.S. 36, 59-60 n.9, 158 L. Ed. 2d 177, 197-98 n.9 (2004)). "This Court reviews *de novo* whether the right to confrontation was violated." *State v. Lowery*, ___ N.C. App. ___, ___, 723 S.E.2d 358, 362 (2012).

In the instant case, the State elicited the following testimony from Agent Brown:

> Q. Now, Agent Brown, during the course of this investigation, which was somewhat lengthy, did you have an occasion to interview other inmates in the department of correction?
>
> A. Yes, I did.
>
> Q. And during the course of your investigation did you determine whether these individuals at some point or another had been housed in the same facility as [defendant]?
>
> A. Yes, they were.
>
> Q. All right. And do you have the names of some of the individuals that you interviewed?
>
> A. Yes, I do, Denzel Williams, James Grimes, Dale Shepherd, Curt -- Mr. Hyman. I can't pronounce his first name and Harris Ford.

The State then focused its inquiry entirely on Agent Brown's interactions with Ford:

> Q. Now as to the last person you named, Harris Ford, do you recall how many times you interviewed him?

A. I spoke to him on three occasions, but I spoke to him twice.

Q. Okay. You said you spoke to him on three occasions, but how many times did you interview him?

A. Twice.

Q. All right. And the third time that you spoke to him, do you recall where that was?

A. That was at Central Prison in Raleigh, North Carolina.

Q. And was anyone else with you on that visit?

A. Yes. The District Attorney, Seth Edwards, and his Assistant District Attorney Tom Anglim.

Q. And do you recall the date of that third encounter with Mr. Ford?

A. I believe it was October 2, 2000 and — give me one second — 2006.

Q. Okay. So that was over four years after Mrs. Highsmith's murder.

A. That's correct.

Q. And as a result of those interviews and conversations, what did you do next in your investigation?

Agent Brown next testified that he "organized a search of some areas that we identified by arranging other local law enforcement . . . to search some areas near the . . . Andrews Terrace projects in Robersonville, North Carolina" on 4 October 2006. Agent Brown then began to describe the parameters of the search near Andrews Terrace. When the State asked Agent Brown what the search had uncovered, defendant objected and the trial court sent the jury out of the courtroom so that the parties could conduct a *voir dire* examination.

Agent Brown testified on *voir dire* that, based upon a conversation between Ford, Edwards and Anglim, outside of Agent Brown's presence, he led a search of a field near the Andrews Terrace projects. Ford's conversation with Edwards and Anglim was the sole reason that Agent Brown searched that area and discovered the knife.

Defendant argues that the State improperly introduced Ford's statement about the location of the knife indirectly through the testimony of Agent Brown. Defendant contends that "the 'inescapable inference' from Agent Brown's testimony was that inmates Williams, Grimes, Shepherd, Hyman, and Ford told him about conversations they had with Mr. Rollins in the Department of Correction in which Mr. Rollins said that he hid a knife under shrubbery near the Andrews Terrace projects."

Initially, we note that defendant's argument exaggerates the scope of the information Agent Brown testified to relying upon. While Agent Brown acknowledged during his testimony that he had spoken to several of defendant's fellow inmates, he only discussed, in detail, his meetings with Ford. It was only after answering several questions about his meetings with Ford that Agent Brown testified that he organized his search. Thus, it is clear from the context of Agent Brown's examination that Ford was the source of his information. Indeed, when arguing that Agent Brown's testimony should be excluded due to its violation of defendant's confrontation rights, defense counsel focused exclusively on Ford:

> Well, I guess, with regards to my argument, Your Honor, I would submit to the Court that it's – it's kind of clear that the testimony is, "I had this conversation with Harris Ford, an inmate, and from that conversation" — even though the officer is not testifying that that conversation led him to the knife, the way he testified it's clear to the jury that he had a conversation with Harris Ford. Following that conversation, "I went to this vacant lot and found this knife based upon what Harris Ford said to me."
>
> . . .
>
> What I am saying is that the confrontation clause, in my opinion and for purposes of my argument, does apply as it relates to Harris Ford giving the police information.

Since defendant's argument at trial was only that the indirect introduction of Ford's interviews with Agent Brown, Edwards, and Anglim violated defendant's confrontation rights, we will limit our focus to the introduction of the information Ford provided to the State regarding the location of the knife recovered from Andrews Terrace.

Our Supreme Court has held that "[o]ut-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay. Specifically, statements are not hearsay if

they are made to explain the subsequent conduct of the person to whom the statement was directed." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002)(citations omitted). Based upon this principle, this Court has upheld a law enforcement officer's testimony concerning witness statements that subsequently explained his actions during an investigation. *See State v. Alexander*, 177 N.C. App. 281, 283-84, 628 S.E.2d 434, 435-36 (2006).

In *Alexander*, a law enforcement officer was told by another detective that an informant had information regarding an armed robbery he was investigating. *Id.* at 283, 628 S.E.2d at 435. According to the officer's testimony, the informant gave him a name, "Vaughntray," which the officer connected to the defendant. *Id.* The officer then showed a photo array to the victim, who identified the defendant "almost immediately." *Id.* This Court held that the officer's testimony

> regarding his interaction with the detective and [the informant] was nonhearsay and proper to explain his subsequent actions. It was not admitted to prove that the information [the informant] offered was "important" or that someone named "Vaughntray" committed the crime. Rather, the testimony explained how Officer Dozier had received information leading him to form a reasonable suspicion that defendant was involved in the robbery, which in turn justified his inclusion of defendant's photograph in the lineup.

Id. at 284, 628 S.E.2d at 436.

In the instant case, Agent Brown's testimony regarding the information he learned from Ford was used to explain to the jury the reason Agent Brown took the subsequent action of searching a particular field near Andrews Terrace almost four years after Highsmith's murder. While it is true, as defendant suggests, that Agent Brown's testimony creates a strong inference that Ford learned the location of the knife from defendant, that inference would only be problematic if Ford's indirect statement had been admitted for its truth. Statements by non-testifying witnesses which may implicate the defendant in a crime are permissible when they are only used to explain the subsequent actions of the testifying witness. *See*, *e.g.*, *id.; State v. Leyva*, 181 N.C. App. 491, 499-500, 640 S.E.2d 394, 398-99 (2007)(Testimony that fellow detective told witness that "[defendant] and the informant were going to meet at Salsa's Restaurant and discuss at least a quarter kilo deal of cocaine" was admissible to "explain the officers' presence at Salsa's Restaurant . . . .");

State v. Wiggins, 185 N.C. App. 376, 378-84, 648 S.E.2d 865, 868-71 (2007) (Testimony regarding an informant's repeated statements to the witness that the defendants would be selling drugs from a Quality Inn was admissible to "explain how the investigation of Defendants unfolded, why Defendants were under surveillance at the Quality Inn, and why [the witness] followed the vehicle to the Quality Inn."); and *State v. Batchelor*, 202 N.C. App. 733, 735-37, 690 S.E.2d 53, 55-56 (2010)(Testimony that an informant told the witness that he recognized the defendant as a drug dealer was admissible "to explain [the witness's] presence at Colony car wash rather than to prove that defendant was a known drug dealer."). Since Agent Brown's testimony regarding his conversations with Ford was admitted for the proper purpose of explaining his decision to conduct a search near Andrews Terrace, the testimony was not hearsay. *See Gainey*, 355 N.C. at 87, 558 S.E.2d at 473. Accordingly, defendant's confrontation rights were not violated because "admission of nonhearsay raises no Confrontation Clause concerns." *Id.* (internal quotations and citations omitted). This argument is overruled.

B. Relevance

Defendant next argues that the trial court erred by admitting the knife into evidence because it was not relevant under Rule 401. "The admissibility of evidence is governed by a threshold inquiry into its relevance. 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." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000)(internal quotations and citation omitted).

> Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the 'abuse of discretion' standard which applies to rulings made pursuant to Rule 403.

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004)(internal quotations and citation omitted).

"As a general rule weapons may be admitted in evidence where there is evidence tending to show that they were used in the commission of a crime." *State v. Bruton*, 344 N.C. 381, 386, 474 S.E.2d 336, 340 (1996) (internal quotations and citation omitted). At trial, the State presented evidence from Dr. M.G.F. Gilliland ("Dr. Gilliland"), a pathologist. Dr. Gilliland testified that Highsmith died of multiple stab wounds which were likely to have been inflicted by a knife which was at least two-and-three-quarter inches long and which did not have a serrated edge.

Defendant contends that the knife which was discovered near Andrews Terrace was improperly admitted into evidence because it could not have been the murder weapon. In support of its argument, defendant notes that (1) the knife was found more than four years after Highsmith's murder, in a public place, and it could not be determined when it was abandoned; (2) the knife contained neither fingerprints nor blood evidence; (3) no testifying witness identified the knife as the potential murder weapon; and (4) the knife which was discovered had small serrations, which did not match Dr. Gilliland's testimony about the type of knife which inflicted Highsmith's wounds.

The trial court conducted a *voir dire* hearing in order to determine if the knife was relevant. At the conclusion of the hearing, the court stated:

> All right. The Court is going to find, pursuant to rule 401, that because of all the factors that have been argued for relevancy, chief among them being the defendant's statement that the knife was a black-handled knife to his wife that has already been admitted into evidence, that the defendant at a time very recently after the death of the victim was in close proximity to the area where the knife was found, and that the knife matches the description of what type of knife that would cause the wounds that the consulting pathologist testified were on Mrs. Highsmith's body, that pursuant to rule 401 this evidence has a tendency to make the existence of any fact that is of consequence to the determination in this trial more probable or less probable than it would be without the evidence, and that is the test, so your objection is overruled, and note the defendant's objection and exception for the Record.

"The trial court's findings of fact following a *voir dire* hearing are binding on this Court when supported by competent evidence." *State v. Lane*, 334 N.C. 148, 154, 431 S.E.2d 7, 10 (1993).

In the instant case, the trial court's findings are supported by competent evidence. Defendant's wife had previously testified that defendant told her that he used a black-handled knife when he stabbed Highsmith. Agent Brown testified on *voir dire* that another officer had seen defendant approximately 150 yards from the field where the knife was discovered on the day of the murder.

Finally, and most importantly, the trial court physically examined the knife on the record and determined it was consistent with Dr. Gilliland's prior testimony. The following exchange occurred between the trial court and the parties immediately prior to the court's ruling:

> THE COURT: Mr. Brown, can I see the knife again.
>
> A. Yes, sir.
>
> THE COURT: If you would, lay it up here in front of me on the bag. All right. You can sit down. Am I not further recalling that Dr. Gilliland indicated the wounds were of a nature that one side of the blade would have been blunt or flat and the other side of the blade would have been sharp, and it would not have been serrated?
>
> [The State]: I think that's what she said.
>
> THE COURT: Isn't that the testimony in the case?
>
> [The State]: Yes, Your Honor.
>
> THE COURT: It appears to me that that is exactly the kind of knife that we have in this exhibit. Have you examined the knife, [defense counsel]?
>
> [Defense Counsel]: Yes, and, again, just, you know, for purposes of the Record, I would submit to the Court that when Dr. Gilliland testified, objections were raised about her ability to testify to such evidence.
>
> THE COURT: All right. I think clearly Dr. Gilliland has the experience and the knowledge of wounds and things, and that's why I overruled your objection –

Thus, the trial court had the knife physically in its possession when it found as fact that it matched Dr. Gilliland's description of the type of knife that would cause Highsmith's wounds. This evidence is sufficient

to support the trial court's findings regarding the relevance of the knife.

We note that after the trial court ruled that the knife was admissible, Agent Brown testified that it had "some small serrations[.]" However, even if this testimony could be considered to conflict with the trial court's finding regarding the characteristics of the knife, the trial court's finding still stands because it was supported by competent evidence. *See State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) ("[A] trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." (internal quotations and citations omitted)). Ultimately, the trial court's findings support its conclusion that the knife was relevant. While the State's evidence did not establish that the knife that was discovered was definitively the knife used by defendant to murder Highsmith, there was sufficient evidence to establish that the knife could have been used to commit the crime. The other issues raised by defendant regarding the knife "merely go to the weight or probative value of the evidence[,]" rather than its relevance. *State v. DeCastro*, 342 N.C. 667, 682, 467 S.E.2d 653, 660 (1996). Accordingly, defendant's relevance argument is overruled.

C. Probative Value and Prejudice

Defendant also contends that the knife should have been excluded under Rule 403, which states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2011). "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). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

In the instant case, we discern no abuse of discretion in the trial court's decision to admit the knife into evidence. The trial court's findings, which are binding on appeal, reflect that the knife could have potentially been the murder weapon. Although this evidence was not substantial, it cannot be said that the court's determination that the knife's probative value was not substantially outweighed by the danger of unfair prejudice to defendant was "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *Id.* Consequently, this argument is overruled.

IV. Voluntariness of Defendant's Confession

[3] Defendant argues that the trial court erred in denying his motion to suppress the statements defendant made to his wife, Tolvi. Defendant contends that the statements were not voluntary and thus, inadmissible. We disagree.

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). In addition, this Court may also consider any uncontroverted evidence which was presented at the suppression hearing which would support the trial court's conclusions of law. *State v. Richardson*, 316 N.C. 594, 600, 342 S.E.2d 823, 828 (1986). "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).

"The ultimate test of the admissibility of a confession is whether the statement was in fact voluntarily and understandingly made." *State v. Davis*, 305 N.C. 400, 419, 290 S.E.2d 574, 586 (1982). "To be admissible, a defendant's statement must be the product of an essentially free and unconstrained choice by its maker, and the State must show by a preponderance of the evidence that defendant's confession was voluntary." *State v. Wilkerson*, 363 N.C. 382, 431, 683 S.E.2d 174, 204 (2009)(internal quotations and citations omitted). "The voluntariness of a confession is determined by the totality of the circumstances. The proper determination is whether the confession at issue was the product of improperly induced hope or fear." *Gainey*, 355 N.C. at 84, 558 S.E.2d at 471 (internal quotations and citation omitted).

> Factors to be considered in this inquiry are whether defendant was in custody, whether he was deceived, whether his *Miranda* rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

State v. Hardy, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994)(citations omitted). However, "[t]he presence or absence of one or more of these

factors is not determinative." *State v. Barlow*, 330 N.C. 133, 141, 409 S.E.2d 906, 911 (1991).

In the instant case, the trial court's order included findings on each of Tolvi's five interactions with defendant while defendant was incarcerated at various correctional facilities due to an unrelated conviction. The findings reflect that Agent Brown instructed Tolvi as to the type of information she should seek from defendant. In order to obtain this information, Tolvi did not threaten defendant, but she instead made up certain pieces of evidence which she claimed law enforcement had recovered. Additionally, Tolvi told defendant that law enforcement suspected that she was involved in Highsmith's murder. In response, defendant provided incriminating statements in which he corrected Tolvi's lies regarding the evidence and admitted some of the details of Highsmith's murder.

In arguing that his confession to Tolvi was involuntary, defendant focuses on Tolvi's deception and her emotional appeals to defendant based on these deceptions. However, our Supreme Court has held that

> [t]he use of trickery by police officers in dealing with defendants is not illegal as a matter of law. The general rule in the United States, which this Court adopts, is that while deceptive methods or false statements by police officers are not commendable practices, standing alone they do not render a confession of guilt inadmissible. ... False statements by officers concerning evidence, as contrasted with threats or promises, have been tolerated in confession cases generally, because such statements do not affect the reliability of the confession.

State v. Jackson, 308 N.C. 549, 574, 304 S.E.2d 134, 148 (1983) (citations omitted). Thus, standing alone, Tolvi's false statements about the evidence and her fear that she was being implicated in the murder, while certainly deceptive, are not determinative on the issue of voluntariness. *Id.; see also State v. Branch*, 306 N.C. 101, 108, 291 S.E.2d 653, 659 (1982)(Law enforcement officer's statement to the defendant that he would "probably need to check to see if his father had any involvement" with the defendant's crime did not render defendant's subsequent confession involuntary.).

In addition, Tolvi's interactions with defendant did not require a warning under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). The United States Supreme Court has specifically held that "[c]onversations between suspects and undercover agents do not

implicate the concerns underlying Miranda." *Illinois v. Perkins*, 496 U.S. 292, 296, 110 L. Ed. 2d 243, 251 (1990). Tolvi's deceptions do not alter this principle, because "Miranda forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust. . . . ...Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within Miranda's concerns." *Id.* at 297, 110 L. Ed. 2d at 251.

The remaining evidence from the suppression hearing strongly suggests that defendant's statements were voluntary. Each of defendant's visits with Tolvi lasted only about one hour, and he was free to terminate the visits at any time. In addition, the trial court specifically found that Tolvi made no threats against defendant during any of her visits. Tolvi also made no promises which would have affected the voluntariness of defendant's confession. *See State v. Wallace*, 351 N.C. 481, 520, 528 S.E.2d 326, 350 (2000)("An improper inducement generating hope must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage." (internal quotations and citation omitted)).

After considering the totality of the circumstances, we hold the trial court's findings and the uncontroverted evidence presented at the suppression hearing support the trial court's conclusion that defendant's confession was voluntary. The preponderance of the evidence demonstrates that defendant's statements to Tolvi were not "the product of improperly induced hope or fear," *Gainey*, 355 N.C. at 84, 558 S.E.2d at 471, but instead resulted from his misplaced trust in her. Accordingly, the trial court did not err in denying defendant's motion to suppress defendant's confession to Tolvi. This argument is overruled.

V. Conclusion

The trial court properly allowed Durham's prior testimony into evidence under Rule 804(b)(1), and defendant's confrontation rights were not violated by the introduction of her testimony. The trial court did not err by allowing Agent Brown to testify that he had met with Ford multiple times, and that, as a result of those meetings, he searched a field near Andrews Terrace and discovered a knife. The trial court's findings, which are unchallenged on appeal, support its conclusions that the knife was relevant under Rule 401 and not unduly prejudicial under Rule 403. Defendant's confession to his wife was voluntarily made and thus, admissible at trial. Defendant received a fair trial, free from error.

No error.

Judge HUNTER, Robert C. concurs.

Judge HUNTER, Jr., Robert N. concurs in the result.

STATE OF NORTH CAROLINA
v.
PAUL EVAN SEELIG, DEFENDANT

No. COA12-442

Filed 19 March 2013

1. Indictment and Information—obtaining property by false pretenses—allegations sufficient—indictment not facially defective

Indictments underlying defendant's twenty-three convictions for obtaining property by false pretenses in a case involving the sale of allegedly gluten-free products were not facially defective. The allegations in the indictments were sufficient to raise a reasonable inference that defendant, who was expressly alleged to have obtained value from the victim by means of a false pretense, was also the person who made the false representation that the products contained no gluten.

2. Constitutional Law—confrontation of witnesses—video testimony—important state interest—reliable testimony—no structural error

The trial court did not violate defendant's rights under the Confrontation Clauses of the federal and state constitutions in an obtaining property by false pretenses case by permitting a witness to testify by way of a live, two-way, closed-circuit internet broadcast from Nebraska. Under the controlling test set out in *Maryland v. Craig*, 497 U.S. 836 (1990), the trial court did not err in allowing the live video testimony as it was necessary to further an important state interest and the reliability of the testimony was assured. Further, the admission of the testimony was not structural error.

3. Crimes, Other—obtaining property by false pretenses—sufficient evidence—no fatal variance

The trial court did not err in an obtaining property by false pretenses case by denying defendant's motion to dismiss the charges. The State presented substantial evidence that the products defendant sold to each of thirteen victims who did not submit samples for laboratory testing contained gluten. Further, the State presented substantial evidence defendant attempted to obtain value from a victim by false pretenses. Additionally, there was no fatal variance between the indictment and evidence presented at trial as the indictment need not have alleged, and the State need not have proven, that defendant intended to defraud any particular person, and the State's evidence was not inconsistent with a bill of particulars.

4. Appeal and Error—preservation of issues—Constitutional Law—double jeopardy—Rule 2 not invoked

Defendant's argument the State violated his right to be free from double jeopardy for obtaining property by false pretenses was not preserved at trial where the record contained no indication that defense counsel specifically argued the double jeopardy issue to the trial court. The Court of Appeals declined to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to review the issue where the record on appeal did not contain all the materials necessary to determine defendant's double jeopardy claim.

5. Appeal and Error—preservation of issues—inadequate record on appeal—constitutional law—effective assistance of counsel

Defendant's argument that he did not receive effective assistance of counsel during the plea bargaining process in an obtaining property by false pretenses case was dismissed without prejudice to defendant's filing a motion for appropriate relief in the trial court. Defense counsel conceded that the record before the Court of Appeals was inadequate to address the issue, and the issue was raised on direct appeal for preservation purposes only.

Appeal by defendant from judgments entered 12 April 2011 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 15 November 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General I. Faison Hicks and Special Deputy Attorney General Anne J. Brown, for the State.

Edward Eldred for defendant-appellant.

GEER, Judge.

Defendant Paul Evan Seelig appeals from 23 convictions of obtaining property by false pretenses. On appeal, defendant primarily argues that his rights under the Confrontation Clauses of the federal and state constitutions were violated when the trial court permitted a witness to testify by way of a live, two-way, closed-circuit internet broadcast from Nebraska. We hold that under the controlling test set out in *Maryland v. Craig*, 497 U.S. 836, 111 L. Ed. 2d 666, 110 S. Ct. 3157 (1990), the trial court did not err in allowing the live video testimony.

Facts

The State's evidence tended to show the following facts. Defendant was the owner of Great Specialty Products, a company that sold, among other things, bagels, breads, and other baked edible goods (collectively "bread products") that were advertised as homemade and gluten free. Gluten is a protein found in wheat, barley, and rye. Some people, including people diagnosed with celiac disease, are gluten intolerant because their bodies recognize gluten as a foreign substance and create antibodies that actually work to damage the body.

When people with gluten intolerance ingest gluten, their symptoms include abdominal bloating, indigestion, abdominal cramping and pain, diarrhea, vomiting, acidosis, and fatigue. For some, but not all, people with celiac disease, ingesting even a very small amount of gluten can cause these symptoms. People who are gluten intolerant are treated by working with nutritionists to maintain gluten-free diets; there is no medication to treat celiac disease.

Defendant began selling his bread products — represented as gluten free — in August 2009. He operated out of a booth at the flea market located on the State Fairgrounds in Raleigh, North Carolina. Defendant next sold the bread products from a booth at the 2009 State Fair in Raleigh. During the fall of 2009 and early 2010, defendant also sold the bread products online from a "Great Specialty Products" website. He delivered the products to customers' homes anywhere within a 40-minute drive from Morrisville, North Carolina.

None of the bread products advertised by defendant as gluten free were actually gluten free. Defendant bought all of the bread products either completely premade or in a partially-baked, frozen form that only needed to be baked briefly in the oven. Many, but not all, of the bread products sold on defendant's website as gluten free were manufactured by Tribecca Oven, a New Jersey bakery. Because gluten is integral to

Tribecca Oven's manufacturing process, a witness from Tribecca Oven described the company as a "gluten machine" and testified that all of the bread products manufactured by Tribecca Oven contain gluten.

All of the bagels and some of the other products defendant represented as homemade and gluten free were purchased from Sam's, Costco, or BJ's. The remainder of the bread products were delivered by truck to defendant's home. None of the products received or purchased by defendant for resale bore labels indicating they were gluten free. The premade bread products were simply repackaged for sale by defendant. The products purchased in a frozen, partially-baked form were briefly baked in an oven and then packaged for sale by defendant. Laboratory testing on 12 of 13 samples of bread products sold by defendant and advertised as gluten free indicated that those samples contained gluten.

During the fall of 2009 and early 2010, defendant or one of his employees sold bread products to at least 23 persons who would not have purchased the products if the products had not been advertised as gluten free. Many of those persons either had celiac disease or were purchasing the products for a person with celiac disease. At least one of those individuals filed a complaint with the North Carolina Department of Justice. The North Carolina Department of Agriculture and Consumer Services investigated defendant and filed a civil action against him seeking permanent injunctive relief. The Department of Agriculture obtained a temporary restraining order against defendant pending a hearing on a preliminary injunction. The record does not contain any further information regarding that civil action.

On 6 April 2010, defendant was indicted for nine counts of obtaining property by false pretenses. On 9 November 2010, defendant was indicted for an additional 19 counts of obtaining property by false pretenses. At trial, defendant testified that he never advertised or sold products as gluten free that he knew, in fact, contained gluten. Defendant claimed he purchased all of his gluten-free products from "Rise 'n Bakeries," an Amish bread products manufacturer located in Millsburg, Ohio. He purchased regular bread products from other companies. According to defendant, none of his bread products or bagels were bought at Costco, Sam's, or BJ's. Defendant testified he regularly performed tests on the products he sold as gluten free to ensure that they were, in fact, gluten free.

Defendant further testified that as of 22 December 2009, defendant believed there may have been cross-contamination at some point during the production process of his bread products such that the end product

was not actually gluten free. Defendant promptly notified his customers and began printing labels on the products warning that they may have been contaminated with gluten.

Defendant also presented the testimony of one of his customers, Sharon Hargraves. Ms. Hargraves testified that she has celiac disease, she purchased bread products from defendant throughout the fall of 2009, and she showed no symptoms of having ingested gluten.

At trial, the State dismissed four counts of obtaining property by false pretenses, and the trial court dismissed an additional count of obtaining property by false pretenses on defendant's motion at the close of all the evidence. The jury found defendant guilty of 23 counts of obtaining property by false pretenses. Defendant then pled guilty to the aggravating factor that he took advantage of a position of trust or confidence to commit the offenses.

The trial court consolidated the convictions into 11 judgments. In each judgment, the court sentenced defendant to an aggravated-range term of 10 to 12 months imprisonment and further ordered that all of the sentences run consecutively. Defendant's written notice of appeal was not timely, but this Court granted defendant's petition for writ of certiorari.

I

[1] Defendant first argues that the indictments underlying his 23 convictions for obtaining property by false pretenses were facially defective. "[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). "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 (2009).

Each of the indictments at issue alleged the following:

> [O]n or about [date(s) of offense], in Wake County the defendant named above unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud, obtain US Currency, having a value of [monetary value] from [name of the victim], by means of a false pretense which was calculated to deceive and did deceive.
>
> The false pretense consisted of the following: The defendant sold bread products to the victim that were

> advertised and represented as Gluten Free when in fact the defendant knew at the time that the products contained Gluten. This act was done in violation of N.C.G.S. 14-100.

Obtaining property by false pretenses consists of four elements: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980). "[A]n indictment must allege every element of an offense . . . ." *State v. Kelso*, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007).

Defendant contends that the indictments fail to sufficiently allege that he made a false representation because they do not allege either "that [defendant] himself 'advertised and represented' the bread products as gluten-free or that [defendant] was the agent of the entity that 'advertised and represented' the products as gluten-free." Defendant points to the indictments' use of the passive voice — "defendant sold bread products to the victim that were advertised and represented as Gluten Free" — and argues that because this language does not explicitly allege that defendant made the misrepresentations, the indictments are fatally defective. We disagree.

In *Cronin*, the defendant challenged the sufficiency of his indictment for obtaining property by false pretenses because, in part, it failed to directly allege "that defendant did in fact deceive the [victim bank]," a necessary element of the offense. 299 N.C. at 236, 262 S.E.2d at 282. The Court explained that the indictment at issue "alleged that defendant knowingly and falsely made false representations to the bank that he was offering as security for a loan a new mobile home having value of $10,850, when actually the offered security was a fire-damaged mobile home of the value of $2,500, and that defendant by means of such false pretense and with intent then and there to defraud the bank received from the bank the sum of $5,704.54." *Id.* at 238, 262 S.E.2d at 283. In concluding that the indictment was adequate, the Court explained: "If the false pretense caused the victim to give up his property, it logically follows that the property was given up because the victim was in fact deceived by the false pretense." *Id.* Thus, the Court upheld the indictment since the allegations were "sufficient to raise a *reasonable inference* that the bank made the loan because it was deceived by defendant's false representations." *Id.* (emphasis added).

In this case, the indictments allege that defendant "*did . . . obtain*

US Currency, having a value of [monetary value] from [name of the victim], *by means of a false pretense* which was calculated to deceive and did deceive." (Emphasis added.) The indictments, therefore, allege that defendant, and not some other person or entity, employed a false pretense to obtain money from the alleged victims. The indictments then specifically describe the false pretense used by defendant as follows: "*The defendant sold* bread products to the victim *that were advertised and represented* as Gluten Free which in fact *the defendant knew* at the time that the products contained Gluten." (Emphasis added.)

We conclude that, as in *Cronin*, the allegations in the indictments were "sufficient to raise a reasonable inference" that defendant, who was expressly alleged to have obtained value from the victim *by means of* a false pretense, was also the person who made the false representation that the products contained gluten. *Id. Cf. State v. Sturdivant*, 304 N.C. 293, 310, 283 S.E.2d 719, 731 (1981) (rejecting defendant's facial challenge to indictment for kidnapping based on argument that indictment failed to indicate kidnapping was accomplished without victim's consent, in part, because indictment stated defendant " '*unlawfully and wilfully did feloniously kidnap*' " and " '*unlawfully restrain[]*' " victim and "common sense dictates that one cannot unlawfully kidnap or unlawfully restrain another with his consent").

Defendant, however, points to *State v. Whedbee*, 152 N.C. 770, 67 S.E. 60 (1910). There, the Court reviewed the sufficiency of an indictment for obtaining property by false pretenses and stated that an indictment "must directly and distinctly aver every fact or circumstance that is essential, and it cannot be helped out by the evidence at the trial, or be aided by argument and inference." *Id.* at 774, 67 S.E. at 62 (internal quotation marks omitted). To the extent the *Whedbee* Court precluded reliance on inferences in reviewing indictments, that aspect of the opinion has been effectively overruled by *Cronin.* Under *Cronin*, the indictments in this case are facially valid.

II

[2] Defendant next contends that the trial court's admission of Sean Kraft's testimony from another state via "live closed-circuit web broadcast" violated defendant's rights under the Confrontation Clauses contained in the Sixth Amendment to the Constitution of the United States and Article I, Section 23 of the Constitution of North Carolina. Mr. Kraft testified regarding the results of laboratory tests he performed on samples of defendant's bread products.

Defendant concedes that he failed to object at trial to the admission

of Mr. Kraft's testimony on the grounds that the testimony "violated the confrontation clause's face-to-face guarantee" and argues plain error. For this Court to find 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 affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted). "We review *de novo* whether the right to confrontation was violated." *State v. Jackson*, 216 N.C. App. 238, 241, 717 S.E.2d 35, 38 (2011), *appeal dismissed and disc. review denied*, ___ N.C. ___, 720 S.E.2d 681, *cert. denied*, ___ U.S. ___, 184 L. Ed. 2d 81, 133 S. Ct. 164 (2012).

The Confrontation Clause contained in the Sixth Amendment to the federal constitution, enforceable against the States through the Fourteenth Amendment, "protects the fundamental right of an accused 'to be confronted with the witnesses against him.' " *Id.* (quoting U.S. Const. amend. VI). "The elements of confrontation include the witness's: physical presence; under-oath testimony; cross-examination; and exposure of his demeanor to the jury." *Id.* "The physical presence, or 'face-to-face,' requirement embodies the general Confrontation Clause protection of an accused's 'right [to] physically face those who testify against him.' " *Id.* (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 94 L. Ed. 2d 40, 53, 107 S. Ct. 989, 998 (1987)). "But, this general rule 'must occasionally give way to considerations of public policy and the necessities of the case.' " *Id.* (quoting *Mattox v. United States*, 156 U.S. 237, 243, 39 L. Ed. 409, 411, 15 S. Ct. 337, 340, (1895)).

In this case, the State contends *State v. Jeffries*, 55 N.C. App. 269, 271-74, 285 S.E.2d 307, 309-11 (1982), is controlling. In *Jeffries*, during the sixth week of the trial, direct examination of the State's final witness was interrupted by an evening recess and, afterwards, the witness was admitted into the hospital for a coronary condition. *Id.* at 283, 285 S.E.2d at 316-17. The witness' treating physician told the trial court that the witness could not return for at least two weeks but that the witness could

testify by way of videotape. *Id.* at 283-84, 285 S.E.2d at 317. The trial court allowed the videotaping of the testimony. *Id.* at 284, 285 S.E.2d at 317.

On appeal, the defendant challenged the admission of videotaped testimony based on his right to confrontation. *Id.* This Court held that videotaped testimony did not violate a defendant's right to confrontation if it was admitted under carefully controlled conditions:

> First, there must be exceptional circumstances necessitating the procedure. . . . [T]he witness must be unavailable to testify within a period of time after which the trial itself would be subject to mistrial. The videotaped session must be under the control and supervision of the trial judge, and the defendant and his attorney must be allowed to attend. Effective cross-examination by defendant must be unimpeded, and all measures must be taken to eliminate possible prejudicial effects due to location or condition of the witness. Furthermore, the videotape shown to the jury must be clear, allowing the jurors to observe clearly the demeanor of the witness.

Id. at 287, 285 S.E.2d at 318. The Court ultimately concluded that all of these requirements were met and, therefore, the defendant had failed to show any violation of his right to confrontation when the witness testified via videotape. *Id.*, 285 S.E.2d at 318-19.

Subsequent to *Jeffries*, however, the United States Supreme Court decided *Craig*, which addressed the constitutionality of a Maryland statute that allowed for alleged child abuse victims to testify by way of live, one-way closed circuit television. 497 U.S. at 840-42, 111 L. Ed. 2d at 675-76, 110 S. Ct. at 3160-61. The Court held: "[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850, 111 L. Ed. 2d at 682, 110 S. Ct. at 3166.

The Court stressed that "[t]he critical inquiry . . ., therefore, is whether use of [one-way closed circuit television] is necessary to further an important state interest." *Id.* at 852, 111 L. Ed. 2d at 682, 110 S. Ct. at 3167. The Court then held that "if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such

cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." *Id.* at 855, 111 L. Ed. 2d at 685, 110 S. Ct. at 3169.

Whether use of a procedure that fails to provide face-to-face confrontation is necessary to further the important state interest must be decided on a case-by-case basis. *Id.* To decide the "necessity" question, the trial court must hold an evidentiary hearing and make case-specific findings as to the necessity of allowing the witness to testify outside of the defendant's physical presence in order to fulfill the important state interest. *Id*. at 855-56, 111 L. Ed. 2d at 685, 110 S. Ct. at 3169.

The *Craig* Court then reviewed the statutory procedure at issue to determine whether it assured the reliability of the testimony. The Court pointed out that although the child witness was unable to see the defendant, the existence of the "other elements of confrontation — oath, cross-examination, and observation of the witness' demeanor — adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Id.* at 851, 111 L. Ed. 2d at 682, 110 S. Ct. at 3166. Ultimately, the Court determined:

> Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.

Id. at 857, 111 L. Ed. 2d at 686, 110 S. Ct. at 3170.

Because *Jeffries* pre-dates *Craig*, we hold that *Craig* replaced the test set out by this Court in *Jeffries* and is the controlling test to determine the admissibility of witness testimony absent face-to-face confrontation at trial.[1] As this Court has previously held in *Jackson*, 216 N.C. App. at 244, 717 S.E.2d at 40, the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 60, 158 L. Ed. 2d 177, 198, 124 S. Ct. 1354, 1369 (2004), did not address the face-to-face aspect of confrontation and did not overrule *Craig*.

Courts in other jurisdictions have, subsequent to *Crawford*,

1. We note, though, that the *Jeffries* test bears a strong similarity to the *Craig* analysis.

continued to apply the *Craig* test in determining whether a defendant's confrontation right was violated by a witness' live, two-way video testimony at trial. *See, e.g.*, *United States v. Yate*s, 438 F.3d 1307, 1313 (11th Cir. 2006) (holding in conspiracy and fraud case that "*Craig* supplies the proper test for admissibility of two-way video conference testimony"); *People v. Wrotten*, 14 N.Y.3d 33, 40, 923 N.E.2d 1099, 1103 (2009) (relying on *Craig* to hold "public policy of justly resolving criminal cases while at the same time protecting the well-being of a witness can require live two-way video testimony in the rare case where a key witness cannot physically travel to court in New York and where, as here, defendant's confrontation rights have been minimally impaired"); *Bush v. State*, 193 P.3d 203, 215-16 (Wyo. 2008) (applying *Craig* test to determine that two-way video conferencing testimony of witness was necessary to meet important public interest because witness was located in another state and too ill to travel); *State v. Johnson*, 195 Ohio App. 3d 59, 74-76, 958 N.E.2d 977, 989-91 (2011) (applying *Craig* test to determine admissibility of testimony via two-way, closed-circuit television when necessary because of defendant's family's intimidation of witnesses), *appeal not allowed*, 131 Ohio St. 3d 1437, 960 N.E.2d 987 (2012).

Here, the first question is whether allowing Mr. Kraft to testify through a two-way, closed circuit web broadcast was necessary to further an important state interest. Other jurisdictions have found important state interests outside the child abuse victim context specifically addressed in *Craig*, including the interest in protecting a witness' health while also expeditiously and justly resolving a criminal proceeding. *See, e.g.*, *Horn v. Quarterman*, 508 F.3d 306, 319-20 (5th Cir. 2007) (finding requisite state interest for use of two-way closed circuit television when necessary to "protect[] the witness . . . from physical danger or suffering" because of witness' illness and inability to travel); *Harrell v. State*, 709 So. 2d 1364, 1369-70 (Fla. 1998) (recognizing important state interest in "expeditiously and justly resolv[ing] criminal matters that are pending in the state court system" when witness "was in poor health and could not make the trip to this country"); *Wrotten*, 14 N.Y.3d at 40, 923 N.E.2d at 1103 (holding that "the public policy of justly resolving criminal cases while at the same time protecting the well-being of a witness can require live two-way video testimony in the rare case where a key witness cannot physically travel to court in New York and where, as here, defendant's confrontation rights have been minimally impaired"); *Bush*, 193 P.3d at 215-16 (holding important state interest was "preventing further harm to [the witness'] already serious medical condition" given that recess to allow witness to recover would not be appropriate because recovery

would take "a long time"). *See also Johnson*, 195 Ohio App. 3d at 75, 958 N.E.2d at 989-90 (holding that "trial court's use of the two-way video procedure was necessary to further the public policy of justly resolving the criminal case, while at the same time protecting the well-being of the state's witnesses" who had been intimidated by defendant's family).

This case, like those in other jurisdictions, implicates the State's interest in justly and efficiently resolving a criminal matter when a witness cannot travel because of his health. The trial court, as required by *Craig*, conducted a hearing and found that Mr. Kraft had a history of panic attacks, had suffered a severe panic attack on the day he was scheduled to fly from Nebraska to North Carolina for trial, was hospitalized as a result, and was unable to travel to North Carolina because of his medical condition.

Defendant challenges the trial court's finding that Mr. Kraft's medical condition was caused by a fear of travelling, rather than a general fear of testifying in court. Mr. Kraft's voir dire testimony, however, supported the trial court's finding that his inability to travel was due to a medical condition and was not simply a general fear of testifying. We may not, therefore, revisit that finding. It was up to the trial court — and not this Court — to determine the credibility of Mr. Kraft's claim that he could not travel due to his health. Consequently, the trial court's findings were sufficient to establish that allowing Mr. Kraft to testify by way of live two-way video was necessary to meet an important state interest.

Turning to *Craig*'s second requirement — that the reliability of the testimony be assured — the trial court, in this case, found that the deputy clerk of court had administered the oath to Mr. Kraft via the two-way video feed and that the court had impressed upon Mr. Kraft that Mr. Kraft's failure to give truthful answers "could subject him to prosecution for the felony of perjury, a Class F felony, with a maximum possible punishment of 50 months imprisonment." The trial court also made the following findings regarding the process employed:

> That the videotaped [sic] session will be under the control of the trial judge and the Defendant and his attorney are present and will be present during the presentation of his testimony.
>
> That effective cross-examination by the Defendant will be unimpeded in this case and that all measures have been taken to eliminate any possible prejudice due to the location and conditions of the witness, and that the

> presentation of the witness's testimony will be clear and presented live to the jury in this case as the witness testifies and offers evidence in this case.

It appears from the record that Mr. Kraft's examination was carried out as specified in the court's finding. Defendant conducted a brief cross-examination of Mr. Kraft, and defendant and the jury could view Mr. Kraft while Mr. Kraft testified.

Thus, like the witnesses in *Craig*, Mr. Kraft "testified under oath, w[as] subject to full cross-examination, and w[as] able to be observed by the judge, jury, and defendant as [he] testified." *Craig*, 497 U.S. at 857, 111 L. Ed. 2d at 686, 110 S. Ct. at 3170. Accordingly, the *Craig* test was satisfied here, and the trial court did not err in admitting Mr. Kraft's testimony.

Defendant further contends that admission of Mr. Kraft's testimony was structural error and error per se. "Structural error is a rare form of constitutional error resulting from structural defects in the constitution of the trial mechanism which are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004) (internal quotation marks omitted). "[A] defendant's remedy for structural error is not dependent upon harmless error analysis; rather, such errors are reversible *per se*." *Id.* "North Carolina courts also apply a form of structural error known as error per se[,]" and "[l]ike structural error, error per se is automatically deemed prejudicial and thus reversible without a showing of prejudice." *Lawrence*, 365 N.C. at 514, 723 S.E.2d at 331, 332.

Because we hold that the admission of Mr. Kraft's testimony was not error, we need not reach the arguments that admission of the testimony was such serious error that it constituted structural error or error per se not requiring a showing of prejudice. Likewise, without error, defendant cannot establish the prejudice necessary to support his claim that he received ineffective assistance of counsel when his trial counsel failed to object to admission of Mr. Kraft's testimony based on the face-to-face aspect of defendant's right to confrontation. *See State v. Pratt*, 161 N.C. App. 161, 165, 587 S.E.2d 437, 440 (2003) ("A successful ineffective assistance of counsel claim based on a failure to request a jury instruction requires the defendant to prove that without the requested jury instruction there was plain error in the charge.").

III

[3] Defendant next argues that the trial court erred in denying his motions to dismiss. "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. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted . . . 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).

First, defendant contends that the State failed to present substantial evidence that the bread products he sold to 13 of the alleged victims contained gluten because the State did not produce evidence that those bread products were subjected to chemical tests showing they contained gluten. Defendant asserts that the only evidence produced by the State that the bread products purchased by those 13 individuals contained gluten was unreliable lay testimony that after eating the bread products, people with gluten intolerances suffered symptoms that they had suffered on prior occasions upon eating gluten.

Defendant has overlooked the testimony of defendant's former employee, Ms. Mills, who testified to the following. She worked for defendant from April 2008 to December 2009, including when defendant sold bread products at the flea market, at the 2009 State Fair, and through his website. According to Ms. Mills, other than certain products delivered by truck, all the bread products sold by defendant were purchased from Costco, BJ's, or Sam's. All of the bagels sold by defendant were "common brand" bagels purchased from Costco, Sam's, or BJ's. Ms. Mills testified that none of the bread products purchased by defendant and ultimately resold bore labels stating that the products were gluten free.

In addition, a representative of Tribecca Oven testified that many, although not all, of the bread products sold on defendant's website as gluten free were manufactured by Tribecca Oven. Tribecca Oven sells its

products in a partially-baked, frozen form. The representative confirmed that all bread products manufactured by Tribecca Oven contain gluten.

In addition, the State presented evidence that laboratory technicians employed by the University of Nebraska's Food Allergy Research and Resource Program ("FARRP"), including Mr. Kraft, performed laboratory tests on 13 samples of food products sold by defendant as gluten free, and that all but one of those samples contained a gluten content of greater than 5,000 parts per million. One of the State's experts testified that while the Food and Drug Administration has not provided a definition for "gluten free" in the United States, European countries have specified that products are "gluten free" when they have a gluten content of less than 20 parts per million.

The laboratory tests were performed on samples of one or more bread products submitted by seven of defendant's alleged victims. With respect to the sole sample that did not test positive for gluten, the State's experts further testified that if the sample had fermented prior to testing, it was possible that the test would not detect high levels of gluten even though they were present.

Finally, the victims who did not submit samples for testing provided lay testimony regarding symptoms they or a person for whom they bought defendant's bread products experienced after eating the products. The victims testified that they or the person for whom they bought the products had celiac disease, a wheat allergy, or were gluten intolerant; they attempted to maintain a gluten-free diet; and, upon eating defendant's products, they experienced symptoms consistent with eating gluten, including one or more of the following symptoms: nausea, vomiting, diarrhea, stomach pain, fatigue, insomnia, thyroid problems, bloating, cramping, headaches, tiredness, digestion problems, depression, and skin rash.

The State's evidence that all of defendant's products were purchased either completely premade or in a partially-baked, frozen form, that none of the products bore labels stating they were gluten free, and that many of the products were manufactured by Tribecca Oven and, therefore, contained gluten, was evidence tending to show that none of defendant's products were gluten free. We hold that this evidence, combined with the laboratory test results from samples submitted by other victims and the lay testimony of victims describing the symptoms they or others suffered after eating defendant's products, constituted substantial evidence that the products defendant sold to each of the victims who did not submit samples for laboratory testing contained gluten.

Defendant also contends that his motion to dismiss the charge that he obtained property by false pretenses from Tara Muller was erroneously denied because the State's evidence showed that Ms. Muller gave defendant a check for her purchase of bread products but that defendant returned the check to Ms. Muller without cashing it. Defendant argues that he, therefore, ultimately obtained no value from Ms. Muller. Defendant's argument fails to recognize that, under N.C. Gen. Stat. § 14-100(a) (2011), obtaining property by false pretenses can be proven by evidence that the defendant "obtain[ed] or *attempt[ed] to obtain* from any person within this State any . . . thing of value." (Emphasis added.) *See also Cronin*, 299 N.C. at 242, 262 S.E.2d at 286 (holding element of obtaining property by false pretenses is making a false representation "by which one person obtains or attempts to obtain value from another"). The State's evidence tending to show defendant obtained the check, but ultimately returned the check upon a complaint by Ms. Muller that she became ill after eating the bread products, was sufficient to show defendant attempted to obtain value from Ms. Muller by false pretenses.

To the extent that defendant argues in his brief that the State's evidence fatally varied from the allegations in the indictment because the indictment alleged that defendant obtained "US Currency" from Ms. Muller rather than a check, that argument was not made below and has, therefore, not been preserved for appellate review. *See State v. Pickens*, 346 N.C. 628, 645, 488 S.E.2d 162, 172 (1997) ("Regarding the alleged variance between the indictment and the evidence at trial, defendant based his motions at trial solely on the ground of insufficient evidence and thus has failed to preserve this argument for appellate review.").

Finally, defendant additionally argues that his motion to dismiss the charge that he obtained property by false pretenses from Amee Wojdyla was erroneously denied because the indictment specifically alleged that defendant obtained value from Ms. Wojdyla, but the State's evidence showed only that defendant obtained value from Ms. Wojdyla's husband. "[T]he evidence in a criminal case must correspond to the material allegations of the indictment, and where the evidence tends to show the commission of an offense not charged in the indictment, there is a fatal variance between the allegations and the proof requiring dismissal." *State v. Williams*, 303 N.C. 507, 510, 279 S.E.2d 592, 594 (1981).

"[A]n indictment 'must allege lucidly and accurately all the essential elements of the offense endeavored to be charged.' " *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) (quoting *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953)). In order to be fatal, a variance must relate to "an essential element of the offense." *Pickens*, 346 N.C. at 646,

488 S.E.2d at 172. Alternately, "[w]hen an averment in an indictment is not necessary in charging the offense, it will be 'deemed to be surplusage.' " *Id.* (quoting *State v. Stallings*, 267 N.C. 405, 407, 148 S.E.2d 252, 253 (1966)).

An indictment for obtaining property by false pretenses need not allege the name of any particular victim because N.C. Gen. Stat. § 14-100(a) "does not require that the State prove 'an intent to defraud any particular person.' " *State v. McBride*, 187 N.C. App. 496, 501, 653 S.E.2d 218, 222 (2007) (quoting N.C. Gen. Stat. § 14-100(a) (2005)). Indeed, N.C. Gen. Stat. § 14-100(a) specifically provides:

> [I]t shall be sufficient in any indictment for obtaining or attempting to obtain any such money, goods, property, services, chose in action, or other thing of value by false pretenses to allege that the party accused did the act with intent to defraud, *without alleging an intent to defraud any particular person*, *and without alleging any ownership of the money*, *goods*, *property*, *services*, *chose in action or other thing of value*; and upon the trial of any such indictment, it shall not be necessary to prove either an intent to defraud any particular person or that the person to whom the false pretense was made was the person defrauded, *but it shall be sufficient to allege and prove that the party accused made the false pretense charged with an intent to defraud.*

(Emphasis added.)

Since an indictment need allege only an intent to defraud and need not allege any person's ownership of the thing of value obtained by the false pretense, when the indictment includes the name of the victim, that allegation is surplusage and any variation between the allegations in the indictment and the evidence at trial as to the name of the victim is not fatal. *See State v. Salisbury Ice & Fuel Co.*, 166 N.C. 366, 367, 81 S.E. 737, 737 (1914) (holding that no fatal variance occurred with respect to indictment charging defendant with obtaining property by false pretenses from different person than proved at trial because "[t]he charge as to the persons intended to be cheated was . . . surplusage and immaterial").

Defendant nonetheless cites *State v. Loudner*, 77 N.C. App. 453, 335 S.E.2d 78 (1985), in support of his argument. There, the defendant was convicted of engaging in a sex act with a person in his custody in violation of N.C. Gen. Stat. § 14–27.7. *Id.* at 453, 335 S.E.2d at 79. On appeal,

the Court held that there was a fatal variance between the indictment and the evidence at trial because the indictment alleged that the "defendant engaged 'in a sexual act, to wit: performing oral sex' on the child involved" and the bill of particulars identified only oral sex as the sexual act involved, but "the State's evidence showed only that the defendant placed his finger in her vagina, which by definition is a separate sex offense under the terms of G.S. 14–27.1(4)." *Id.*

The essential elements of the offense at issue in *Loudner* were "that the defendant had (1) assumed the position of a parent in the home, (2) of a minor victim, and (3) engaged in a sexual act with the victim residing in the home." *State v. Oakley*, 167 N.C. App. 318, 322, 605 S.E.2d 215, 218 (2004). Thus, unlike the name of the victim in the present case, the performance of the sexual act *was* an essential element of the offense in *Loudner*. The State was, therefore, bound by the allegation in the indictment and the bill of particulars regarding the essential element even though it was not required to specifically identify the actual sex act in the indictment. *Loudner*, 77 N.C. App. at 454, 335 S.E.2d at 78.

Because (1) the General Assembly has expressly provided that an indictment for obtaining property by false pretenses need not allege and the State need not prove that the defendant intended to defraud any particular person and (2) the State's evidence was not inconsistent with a bill of particulars, *Loudner* does not control. There was no fatal variance, and the trial court properly denied the motion to dismiss.

IV

[4] Defendant next contends that the State violated his right to be free from double jeopardy for the same offense because, prior to this criminal action, the North Carolina Department of Agriculture and Consumer Services filed a civil action against defendant seeking injunctive relief. We must first address whether this argument was preserved in the trial court.

Below, defendant, although represented by trial counsel, filed 10 pro se motions to dismiss, three of which included double jeopardy claims. Defendant's trial counsel, however, did not expressly raise the double jeopardy argument. It is well established 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. Williams*, 363 N.C. 689, 700, 686 S.E.2d 493, 501 (2009) (quoting *State v. Grooms*, 353 N.C. 50, 61, 540 S.E.2d 713, 721 (2000)).

Thus, ordinarily, a defendant has no right to file motions pro se while represented by counsel. Nevertheless, this Court has held that a ruling on a pro se motion to dismiss on speedy trial grounds, filed when a defendant was represented by counsel, may be reviewed on appeal if (1) defense counsel argues the speedy trial issue to the trial court and (2) both the State and the trial court consent to addressing the issue. *State v. Howell*, 211 N.C. App. 613, 615, 711 S.E.2d 445, 447-48 (2011), *disc. review denied*, 366 N.C. 392, 732 S.E.2d 486 (2012).

Assuming, without deciding, that *Howell* would also apply to a motion to dismiss based on double jeopardy, defense counsel in this case only referred generally to defendant's motions to dismiss. The record contains no indication that defense counsel ever specifically argued the double jeopardy issue to the trial court. Accordingly, the double jeopardy argument is not properly before this Court. *See Williams*, 363 N.C. at 700-01, 686 S.E.2d at 501 (holding trial court properly refused to rule on defendant's pro se motions filed while he was represented by counsel where counsel did not argue merits of motions to trial court and, instead, merely observed existence of pro se motions and stated " '[w]e need rulings on those' ").

Defendant asks this Court to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to review this issue and cites *State v. Williams*, 201 N.C. App. 161, 689 S.E.2d 412 (2009), in support of his argument. There, this Court reviewed the defendant's double jeopardy argument despite the fact that he failed to properly raise the issue at trial. *Id.* at 172, 689 S.E.2d at 418. However, the record in *Williams* contained all the information needed to determine the double jeopardy issue. *Id.* at 167, 172, 689 S.E.2d at 415, 418.

In this case, because the issue was not specifically raised below, we are lacking the information necessary to properly resolve the issue. The record before us does not include the pleadings from the civil injunctive relief action brought by the Department of Agriculture or any information regarding the final judgment reached in that action. As the record does not contain all the materials necessary to determine defendant's double jeopardy claim, we decline to invoke Rule 2 to reach the issue.

V

[5] Finally, defendant argues he received ineffective assistance of counsel during the plea bargaining process.

> It is well established that ineffective assistance of counsel claims brought on direct review will be decided on

> the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (internal citation and quotation marks omitted). Defendant concedes that "[t]he record before this Court is inadequate to address this issue, and this issue is raised on direct appeal only for preservation issues." Accordingly, we dismiss the claim without prejudice to the defendant's filing a motion for appropriate relief in the trial court.

No error.

Judges STEPHENS and McCULLOUGH concur.

PAUL E. WALTERS, PLAINTIFF
v.
ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA, DEFENDANT

No. COA12-1221

Filed 19 March 2013

Sexual Offenders—sex offender registration—prayer for judgment continued

A true prayer for judgment continued does not operate as a "final conviction" for the purposes of the Sex Offender and Public Protection Registration Program. Accordingly, plaintiff's motion for summary judgment in an action seeking a declaratory judgment that he did not have to register as a sex offender should have been granted, and the trial court erred in granting judgment for defendant.

Judge STEELMAN dissenting

Appeal by plaintiff from order entered 23 July 2012 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 13 February 2013.

Etheridge & Hamlett, LLP, by J. Richard Hamlett, II, for plaintiff-appellant.

Attorney General Roy Cooper, by Assistant Attorney General William P. Hart, Jr., for defendant-appellee.

HUNTER, JR., Robert N., Judge.

Paul E. Walters ("Plaintiff") appeals from an order denying his Motion for Summary Judgment and granting summary judgment for Defendant. On appeal, Plaintiff argues the trial court erred in concluding that Plaintiff has a "reportable conviction" which subjects him to the Sex Offender and Public Protection Registration Program. For the following reasons, we reverse.

I. Factual & Procedural History

On 16 August 2006 Plaintiff, then 19 years old, pled guilty to the criminal charge of sexual battery in Nash County Superior Court. On the same date, Prayer for Judgment was continued by the trial court upon payment of costs and attorney fees, and so long as Plaintiff did not have any contact with the victim or her immediate family. Plaintiff was not required by the trial court to comply with the registration requirements of the Sex Offender and Public Protection Registration Program.

From the date of the Prayer for Judgment Continued until November 2011, Plaintiff resided in Franklin County and was not registered as a sex offender. In November 2011, the Franklin County Sheriff's Office notified Plaintiff that because of his conviction for sexual battery, he was required to register as a sex offender, or else be criminally charged for his failure to do so. On 30 November 2011 Plaintiff registered as a sex offender with the Franklin County Sheriff's Office. Plaintiff filed this action on 4 April 2012, seeking (1) a Declaratory Judgment that he is not subject to registration and (2) an order directing the Office of the North Carolina Attorney General to remove his name and other information from the sex offender registry.

Except for the conviction in question, Plaintiff has no criminal convictions which would require him to maintain registration as a sex offender. At the hearing on Plaintiff's Motion for Summary Judgment, the parties agreed to these facts and stipulated that there was no issue of material fact before the Court. The trial court granted summary judgment for Defendant on 23 July 2012. Plaintiff filed a timely written notice of appeal. Plaintiff has remained registered during the pendency of this appeal.

II. Jurisdiction & Standard of Review

As Plaintiff appeals from the final judgment of a superior court, an appeal lies of right to this Court pursuant to N.C. Gen. Stat. § 7A–27(b) (2011).

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007)).

III. Analysis

Plaintiff's sole argument on appeal is that the trial court erred in concluding that the Prayer for Judgment Continued ("PJC") entered on his sexual battery conviction makes that conviction a "final conviction," and thus a "reportable conviction," such that Plaintiff must comply with the provisions of the Sex Offender and Public Protection Registration Program.

North Carolina's Sex Offender and Public Protection Registration Program requires any individual "who has a reportable conviction . . . to maintain registration with the sheriff of the county where the person resides" for a period of at least 30 years. N.C. Gen. Stat. § 14-208.7(a) (2011). A "reportable conviction" is defined as "[a] *final conviction* for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses." N.C. Gen. Stat. § 14-208.6(4) (2011) (emphasis added). Sexual battery falls within the definition of "sexually violent offense." *See* N.C. Gen. Stat. § 14-208.6(5) (2011).

The term "final conviction," however, is not defined in the registration statute. Thus, the question presented by this appeal is whether a PJC entered upon a conviction makes that conviction a "final conviction," and therefore a "reportable conviction" for the purposes of the registration statute. After review of analogous case law and consideration of the

legislature's intent, we hold that a true PJC does not operate as a "final conviction" under the registration statute.

After a defendant has been found guilty or entered a guilty plea, a trial court may (1) pronounce judgment and place it into immediate execution; (2) pronounce judgment and suspend or stay its execution; or (3) enter a PJC. *State v. Griffin*, 246 N.C. 680, 682, 100 S.E.2d 49, 50 (1957). A prayer for judgment continued upon payment of costs, without more, does not typically constitute an entry of judgment. *See* N.C. Gen. Stat. § 15A-101(4a) (2011). However, our Supreme Court has acknowledged that a continuation of entry of judgment may lose its character as "true" PJC and is converted into a "judgment" when it includes conditions "amounting to punishment." *Griffin*, 246 N.C. at 683, 100 S.E.2d at 51.

At the outset, we note that none of the conditions imposed upon Plaintiff in this case appear to be punitive in nature, and Defendant does not contend otherwise on appeal. In fact, Defendant acknowledges that "no punitive sentence was pronounced against [Plaintiff]." "Issues not presented and discussed in a party's brief are deemed abandoned." N.C. R. App. P. 28(a). Accordingly, we conclude Plaintiff in fact received a "true PJC" for the purposes of our analysis.

"Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (quotation marks and citation omitted). In this case, however, the term "final conviction" has no ordinary meaning, and is not otherwise defined by the statute. In situations such as this, "[w]here the plain meaning is unclear, legislative intent controls." *Sharpe v. Worland*, 137 N.C. App. 82, 85, 527 S.E.2d 75, 77 (2000). In ascertaining the legislature's intent, our Courts should consider the statute in its entirety, "weighing the language of the statute, its spirit, and that which the statute seeks to accomplish." *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 191, 420 S.E.2d 124, 128 (1992) (quotation marks and citation omitted). We also assume that the legislature acted with full knowledge of prior and existing law in drafting any particular statute. *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970).

Our Court has considered the precise issue presented by this appeal before, in the context of our motor vehicle statutes. *See Florence v. Hiatt*, 101 N.C. App. 539, 400 S.E.2d 118 (1991). In *Florence*, a criminal defendant was convicted of operating a motor vehicle without a license. He received a PJC from the trial court, which included certain

non-punitive conditions. *Id.* at 539–40, 400 S.E.2d at 119. Subsequently, the Department of Motor Vehicles revoked the defendant's license pursuant to the then-applicable version of N.C. Gen. Stat. § 20-28.1, which permitted the DMV to revoke a driver's license upon conviction of a moving violation during a period of suspension. *Id.* At that time, N.C. Gen. Stat. § 20-24 defined "conviction" as a "*final conviction* of a criminal offense." *Id.* at 540–41, 400 S.E.2d at 119–20; N.C. Gen. Stat. § 20-24(c) (1987) (emphasis added).[1]

The defendant in *Florence* obtained a permanent injunction against the DMV enjoining it from suspending his license. The DMV appealed. *Id.* at 540, 400 S.E.2d at 119. "The issue on appeal [was] whether the conditional language in [the trial court's] order render[ed] the putative 'prayer for judgment continued' a final conviction." *Id.* This Court ultimately held that a true PJC does not operate as a "final conviction" for the purposes for Chapter 20. *Id.* at 542, 400 S.E.2d at 121.

The registration statute in the instant case was first enacted in 1995. We must therefore presume that the legislature was aware of our prior case law, albeit in another context, interpreting the term "final conviction" as excluding convictions which are followed by true PJCs. In drafting the registration statute, the legislature could have indicated that *any* conviction triggers the provisions of the statute, as it has in other contexts. *See*, *e.g.*, N.C. R. Evid. 609 (allowing in some circumstances impeachment of a witness via evidence that the witness "has been convicted of a felony"); N.C. Gen. Stat. § 14-415.1 (2011) (making it unlawful for "any person who has been convicted of a felony" to possess a firearm and specifically defining "conviction" as "a final judgment in any case in which felony punishment is . . . authorized, without regard . . . to the sentence imposed").

Instead, the legislature chose the registration statute at issue in this case to apply to only those individuals who have obtained a "*final* conviction," and did not provide any additional definition for that term. We must assume that the legislature enacted Section 14-208.6 with an awareness of *Florence*, and yet chose not to articulate whether PJCs are "final convictions" for the purposes of the registration statute. This suggests that the legislature saw no need to do so, even in light of case law holding PJCs are not "final convictions" in the context of another statutory scheme employing similar language.

---

1. The definition of "conviction" in Chapter 20 is now found in N.C. Gen. Stat. § 20-4.01(4a) (2011).

Our Supreme Court has not ruled on this particular issue, and we are bound by previous holdings of this Court. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Therefore, in reliance on *Florence*, we hold that a true PJC does not operate as a "final conviction" for the purposes of the Sex Offender and Public Protection Registration Program. Accordingly, Plaintiff's motion for summary judgment should have been granted, and the trial court erred in granting judgment for Defendant.

Defendant acknowledges that "it is reasonable to conclude . . . that the use of the word 'final' would import some meaning for the purposes of [S]ection 14-208.6(4)." However, Defendant suggests that purpose of the word "final" in the statute is to indicate that the "conviction" must be final within the trial division before it becomes a "final conviction." For example, Defendant contends a conviction would not be "final" if it were obtained in district court and an appeal *de novo* was pending in the superior court. We find this argument unpersuasive. Plaintiff's particular offense notwithstanding, the vast majority of offenses which subject an individual to registration are felonies, and thus are generally tried in superior court from the outset. *See* N.C. Gen. Stat. §§ 7A-271, 7A-272 (2011) (specifying the original jurisdiction of superior and district courts). It would seem unlikely that the legislature inserted the word "final" to guard against a contingency which could only occur in a small minority of cases implicating the statute.

IV. Conclusion

For the foregoing reasons, the order of the trial court is reversed and remanded for entry of an order directing the Office of the Attorney General to remove Plaintiff's name and other information from the sex offender registry.

REVERSED AND REMANDED.

Judge GEER concurs.

Judge STEELMAN dissents in a separate opinion.

STEELMAN, Judge, dissenting.

The majority's analysis is based upon case law construing provisions of Chapter 20 of the General Statutes, which deals with motor vehicles. This is a case involving sex offender registration under Article 27A of Chapter 14 of the General Statutes. The purpose of this statute was set forth in N.C. Gen. Stat. § 14-208.5:

> The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest.

N.C. Gen. Stat. § 14-208.5 (2011).

The majority acknowledges that the crime to which defendant pled guilty was a "sexually violent offense" under the provisions of N.C. Gen. Stat. § 14-208.6(5). Because a final conviction for a sexually violent offense is a "reportable conviction" under N.C. Gen. Stat. § 14-208.6(4)(a), defendant was required to register as a sex offender. N.C. Gen. Stat. § 14-208.7(a) (2011).

The only issue presented in this case is whether the judgment entered in the underlying criminal case was a "final conviction" as required by N.C. Gen. Stat. § 14-208.6(4)(a). I would look for resolution of this question to the provisions of Chapter 15A of the General Statutes, dealing with criminal procedure, rather than to the motor vehicle laws.

N.C. Gen. Stat. § 15A-101(4a) defines the term "entry of judgment" as follows: "Judgment is entered when sentence is pronounced. Prayer for judgment continued upon payment of costs, without more, does not constitute the entry of judgment." N.C. Gen. Stat. § 15A-101(4a) (2011).

As acknowledged by the majority, the prayer for judgment entered in the underlying criminal case was not a "[p]rayer for judgment continued upon payment of costs, without more[.]" N.C. Gen. Stat. § 15A-101(4a). The trial court placed several explicit conditions upon the entry of the prayer for judgment continued.

In *State v. Brown*, 110 N.C. App. 658, 430 S.E.2d 433 (1993), this Court set forth the circumstances where the entry of a prayer for judgment continued constituted "entry of judgment."

> "When the prayer for judgment is continued there is no judgment-only a motion or prayer by the prosecuting officer for judgment." *Griffin*, 246 N.C. at 683, 100 S.E.2d at 51. When, however, the trial judge imposes conditions "amounting to punishment" on the continuation of the entry of judgment, the judgment loses its character as a PJC and becomes a final judgment. *Id.* Conditions "amounting to punishment" include fines and imprisonment. *Id.*

> Conditions not "amounting to punishment" include "requirements to obey the law," *State v. Cheek*, 31 N.C. App. 379, 382, 229 S.E.2d 227, 228 (1976), and a requirement to pay the costs of court. *State v. Crook*, 115 N.C. 760, 764 (1894); N.C.G.S. § 15A-101(4a) (1988) ("[p]rayer for judgment continued upon payment of costs, without more, does not constitute the entry of judgment").

State v. Brown, 110 N.C. App. at 659-60, 430 S.E.2d at 434.

In *Brown*, we held that a prayer for judgment continued upon defendant continuing with psychiatric treatment "went beyond defendant's obligation to obey the law, and was thus punishment." *Id.* at 660, 430 S.E.2d at 434. We further noted that violation of this condition "subjected the defendant to criminal contempt of court[.]" *Id.*

In the instant case, the entry of the prayer for judgment continued was expressly conditioned upon defendant not having any contact or communication with the victim; defendant not being on the victim's property; and defendant not having any contact with any member of the victim's immediate family. This condition amounts to more than a mere requirement that defendant "obey the law." It places fundamental restrictions upon his rights of association and restrains him from going upon the victim's property. These conditions constitute "punishment" for which defendant could be subject to contempt. Under the rationale of *Brown* and N.C. Gen. Stat. 15A-101(4a), the judgment entered upon the defendant's guilty plea to the charge of sexual battery was a "final conviction" as required by N.C. Gen. Stat. § 14-208.6(4)(a).

The majority relies upon the following sentence from the State's brief to support its assertion that the State acknowledged that the conditions imposed were not punishment:

> Plaintiff, whose guilt for the registerable offense of sexual battery has been definitively established in a court of law, should not be permitted to evade the civil regulatory scheme of the Registration Programs, the purpose of which is to protect the general public, merely because no punitive sentence was pronounced against him.

First, the State's argument refers to "no punitive sentence." In fact, the judgment did not impose a sentence upon defendant. This passage does not refer to whether the conditions imposed upon the prayer for judgment constituted punishment. Second, whether a condition of a prayer for judgment continued constituted "punishment" is a question

of law for the courts to determine. It is not a question of fact as to which the parties, on appeal, can stipulate. *See State v. Rogers*, 275 N.C. 411, 421, 168 S.E.2d 345, 350 (1969) (holding that "[w]hat constitutes cruel and unusual punishment is a question of law").

I would affirm the order of the learned trial judge.

WELLS FARGO BANK, N.A., SUCCESSOR BY MERGER TO WACHOVIA BANK, NATIONAL ASSOCIATION, PLAINTIFF

v.

ARLINGTON HILLS OF MINT HILL, LLC, JOHN KEVIN COBB, BEVERLY A. COBB, MAX B. SMITH, JR., CHRISTY C. SMITH AND MARK E. CARPENTER, DEFENDANTS

No. COA12-1060

Filed 19 March 2013

Mortgages and Deeds of Trust—offset defense—not available

The trial court did not err by entering summary judgment in favor of plaintiff bank in a foreclosure case because although defendant guarantor received an interest in the property and was liable on his guaranty, he was not the mortgagor, trustor, or other maker of any such obligation whose property has been so purchased. Accordingly, the offset defense provided in N.C.G.S. § 45-21.36 was not available to defendant guarantor.

Appeal by defendant Mark E. Carpenter from order entered 1 June 2012 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 January 2013.

Robinson, Bradshaw & Hinson, P.A., by David M. Schilli and Ty E. Shaffer, for plaintiff appellee.

Tison Redding, PLLC, by Joseph R. Pellington and Marjorie C. Redding, for Mark E. Carpenter defendant appellant.

McCULLOUGH, Judge.

Defendant Mark E. Carpenter ("Guarantor") appeals from the trial court's grant of summary judgment in favor of Wells Fargo Bank, National Association ("Bank"), successor by merger to Wachovia Bank, National Association. For the following reasons, we affirm.

I. Background

On 30 November 2005, defendant Arlington Hills of Mint Hill, LLC ("Borrower") entered into a loan agreement with Bank in order to acquire real property in Mecklenburg County and develop a residential subdivision (the "property"). In connection with the loan, Borrower executed a promissory note in the principal amount of $596,345.00 in favor of Bank to evidence the debt and a deed of trust conveying the property in trust to TRSTE, Inc. ("Trustee") for the benefit of Bank to secure payment on the note and future advances.

Thereafter, the loan agreement and promissory note were renewed and modified several times in accordance with their terms. With the intent to induce Bank to agree to the renewals and modifications, the individually named defendants, who are members of Borrower, executed individual guaranties of Borrower's obligations to Bank. Particularly relevant in this appeal, on 18 October 2006, Guarantor executed a guaranty, providing that he "absolutely, irrevocably and unconditionally guarantees to Bank and its successors, assigns and affiliates the timely payment and performance of all liabilities and obligations of Borrower to Bank and its affiliates, including, but not limited to, all obligations under any notes, loan agreements, [and] security agreements . . . ." The last modifications occurred 10 June 2008 and evidenced Borrower's aggregate obligation to Bank of $1,981,421.00 in principal.

Upon Borrower's default, Bank requested that Trustee foreclose on the deed of trust under power of sale. Trustee then initiated the foreclosure. In addition to foreclosing on the deed of trust, on 10 March 2010, Bank filed suit against Borrower and the individually named defendants, including Guarantor, for any deficiency resulting from the foreclosure.

Following a 29 April 2010 foreclosure hearing, the Clerk authorized Trustee to proceed with foreclosure on the deed of trust. A public sale of the property was held on 25 May 2010. However, before the foreclosure was finalized, Borrower filed a petition for relief under Chapter 11 of the Bankruptcy Code and the foreclosure proceedings were automatically stayed. Bank was granted relief from the automatic stay on 4 October 2010 and Trustee's foreclosure efforts resumed. Thereafter, on 7 January 2011, only days before the completion of the foreclosure proceedings, Borrower transferred its interest in the property to its members by general warranty deed. Guarantor received a 40% undivided interest. Despite the transfer, on 13 January 2011, Bank purchased the property for $1,000,000.00 at a public sale.

In response to Bank's deficiency suit, on 15 June 2011, Guarantor filed an answer and affirmative defenses. Guarantor's third affirmative defense included a claim to a right of offset pursuant to N.C. Gen. Stat. § 45-21.36. During discovery, Guarantor was deposed twice. In response to questions concerning the true value of the property, Guarantor denied any knowledge. Based on Guarantor's responses, Bank filed a motion for summary judgment against Guarantor on 11 April 2012. Yet, on 18 May 2012, just days before Bank's motion for summary judgment came on for hearing, Guarantor filed an affidavit claiming the value of the property far exceeded the Bank's winning bid at the public sale.

Bank's motion for summary judgment came on for hearing 22 May 2012 before the Honorable W. Robert Bell in Mecklenburg County Superior Court. By order filed 1 June 2012, Bank's motion for summary judgment was granted. Guarantor timely appealed on 28 June 2012.[1]

II. Analysis

The sole issue raised on appeal is whether the trial court erred in entering summary judgment in favor of Bank. We hold the trial court did not err.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). "Evidence presented by the parties is viewed in the light most favorable to the non-movant." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). Moreover, "[i]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

In this case, Guarantor argues that summary judgment was inappropriate because he was entitled to present evidence concerning the reasonable value of the property in order to substantiate his claim to an offset under N.C. Gen. Stat. § 45-21.36. N.C. Gen. Stat. § 45-21.36 provides:

> When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of

1. Bank earlier obtained a default judgment against Borrower, and the other defendants filed for Chapter 7 bankruptcy. Thus, defendant is the only remaining party.

> the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part: Provided, this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust or other instrument: Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale made and confirmed prior to April 18, 1933.

N.C. Gen. Stat. § 45-21.36 (2011).[2] In order to determine whether the trial court erred in entering summary judgment, the first issue that this Court must address is whether the offset defense in N.C. Gen. Stat. § 45-21.36 is available to Guarantor.

Citing *Raleigh Federal Savings Bank v. Godwin*, 99 N.C. App. 761, 394 S.E.2d 294 (1990), Guarantor contends that a party who is liable on the underlying debt and holds a property interest in the mortgaged property may assert an offset defense under N.C. Gen. Stat. § 45-21.36. *Raleigh Federal Savings Bank*, 99 N.C. App. at 762-63, 394 S.E.2d at 296 (affirming summary judgment against defendants in a deficiency suit on the basis that defendants could not claim a right to an offset pursuant to N.C. Gen. Stat. § 45-21.36 where they did not hold a property interest in the mortgaged property). Thus, in this case, where Guarantor is liable on the underlying obligation as a result of his guaranty of Borrower's

---

2. In short, "N.C. Gen. Stat. § 45–21.36 [] allows the debtor an offset against a deficiency judgment in certain cases when the creditor purchases the property at foreclosure with a bid that is substantially less than the true value of the property." *Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 429 n.4, 651 S.E.2d 386, 389 n.4 (2007).

debt and where Guarantor acquired a 40% undivided interest in the property on 7 January 2011 when Borrower executed a deed conveying the property to its members prior to the foreclosure being completed on 13 January 2012, Guarantor argues that he is entitled to present evidence to show that the Bank's bid for the property was substantially less than the true value of the property.

While we agree with Guarantor that it is necessary that a party claiming an offset defense pursuant to N.C. Gen. Stat. § 45-21.36 be liable on the underlying debt and hold a property interest in the mortgaged property, we do not think it sufficient under the language of the statute.

As further noted in *Raleigh Federal Savings Bank*, "[t]he statute explicitly limits the defense to situations in which the mortgagee sues 'to recover a deficiency judgment against the mortgagor, trustor, or other maker of any such obligation whose property has been so purchased.' " *Id.* at 762-63, 394 S.E.2d at 296 (quoting *First Citizens Bank & Trust Co. v. Martin*, 44 N.C. App. 261, 261 S.E.2d 145 (1979) (emphasis omitted); *see also In re Foreclosure of Otter Pond Investment Group*, 79 N.C. App. 664, 665, 339 S.E.2d 854, 855 (1986) ("G.S. 45-21.36 permits such proof only in a suit against a mortgagor, trustor, or other maker for a deficiency judgment . . . ."). Here, although Guarantor received an interest in the property and is liable on his guaranty, he is not the "mortgagor, trustor or other maker of any such obligation whose property has been so purchased[.]" N.C. Gen. Stat. § 45-21.36. The general warranty deed by which Guarantor acquired his interest in the property did not indicate that Guarantor assumed any of Borrower's obligations to Bank under the promissory note. The fact that Bank also named Borrower, the mortgagor, as a defendant in the deficiency action does not expand the availability of the offset defense under N.C. Gen. Stat. § 45-21.36 to non-mortgagor defendants. *See Martin*, 44 N.C. App. at 267, 261 S.E.2d at 150 (discussing the availability of N.C. Gen. Stat. § 45-21.36 and holding "[the statute] was not available as a defense to [the] non-mortgagor defendants").

Furthermore, case law suggests that guarantors are not afforded the protections of N.C. Gen. Stat. § 45-21.36. Although not controlling on this Court, we find the discussion in *Poughkeepsie Sav. Bank, FSB v. Harris*, 833 F. Supp. 551 (W.D.N.C. 1993), persuasive. In *Poughkeepsie*, the court addressed whether the offset defense in N.C. Gen. Stat. § 45-21.36 was available to a guarantor who also owned an interest in the property. The court concluded that where the guarantor was sued for a deficiency solely in his capacity as a guarantor, the offset defense was unavailable. *Poughkeepsie*, 833 F. Supp. at 554. The court reasoned that

"[t]o permit Defendants to raise a defense only available to them in their capacity as owners, when they are being sued for their duties as guarantors, would erase their duty as guarantors." *Id.* In this case, Guarantor "absolutely, irrevocably and unconditionally guarantee[d] to [Lender] and its successors, assigns and affiliates the timely payment and performance of all liabilities and obligations of Borrower to [Lender] and its affiliates, including, but not limited to, all obligations under any notes, loan agreements, [and] security agreements . . ." separate and apart from any property interest in the mortgaged property that he later acquired. Thus, as was the case in *Poughkeepsie*, "[i]n this case, Guarantor voluntarily assumed the duties of owning property and of serving as [a] guarantor[]. . . . Since [Guarantor] assumed both duties, and since [he] chose to be treated as both [a] property owner[] and [a] guarantor[], [this] Court can find no reason why [he] should not now by [sic] compelled to accept all of [his] duties as [a] guarantor[]." *Id.*

Because we find that the offset defense provided in N.C. Gen. Stat. § 45-21.36 is not available to Guarantor in this case, we need not reach Guarantor's remaining arguments concerning the fair value of the property. Nevertheless, we opine that even if Guarantor was afforded the offset defense in N.C. Gen. Stat. § 45-21.36, Guarantor's affidavit providing his opinion as to the value of the property, filed only days before the hearing on Bank's motion for summary judgment, was insufficient to create a triable issue where Guarantor previously testified at a deposition that he had no idea of the fair market value of the property. *See Wachovia Mortg. Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 9, 249 S.E.2d 727, 732 (1978) (holding that "contradictory testimony contained in an affidavit of the nonmovant may not be used by him to defeat a summary judgment motion where the only issue of fact raised by the affidavit is the credibility of the affiant"), *aff'd*, 297 N.C. 696, 256 S.E.2d 688 (1979); *see also Hubbard v. Fewell*, 170 N.C. App. 680, 613 S.E.2d 58 (2005).

III. Conclusion

For the reasons discussed above, the order of the trial court is affirmed.

Affirmed.

Judges STEELMAN and STEPHENS concur.

DAVID B. WIND, PLAINTIFF
v.
THE CITY OF GASTONIA, NORTH CAROLINA, A MUNICIPAL CORPORATION, DEFENDANT

No. COA12-421

Filed 19 March 2013

1. Appeal and Error—interlocutory orders and appeals—substantial right—privileged information

Because the trial court's interlocutory order compelled production of files which may be privileged pursuant to N.C.G.S. § 160A-168 the trial court's order affected a substantial right and was immediately appealable.

2. Public Officers and Employees—police officer—right to inspection of documents—employee personnel file—official personnel decisions

The trial court did not err by concluding that defendant City violated N.C.G.S. § 160A-168 by denying plaintiff police officer's request to inspect the pertinent documents in his employee personnel file. Assuming *arguendo* that Internal Affairs Investigative Case Files 2008265 and 2008307 were materials to which the disclosure exemptions of subsection (c1)(4) applied, such materials were used by Chief Adams to make official personnel decisions with respect to plaintiff, and thus, plaintiff had a statutory right to inspect the requested files under subsection (c1)(4).

3. Discovery—statutory obligation to allow inspection of confidential information—employee personnel file

Separately maintaining Internal Affairs investigative files, which defendant City conceded were a part of plaintiff's employee personnel file, did not exempt defendant from its statutory obligation under N.C.G.S. § 160A-168(c)(1) to allow plaintiff to inspect this "confidential" information.

4. Appeal and Error—preservation of issues—failure to argue

Since defendant City did not argue that it could satisfy the mandatory disclosure requirement of N.C.G.S. § 160A-168(c)(1) by allowing plaintiff to inspect "confidential" information from his own employee personnel file that had been subjectively redacted by defendant, and since questions as to public policy are for legislative determination, such a discussion was inapposite to the issues.

Judge DILLON concurring in part and dissenting in part.

Appeal by defendant from order entered 1 November 2011 by Judge Forrest Donald Bridges in Gaston County Superior Court. Heard in the Court of Appeals 7 January 2013.

The McGuinness Law Firm, by J. Michael McGuinness, for plaintiff–appellee.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch, Patrick H. Flanagan, and Bradley P. Kline, for defendant–appellant.

North Carolina State Lodge of the Fraternal Order of Police, by Richard L. Hattendorf, amicus curiae.

MARTIN, Chief Judge.

Defendant City of Gastonia appeals from the trial court's order granting plaintiff David B. Wind's motion for summary judgment, denying defendant's cross-motion for summary judgment, and ordering that defendant disclose to plaintiff unredacted copies of all documents contained in the City of Gastonia Police Department's Internal Affairs Investigative Case Files 2008265 and 2008307. We affirm and remand for further proceedings.

According to the record before us, plaintiff joined the Gastonia Police Department in March 2008 as a patrolman, after serving as a detention enforcement officer for the United States Immigration and Naturalization Service, and as an officer and detective with the Coral Springs Police Department in Florida. In the Fall of 2008, two complaints were made against plaintiff and reported to the Gastonia Police Department; one by a citizen, and one by a police officer. The citizen's complaint, which was designated as Internal Affairs ("IA") Investigative Case File 2008307, alleged that plaintiff exhibited "Rudeness/Force by Firearm" after plaintiff disarmed the citizen and secured the citizen's firearm while plaintiff conducted an investigation. The officer's complaint, which had been designated as IA Investigative Case File 2008265, alleged that plaintiff exhibited "Conduct Unbecoming of an Officer" and challenged plaintiff's "Integrity" and "Truthfulness" after the complainant charged that plaintiff falsified grounds for probable cause in order to make an arrest at a traffic stop. The citizen's complaint was investigated by plaintiff's supervisor, while the officer's complaint was investigated by Gastonia Police Department's Office of Professional Standards Unit, formerly its IA Unit.

Gastonia Police Department's Chief of Police Timothy Lee Adams was provided with all of the information collected upon the conclusion of both investigations in order to "adjudicate[] the case[s]" and make his final decisions with respect to each complaint. With respect to the citizen's complaint, the allegations "were determined to be NOT SUSTAINED" and the case was "closed." With respect to the officer's complaint, the allegations were determined to be "unfounded by the Chief [of Police]" and the case was designated as "closed, no further action required."

In February 2009, after the cases were deemed closed, plaintiff sent a written memorandum to Chief Adams requesting an opportunity to view the complete investigative files associated with the complaints, and met with Chief Adams in person shortly thereafter to request the same. Plaintiff asserts that Chief Adams refused his request to inspect the complete contents of the files. While the record indicates that Chief Adams did provide documents from these files to plaintiff—albeit two years after plaintiff's initial request—the documents provided to plaintiff were significantly redacted. Defense counsel represented to the trial court that the redactions concealed only the identity of the complainants and such information as would enable someone to identify them.

Plaintiff filed his Complaint and First Amended Complaint against defendant City of Gastonia ("Gastonia") in February 2010, alleging that Gastonia violated N.C.G.S. § 160A-168, the North Carolina Constitution, and Gastonia's own "rules, regulations, policies and procedures" by "refusing to disclose [to plaintiff] the requested documents" comprising IA Investigative Case Files 2008307 and 2008265. Plaintiff and Gastonia filed cross-motions for summary judgment, which were heard on 24 October 2011. On 1 November 2011, the trial court entered an order granting plaintiff's motion for summary judgment, denying Gastonia's motion for summary judgment, and retaining for trial "[t]he issue of any damages from the denial of the records . . . ." The court further ordered that plaintiff "is entitled to complete copies of the documents contained in [IA] Files 2008265 and 2008307 without any redacted information," and ordered that Gastonia "disclose these documents to [plaintiff]." Gastonia appealed to this Court, and the trial court entered a consent order staying "all further trial court level proceedings in this matter" until the conclusion of this appeal.

---

[1] "Generally, there is no right of immediate appeal from interlocutory

orders and judgments." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999), *on remand*, 137 N.C. App. 82, 527 S.E.2d 75 (2000); *see also id.* ("Interlocutory orders and judgments are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court to settle and determine the entire controversy." (internal quotation marks omitted)). However, "[n]otwithstanding this cardinal tenet of appellate practice, immediate appeal . . . is available from an interlocutory order or judgment which affects a substantial right." *Sharpe*, 351 N.C. at 161–62, 522 S.E.2d at 579 (citations and internal quotation marks omitted); *see also* N.C. Gen. Stat. § 1-277(a) (2011); N.C. Gen. Stat. § 7A-27(d)(1) (2011). "It is well settled that an interlocutory order affects a substantial right if the order deprive[s] the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." *Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579 (alteration in original) (internal quotation marks omitted).

Here, Gastonia concedes that the present appeal is interlocutory. However, Gastonia argues that such appeal is properly before this Court for immediate review because the trial court's order affects a substantial right "that would be forever lost by [Gastonia] if the matter proceeded[] by having to turn over documents which [Gastonia] claims are statutorily privileged." We recognize that "if [Gastonia] is required to disclose the very documents that it alleges are protected from disclosure by the statutory privilege, then a right materially affecting those interests which a [person] is entitled to have preserved and protected by law——a substantial right——is affected," and "the substantial right asserted by [Gastonia] will be lost if the trial court's order is not reviewed before entry of a final judgment." *See id.* at 164–65, 522 S.E.2d at 580–81 (second alteration in original) (internal quotation marks omitted). Thus, because the trial court's interlocutory order compels production of files which may be privileged pursuant to N.C.G.S. § 160A-168, we conclude that the trial court's order affects a substantial right and is immediately appealable to this Court. *See Hayes v. Premier Living, Inc.*, 181 N.C. App. 747, 751, 641 S.E.2d 316, 318 (2007). We further conclude, since the sole argument advanced by the parties regarding the grounds for immediate appellate review is Gastonia's argument that protecting the requested files from disclosure affects a substantial right pursuant to a statutory privilege arising under N.C.G.S. § 160A-168, only the issues of whether N.C.G.S. § 160A-168 requires Gastonia to disclose the requested files to plaintiff, and whether Gastonia is statutorily exempt from the requirement, if any, to disclose the same, are properly before us.

[2] Gastonia first argues that it did not violate N.C.G.S. § 160A-168 by denying plaintiff's request to inspect the documents at issue, because the documents requested fall within a subsection of the statute, N.C.G.S. § 160A-168(c1)(4), which, according to Gastonia's argument, exempts it from any disclosure obligations arising under the other subsections of the statute. "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." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990); *see also Perkins v. Ark. Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000) ("Nothing else appearing, the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning." (internal quotation marks omitted)). "[H]owever, where a statute is ambiguous or unclear as to its meaning, we must interpret the statute to give effect to the legislative intent." *N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 767, 675 S.E.2d 709, 711 (2009). Additionally, "[w]ords and phrases of a statute may not be interpreted out of context, but individual expressions must be construed as a part of the composite whole and must be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." *In re Hardy*, 294 N.C. 90, 95–96, 240 S.E.2d 367, 371–72 (1978) (internal quotation marks omitted).

According to N.C.G.S. § 160A-168(a), employee personnel files "maintained by a city are subject to inspection and may be disclosed only as provided by [N.C.G.S. § 160A-168]." N.C. Gen. Stat. § 160A-168(a) (2011). "[A]n employee's personnel file" "consists of any information in any form gathered by the city with respect to that employee and, by way of illustration but not limitation, relating to his application, selection or nonselection, performance, promotions, demotions, transfers, suspension and other disciplinary actions, evaluation forms, leave, salary, and termination of employment." *Id.* In the present case, Gastonia conceded during oral arguments to this Court that the documents at issue are a part of plaintiff's employee personnel file in accordance with N.C.G.S. § 160A-168(a).

All information contained in a city employee's personnel file that is not deemed to be "a matter of public record," which includes information such as name, age, current position and salary, and date of original employment, *see* N.C. Gen. Stat. § 160A-168(b), "is confidential and shall be open to inspection only" in certain instances. N.C. Gen. Stat. § 160A-168(c)(1). One instance in which "confidential" information from a city employee's personnel file "shall be open to inspection" allows

"[t]he employee or his duly authorized agent" to "examine all portions of his personnel file," *id.*, with limited exceptions,[1] which gives the employee an opportunity to determine whether material in his file "is inaccurate or misleading." *See, e.g.*, N.C. Gen. Stat. § 160A-168(d) (providing that the city council of a city that maintains personnel files "containing information other than" that which is a matter of public record "shall establish procedures whereby an employee who objects to material in his file on grounds that it is inaccurate or misleading may seek to have the material removed from the file or may place in the file a statement relating to the material"). In the present case, Gastonia does not dispute that, with limited exceptions, a city employee has a statutory right to inspect "confidential" information in his own personnel file pursuant to N.C.G.S. § 160A-168(c)(1).

However, the statute further provides that, "[e]ven if considered part of an employee's personnel file, the following information need not be disclosed to an employee nor to any other person": "Notes, preliminary drafts and internal communications concerning an employee. In the event such materials are used for any official personnel decision, then the employee or his duly authorized agent shall have a right to inspect such materials." N.C. Gen. Stat. § 160A-168(c1)(4). It is under this exception enumerated in subsection (c1)(4)[2] that Gastonia asserts its authority to deny plaintiff's request to inspect the documents at issue. Thus, we now consider whether Gastonia was permitted by the exemption under N.C.G.S. § 160A-168(c1)(4) to deny plaintiff the opportunity to inspect the IA investigative files at issue——files which Gastonia concedes are a part of plaintiff's employee personnel file in accordance with N.C.G.S. § 160A-168(a)—despite plaintiff's statutory right under N.C.G.S. § 160A-168(c)(1) to otherwise inspect this "confidential" information.

---

1. Subsection (c)(1) provides that all information contained in a city employee's personnel file other than that which is deemed a matter of public record under subsection (b) "shall be open to inspection" to an "employee or his duly authorized agent . . . except (i) letters of reference solicited prior to employment, and (ii) information concerning a medical disability, mental or physical, that a prudent physician would not divulge to his patient." N.C. Gen. Stat. § 160A-168(c)(1). Because neither plaintiff nor Gastonia assert that these exceptions are applicable to the files requested in the present case, we do not address these exceptions further.

2. Subsections (c)(1) and (c1) of N.C.G.S. § 160A-168 are similarly-enumerated provisions of the same statute; subsection (c1) was added to N.C.G.S. § 160A-168 by the General Assembly in 1981, after subsections (a) through (f) were already codified. *See* 1981 N.C. Sess. Laws 1424, 1425, ch. 926, § 3; 1975 N.C. Sess. Laws 929, 930–32, ch. 701, § 2. Because this opinion makes repeated references to both subsections, we caution the reader to be mindful of the potential confusion these similar designations may cause.

We note as a preliminary matter that, because the disclosure exemption arising under subsection (c1)(4) particularly applies only to those materials "concerning an employee" that are described as "[n]otes, preliminary drafts and internal communications," *see* N.C. Gen. Stat. § 160A-168(c1)(4), Gastonia can only invoke the disclosure exemption of this subsection if the IA investigative files at issue are materials that qualify for this exemption. In other words, because Gastonia asks this Court to conclude that it was statutorily authorized to exempt the complete IA investigative files at issue under subsection (c1)(4), each file would have to be deemed a note, a preliminary draft, or an internal communication concerning plaintiff, as such terms are used in subsection (c1)(4), in order for Gastonia's claim of an exemption from the disclosure requirements of subsection (c)(1) to succeed.

We look for guidance about what materials the General Assembly intended to include within the ambit of "[n]otes, preliminary drafts and internal communications" by examining the plain meaning of these terms. Based on the common definitions of these terms at the time this statute was promulgated, it appears the General Assembly intended to allow a disclosure exemption under subsection (c1)(4) for written materials that are informal or provisional in character. *See Webster's New World Dictionary* 423 (2d ed. 1974) (defining "draft" as "a rough or preliminary sketch of a piece of writing"); *id.* at 973 (defining "note" as "a brief statement of a fact, experience, etc. written down for review, as an aid to memory, or to inform someone else"). In the present case, the documents comprising the IA investigative files at issue are not in the record before this Court, nor would we expect them to be in light of the substantial right asserted as the grounds for Gastonia's interlocutory appeal. Nonetheless, the materials sought for inspection by plaintiff in this case are the complete investigative files concerning complaints made against plaintiff, which investigations have been finally adjudicated and determined to be closed. Since it is Gastonia's burden as the appellant to provide argument supporting its assertion that the materials it seeks to exempt from the disclosure requirement of subsection (c)(1) fall within the ambit of material that may be exempt from disclosure under subsection (c1)(4), *see* N.C.R. App. P. 28(b)(6), in the absence of contrary argument or evidence in the record, we cannot conclude that the IA investigative files that plaintiff seeks to inspect are each a note, a preliminary draft, or an internal communication concerning plaintiff. Nevertheless, even assuming without deciding that the IA investigative files that plaintiff seeks to inspect are materials that may be exempted from disclosure to plaintiff under subsection (c1)(4), we are not persuaded by Gastonia's argument that it had a statutory right to refuse

plaintiff's request to inspect these materials because such materials were not "used for any official personnel decision."

While the General Assembly uses the phrase "official personnel decision" in four other provisions of the General Statutes, *see* N.C. Gen. Stat. § 122C-158(d)(4) (2011) (regarding privacy of personnel records for employees of facilities delivering services for mental health, developmental disabilities, and substance abuse); N.C. Gen. Stat. § 131E-257.2(d)(4) (2011) (regarding privacy of personnel records for public hospital employees); N.C. Gen. Stat. § 153A-98(c1)(4) (2011) (regarding privacy of personnel records for county employees); N.C. Gen. Stat. § 162A-6.1(d)(4) (2011) (regarding privacy of personnel records for water and sewer authorities' employees), the General Assembly has not explicitly defined this phrase.

As we recognized above, "[s]tatutory interpretation properly begins with an examination of the plain words of the statute," because "[t]he legislative purpose of a statute is first ascertained by examining the statute's plain language." *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992); *see also Perkins*, 351 N.C. at 638, 528 S.E.2d at 904 ("[C]ourts may look to dictionaries to determine the ordinary meaning of words within a statute."). "If a statute 'contains a definition of a word used therein, that definition controls,' but nothing else appearing, 'words must be given their common and ordinary meaning.' " *Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 492, 616 S.E.2d 602, 607 (quoting *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202–03 (1974)), *disc. review denied*, 360 N.C. 176, 626 S.E.2d 299 (2005).

Generally, "official" is defined as "by, from, or with the proper authority; authorized or authoritative"; "personnel" is defined as "persons employed in any work, enterprise, service, establishment, etc."; and "decision" is defined as "a judgment or conclusion reached or given." *Webster's New World Dictionary* 366, 988, 1062 (2d ed. 1974). Thus, according to the plain meaning of the terms comprising this phrase, an "official personnel decision" is an authorized or authoritative judgment or conclusion of or pertaining to employed persons. Since "personnel" is a collective noun, the plain meaning of this phrase—as it is used in this statute—more specifically refers to authorized or authoritative judgments or conclusions of or pertaining to the employed person about whom the judgment or conclusion is rendered. Gastonia urges this Court to narrowly construe this phrase to apply only to those "decisions" that result in "*some type of change or alternation* [sic] in employment."

(Emphasis added.) However, Gastonia provides no meaningful support for its narrowly-drawn interpretation. Instead, we think the General Assembly's use of the term "personnel" in subsection (a) of this statute is consistent with a less-constrained reading of the phrase "official personnel decision," as the phrase is used in subsection (c1)(4), and is also instructive in construing the meaning of the challenged phrase within the context of this statute.

The General Assembly broadly defines the phrase "employee's personnel file" as "consist[ing] of *any information in any form* gathered by the city *with respect to* that employee." N.C. Gen. Stat. § 160A-168(a) (emphasis added). In other words, according to the General Assembly, the information included in a city employee's personnel file is not limited to information that, as Gastonia might suggest based on its asserted plain meaning of the term "personnel," concerns only changes in employment like promotions, demotions, or transfers. Rather, according to the express language of the statute, the information in a city employee's personnel file also concerns "nonselection," "performance," "evaluation forms," as well as other information "in any form gathered by the city with respect to that employee." *See id.* In fact, the General Assembly expressly declines to limit what form the information included in an employee's personnel file may take, by providing a list of examples of information that it specifies is offered "by way of illustration *but not limitation.*" *See id.* (emphasis added). Thus, with respect to the phrase "official personnel decision," as it is used in the context of the subsection (c1)(4) exemption, we are of the opinion that the General Assembly similarly intended that an "official personnel decision" need not be limited only to those determinations that result in a change to an employee's position of employment, as Gastonia suggests. Therefore, we conclude that when an informal, provisional, or otherwise "preliminary" or "internal" communication, note, or draft concerning an employee is included in his or her personnel file, that communication, note, or draft is subject to the disclosure requirement of subsections (c)(1) and (c1)(4) when such materials are used to make an authorized or authoritative judgment or conclusion with respect to that employee.

According to the depositions of both Chief Adams and Sergeant Reid E. Brafford, who is the supervisor of the Office of Professional Standards and reports directly to Chief Adams, once the investigations were concluded, the complete investigative files for each complaint, which included all of the documents necessary to develop a thorough investigative file into both complaints, were provided to Chief Adams, the senior-most official of the department. In accordance with departmental

policy, Chief Adams is the person authorized to serve as the final decision-maker with respect to complaints of misconduct against employees and to adjudicate such matters on behalf of the department. Chief Adams analyzed the facts and issues arising out of the complaints as detailed in each document comprising the investigative files and weighed all of the evidence based on the information included in the respective investigative files in order to finally determine each matter. After considering all of the information included in each document in the investigative files, Chief Adams finally decided to dismiss or terminate the complaints made against plaintiff and determined, as a result of the respective investigations, that no disciplinary action need be taken against plaintiff in either matter. In other words, Chief Adams was authorized to, and did, use IA Investigative Case Files 2008265 and 2008307 to finally adjudicate matters pertaining to plaintiff.

Gastonia insists, however, that because plaintiff "experienced no change" in his employment as a result of Chief Adams's final adjudications regarding the complaints against plaintiff, Chief Adams "made no 'official personnel decision' with regards to the two disputed IA investigative files," and, thus, plaintiff failed to establish that he is entitled to inspect the investigative files under subsection (c1)(4). Nonetheless, as we recognized above, the General Assembly provided in subsection (a) that an employee's "personnel" file may include information regarding "selection *or nonselection*," "performance," "evaluation forms," as well as other information "in any form" "with respect to that employee." N.C. Gen. Stat. § 160A-168(a) (emphasis added). Similarly, even though Chief Adams's decisions did not result in a change in plaintiff's employment, we are persuaded that Chief Adams made official personnel decisions, as we have construed this phrase, to finally dismiss or terminate the complaints against plaintiff and to take no disciplinary action against him using the information included in the IA investigative files. Therefore, assuming *arguendo* that IA Investigative Case Files 2008265 and 2008307 were materials to which the disclosure exemptions of subsection (c1)(4) applied, because we are persuaded that such materials were used by Chief Adams to make official personnel decisions with respect to plaintiff, we conclude that plaintiff has a statutory right to inspect the requested files under subsection (c1)(4).

[3] Gastonia next argues that it did not violate N.C.G.S. § 160A-168 by denying plaintiff's request to inspect the documents at issue, because the requested documents "are separate files employed for the maintenance of confidentially [sic] and protection of [Gastonia's] IA investigation program." Gastonia appears to suggest that physically separating the IA

investigative files at issue from other materials in plaintiff's employee personnel file renders the disclosure requirements of this statute inapplicable to the requested files. Nevertheless, perhaps because Gastonia realized the untenability of its argument, seeking an exemption from a statutory requirement to disclose certain documents while simultaneously arguing that the statute under which the disclosure requirement arises is inapplicable to the type of documents for which it seeks the statutory exemption, Gastonia conceded during oral arguments that the requested files *are* a part of plaintiff's employee personnel file under N.C.G.S. § 160A-168(a). Additionally, Gastonia does not direct this Court to any relevant authority which exempts the requested files from the disclosure mandate of N.C.G.S. § 160A-168(c)(1), requiring that, with limited exception, all "confidential" information in a city employee's personnel file "shall be open to inspection" by that employee. Thus, we find no support for Gastonia's assertion that "separately" "maintain[ing]" these IA investigative files, which it concedes are a part of plaintiff's employee personnel file, exempts Gastonia from its statutory obligation under N.C.G.S. § 160A-168(c)(1) to allow plaintiff to inspect this "confidential" information.

[4] Finally, we note that the dissent raises a public policy argument that advocates for Gastonia's right to provide plaintiff with redacted information from plaintiff's own employee personnel file. Since Gastonia does not present argument to this Court that it could satisfy the mandatory disclosure requirement of N.C.G.S. § 160A-168(c)(1) by allowing plaintiff to inspect "confidential" information from his own employee personnel file that had been subjectively redacted by Gastonia, and since "questions as to public policy are for legislative determination," *see Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 285, 177 S.E.2d 291, 298 (1970), we find such a discussion to be inapposite to the issues properly before us.

Accordingly, we conclude the trial court did not err when it granted summary judgment in favor of plaintiff, denied Gastonia's cross-motion for summary judgment, and ordered Gastonia to disclose to plaintiff unredacted copies of all documents contained in Gastonia Police Department's IA Investigative Case Files 2008265 and 2008307.

Affirmed; Remanded for further proceedings.

Judge HUNTER concurs.

Judge DILLON concurs in part and dissents in part.

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

I concur with the majority's holding that, although interlocutory, the trial court's summary judgment order is immediately appealable as the order affects a substantial right. I also concur with the majority's holding that the information sought by Plaintiff falls within the scope of N.C. Gen. Stat. § 160A-168(a) (2011), as part of Plaintiff's employee personnel file. However, I respectfully dissent from the portion of the majority opinion defining "official personnel decision" and affirming the trial court's order, because I believe, based on the facts of this case and the issues properly before us, that the information sought by Plaintiff falls under the exemption contained in N.C. Gen. Stat. 160A-168(c1)(4) (2011).

In the case *sub judice*, Plaintiff, a police officer employed by Defendant, was the subject of two separate internal affairs investigations which arose out of complaints filed against him, one by a citizen and one by a fellow police officer. After investigations were conducted, both complaints were dismissed by Plaintiff's superior, Chief of Police Tim Adams (Chief Adams), with no action taken against Plaintiff. Plaintiff, however, sought from Defendant access to the contents of the internal investigation files. Based on the record, it appears that Defendant has provided all of the requested information to Plaintiff, but with the identities of the people who lodged the initial complaints redacted. Plaintiff filed this appeal to compel Defendant to disclose the *identity* of the citizen and the police officer who filed the complaints.[1]

I: Exemption, N.C. Gen. Stat. § 160A-168(c1)(4)

Defendant argues that even if the information is part of Plaintiff's "employee personnel file" pursuant to N.C. Gen. Stat. § 160A-168(a), Defendant may, nonetheless, withhold the information from Plaintiff pursuant to the exemption in N.C. Gen. Stat. § 160A-168(c1)(4), which provides the following:

> (c1) Even if considered part of an employee's personnel file, the following information need not be disclosed to an employee nor to any other person:

1. At the hearing on the motions for summary judgment, the trial court asked whether "the city's position is the plaintiff doesn't get anything from the IA file[,]" to which Defendant's attorney stated, "[j]ust the identity of the individuals who made the [complaints]." When the court further inquired, "so everything else has been disclosed," Defendant's attorney responded, "Yes[.]" This is a fact that Plaintiff does not dispute.

. . . .

> (4) Notes, preliminary drafts and internal communications concerning an employee. In the event such materials are used for any official personnel decision, then the employee or his duly authorized agent shall have a right to inspect such materials.

Id. Therefore, to qualify for the exemption from disclosure under (c1)(4), the information sought (1) must be comprised of "[n]otes, preliminary drafts [or] internal communications[,]" *and* (2) must not have been "used for any official personnel decision[.]" *Id.* The majority ultimately bases its holding on the second requirement, concluding that the requested information *was* used for "official personnel decision[s]" as follows: "Nevertheless, even assuming without deciding that the IA investigative files that plaintiff seeks to inspect are [notes, preliminary drafts and internal communications], we are not persuaded by Gastonia's argument that it had a statutory right to refuse plaintiff's request to inspect these materials because such materials were not 'used for any official personnel decision.' " I disagree with the majority and believe that the decisions by Chief Adams not to sustain the complaints did not rise to the level of "official personnel decision[s]" under (c1)(4). I believe the proper holding in this case is to reverse the trial court's entry of summary judgment in favor of Plaintiff and to remand the case to the trial court for entry of an order granting Defendant's motion for summary judgment.

Based on the record and the arguments of the parties, the only issue regarding the application of (c1)(4) concerns the question of whether an "official personnel decision" was made, and not whether the materials were "[n]otes, preliminary drafts and internal communications[.]" N.C. Gen. Stat. § 160A-168(c1)(4). At the summary judgment hearing below, Plaintiff conceded that the only issue in this case regarding the applicability of (c1)(4) concerns whether the materials were "used for [an] official personnel decision":

> THE COURT: But it sounds like what my decision really boils down to in this case is a matter of statutory interpretation of [N.C. Gen. Stat. §] 160A-168 subsection (c1)(4). "In the event such materials are used for any official personnel decision, then the employer's duly authorized agent shall have the right to inspect such material [sic]." So what I am being called on to decide is, does that mean what it says, any official personnel decision including the determination of what if any consequences are suffered as

> a result of that internal affairs investigation. Or does that really mean any other official personnel decision, other than [a] determination of the subject of the internal affairs inquiry. Is that really what it boils down to?
>
> [PLAINTIFF'S COUNSEL]: Your Honor, I think . . . the foremost determination that you have to make . . . [is whether Defendant has] to comply with that statute because their chief of police, and I give him credit for this, their chief of police testified under oath that he made a personnel decision.

Likewise, Plaintiff does not make an argument in his brief with this Court that the information requested is *not* "[n]otes, preliminary drafts [or] internal communications[.]" N.C. Gen. Stat. § 160A-168(c1)(4). Rather, Plaintiff argues that subsection "(c1)(4) essentially presents one question: were the documents [at] issue used for any official personnel decision? Chief Adams used the information from the documents in making his final official personnel decision."

The majority states that "we cannot conclude that the IA investigative files that plaintiff seeks to inspect are each a note, a preliminary draft, or an internal communication," recognizing that not all of the materials sought by Plaintiff are even part of the record. However, though not part of its holding, the majority does state that it appears the General Assembly intended the phrase "notes, preliminary drafts and internal communications" as used in (c1)(4) to apply to "materials that are informal or provisional in character[,]" relying on WEBSTER'S DICTIONARY definitions for "note" and "draft." Specifically, the majority refers to WEBSTER'S definition of "note" as being "a brief statement of a fact, experience, etc. written down for review, as an aid to memory, or to inform someone else[.]" Based on evidence of record, I believe that at least some portions of the IA investigative file — collections of statements of facts or experiences, "written down for review" by Chief Adams or "to inform" Chief Adams — falls within the majority's stated definition of "notes." Additionally, the record does contain a redacted memorandum to Chief Adams drafted by the officer who investigated one of the complaints against Plaintiff, which I believe clearly constitutes an "internal communication concerning an employee" within the plain meaning of (c1)(4).

I also find the Supreme Court's decision in *News and Observer Publishing Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992), informative as to the meaning of "preliminary draft." In that case, the UNC system president appointed a commission to investigate alleged improprieties

relating to a university's men's basketball team. *Id.* at 470, 412 S.E.2d at 10. At the conclusion of the investigation, members of the commission submitted reports to the UNC system president. *Id.* at 483, 412 S.E.2d at 18. The plaintiff newspaper sought, in part, the disclosure of those investigative reports pursuant to the Public Records Law. *Id.*; *see also* N.C. Gen. Stat. § 132-6. In that case, the reports prepared by the commission were described as "preliminary draft reports." *Poole*, 330 N.C. at 484, 412 S.E.2d at 34. The Court's language suggests and could be construed to stand for the proposition that the product of an investigation (*e.g.*, reports) submitted for review by a person in authority may constitute "preliminary drafts."

I now turn to the phrase "official personnel decision[.]"[2] Neither party nor the majority cites any case law in which this phrase has been construed or applied. Rather, by combining the respective definitions for "official," "personnel," and "decision" as contained in WEBSTER'S DICTIONARY, the majority interprets the statutory phrase as follows: "[T]he plain meaning of this phrase — as used in this statute — more specifically refers to *authorized or authoritative judgments or conclusions of or pertaining to the employed person about whom the judgment or conclusion is rendered*." (emphasis added). I believe the majority's definition is overly broad because it could be applied essentially to *any* "personnel decision," rendering the word "official" in the statutory language meaningless. *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 216, 388 S.E.2d 134, 140 (1990) (stating that "[a] statute must be construed, if possible, so as to give effect to every provision, it being presumed that the Legislature did not intend any of the statute's provisions to be surplusage"). The majority fails to recognize that every legitimate personnel decision which occurs in a workplace, by its nature, is a judgment or conclusion made by someone authorized to make the decision. I believe that the General Assembly did not intend that the word "official" be surplusage, but rather intended for the word "official" to modify "personnel decision" to limit the phrase's application.

In further support of a broad interpretation of "official personnel decision," the majority states that "we think the General Assembly's use of the term 'personnel' in subsection (a) of this statute is consistent with

---

2. The second part of the exemption in subsection (c1)(4) requires that the materials not be "used" in any "official personnel decision." Defendant does not argue that a genuine issue of material fact exists as to whether Chief Adams "used" the information sought by Plaintiff, i.e., the names of the complainants, to make his determination not to sustain the complaints. As such, the analysis is properly limited to the definition of the phrase "official personnel decision."

a less-constrained reading of the phrase 'official personnel decision,' as the phrase is used in subsection (c1)(4), and is also instructive in construing the meaning of the challenged phrase within the context of this statute." In other words, the majority argues that the General Assembly must have intended for "official personnel decision" to be construed broadly since the phrase "employee's personnel file" in subsection (a) is defined broadly and both phrases relate to "personnel." I agree with the majority that, in construing the phrase "official personnel decision," the entire statute should be read in context and the definition of "employee's personnel file" as used in subsection (a) should be considered. However, the majority's comparison of the two phrases is flawed because it ignores the fact that the General Assembly chose to incorporate the modifier "official" to limit the scope of "personnel" in (c1)(4), but did not do so in subsection (a).

While our courts have never construed or applied the phrase "official personnel decision," our courts have used the phrase "personnel decision" on a number of occasions to describe a broad range of workplace decisions made by someone in a position of authority, all of which would fit the majority's definition of "official personnel decision." *See, e.g.*, *In re Officials of Kill Devil Hills Police Dep't.*, __ N.C. App. __, __, 733 S.E.2d 582, 587 (2012) (overruling the trial court's attempt to discipline a Chief of Police and other police officers and referring to such decisions as rightfully the department's "personnel decisions"); *Bulloch v. N.C. Dept. of Crime Control & Pub. Safety*, __ N.C. App. __, __, 732 S.E.2d 373, 379, *disc. review denied*, __ N.C. __, 735 S.E.2d 178 (2012) (referring to a Line Sergeant's dismissal from employment with the North Carolina Highway Patrol, on grounds of unacceptable personal conduct, as a "personnel decision"); *Bradley v. Bradley*, 206 N.C. App. 249, 257, 697 S.E.2d 422, 427 (2010) (using the term "personnel decision" to describe a decision by one in a position of authority that would "in any way change, modif[y], or affect" another's "rights, positions, or ownership interest" in a company); *Zimmerman v. Appalachian State Univ.*, 149 N.C. App. 121, 133, 560 S.E.2d 374, 382 (2002) (referring to the decision by administrators of Appalachian State University not to offer a reappointment contract to a non-tenured faculty member as a "personnel decision").

It is interesting that Defendant presents an argument in its brief, in essence, that the information sought by Plaintiff does not even fall within the definition of "employee's personnel file" in subsection (a) because the information is stored by Defendant separately from Plaintiff's official personnel file. N.C. Gen. Stat. § 160A-168(a). I agree, though, with the

majority that the General Assembly expressly intended the phrase "employee's personnel file" in subsection (a) to be construed more broadly than Defendant argues, and not to apply *only* to materials stored within an employee's *official* personnel file. Otherwise, the General Assembly could have employed the phrase "employee's *official* personnel file" in subsection (a).[3]

Our courts have recognized that even though "[g]ood public policy is said to require liberality in the right to examine public records . . . some degree of confidentiality is necessary for government to operate effectively[.] . . ." *Advanced Publications, Inc. v. Elizabeth City*, 53 N.C. App. 504, 506, 281 S.E.2d 69, 70-71 (1981); *see also News and Observer Publishing Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992). I believe the General Assembly enacted the exemptions in subsection (c1) to recognize the interest of government to keep certain information confidential and enable supervisors to better manage the employees in their respective governmental departments. The Fourth Circuit Court of Appeals has recognized this legitimate concern in the context of internal affairs investigations within police departments:

> [Internal] investigations face an uphill battle due to the so-called "blue wall," the tendency of law enforcement officers to place solidarity above all else and to be less than fully cooperative with investigations of fellow officers. "Officers who report misconduct are ostracized and harassed; becoming targets of complaints and even physical threats; and are made to fear that they will be left alone on the streets in a time of crisis." In such a setting, the confidentiality of internal investigations may be not only desirable but essential.

In re Grand Jury, John Doe No. G.J.2005-2, 478 F.3d 581, 586 (4th Cir. 2007) (internal citation omitted).

Defendant has addressed this concern in its Policies and Procedures, a portion of which is part of the record and includes the following:

> In order to safeguard the anonymity of complain[ants] who wish to remain anonymous, and because charges are

3. In construing N.C. Gen. Stat. § 153A-98(a), which defines "personnel file" for a county employee with identical language to that used in N.C. Gen. Stat. § 160A-168(a) to define a personnel file for a municipal employee, this Court held that whether a document is part of a " 'personnel file' . . . depends upon the nature of the document and not upon where the document has been filed." *News Reporter Co. v. Columbus County*, 184 N.C. App. 512, 516, 646 S.E.2d 390, 393 (2007).

> based only on the results of an investigation, an officer who is charged with an offense will have access only to that material which will be introduced against him or her in a departmental hearing.

Additionally, according to Defendant's policies a police officer does not even have the right to know the facts surrounding a complaint against him until the investigation is completed, and only then if the Chief of Police recommends disciplinary action. By way of analogy, consider the Rules of our State's Judicial Standards Commission regarding the investigation of North Carolina judges. Specifically, Rule 6 states that unless an investigation results in the issuance of a public reprimand or the institution of a disciplinary proceeding, a judge does not have the absolute right to know the identity of the person filing the complaint or even that a complaint has been lodged. *See* North Carolina Rules of the Judicial Standards Commission, Rule 6 (stating that "the investigative officer *may* notify respondent that a complaint has been received and *may* disclose to respondent the name of the person making the complaint") (emphasis added); *see also Brock & Scott Holdings, Inc. v. Stone*, 203 N.C. App. 135, 137, 691 S.E.2d 37, 38 (2010) (stating that the "use of [the word] 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular act").

While I believe that the General Assembly enacted the exemptions in subsection (c1)(4) to allow governmental departments to maintain a level of confidentiality in its dealings with internal employment matters, I believe the General Assembly incorporated the phrase "official personnel decision" in subsection (c1)(4) to balance this government's interest with an employee's interest to confront and address information that is used in official decisions affecting his employment. N.C. Gen. Stat. § 160A-168(c1)(4).

In this case, the majority concludes the decisions by Chief Adams *not* to recommend that disciplinary action be taken against Plaintiff constitute "official personnel decisions." Though Chief Adams' decisions could arguably constitute "personnel decisions," I do not believe that these decisions constitute "official personnel decisions" under (c1)(4). Rather, Chief Adams' decisions involved the classification of complaints rather than a recommendation or order affecting the Plaintiff's position of employment. I do not believe Chief Adams' actions would have risen to the level of "official personnel decision[s]" unless he had sustained the complaints and had recommended discipline against Plaintiff. Under the majority's definition, even the decision by the investigating

officer to commence investigations after receiving the complaints would require the Plaintiff be notified about the impending investigation, thus possibly compromising the ability of the investigating officer to compile evidence.

Based on the foregoing, I would conclude that the decision by Chief Adams to classify the two complaints against Plaintiff as "not sustained" did not rise to the level of an "official personnel decision" under (c1)(4).

II: Redaction and Public Policy

This Court has held that, as a matter of public policy, information which falls under the Public Records Act may be provided with the identities of certain individuals redacted to insure the "safety and security" of the individuals, notwithstanding the lack of a statute authorizing the redaction. *S.E.T.A. UNC-CH v. Huffines*, 101 N.C. App. 292, 295, 399 S.E.2d 340, 342 (1991). In *S.E.T.A.*, the plaintiff sought certain records concerning animal experiments being conducted at UNC-Chapel Hill. *Id.* at 293, 399 S.E.2d at 341. The University argued, in part, that the names of the individuals conducting the research should not be disclosed because of concerns regarding the safety of the researchers and because of the potential "chilling effect" disclosing their identities might have on the University finding other individuals willing to conduct animal research. *Id.* at 295, 399 S.E.2d at 343. This Court ordered that the portions of the research records, not otherwise subject to a statutory exemption, be made available for inspection under the Public Records Act, but that the University could redact the names of the researchers based on public policy concerns. *Id.* at 298, 399 S.E.2d at 344.

In this case, Plaintiff has admitted in his complaint and argues in his brief that one of his motivations to discover the identity of the complainants is so that he can sue them. In the hearing on the motions for summary judgment, Plaintiff's attorney spoke openly about possible causes of action, stating, "we might have had us a decent defamation claim[.]" I believe that, because of the threat of a lawsuit and also for the safety concerns quoted in *In re Grand Jury* above, divulging the names of complainants would have a chilling effect on police officers and others reporting misconduct and would affect Chief Adams' ability to manage his department effectively.

Based on this Court's reasoning in *S.E.T.A.*, *supra*, as a matter of public policy, a municipal employer should be allowed to redact certain information when providing an employee with information that may be, technically, within an employee's personnel file. Such redactions may

include the identities of those who alert their managers of misconduct by co-workers where the testimony of the original complainant is not used or needed to sustain the complaint or where the complaint is, otherwise, not sustained. Therefore, even if the materials sought by Plaintiff falls outside the exemption in subsection (c1)(4), I believe Defendant acted appropriately by providing the information with the names of the complainants redacted based on the public policy concern that has been recognized by this Court.

IV: Conclusion

For the reasons stated above, I would reverse the decision of the trial court to grant Plaintiff's motion for summary judgment, and I would reverse the decision of the trial court to deny Defendant's motion for summary judgment. Contrary to the decision of the majority, I believe the law requires that this Court remand this case to the trial court for entry of summary judgment in favor of Defendant.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 MARCH 2013)

ANTELO v. WAL-MART ASSOCS., INC. No. 12-846	N.C. Industrial Commission (702263)	Affirmed
BOYD v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 12-823	N.C. Dept.of Health & Human Servs. (TA-21206)	Affirmed
BRODIE v. EXCEL STAFFING SERVS. No. 12-885	N.C. Industrial Commission (454421)	Affirmed
CARDEN v. OWLE CONSTR., LLC No. 12-493	Durham (11CVS5119)	Affirmed
GODON CONSTR., INC. v. PRIMO ENTERS., LLC No. 12-335	Lee (11CVS115)	Reversed and Remanded
INDEP. TECHNOLOGIES, INC. v. MARTIN No. 12-872	Union (08CVS2547)	Dismissed
IN RE A.J.W. No. 12-1138	Guilford (11JT26-27)	Affirmed
IN RE FORECLOSURE OF PERRY No. 12-944	Durham (11SP683)	Affirmed
IN RE J.M. No. 12-1014	Robeson (02JT06) (02JT185)	Reversed
IN RE J.W. No. 12-880	Rowan (11JA162-164)	Affirmed
IN RE K.A.U. No. 12-1046	Caldwell (10JA122)	Affirmed
IN RE S.S. No. 12-1011	Wake (09JA833)	Affirmed
IN RE FORECLOSURE OF DONG No. 12-942	Mecklenburg (10SP7029)	Affirmed
LAWING v. LAWING No. 12-982	Iredell (10CVD490)	Vacated and Remanded

LOWDER v. PAYNE No. 12-512	Mecklenburg (07CVS1129)	Affirmed
MCCALLISTER v. LEE No. 12-1168	Onslow (12CVS1694)	Affirmed
MENIUS v. CEI TRANSP., INC. No. 12-929	Cabarrus (11CVS3502)	Dismissed
METTS v. METTS No. 12-427	New Hanover (08CVD1948)	Affirmed in part; dismissed in part; remanded in part.
N.C. STATE BAR v. BURFORD No. 12-909	N.C. State Bar (11DHC3)	Dismissed
STATE v. AVERY No. 12-695	Transylvania (11CRS406) (11CRS51507)	No Error
STATE v. BENNETT No. 12-870	Rowan (01CRS58057) (11CRS2755)	No Error
STATE v. BURRIS No. 12-892	Onslow (11CRS53109) (11CRS53110)	No error in part; Reversed and remanded in part
STATE v. CLAROS No. 12-994	Mecklenburg (09CRS247373-74) (09CRS247376)	No Error
STATE v. COOK No. 12-519	Guilford (11CRS66722)	No Error
STATE v. FENNELL No. 12-993	Pender (08CRS3155) (08CRS52362)	Reversed and Remanded
STATE v. HAIRE No. 12-1086	Moore (10CRS52139)	No Error in Part, Judgment Arrested in Part, and Remanded for Re-sentencing.
STATE v. HARRIS No. 12-864	Mecklenburg (09CRS67111)	No Error
STATE v. JONES No. 12-934	Forsyth (11CRS51352)	No Error

STATE v. KEE No. 12-784	Pender (10CRS52105)	No Error
STATE v. KLINGER No. 12-798	Avery (11CRS1745)	No error in part; Reversed and Vacated in part.
STATE v. LONG No. 12-1263	Guilford (10CRS96290)	Affirmed
STATE v. MOORE No. 12-1025	Buncombe (09CRS50593)	No Error
STATE v. POLLOCK No. 12-971	Randolph (08CRS52283)	No Error
STATE v. RICE No. 12-735	Wayne (09CRS704781)	No Error
STATE v. TAYLOR No. 12-529	Forsyth (07CRS61195)	No Error
STATE v. THOMPSON No. 12-1193	Cumberland (09CRS55043)	Affirmed
STATE v. ZINKAND No. 12-756	Macon (11CRS50083)	No error as to conviction; Remanded for resentencing.
WILLIARD v. WILLIARD No. 12-931	Davidson (95CVD753)	Affirmed

BOBBY ANGLIN, PLAINTIFF
v.
DUNBAR ARMORED, INC. AND GALLAGER BASSETT SERVICES, INC., DEFENDANTS

No. COA12-1176

Filed 2 April 2013

Liens—underinsured motorist coverage funds—North Carolina law applicable

The trial court did not err by denying plaintiff's request to reduce or eliminate defendants' lien on funds plaintiff received from South Carolina underinsured motorist (UIM) coverage. The trial court correctly applied North Carolina law which gave the trial court authority to adjust the North Carolina lien on plaintiff's UIM funds.

Appeal by plaintiff from order entered 1 August 2012 by Judge Timothy Kincaid in Superior Court, Mecklenburg County. Heard in the Court of Appeals 14 February 2013.

The Sumwalt Law Firm, by Vernon Sumwalt and Mark T. Sumwalt, for plaintiff-appellant.

McAngus, Goudelock & Courie, by Colin E. Scott, for defendants-appellees.

STROUD, Judge.

Plaintiff appeals a trial court order which denied plaintiff's request to reduce or eliminate defendants' lien on funds plaintiff received from South Carolina underinsured motorist coverage, contending that because South Carolina law would not allow a lien on such funds neither should North Carolina. For the following reasons, we disagree and thus affirm.

I. Background

Plaintiff filed a complaint on 18 January 2012 seeking "declaratory relief and to eliminate or reduce Defendants' subrogation interest so that Plaintiff can then proceed to the Industrial Commission for proper disbursement of Plaintiff's UIM settlement pursuant to N.C. Gen. Stat. § 97-10.2(f)." On 1 August 2012, after a hearing on "PLAINTIFF'S MOTIONS FOR: (1) JUDGMENT ON THE PLEADINGS PURSUANT

TO N.C.R. CIV. P. 12(c) AND (2) ELIMINATION OR REDUCTION OF WORKERS' COMPENSATION LIEN PURSUANT TO N.C. GEN. STAT. § 97-10.2(j)[,]" the trial court made the following uncontested findings of fact:

1. That the Plaintiff was injured while in the course and scope of employment with the Defendant Dunbar in an automobile accident which occurred in South Carolina on May 13, 2009;

2. That the Plaintiff and Defendant driver were both residents of South Carolina;

3. That the Defendant Dunbar did business out of North Carolina;

4. That as a result of the Plaintiff's injuries, the Plaintiff received Worker's [sic] Compensation benefits from the Defendants pursuant to the North Carolina Worker's [sic] Compensation Act;

5. That the Plaintiff was paid a total of $31,809.48 in Worker's [sic] Compensation benefits by the Defendants;

6. That the Plaintiff settled the liability claim with the at fault driver for $92,712.55;

7. That on January 31, 2011, the Defendants agreed to settle its lien on the liability settlement for 1/3 of the lien ($10,613.16);

8. That on or about April 18, 2011, Plaintiff settled with his Underinsured Motorist Carrier (UIM) for injuries sustained in the 2009 accident for a total of $30,000.00;

9. That the Defendants were unaware of the UIM funds at the time the lien was settled in January of 2011;

10. That Plaintiff contends that South Carolina law applies because the Plaintiff was entitled to UIM funds pursuant to a South Carolina Policy. Plaintiff further contends that the Defendants cannot subrogate UIM funds under South Carolina law (S.C. Code[] Ann. §38-77-160);

11. That Plaintiff also contends that there was an accord and satisfaction because the Defendants agreed to 1/3 of the lien;

12. That the Defendants contend that they are entitled to the remaining $21,206.31 of the lien from the UIM funds because North Carolina [law] applies and because they were not aware of the UIM funds at the time of the settlement[.]

Based upon the findings of fact the trial court ordered:

1. That North Carolina law should apply because the Plaintiff is seeking relief pursuant to North Carolina law (NCGS §97-10.2(j));

2. That North Carolina does not have a statute which prevents subrogation of UIM funds;

3. That applying S.C. Code Ann §38-77-160 in this case would be contrary to the policies and procedures set for[th] in the North Carolina Worker's [sic] Compensation Act.

4. That there is not an accord and satisfaction of the lien as it relates to the UIM funds because the Defendants were not aware of the UIM funds at the time of the settlement of the lien;

5. That after consider[ing] all of the factors in 97-10.2(j), including the anticipated amount of prospective compensation the employer or worker's [sic] compensation carrier is likely to pay to the employee in the future, the net recovery to Plaintiff, the likelihood of the Plaintiff prevailing at trial or on appeal, the need for finality in the litigation and other factors as set forth above, the Defendants are entitled to the remaining $21,206.31 of the lien from the $30,000.00 of UIM funds.

Plaintiff appeals.

II. N.C. Gen. Stat. § 97-10.2(j)

Plaintiff contends that the trial court erred by applying North Carolina law because this issue is controlled by South Carolina law as the funds subject to subrogation were paid under a South Carolina UIM policy. Plaintiff asserts that

> in allowing defendants to recoup their workers' compensation lien under N.C. Gen. Stat. § 97-10.2(j), the superior court judge misapprehended the law by engrafting the substantive law of North Carolina upon an insurance contract between a South Carolina resident and his UIM carrier, which the substantive law of South Carolina governed.

(Original in all caps.) Essentially, plaintiff contends that because the funds at issue were paid to plaintiff from a South Carolina contract — his UIM insurance policy — South Carolina law controls. However, the terms of the insurance contract are not at issue in this case, and defendant was not even a party to the South Carolina contract; the issue here is actually what law applies to the trial court's authority to adjust the North Carolina lien on plaintiff's UIM funds, despite their origin.

Whether North Carolina law or South Carolina law governs is a question of law which we review *de novo*. *See Harris v. Ray Johnson Const. Co., Inc.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000). Under N.C. Gen. Stat. § 97-10.2, a subrogation lien for the benefit of the workers' compensation carrier automatically attaches to the third party proceeds received by a plaintiff for whom the carrier has paid medical expenses arising from the injury by accident. *See Cook v. Lowe's Home Centers, Inc.*, 209 N.C. App. 364, 367, 704 S.E.2d 567, 570 (2011) ("Under North Carolina law an employer's statutory right to a lien on a recovery from the third-party tort-feasor is mandatory in nature." (citation, quotation marks, ellipses, and brackets omitted)). This lien may be reduced or eliminated by the trial court in certain circumstances, under N.C. Gen. Stat. § 97-10.2(j), which provides as follows:

> Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation

> to be shared between the employee and employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien. If the matter is pending in the federal district court such determination may be made by a federal district court judge of that division.

N.C. Gen. Stat. § 97-10.2(j) (2009).

Plaintiff recognizes that N.C. Gen. Stat. § 97-10.2 provides a "procedural remedy" and not a substantive claim, but still argues that the substantive law of South Carolina should be applied in this case, relying upon *Cook*. *Cook*, 209 N.C. App. 364, 704 S.E.2d 567. In *Cook*, this Court determined that N.C. Gen. Stat. § 97-10.2(j) "is remedial in nature" and that "remedial rights are determined by the law of the forum." 209 N.C. App. 364, 367-68, 704 S.E.2d 570-71.

> Cook, an employee of the Oryan Group, a Tennessee corporation, sustained an injury in the course of performing the duties of his employment on the premises of Lowe's Home Improvement in Greensboro, North Carolina. Before a Chancery Court of Tennessee, Cook and the Oryan Group acknowledged Tennessee Workers' Compensation Law applied to them at the time of his injury. Cook and the Oryan Group petitioned the Chancery Court pursuant to Tennessee Workers' Compensation Statutes for, and thereafter received, a lump sum settlement wherein Cook recovered from his employer and Hartford Insurance $97,397.00 for permanent-partial disability of 75% to the body as a whole and ongoing medical treatment of his injury by authorized, pre-approved panel physicians. Subsequently, Cook filed a negligence action against defendants in Superior Court in Guilford County, North Carolina. Hartford Insurance intervened to enforce a subrogation lien against any recovery. Cook and defendants settled the North Carolina negligence claim for $220,000.00. Cook filed a motion in the Superior Court to reduce or extinguish the lien pursuant to N.C. Gen. Stat.

> § 97–10.2(j), which Hartford Insurance opposed by asserting that Tennessee law applied. However, after a hearing, the trial court entered an order reducing the amount of the lien to $30,000.00 pursuant to N.C.G.S § 97–10.2(j).

Id. at 367-68, 704 S.E.2d at 570. "On appeal, Hartford Insurance challenge[ed] the trial court's ruling that North Carolina law applied to the issue of reduction or elimination of the workers' compensation subrogation lien. Hartford argue[ed] that Tennessee law would not permit reduction of the subrogation lien and that Tennessee law should be applied here." *Id.* at 366, 704 S.E.2d at 569. This Court disagreed stating,

> As to substantive laws, or laws affecting the cause of action, the lex loci—or law of the jurisdiction in which the transaction occurred or circumstances arose on which the litigation is based—will govern; as to the law merely going to the remedy, or procedural in its nature, the lex fori—or law of the forum in which the remedy is sought—will control.

Where a lien is intended to protect the interests of those who supply the benefit of assurance that any work-related injury will be compensated, it is remedial in nature. A statute that provides a remedial benefit must be construed broadly in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained.

Under North Carolina law an employer's statutory right to a lien on a recovery from the third-party tortfeasor is mandatory in nature. However, after notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien.

> There is no mathematical formula or set list of factors for the trial court to consider in making its determination; the statute plainly affords the trial court discretion to determine the appropriate amount of defendant's lien. The exercise of discretion requires that the court make a reasoned choice, a judicial value judgment, which is factually supported.

Id. at 366-67, 704 S.E.2d at 569-70 (citations, quotation marks, ellipses, and brackets omitted). The *Cook* Court thus determined that rights arising from the subrogation lien under N.C. Gen. Stat. § 97-10.2(j) are remedial or procedural, not substantive. *Id.* at 367-68, 704 S.E.2d at 570-71.

> [A]s stated earlier, remedial rights are determined by the law of the forum. In this case the forum is North Carolina.
>
> The North Carolina subrogation statute at issue here gives the court discretion to consider many factors, including any other factors the court deems just and reasonable, in determining the amount of the employer's lien. In his motion to reduce or extinguish the lien, Cook set forth the significant injuries he suffered, including impairment of his ability to earn wages. He also emphasized to the court that his worker's [sic] compensation award was grossly insufficient and inadequate to compensate him for his disability. After a hearing on the motion the trial court entered its ruling reducing Hartford's lien to $30,000. We hold the trial court acted within, and did not abuse, its discretion in applying North Carolina law and reducing the amount of Hartford Insurance's subrogation lien pursuant to N.C.G.S. § 97–10.2(j).

Id. at 368, 704 S.E.2d at 571 (citation and quotation marks omitted).

Plaintiff argues that under *Cook*, the procedural remedy of adjustment of the subrogation lien by the court was available only because the substantive law of Tennessee did not differ from North Carolina's law as to the availability of subrogation liens. After a thorough analysis of *Cook*, we disagree with plaintiff's interpretation. In *Cook*, this Court determined that North Carolina law, N.C. Gen. Stat. § 97-10.2(j), was applicable not because "the substantive law of Tennessee did not differ from the substantive law of North Carolina" but because N.C. Gen. Stat. § 97-10.2(j) "is remedial in nature" and "remedial rights are determined by the law of the forum" which in *Cook* was North Carolina. 209 N.C. App. at 367-68, 704 S.E.2d at 570-71; *see Robinson v. Leach*, 133 N.C. App. 436, 514 S.E.2d 567 (determining that subrogation on UIM funds is procedural in nature and thus controlled by North Carolina law, the law of the forum state), *disc. review denied*, 350 N.C. 835, 539 S.E.2d 293 (1999). As plaintiff sought reduction or elimination of the subrogation lien pursuant to N.C. Gen. Stat. § 97-10.2(j), and as this Court has previously determined that N.C. Gen. Stat. § 97-10.2(j) "is remedial in nature" and "remedial rights are determined by the law of the forum[,]" *Cook* at

367-68, 704 S.E.2d at 570-71, the trial court did not err in applying N.C. Gen. Stat. § 97-10.2(j) to plaintiff's UIM funds received under a South Carolina insurance policy.[1]

III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges STEPHENS and DILLON concur.

MARK C. BEASON, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF THE SECRETARY OF STATE, RESPONDENT

No. COA12-837

Filed 2 April 2013

1. Appeal and Error—interlocutory orders and appeals—substantial right—violations and enforcement of lobbying laws

Although respondent's appeal from the trial court's order reversing and setting aside a civil fine assessment imposed against petitioner was from an interlocutory order, a substantial right was affected entitling respondent to immediate appellate review since respondent was charged with investigating violations of and enforcing Articles 2, 4, and 8 of the lobbying laws pursuant to N.C.G.S. § 120C-600 (a-b).

2. Administrative Law—lobbying law—civil fine—set aside

The trial court did not err by reversing and setting aside the civil fine assessment imposed against petitioner lobbyist who was attempting to amend or repeal the "Buy America" law. Respondent lacked authority to interpret the lobbying laws and to find violations of those laws through the common law doctrine of acting in concert.

---

1. Of course, had the trial court in its discretion decided to reduce or eliminate the subrogation lien, plaintiff would be in the same position as the plaintiff in *Cook*; the only difference here is that the trial court in *Cook* decided to reduce the lien, while the trial court here decided not to reduce or eliminate the lien. *See Cook*, 209 N.C. App. at 366, 704 S.E.2d at 569. But as to the applicable law or the trial court's authority, there is no difference between this case and *Cook*, only the result, and thus the party appealing is different. *See id.*

3. Administrative Law—lobbying law—lobbyist principal—no compensation

The trial court did not err by concluding that the Engineering Export Promotion Council (EEPC) was not a lobbyist principal of petitioner's because petitioner received no compensation from EEPC.

Appeal by respondent from order entered 6 January 2012 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 8 January 2013.

Bailey & Dixon, LLP, by Sabra J. Faires, Michael L. Weisel, and Adam N. Olls, and Allen, Pinnix & Nichols, P.A., by M. Jackson Nichols, Anna Baird Choi, and Catherine E. Lee, for petitioner-appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel Snipes Johnson and Assistant Attorney General Melissa H. Taylor, for respondent-appellant.

HUNTER, Robert C., Judge.

Respondent the North Carolina Department of the Secretary of State appeals the trial court's order reversing and setting aside the civil fine assessment imposed against petitioner Mark Beason. After careful review, we affirm the trial court's order.

This case involves the lobbying efforts of petitioner to repeal or amend N.C. Gen. Stat. § 136-28.7 (2011), commonly known as the "Buy America" law, which prohibits the North Carolina Department of Transportation from purchasing or using foreign-made steel and iron in highway construction projects. Petitioner has been working as a lobbyist since 1999. His father, Donald Beason ("Don"), was also a registered lobbyist in North Carolina from 1993 to 2007. Between late 2006 and August 2007, petitioner worked with his father at Beason Government Affairs (BGA), a lobbying firm. Respondent and the North Carolina Ethics Commission are the administrative agencies statutorily charged with enforcing and administering Chapter 120C of the North Carolina General Statutes (the "lobbying laws"). N.C. Gen. Stat. § 120C-600 and § 120C-601 (2011).

In late 2006, Sigma, a New Jersey corporation that imports and sells foreign manufactured cast iron and steel products in the United States,

and Don discussed the possibility of Don lobbying on behalf of Sigma and/or the Engineering Export Promotion Council ("EEPC"), an Indian trade association for exporters of iron products from India. During those discussions, Sigma requested that Don send a proposal for lobbying services so that Sigma could forward it to EEPC. Don sent a proposal indicating that petitioner, Don, and T. Jerry Williams ("Mr. Williams"), an independent contractor of BGA, would perform lobbying services to amend or repeal the "Buy America" law. In December 2006, EEPC sent Don an unsigned agreement that incorporated Don's proposal and indicated that EEPC was the client. Don signed his own name and petitioner's name on the proposed contract and returned it to Sigma for EEPC to sign. EEPC refused to execute the contract. There is no evidence in the record that petitioner had any knowledge of this unexecuted contract.

In February 2007, Sigma executed a contract with BGA. The contract stated that petitioner, Don, and Mr. Williams would lobby on behalf of Sigma and be paid $95,000 plus expenses. Documents obtained by respondent during its investigation indicate that five companies engaged in importing and selling iron products—specifically, EEPC; Star Pipe Products ("Star"); General Foundries, Inc. ("GF"); Serampore Industries Products (Ltd.) Inc.; and Capitol Foundry of Virginia ("Capitol")—agreed to reimburse Sigma for its contract with BGA. After executing the contract, both petitioner and Mr. Williams lobbied on behalf of Sigma to repeal the "Buy America" law. Petitioner, Don, and Mr. Williams all registered with respondent as lobbyists for Sigma.

In March 2007, in response to safety concerns of Indian iron products, Don attended a meeting in Washington, D.C. with Sigma representatives, EEPC, and various other representatives of companies involved with exporting Indian Steel. Petitioner and Mr. Williams were not aware of this meeting.

In October 2007, respondent initiated an investigation into Don and petitioner's lobbying activities. On 31 March 2010, respondent issued a civil fine assessment against petitioner for three alleged violations of the lobbying laws. Specifically, respondent contended that petitioner violated section 200 by failing to register as a lobbyist for EEPC, section 402 by failing to file lobbyist reports as a lobbyist for EEPC, and section 200 by failing to disclose to designated individuals that he was a lobbyist for EEPC. In the fine, respondent noted that the fine was based on petitioner's " 'coordinated efforts' on behalf of the registered principal, Sigma, and EEPC" and his "acting in concert" with numerous individuals

and business entities in his lobbying efforts. Respondent fined petitioner $6000 based on these alleged violations of the lobbying laws.

On 29 March 2010, respondent also issued a civil fine assessment against Don, citing nine violations of the lobbying laws and related administrative rules. Don was ordered to pay a civil fine totaling $111,000.

On 15 April 2010, because they were both fined by respondent, petitioner and Don filed a joint petition for a contested case hearing with the Office of Administrative Hearings appealing their civil fine assessments. The matter came on for hearing on 30 August 2010, and Administrative Law Judge Fred G. Morrison, Jr. ("ALJ Morrison") issued his Decision ("ALJ Decision") on 22 November 2010. Relying on the definition of lobbying in N.C. Gen. Stat. § 120C-100(a)(9)[1], ALJ Morrison concluded that "[t]he activities of Don Beason, Mark Beason, and T. Jerry Williams during 2007 to seek repeal or amendment of the 'Buy America' law constituted lobbying." Because petitioner failed to register as a lobbyist for EEPC, failed to disclose to designated individuals that he was lobbying on behalf of EEPC, and failed to file lobbyist reports as a lobbyist for EEPC, the ALJ Decision upheld the $6000 penalty assessed against petitioner.

Petitioner filed a Petition for Judicial Review, including a North Carolina Constitutional Claim, in Wake County Superior Court on 8 March 2011. On 8 April 2011, respondent issued its Final Agency Decision, affirming in part and modifying in part the ALJ Decision. The Final Agency Decision adopted the conclusion, made by ALJ Morrison, that petitioner's "activities" constituted lobbying. Moreover, respondent concluded that the "joint lobbying activities of Don Beason and Mark Beason" violated N.C. Gen. Stat. § 120C-200 and § 120C-402 (the same violations found by ALJ Morrison). Thus, the civil fine assessment against petitioner was affirmed.

In response to the Final Agency Decision, petitioner filed an Amended Petition for Judicial Review ("Amended Petition"), which also included a North Carolina Constitutional Claim, in Wake County Superior Court. In response to various discovery motions and respondent's motion to dismiss petitioner's constitutional claim in his Amended Petition, the trial court issued an order deferring ruling on the discovery motions, staying discovery, and staying petitioner's constitutional claim. The trial court also dismissed petitioner's 8 March 2011 Petition for Judicial Review

1. We note that ALJ Morrison cites to N.C. Gen. Stat. § 120C-100(a)(10) when quoting the definition of "lobbying." However, the definition of "lobbying" is found in section 100(a)(9).

and stated that petitioner's Amended Petition was the matter currently pending before the trial court.

On 5 December 2011, petitioner's Amended Petition came on for hearing. On 6 January 2012, Judge Ridgeway issued a Memorandum of Decision and Order ("order"), reversing and setting aside the civil fine assessment against petitioner. Specifics of the order will be discussed as they relate to respondent's arguments on appeal. Respondent appealed the order on 3 February 2012. On 23 August 2012, petitioner filed a motion to dismiss the appeal.

Grounds for Appeal

[1] As an initial matter, we must determine whether respondent's appeal is interlocutory. Petitioner claims that the appeal is interlocutory because the order did not resolve all of his claims for relief, specifically, his constitutional *Corum* claim.[2] Therefore, the order was not a final order, and the appeal should be dismissed.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *rehearing denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). There is no evidence in the record that the trial court addressed petitioner's *Corum* claim besides its order staying it. Since petitioner's *Corum* claim is still pending, the trial court's order did not fully dispose of petitioner's case. Thus, we must conclude that petitioner's appeal is interlocutory.

However, an interlocutory appeal is immediately appealable if it involves a substantial right. *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999). To determine if an appeal involves a substantial right, "[e]ssentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736.

We conclude that since respondent is charged with investigating violations of and enforcing Articles 2, 4, and 8 of the lobbying laws pursuant

2. In *Corum v. Univ. of N.C.*, 330 N.C. 761, 785-86, 413 S.E.2d 276, 291-92, *rehearing denied*, 331 N.C. 558, 418 S.E.2d 664 (1992), our Supreme Court concluded that, under specific circumstances, a plaintiff may bring a direct claim under our state constitution in the absence of an adequate state remedy and that sovereign immunity does not bar these claims.

to N.C. Gen. Stat. § 120C-600 (a-b), we find that respondent's right to carry out these duties is substantial. Moreover, respondent's ability to carry out its duties requires that it be able to act timely on allegations it believes constitute violations. The substantial basis of this appeal involves the trial court's order concluding that the alleged violations respondent fined petitioner for were not actually violations. In other words, the trial court found that respondent was improperly interpreting statutes it is responsible for investigating and enforcing. Thus, we conclude that respondent suffers the risk of injury if we do not consider the merits of this interlocutory appeal. Therefore, we deny petitioner's motion to dismiss.

Standard of Review

Pursuant to N.C. Gen. Stat. § 150B-51(b) (2009) [3], a trial court reviewing a decision of an agency

> may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B–29(a), 150B–30, or 150B–31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

---

3. We note that N.C. Gen. Stat. § 150B-51 was modified by Session law in 2011. *See* 2011 N.C. Sess. Laws ch. 398, sec. 27 (2011). However, the modifications were not effective until 1 January 2012 and only apply to contested cases commenced on or after that date. Since the Final Agency Decision was issued 8 April 2011 and petitioner's Amended Petition was filed 2 May 2011, the trial court's review is governed by the version of N.C. Gen. Stat. § 150B-51 in effect prior to 1 January 2012.

The trial court's review of respondent's 8 April 2011 Final Agency Decision is governed by N.C. Gen. Stat. § 150B-51(c), which states:

> In reviewing a final decision in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B–34(a), and the agency does not adopt the administrative law judge's decision, the court shall review the official record, de novo, and shall make findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record.

Our standard of review of a trial court's order reviewing a final agency decision is well-established:

> On appeal from a trial court's review of a final agency decision, an appellate court's task is to examine the trial court's order for error of law by (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) determining whether the court did so properly.

Bulloch v. N.C. Dep't of Crime Control & Pub. Safety, __ N.C. App. __, __, 732 S.E.2d 373, 377, *disc. review denied*, __ N.C. __, 735 S.E.2d 178 (2012). "For errors alleged regarding violations of subsections 150B–51(b)(1) through (4), the appellate court engages in *de novo* review; for errors alleged regarding violations of subsections 150B–51(b)(5) or (6), the 'whole record test' is appropriate." *Id.* Here, the trial court stated that it reviewed the matter *de novo*. Respondent does not allege that the trial court applied the wrong standard of review, only that it applied it incorrectly. Therefore, we must determine whether the trial court applied its *de novo* review properly.

Arguments

[2] Respondent's overarching argument is that the trial court erred in concluding that respondent lacked authority to interpret the lobbying laws and find violations of those laws through the common law doctrine of "acting in concert." Specifically, respondent contends that its conclusion that petitioner was "lobbying" based on his "coordinated efforts"

and "acting in concert" with others was a proper interpretation of N.C. Gen. Stat. § 120C-100(a)(9), the statute defining "lobbying."

There seems to be two basic issues that must be resolved with regard to respondent's first argument. The first issue is whether respondent had the authority to interpret the lobbying laws. The second is whether respondent properly found that petitioner was a lobbyist for EEPC based on his "coordinated efforts" and "acting in concert" with others.

With regard to the first issue, whether respondent had the authority to interpret the lobbying laws, we conclude that the trial court properly found that respondent did not have such authority. "[T]he responsibility for determining the limits of statutory grants of authority to an administrative agency is a judicial function for the courts to perform." *McDonald v. N.C. Dep't of Corr.*, __ N.C. App. __, __, 724 S.E.2d 138, 140, *disc. review denied*, __ N.C. __, 731 S.E.2d 146 (2012). "An administrative agency is a creature of the statute creating it and has only those powers expressly granted to it or those powers included by necessary implication from the legislature grant of authority." *Boston v. N.C. Private Protective Servs. Bd.*, 96 N.C. App. 204, 207, 385 S.E.2d 148, 150-51 (1989).

In concluding that respondent lacked the authority to interpret the lobbying laws, the trial court looked to N.C. Gen. Stat. § 120C-101(a) (2011), the statute setting out the rule-making responsibilities of the Ethics Commission and respondent. Respondent was required to adopt any rules, orders, and forms necessary to administer the provisions of Articles 2, 4, and 8 of the lobbying laws. *Id.* However, the Ethics Commission was responsible for adopting rules necessary to *interpret all provisions of the lobbying laws* and for adopting rules necessary to administer Articles 1, 3, 5, 6, and 7 of the lobbying laws. *Id.* (emphasis added). Based on this statute, the trial court concluded that: (1) the legislature delegated the authority to interpret the lobbying laws to the Ethics Commission; (2) any interpretation of the lobbying laws by respondent was "not entitled to traditional deference by the [c]ourt"; and (3) any interpretation by respondent that would expand the plain meaning of the lobbying laws or define terms would be beyond its statutory authority.

While respondent, in administering Articles 2, 4, and 8 of the lobbying laws, would have the implied power to determine whether certain actions constituted violations of those laws, the power to interpret the lobbying laws has been expressly granted to the Ethics Commission pursuant to N.C. Gen. Stat. § 120C-101(a). "In performing its function, the power of an agency to interpret a statute that it administers is limited

by the actions of the legislature." *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Dep't of Health & Human Servs.*, 201 N.C. App. 70, 72, 685 S.E.2d 562, 565 (2009). Here, the legislature has specifically stated that although respondent has the power to administer Articles 2, 4, and 8, respondent has no power to interpret any of the provisions of the lobbying laws. The power to interpret rests solely with the Ethics Commission. Thus, the legislature has given respondent no power to interpret the statutes it is charged with administering. Therefore, we affirm the trial court's conclusion that respondent does not have authority to interpret the lobbying laws and that any interpretation by respondent that expands or defines terms in a way that conflicts with the plain language of the statutes would be outside its statutory powers.

Moreover, we note that "[a]lthough the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts," *Charlotte-Mecklenburg Hosp. Auth.*, 201 N.C. App. at 73, 685 S.E.2d at 565, respondent had no authority to interpret the statutes it was charged with administering. Thus, we also affirm the trial court's conclusion that the interpretation of the lobbying laws by respondent was "not entitled traditional deference."

Next, we must determine whether respondent was authorized to find violations of the lobbying laws based on the common law doctrine of "acting in concert." In reviewing the lobbying laws, the trial court strictly construed them, concluding that they are penalty statutes. Statutes imposing penalties are to be strictly construed. *State v. Holmes*, 149 N.C. App. 572, 576, 562 S.E.2d 26, 30 (2002). "Statutes imposing penalties are similarly strictly construed in favor of the one against whom the penalty is imposed and are never to be extended by construction." *Winston-Salem Joint Venture v. City of Winston-Salem*, 54 N.C. App. 202, 205, 282 S.E.2d 509, 511 (1981). Respondent contends that the trial court erred in strictly construing the lobbying laws because, as a whole, they should not be considered penalty statutes, only the statutes in Article 6 entitled "Violations and Enforcement." However, the statutes in Articles other than Article 6 provide the basis for a penalty. Moreover, the statutes in Articles 2, 4, and 8 of the lobbying laws are specifically incorporated in N.C. Gen. Stat. § 120C-602(b), the statute authorizing respondent to "levy civil fines" for violations of statutes in those Articles. While the statutes in sections 200 and 400 are not per se penalty statutes, they allow the imposition of a fine or penalty under Article 6 of the lobbying laws. *See id.* Therefore, they constitute penalty statutes and must be strictly construed and in favor of petitioner. *See generally Winston-Salem Joint Venture*, 54 N.C. App. at 206, 282 S.E.2d at 511.

Strictly construing N.C. Gen. Stat. § 120C-100(a)(9), the statute that defines terms used in Articles 2, 4, and 8, we conclude that respondent improperly construed the definition of "lobbying" to find violations based on "coordinated efforts" or "acting in concert" with another. Pursuant to N.C. Gen. Stat. § 120C-100(a)(9) (2011), lobbying is defined as:

> a. Influencing or attempting to influence legislative or executive action, or both, *through direct communication or activities* with a designated individual or that designated individual's immediate family.
>
> b. Developing goodwill through communications or activities, including the building of relationships, with a designated individual or that designated individual's immediate family with the intention of influencing current or future legislative or executive action, or both.

(Emphasis added). Respondent only contended that petitioner engaged in "lobbying" as defined in subparagraph (a). The definition of lobbying at issue here specifically states that lobbying only includes direct communication or activities. Therefore, indirect communications, such as those that could be based on "acting in concert" or imputed liability, would not constitute lobbying. Here, the language and intent of the legislature is unambiguous, and respondent did not have room to construe the statute and find violations of the lobbying laws based on imputed liability. Thus, by doing so, respondent impermissibly expanded the definition of lobbying. We note that, as the trial court concluded, had the General Assembly wanted to include "indirect communication" in its definition of lobbying, it could have drafted the statute similar to Minnesota's statute, defining a lobbyist as an individual "engaged for pay or other consideration . . . for the purpose of attempting to influence legislative or administrative action, or the official action of a metropolitan governmental unit, by communicating *or urging others to communicate with public or local officials*." Minn. Stat. § 10A.01, subd. 21 (2005) (emphasis added). Similarly, Mississippi defines "lobbying" as "(i) [i]nfluencing or attempting to influence legislative or executive action through oral or written communication; or (ii) *[s]olicitation of others to influence legislative or executive action*." Miss. Code Ann. § 5-8-3 (2002) (emphasis added). However, here, our General Assembly did not include such language in the definition of "lobbying." Therefore, the trial court did not err in concluding that respondent exceeded its statutory authority by extending the definition of lobbying.

[3] Next, respondent argues that the trial court's conclusion that petitioner was not lobbying for EEPC because he was not aware of EEPC leads to absurd results. We disagree.

In its order, the trial court concluded that "EEPC was not a lobbying principal of [p]etitioner" because:

- There is no evidence that [p]etitioner was aware of the existence, the identity, or the purpose of EEPC;
- There is no evidence of communications between [p]etitioner and EEPC;
- There is no evidence of [p]etitioner's awareness of any communications, negotiations or discussions between Donald Beason and others regarding EEPC;
- There is no evidence of any compensation paid to [p]etitioner by EEPC;
- There is no evidence of direction or instructions from EEPC to [p]etitioner;
- The [p]etitioner's evidence is largely corroborated by the sworn testimony of a third party, T. Jerry Williams, who has been exonerated by the [r]espondent of any wrongdoing with respect to these matters; and
- The absence of any contradictory evidence offered by the [r]espondent to refute these findings[.]

In other words, the trial court concluded that EEPC was not a lobbyist principal for two primary reasons: (1) petitioner had no knowledge of EEPC, and (2) petitioner was not paid by EEPC.

The evidence relied upon by the trial court supported its conclusion that EEPC was not a lobbyist principal of petitioner. Pursuant to N.C. Gen. Stat. § 120C-100(a)(11), a lobbyist principal is defined as "[t]he person or governmental unit on whose behalf the lobbyist lobbies and who makes payment for the lobbying." Without knowledge of EEPC, petitioner could not have been lobbying on behalf of EEPC, an unknown entity. The findings of fact, which respondent did not challenge, overwhelmingly support this conclusion. Specifically, the trial court found that petitioner had no knowledge that EEPC existed or that Don had discussed a potential client relationship with it. In addition, with regard to the unexecuted contract between BGA and EEPC, the trial court noted that petitioner never saw the proposed contract nor was he aware of

its existence. Furthermore, the trial court found that respondent relied on petitioner's signature on that contract as its "lone piece of evidence" showing petitioner had knowledge of EEPC, even though respondent's investigation established that Don signed it for petitioner without petitioner's knowledge. Finally, the trial court determined that petitioner had not heard of EEPC and was not aware of it during the 2007 Session of the General Assembly, never saw or reviewed any correspondence of Don or any documents concerning EEPC, had no indication that he was lobbying for anyone else besides Sigma, and was never informed that Sigma was reimbursed by EEPC. Respondent fails to point to any contradictory evidence to refute these findings on appeal. Thus, we conclude that the trial court properly determined that EEPC was not a lobbyist principal of petitioner.

In a separate, yet related, argument, respondent seems to argue that EEPC was a lobbyist principal of petitioner's because petitioner received payment for his lobbying services, contrary to the trial court's order concluding otherwise. Respondent contends that N.C. Gen. Stat. § 120C-100(a)(11) does not require that payment be made directly to the lobbyist from the lobbyist principal. Accordingly, "[p]ayment to the source of [p]etitioner's clients constituted payment to him." However, the trial court specifically concluded that "[t]here [was] no evidence of any compensation paid to [p]etitioner by EEPC[,]" and respondent fails to point to any evidence in the record on appeal that EEPC made any payment to petitioner or BGA. Therefore, by not providing any contradictory evidence, respondent has not established grounds to support its contention that the trial court's conclusion was erroneous. Thus, we affirm the trial court's conclusion that EEPC was not a lobbyist principal of petitioner's because petitioner received no compensation from EEPC.

Conclusion

Based on the foregoing reasons, we affirm the trial court's order.

Affirmed.

Judges ELMORE and STEELMAN concur.

DONALD R. BEASON, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF THE SECRETARY OF STATE, RESPONDENT

No. COA12-838

Filed 2 April 2013

1. Appeal and Error—interlocutory orders and appeals—lobbying enforcement—substantial right

Respondent's appeal was from an interlocutory order but immediately appealable because a substantial right was affected where respondent investigated petitioner's lobbying activities and issued fines, and the matter proceeded through administrative hearings to the superior court, where the fines were set aside. Petitioner's constitutional claim was still pending, but immediately appealable because respondent was charged with investigating violations of and enforcing the lobbying laws and respondent's ability to carry out its duties required that it be able to act timely on allegations it believed constituted violations.

2. Administrative Law—lobbying statutes—interpretation—authority

The trial court properly found that respondent Department of the Secretary of State did not have the power to interpret the lobbying laws, which rests solely with the Ethics Commission, although the Department of the Secretary of State has some power to administer certain parts of the law.

3. Administrative Law—lobbying statutes—imputed liability

Respondent-Secretary of State improperly construed the definition of "lobbying" to find violations based on "coordinated efforts" or "acting in concert" with another. Respondent only contended that petitioner engaged in lobbying as defined in N.C.G.S. § 120C-100(a)(9)a; the language and intent of the legislature is unambiguous, and respondent did not have room to construe the statute and find violations of the lobbying laws based on imputed liability.

4. Administrative Law—lobbying—definition—two prongs

A trial court decision on whether petitioner's activities constituted lobbying was reversed and remanded where the trial court did not consider both prongs of the definition of "lobbying" found in N.C.G.S. § 120C-100(a)(9)(a).

Appeal by respondent from order entered 6 January 2012 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 8 January 2013.

Bailey & Dixon, LLP, by Sabra J. Faires, Michael L. Weisel, and Adam N. Olls, and Allen, Pinnix & Nichols, P.A., by M. Jackson Nichols, Anna Baird Choi, and Catherine E. Lee, for petitioner-appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel Snipes Johnson and Assistant Attorney General Melissa H. Taylor, for respondent-appellant.

HUNTER, Robert C., Judge.

Respondent the North Carolina Department of the Secretary of State appeals the trial court's order reversing and setting aside the civil fine assessment imposed against petitioner Donald Beason. After careful review, we affirm in part and reverse and remand in part the trial court's order.

This case involves the lobbying efforts of petitioner to repeal or amend N.C. Gen. Stat. § 136-28.7 (2011), commonly known as the "Buy America" law, which prohibits the North Carolina Department of Transportation from purchasing or using foreign-made steel and iron in highway construction projects. Petitioner was a registered lobbyist in North Carolina from 1993 until 2007. His son, Mark Beason ("Mark"), has been a registered lobbyist since 1999. Between late 2006 and August 2007, Mark worked for petitioner at Beason Government Affairs (BGA), a lobbying firm operated by petitioner. Respondent and the North Carolina Ethics Commission are the administrative agencies statutorily charged with enforcing and administering Chapter 120C of the North Carolina General Statutes (the "lobbying laws"). N.C. Gen. Stat. § 120C-600 and § 120C-601 (2011).

In late 2006, Sigma, a New Jersey corporation that imports and sells foreign manufactured cast iron and steel products in the United States, and petitioner discussed the possibility of BGA lobbying on behalf of Sigma and/or the Engineering Export Promotion Council ("EEPC"), an Indian trade association for exporters of iron products from India. During those discussions, Sigma requested that petitioner send a proposal for lobbying services so that Sigma could forward it to EEPC. Petitioner sent a proposal indicating that he, Mark, and T. Jerry Williams

("Mr. Williams"), an independent contractor of BGA, would perform lobbying services for EEPC. In December 2006, EEPC sent petitioner an unsigned agreement that incorporated the proposal. Petitioner signed his name and Mark's name on the proposed contract and returned it to Sigma for EEPC to sign. EEPC refused to execute the contract.

In February 2007, Sigma executed a contract with BGA. The contract stated that petitioner, Mark, and Mr. Williams would lobby on behalf of Sigma and be paid $95,000 plus expenses. Documents obtained by respondent during its investigation indicate that five companies engaged in importing and selling iron products—specifically, EEPC; Star Pipe Products ("Star"); General Foundries, Inc. ("GF"); Serampore Industries Products (Ltd.) Inc. ("SIP"); and Capitol Foundry of Virginia ("Capitol")—agreed to reimburse Sigma for its contract with BGA. It is not definitively established whether petitioner was aware of the agreement between Sigma and the five other companies. After executing the contract, both Mark and Mr. Williams lobbied on behalf of Sigma to repeal the "Buy America" law. Petitioner, Don, and Mr. Williams all registered with respondent as lobbyists for Sigma.

In March 2007, in response to safety concerns of Indian iron products, petitioner attended a meeting in Washington, D.C. with Sigma representatives, EEPC, and various other representatives of companies involved with exporting Indian Steel. Mark and Mr. Williams were not aware of this meeting.

In 2007, respondent initiated an investigation into the lobbying activities of petitioner and Mark. On 29 March 2010, respondent issued a civil fine assessment against petitioner for nine alleged violations of the lobbying laws and administrative rules. In the civil fine, respondent noted that it was based on petitioner's "coordinated efforts" on behalf of Sigma and five unregistered lobbyist principals and his "acting in concert" with numerous individuals and business entities in his lobbying efforts. Respondent fined petitioner $111,000.[1]

Respondent also fined Mark for three alleged violations of the lobbying laws. Mark's fine totaled $6000.

On 15 April 2010, because they were both fined by respondent, petitioner and Mark filed a joint petition for contested case hearing with the

---

1. We note that the amount of this fine, specifically the enhancement of petitioner's fine based on aggravating factors, is discussed in a separate case, *Donald R. Beason v. The N.C. Dep't of the Sec'y of State*, __ N.C. App. __, __ S.E.2d __ (No. COA 12-874) (April 2, 2013), filed contemporaneously with this opinion.

Office of Administrative Hearings appealing their civil fine assessments. The matter came on for hearing on 30 August 2010, and Administrative Law Judge Fred G. Morrison, Jr. ("ALJ Morrison") issued his Decision ("ALJ Decision") on 22 November 2010. Relying on the definition of lobbying in N.C. Gen. Stat. § 120C-100(a)(9)[2], ALJ Morrison concluded that "[t]he activities of Don Beason, Mark Beason, and T. Jerry Williams during 2007 to seek repeal or amendment of the 'Buy America' law constituted lobbying." Because petitioner failed to register as lobbyist for EEPC, failed to disclose to designated individuals that he was lobbying on behalf of EEPC, and failed to file lobbyist reports as a lobbyist for EEPC, the ALJ Decision upheld the civil assessment against petitioner in a modified amount of $6000.[3]

Petitioner filed a Petition for Judicial Review, including a North Carolina Constitutional Claim, in Wake County Superior Court on 8 March 2011. On 8 April 2011, respondent issued its Final Agency Decision, affirming in part and modifying in part the ALJ Decision. The Final Agency Decision adopted the conclusion, made by ALJ Morrison, that petitioner's "activities" constituted lobbying. Moreover, respondent concluded that the "joint lobbying activities of Don Beason . . . as defined by N.C. Gen. Stat. § 120C-100(a)(9)" violated N.C. Gen. Stat. § 120C-200(e), § 120C-200, and § 120C-402 for failing to file lobbyist reports for, failing to disclose he was a lobbyist for, and failing to register as a lobbyist for five undisclosed principals. The undisclosed principals included EEPC, Capitol, GF, SIP, and Star. Thus, the civil fine assessment against petitioner was affirmed in a modified amount of $30,000 ($2000 fine per violation per undisclosed principal).

In response to the Final Agency Decision, petitioner filed an Amended Petition for Judicial Review ("Amended Petition"), which also included a North Carolina Constitutional Claim, in Wake County Superior Court on 2 May 2011. In response to various discovery motions and respondent's motion to dismiss petitioner's constitutional claim in his Amended Petition, the trial court issued an order deferring ruling on the discovery motions, staying discovery, and staying petitioner's constitutional claim. The trial court also dismissed petitioner's 8 March 2011 Petition for Judicial Review because petitioner's Amended Petition was the matter currently pending before the trial court.

---

2. We note that ALJ Morrison cites to N.C. Gen. Stat. § 120C-100(a)(10) when quoting the definition of "lobbying." However, the definition of "lobbying" is found in section 100(a)(9).

3. In contrast to respondent, ALJ Morrison concluded that petitioner only violated three statutes and that the only undisclosed principal was EEPC.

On 5 December 2011, petitioner's Amended Petition came on for hearing. On 6 January 2012, Judge Ridgeway issued a Memorandum of Decision and Order ("order"), reversing and setting aside the civil fine assessment against petitioner. Specifics of the order will be discussed as they relate to respondent's arguments on appeal. Respondent appealed the order on 3 February 2012. On 23 August 2012, petitioner filed a motion to dismiss the appeal.

Grounds for Appeal

[1] As an initial matter, we must determine whether respondent's appeal is interlocutory. Petitioner claims that the appeal is interlocutory because the order did not resolve all of his claims for relief, specifically, his constitutional *Corum* claim.[4] Therefore, the order was not a final order, and the appeal should be dismissed.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *rehearing denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). There is no evidence in the record that the trial court addressed petitioner's *Corum* claim besides its order staying it. Since petitioner's *Corum* claim is still pending, the trial court's order did not fully dispose of petitioner's case. Thus, we must conclude that petitioner's appeal is interlocutory.

However, an interlocutory appeal is immediately appealable if it involves a substantial right. *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999). To determine if an appeal involves a substantial right, "[e]ssentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736.

We conclude that since respondent is charged with investigating violations of and enforcing Articles 2, 4, and 8 of the lobbying laws pursuant to N.C. Gen. Stat. § 120C-600 (a-b), respondent's right to carry out

4. In *Corum v. Univ. of N.C.*, 330 N.C. 761, 785-86, 413 S.E.2d 276, 291-92, rehearing denied, 331 N.C. 558, 418 S.E.2d 664 (1992), our Supreme Court concluded that, under specific circumstances, a plaintiff may bring a direct claim under our state constitution in the absence of an adequate state remedy and that sovereign immunity does not bar these claims.

these duties is substantial. Moreover, respondent's ability to carry out its duties requires that it be able to act timely on allegations it believes constitute violations. The substantial basis of this appeal involves the trial court's order concluding that the alleged violations respondent fined petitioner for were not actually violations. In other words, the trial court found that respondent was improperly interpreting statutes it is responsible for enforcing. Thus, we conclude that respondent suffers the risk of injury if we do not consider the merits of this interlocutory appeal. Therefore, we deny petitioner's motion to dismiss.

Standard of Review

Pursuant to N.C. Gen. Stat. § 150B-51(b) (2009)[5], a trial court reviewing a decision of an agency

> may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B–29(a), 150B–30, or 150B–31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

The trial court's review of respondent's 8 April 2011 Final Agency Decision is governed by N.C. Gen. Stat. § 150B-51(c) (2011), which states:

---

5. We note that N.C. Gen. Stat. § 150B-51 was modified by Session law in 2011. *See* 2011 N.C. Sess. Laws ch. 398, sec. 27 (2011). However, the modifications were not effective until 1 January 2012. Since the Final Agency Decision was issued 8 April 2011 and petitioner's Amended Petition was filed 2 May 2011, the trial court's review is governed by the version of N.C. Gen. Stat. § 150B-51 in effect prior to 1 January 2012.

> In reviewing a final decision in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B–34(a), and the agency does not adopt the administrative law judge's decision, the court shall review the official record, de novo, and shall make findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record.

Our standard of review of a trial court's order reviewing a final agency decision is well-established:

> On appeal from a trials court's review of a final agency decision, an appellate court's task is to examine the trial court's order for error of law by (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) determining whether the court did so properly.

Bulloch v. N.C. Dep't of Crime Control & Pub. Safety, __ N.C. App. __, __, 732 S.E.2d 373, 377, *disc. review denied and appeal dismissed*, __ N.C. __, __ S.E.2d __ (2012). "For errors alleged regarding violations of subsections 150B–51(b)(1) through (4), the appellate court engages in *de novo* review; for errors alleged regarding violations of subsections 150B–51(b)(5) or (6), the 'whole record test' is appropriate." *Id.* Here, the trial court stated that it reviewed the matter *de novo*. Respondent does not allege that the trial court applied the wrong standard of review, only that it applied it incorrectly. Therefore, we must determine whether the trial court applied its *de novo* review properly.

Arguments

Respondent's overarching argument is that the trial court erred in concluding that respondent lacked authority to interpret the lobbying laws and find violations of those laws through the common law doctrine of "acting in concert." Respondent contends that since it is obligated to enforce the lobbying laws, it had implied powers to use a concerted effort theory to establish violations of the lobbying laws. There seems to be two basic issues that must be resolved with regard to respondent's first argument. The first issue is whether respondent had the authority to interpret the lobbying laws. The second is whether respondent properly

found that petitioner was a lobbyist for EEPC based on his "coordinated efforts" and "acting in concert" with others.

[2] With regard to the first issue, whether respondent had the authority to interpret the lobbying laws, we conclude that the trial court properly found that respondent did not have such authority. "[T]he responsibility for determining the limits of statutory grants of authority to an administrative agency is a judicial function for the courts to perform." *McDonald v. N.C. Dep't of Corr.*, __ N.C. App. __, __, 724 S.E.2d 138, 140, *disc. review denied*, __ N.C. __, 731 S.E.2d 146 (2012). "An administrative agency is a creature of the statute creating it and has only those powers expressly granted to it or those powers included by necessary implication from the legislature grant of authority." *Boston v. N.C. Private Protective Servs. Bd.*, 96 N.C. App. 204, 207, 385 S.E.2d 148, 150-51 (1989).

In concluding that respondent lacked the authority to interpret the lobbying laws, the trial court looked to N.C. Gen. Stat. § 120C-101(a) (2011), the statute setting out the rule-making responsibilities of the Ethics Commission and respondent. Respondent was required to adopt any rules, orders, and forms necessary to administer the provisions of Articles 2, 4, and 8 of the lobbying laws. *Id.* However, the Ethics Commission was responsible for adopting rules necessary to *interpret all provisions of the lobbying laws* and for adopting rules necessary to administer Articles 1, 3, 5, 6, and 7 of the lobbying laws. *Id.* (emphasis added). Based on this statute, the trial court concluded that: (1) the legislature delegated the authority to interpret the lobbying laws to the Ethics Commission; (2) any interpretation of the lobbying laws by respondent was "not entitled to traditional deference by the [c]ourt"; and (3) any interpretation by respondent that would expand the plain meaning of the lobbying laws or define terms would be beyond its statutory authority.

While respondent, in administering Articles 2, 4, and 8 of the lobbying laws, would have the implied power to determine whether certain actions constituted violations of those laws, the power to interpret the lobbying laws has been expressly granted to the Ethics Commission pursuant to N.C. Gen. Stat. § 120C-101(a). "In performing its function, the power of an agency to interpret a statute that it administers is limited by the actions of the legislature." *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Dep't of Health & Human Servs.*, 201 N.C. App. 70, 72, 685 S.E.2d 562, 565 (2009). Here, the legislature has specifically stated that although respondent has the power to administer Articles 2, 4, and 8, respondent has no power to interpret any of the provisions of the lobbying laws.

The power to interpret rests solely with the Ethics Commission. Thus, the legislature has given respondent no power to interpret the statutes it is charged with administering. Therefore, we affirm the trial court's conclusion that respondent does not have authority to interpret the lobbying laws and that any interpretation by respondent that expands or defines terms in a way that conflicts with the plain language of the statutes would be outside its statutory powers.

Moreover, we note that "[a]lthough the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts," *Charlotte-Mecklenburg Hosp. Auth.*, 201 N.C. App. at 73, 685 S.E.2d at 565, respondent had no authority to interpret the statutes it was charged with administering. Thus, we also affirm the trial court's conclusion that the interpretation of the lobbying laws by respondent was "not entitled traditional deference."

[3] Next, we must determine whether respondent was authorized to find violations of the lobbying laws based on the common law doctrine of "acting in concert." In reviewing the lobbying laws, the trial court strictly construed them, concluding that they are penalty statutes. Statutes imposing penalties are to be strictly construed. *State v. Holmes*, 149 N.C. App. 572, 576, 562 S.E.2d 26, 30 (2002). "Statutes imposing penalties are similarly strictly construed in favor of the one against whom the penalty is imposed and are never to be extended by construction." *Winston-Salem Joint Venture v. City of Winston-Salem*, 54 N.C. App. 202, 205, 282 S.E.2d 509, 511 (1981). Respondent contends that the trial court erred in strictly construing the lobbying laws because, as a whole, they should not be considered penalty statutes, only the statutes in Article 6 entitled "Violations and Enforcement." However, the statutes in Articles other than Article 6 provide the basis for a penalty. Moreover, the statutes in Articles 2, 4, and 8 of the lobbying laws are specifically incorporated in N.C. Gen. Stat. § 120C-602(b), the statute authorizing respondent to "levy civil fines" for violations of statutes in those Articles. While the statutes in sections 200 and 400 are not *per se* penalty statutes, they allow the imposition of a fine or penalty under Article 6 of the lobbying laws. *See id.* Therefore, they constitute penalty statutes and must be strictly construed and in favor of petitioner. *See generally Winston-Salem Joint Venture*, 54 N.C. App. at 206, 282 S.E.2d at 511.

Strictly construing N.C. Gen. Stat. § 120C-100(a)(9), the statute that defines terms used in Articles 2, 4, and 8, we conclude that respondent improperly construed the definition of "lobbying" to find violations based on "coordinated efforts" or "acting in concert" with another. Pursuant to N.C. Gen. Stat. § 120C-100(a)(9) (2011), lobbying is defined as:

> a. Influencing or attempting to influence legislative or executive action, or both, *through direct communication or activities* with a designated individual or that designated individual's immediate family.
>
> b. Developing goodwill through communications or activities, including the building of relationships, with a designated individual or that designated individual's immediate family with the intention of influencing current or future legislative or executive action, or both.

(Emphasis added). Respondent only contended that petitioner engaged in "lobbying" as defined in subparagraph (a). The definition of lobbying at issue here specifically states that lobbying only includes direct communication or activities. Therefore, indirect communications, such as those that could be based on "acting in concert" or imputed liability, would not constitute lobbying. Here, the language and intent of the legislature is unambiguous, and respondent did not have room to construe the statute and find violations of the lobbying laws based on imputed liability. Thus, by doing so, respondent impermissibly expanded the definition of lobbying. We note that, as the trial court concluded, had the General Assembly wanted to include "indirect communication" in its definition of lobbying, it could have drafted the statute similar to Minnesota's statute which defines a lobbyist as an individual "engaged for pay or other consideration . . . for the purpose of attempting to influence legislative or administrative action, or the official action of a metropolitan governmental unit, by communicating *or urging others to communicate with public or local officials*." Minn. Stat. § 10A.01, subd. 21 (2005) (emphasis added). Similarly, Mississippi defines "lobbying" as "(i) [i]nfluencing or attempting to influence legislative or executive action through oral or written communication; or (ii) *[s]olicitation of others to influence legislative or executive action*." Miss. Code Ann. § 5-8-3 (2002) (emphasis added). However, here, our General Assembly did not include such language in the definition of "lobbying." Therefore, the trial court did not err in concluding that respondent exceeded its statutory authority by extending the definition of lobbying.

[4] Next, respondent alleges that, as applied, the trial court's decision leads to absurd results. Specifically, respondent contends that "[t]he manifest purpose of the [lobbying laws] [are] to provide full and complete public disclosure of all lobbying activities and expenditures." By concluding that only "in person, face-to-face" communication constitutes lobbying, the trial court circumvents that purpose. While

respondent couches its argument in its overarching argument that the order "prohibits [respondent] from carrying out [its] statutory duties[,]" we conclude that the trial court's conclusion was erroneous for a different reason.

Here, the trial court concluded that

> in order for [p]etitioner to be a 'lobbyist,' as that term is defined by statute, he must have individually and personally 'lobbied,' which in turn requires that he have engaged in direct communication or activities with legislators, legislative employees, or public servants in an attempt to influence legislative or executive action, or both.

Because the trial court found that "[t]here is no evidence of record that petitioner personally engaged in direct communication with any designated individual[,]" he did not engage in lobbying. In fact, the trial court noted that "without a showing that [p]etitioner individually had direct communication with any designated individual, he was not a 'lobbyist' required to file a registration under plain meaning of the terms used in N.C. Gen. Stat. § 120C-200(a)." In other words, the trial court concluded that petitioner was not a lobbyist because he never directly communicated with any individual on behalf of EEPC, SIP, Star, Capitol, or GF.

Although respondent claims that the trial court's interpretation of "lobbying" is erroneous because it curtails the authority of respondent, we find that the trial court erred by not considering both prongs of the definition of "lobbying" found in N.C. Gen. Stat. § 120C-100(a)(9)(a). Specifically, lobbying can be effectuated by either influencing or attempting to influence legislative or executive action, or both, through: (1) direct communication, or (2) activities. While the trial court specifically quoted this definition, it only considered whether petitioner lobbied by engaging in direct communication. It failed to find whether the evidence supported a conclusion that petitioner lobbied based on his "activities," the second prong of the definition. Moreover, we note that both the ALJ Decision and respondent's Final Agency Decision concluded that petitioner's "activities" constituted lobbying.[6] While the trial court is not bound by these previous decisions, its failure to address both types of "lobbying" specifically stated in N.C. Gen. Stat. § 120C-100(a)(9)(a) was error. Therefore, we must reverse and remand the matter to the

---

6. We note that both the ALJ Decision and the Final Agency Decision stated that "[l]obbying consists of any of the following *activities*: 1) influencing or

trial court on the issue of whether petitioner's activities constituted lobbying under the statute.

Conclusion

For the foregoing reasons, we affirm in part and reverse and remand in part the trial court's order.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges ELMORE and STEELMAN concur.

DONALD R. BEASON, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF THE SECRETARY OF STATE, RESPONDENT

No. COA12-874

Filed 2 April 2013

Administrative Law—mootness—final agency decision—fine reduced

The trial court did not err by dismissing as moot a declaratory judgment action arising from an enhanced fine imposed on petitioner for lobbying activities where the final agency decision did not utilize aggravating or mitigating factors and reduced the amount of the fine.

Appeal by petitioner from order entered 27 March 2012 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 8 January 2013.

Bailey & Dixon, L.L.P., by Adam N. Olls, Michael L. Weisel, and Sabra J. Faires, and Allen, Pinnix & Nichols, P.A., by M. Jackson Nichols and Anna Baird Choi for petitioner-appellant.

---

attempting to influence legislative or executive action, or both, through direct communication *or activities*[.]" Thus, the conclusions are written in such a way that "activities" could include both direct communication or activities or could simply mean "activities," the second prong of the lobbying definition. However, what the ALJ Decision and the Final Agency Decision meant by "activities" does not affect our ultimate conclusion that the trial court erred in not considering both parts of the lobbying definition.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel Snipes Johnson and Assistant Attorney General Brandon L. Truman, for respondent-appellee.

HUNTER, Robert C., Judge.

Petitioner Donald R. Beason appeals an order dismissing his Petition for Judicial Review and for Writ of Mandamus or Mandatory Injunction. On appeal, petitioner argues that the trial court erred by: (1) dismissing his action as moot; (2) not conducting judicial review; and (3) not concluding that respondent's policy on "aggravating" and "mitigating factors is invalid. After careful review, we affirm the trial court's order.

Background

A. Case No. 11 CVS 3810

On 29 March 2010, the North Carolina Department of the Secretary of State ("respondent") issued a civil fine assessment against petitioner based on nine alleged violations of chapter 120C of the North Carolina General Statutes ("the lobbying laws"). Based on the presence of seven aggravating factors, respondent enhanced petitioner's fine by 50% for a total fine of $111,000 (plus a $500 lobbyist registration fee). Specifically, respondent noted the following aggravating factors: (1) willful and knowing violation of the law and rules; (2) more than five violations of the same law or rules; (3) duration of the violations; (4) the scope of the lobbying activities concealed; (5) the number of principals concealed; (6) petitioner assisted with or encouraged a filer to make a false or misleading statement; and (7) petitioner engaged in destroying or altering a record, report, or document.

On 15 April 2010, petitioner filed a Petition for a Contested Case Hearing in the Office of Administrative Hearings. On 22 November 2010, Administrative Law Judge Fred G. Morrison, Jr. issued his Decision ("ALJ Decision") upholding the penalty assessed against petitioner, in a modified amount of $6000. The ALJ Decision did not utilize any aggravating or mitigating factors in determining the amount of the assessment.

On 8 April 2011, respondent issued its Final Agency Decision. Respondent upheld the assessment against petitioner in a modified amount of $30,000. The Final Agency Decision adopted most findings of the ALJ Decision except it concluded petitioner lobbied for five principals without registering for, filing reports on behalf of, or disclosing that he was a lobbyist for those principals (the ALJ Decision only concluded

petitioner lobbied for one undisclosed principal). Similar to the ALJ Decision, the Final Agency Decision did not utilize any aggravating or mitigating factors in determining the amount of the assessment.

On 2 May 2011, petitioner filed an Amended Petition in Wake County Superior Court seeking judicial review of the Final Agency Decision. The trial court issued its Memorandum of Decision and Order in case no. 11 CVS 3810 on 6 January 2012 reversing and setting aside the civil fine assessment against petitioner. Specifically, the trial court concluded that petitioner was not a lobbyist because he did not directly communicate with any individual in an attempt to influence legislative or executive action on behalf of any principal. Respondent appealed the trial court's Decision and Order in *Donald R. Beason v. The N.C. Dep't of the Secr'y of State*, __ N.C. App. __, __ S.E.2d __ (No. COA 12-838) (April 2, 2013), filed contemporaneously with this opinion.

B. The Request for a Declaratory Ruling - Case no. 11 CVS 4581

On 10 January 2011, prior to respondent issuing its Final Agency Decision, petitioner filed a Request for a Declaratory Ruling ("Request") with respondent. Although petitioner stated 11 questions upon which he was seeking a declaratory ruling, the questions involved two basic issues: (1) whether the aggravating and mitigating factors applied by respondent are policies or procedures that require rulemaking pursuant to N.C. Gen. Stat. § 150B-2(8a); and (2) whether respondent had authority to adopt rules regarding aggravating and mitigating factors.

Respondent did not issue a ruling on petitioner's Request.[1]

On 23 March 2011, pursuant to N.C. Gen. Stat. § 150B-4 and § 150B-43, petitioner filed a Petition for Judicial Review ("Petition") of respondent's decision to deny petitioner's Request. The Petition, which is the subject of the current appeal, requested the trial court conclude that respondent did not have authority to impose civil fines using "aggravating" and "mitigating" factors pursuant to N.C. Gen. Stat. § 120C-602(b) and issue a writ of mandamus or mandatory injunction prohibiting respondent from enhancing civil fines with these factors.

On 27 March 2012, the trial court dismissed the Petition ("Order").

---

1. We note that, at the time petitioner requested a declaratory ruling, respondent was not required to issue a ruling if it determined with good cause that the issuance would be "undesirable." N.C. Gen. Stat. § 150B-4 (2010). However, this statute has been changed, pursuant to Session Law 2011-398, *see* 2011 N.C. Sess. Laws ch. 398, sec. 56, which became effective 25 July 2011, *see* N.C. Sess. Laws ch. 398, sec. 63, and an agency no longer has the option of not issuing a ruling simply because it may be "undesirable."

Specifically, the trial court concluded that "the questions originally in controversy between the parties in this action are no longer at issue and are moot."

Petitioner appealed the trial court's order dismissing his Petition on 25 April 2012.

Arguments

Petitioner first argues that the trial court erred in dismissing the action as moot. Specifically, petitioner contends that because he remains subject to the regulatory oversight of respondent, there still exists a controversy between the parties, regardless of the outcome of the companion case.

Generally, our review of a trial court's order regarding an agency's treatment of a request for a declaratory ruling is the same as our review of any trial court's review of an administrative decision. *See Christenbury Surgery Ctr. v. N.C. Dep't of Health & Human Servs., Div. of Facility Serv.*, 138 N.C. App. 309, 311-12, 531 S.E.2d 219, 221, *writ of supersedeas denied*, 352 N.C. 587, 544 S.E.2d 564 (2000); *Hope-A Women's Cancer Ctr., P.A. v. N.C. Dep't of Health & Human Servs., Div. of Health Servs. Regulation*, 203 N.C. App. 276, 280, 691 S.E.2d 421, 424 (2010). Specifically, "[a]n appellate court's review of a superior court order regarding an administrative decision consists of examining the superior court order for errors of law; i.e. determining first whether the superior court utilized the appropriate scope of review and, second, whether it did so correctly." *Christenbury*, 138 N.C. App. at 311, 544 S.E.2d at 564 (internal citations omitted). The trial court's review depends on the nature of the error alleged by the petitioner: "If the party asserts the agency's decision was affected by a legal error, *de novo* review is required; if the party seeking review contends the agency decision was not supported by the evidence, or was arbitrary or capricious, the whole record test is applied." *Id.* at 312, 531 S.E.2d at 221.

Based on the version of N.C. Gen. Stat. § 150B-4(a) which was applicable at the time this action was filed (prior to 25 July 2011, the date the statute was amended by Session Law 2011-398 and became effective, *see* 2011 N.C. Sess. Laws ch. 398, secs. 56, 63 (2011)), respondent's failure to issue a ruling within 60 days constituted a denial on the merits of the request. However, in the present case, there was no judicial review of respondent's denial of petitioner's Request. Instead, the trial court dismissed the petition as moot without conducting any judicial review of respondent's denial. Thus, our review of the Order is limited to determining whether its legal conclusion that the case was moot was proper.

"A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Ass'n for Home & Hospice Care of N.C., Inc. v. Div. of Med. Assistance*, __ N.C. App. __, __, 715 S.E.2d 285, 287-88 (2011) (citations omitted). "Whenever during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain an action merely to determine abstract propositions of law." *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994). Here, the trial court's determination that petitioner's case was moot is a conclusion of law since it involves "a statement of the law arising on the specific facts of a case which determines the issues between the parties." *Wiseman Mortuary, Inc. v. Burrell*, 185 N.C. App. 693, 697, 649 S.E.2d 439, 442 (2007). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). "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. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks omitted).

Here, although respondent applied the aggravating factors to enhance the civil fine in its initial assessment on 29 March 2010, respondent did not enhance the fine in its Final Agency Decision using these factors. Thus, any alleged error regarding respondent's use of aggravating factors to enhance the fine was rendered moot when respondent decided to not apply those factors in its Final Agency Decision. Therefore, a legal determination of whether respondent had authority to enhance petitioner's fine using aggravating factors would have no practical effect on the controversy, and the issue presents only abstract and hypothetical propositions of law. Accordingly, we must conclude that the trial court properly concluded that the case was moot.

Petitioner contends that his case is not moot because the trial court never answered whether respondent's policy of applying aggravating factors meets the definition of a rule and because respondent's "practice" of applying factors is still alive, which respondent conceded at oral argument. However, once respondent stopped enhancing petitioner's fine with aggravating factors, the case became moot, and the trial court was not required to address petitioner's remaining questions. Moreover, we note that even though the practice of applying aggravating factors may still be "alive," it is not "alive" with regard to petitioner, which renders his case moot.

In support of his argument that the trial court erred in dismissing his case as moot, petitioner claims that "[i]t is well established that persons who are subject to regulation by an agency are affected by rules adopted by the agency concerning the regulated activity." In support of this contention, petitioner cites *In re Declaratory Ruling by the N.C. Comm'r of Ins. Regarding 11 N.C.A.C. 12.0319*, 134 N.C. App 22, 517 S.E.2d 134 (1999), and *N.C. Forestry Ass'n v. N.C. Dep't of Envtl. & Natural Res.*, 357 N.C. 640, 588 S.E.2d 880 (2003). While we note that it is true that individuals subject to regulation by an agency will be affected by rules adopted by that agency, there still must be some showing that the individual has been affected by some rule or decision by an administrative agency. In *Declaratory Ruling*, 134 N.C. App. at 24, 517 S.E.2d at 137, the petitioner was challenging an administrative rule prohibiting the use of subrogation clauses in life, accident, and health insurance forms. Similarly, in *N.C. Forestry Ass'n*, 357 N.C. at 643, 588 S.E.2d at 882, the administrative agency had denied the petitioner a general permit based on the agency's discretionary decision. In both of these cases, the petitioners could point to an actual administrative rule or decision of the agency that affected the petitioner. In contrast, here, respondent has not adopted an administrative rule regarding the application of aggravating factors to enhance a civil fine[2], and it is no longer applying those factors in determining the amount of petitioner's fine. Thus, petitioner is unable to show that he is currently being affected by any administrative rule or decision of respondent. Therefore, the cases cited by petitioner are inapposite and have no bearing on our conclusion that the trial court properly dismissed his case as moot.

We also note that even if we agreed with petitioner's contention that an individual's request for a declaratory ruling would not be moot if that individual is subject to regulation by an administrative agency, petitioner was not registered as a lobbyist when he initiated his Request. Petitioner retired in 2007 from lobbying and did not reregister until 31 October 2011. Therefore, when he filed his Request, he was no longer subject to regulation by respondent. Thus, petitioner's argument is without merit.

Next, petitioner argues that even if the Court determines that his case is moot, it is still reviewable because it involves a matter of public interest. In support of his argument, petitioner claims that the case: (1) presents a dispute between two state agencies; (2) presents an internal conflict of an agency; and (3) "presents a troubling failure of an agency

2. We note that, in 2007, respondent submitted proposed administrative rules on mitigating and aggravating factors. However, those rules were never adopted.

to comply with the requirements of the APA and to recognize the agency's statutory limitations." We disagree.

"Even if moot, however, this Court may, if it chooses, consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989). However, here, we do not find that the issues raised by petitioner are ones of such "general importance," *id.*, to justify the application of the public interest exception. Therefore, petitioner's argument is overruled.

Next, petitioner argues that the trial court erred in not conducting judicial review. Specifically, petitioner contends that his Petition is not moot because he is an "aggrieved person" under chapter 150B of the North Carolina General Statutes, the Administrative Procedure Act. We disagree.

Pursuant to N.C. Gen. Stat. § 150B-4(a) (2011),

> On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency. Upon request, an agency shall also issue a declaratory ruling to resolve a conflict or inconsistency within the agency regarding an interpretation of the law or a rule adopted by the agency.

As discussed above, the issuance of respondent's Final Agency Decision where it did not apply aggravating factors to enhance petitioner's fine, the relief sought in the Petition, rendered moot the substance of petitioner's claims. Thus, the constitutional arguments, specifically petitioner's claim that respondent's act of applying aggravating factors was an *ultra vires* act, are hypothetical since those factors are no longer being applied against petitioner. Petitioner provides no support for his claim that the traditional mootness analysis does not apply to his Petition because he is an "aggrieved person" pursuant to N.C. Gen. Stat. § 150B-4(a). Moreover, we can find no reason why a petitioner's request for a declaratory ruling would not be subject to a review for mootness. While his status as an "aggrieved person" has a bearing on standing, *see Thompson v. N.C. Respiratory Care Bd.*, 202 N.C. App. 340, 343-44, 688 S.E.2d 516, 518 (2010) (noting that the petitioner must be an "aggrieved party," along with four other requirements, to have standing under N.C. Gen. Stat. § 150B-43), a case becomes moot "when events occur during the pendency of the appeal which cause the underlying controversy to

cease to exist." *Calabria v. N.C. State Bd. of Elections*, 198 N.C. App. 550, 557-58, 680 S.E.2d 738, 745 (2009). Therefore, we conclude that because there is no longer any controversy once respondent decided to not apply the aggravating factors to petitioner's fine, the trial court properly concluded the case was moot regardless of whether petitioner is a "person aggrieved" pursuant to N.C. Gen. Stat. § 150B-4. Thus, the trial court did not err in not conducting judicial review of petitioner's Request.

Moreover, we note that even if we concluded that petitioner's case is not moot, he is no longer a "person aggrieved" since respondent decided to not apply the aggravating factors to enhance his fine in its Final Agency Decision. "A 'person aggrieved' is any person or group of persons whose rights have been adversely affected." *Gen. Motors Corp. v. Carolina Truck & Body Co., Inc.*, 102 N.C. App. 349, 350, 402 S.E.2d 139, 139-40 (1991). Once respondent stopped enhancing petitioner's fine, petitioner's rights were no longer being adversely affected. Thus, petitioner's contention that he is an "aggrieved person" pursuant to N.C. Gen. Stat. §§ 150B-4 or 150B-43 is without merit.

Finally, petitioner requests this Court conclude that "respondent's policy on 'aggravating' and 'mitigating' factors is invalid." However, since we have concluded that the trial court properly dismissed the Petition as moot, we need not address this issue.

Conclusion

Based on the foregoing reasons, we affirm the trial court's order dismissing petitioner's Petition for Judicial Review.

Affirmed.

Judges ELMORE and STEELMAN concur.

HAUSLE v. HAUSLE

[226 N.C. App. 241 (2013)]

CELESTE T. HAUSLE (NOW CELESTE OWEN), PLAINTIFF
v.
EDWARD P. HAUSLE, DEFENDANT

No. COA12-967

Filed 2 April 2013

Appeal and Error—interlocutory orders and appeals—denial of motion to dismiss

Plaintiff mother's appeal from the trial court's order denying her motion to modify child custody was dismissed because it was an appeal from an interlocutory order. The reserved issue of attorney fees under N.C.G.S. § 50-13.6 precluded the finality of the child custody order. Plaintiff's conditional petition for writ of *certiorari* was denied.

Appeal by plaintiff from order entered 13 January 2012 by Judge W. Turner Stephenson, III in Pitt County District Court. Heard in the Court of Appeals 12 December 2012.

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

Mills & Bryant, LLP, by Cynthia A. Mills, for defendant appellee.

McCULLOUGH, Judge.

Celeste T. Hausle (now Owen) ("plaintiff") appeals from the trial court's order denying her motion to modify child custody. For the following reasons, we dismiss the appeal.

I. Background

Plaintiff and Edward P. Hausle ("defendant") were married on 4 September 1988. During their marriage, plaintiff and defendant had two daughters, now teenagers. By 28 April 2003, plaintiff and defendant were separated.

On 19 May 2003, plaintiff initiated an action by filing a complaint seeking child custody, child support, and equitable distribution. Defendant responded with an answer and counterclaim filed 3 June 2003 seeking child custody, child support, post separation support, alimony, equitable distribution, and attorney fees. A memorandum of order was filed 19

December 2003 acknowledging that plaintiff and defendant had settled their claims for equitable distribution, child support, alimony, post separation support, and attorney fees. Moreover, a child custody order was also filed on 19 December 2003 (the "first custody order") evidencing an agreement by plaintiff and defendant as to custody of their daughters. By the terms of the agreement, plaintiff and defendant were awarded joint legal custody of their daughters with defendant receiving primary physical custody and plaintiff receiving secondary physical custody consistent with the schedule set forth therein.

Additional child support orders were filed on 18 February 2004 and 18 July 2004, and plaintiff and defendant were legally divorced by year's end.

On 8 February 2005, defendant filed a motion to suspend plaintiff's visitation and to modify the first custody order. Upon further agreement between plaintiff and defendant regarding custody of their daughters, a child custody order was filed on 1 August 2005 (the "second custody order") whereby plaintiff and defendant maintained joint legal custody and defendant maintained primary physical custody; plaintiff's schedule for secondary physical custody, however, was modified to account for changed circumstances.

After the second custody order was filed, defendant filed motions on 1 June 2009 and 30 June 2009 to hold plaintiff in contempt of the support and custody orders. Defendant's contempt motions came on for hearing on 30 September 2009. On 25 March 2010, the trial court filed an order holding plaintiff in contempt of the second custody order but finding plaintiff was not in contempt of the support order.

Defendant filed another motion seeking to hold plaintiff in contempt of the second custody order, the return of the children, and suspension of plaintiff's visitation on 23 August 2010. The following day, the trial court entered an order requiring the return of the children to defendant and suspending plaintiff's visitation. The trial court did not rule on defendant's motion to hold plaintiff in contempt.

Particularly relevant to this appeal, on 7 October 2009, prior to entry of the 25 March 2010 contempt order, plaintiff filed a motion to modify child support. Then, following the 24 August 2010 suspension of plaintiff's visitation and with plaintiff's 7 October 2009 motion to modify child support still pending, plaintiff filed a motion to modify the prior custody orders on 23 May 2011. In her motion, plaintiff sought primary physical custody, child support, and costs.

On 14 June 2011, defendant filed a motion to have plaintiff held in contempt of the 18 July 2004 support order. On the following day, defendant filed a response to plaintiff's motion to modify the prior child custody orders in which defendant denied plaintiff's allegations that there had been a substantial change in circumstances.

The trial court filed an order on 21 June 2011 deciding defendant's 23 August 2010 contempt motion and holding plaintiff in contempt of the second custody order.

On 3 August 2011, the same day plaintiff's 23 May 2011 motion to modify the prior custody orders and defendant's 14 June 2011 motion to hold plaintiff in contempt came on for hearing, plaintiff voluntarily dismissed her 7 October 2009 motion to modify child support. A hearing on plaintiff's and defendant's remaining motions was conducted in Pitt County District Court on 3 and 4 August 2011 before the Honorable W. Turner Stephenson, III.

The trial court filed an order denying plaintiff's motion to modify child custody on 13 January 2012. By the same order, the trial court reserved its decision on "the issues of modification of child support, contempt[,] and counsel fees . . . for future proceedings." Plaintiff appealed the denial of her motion to modify the prior custody orders.

II. Analysis

The sole issue that plaintiff raises on appeal is whether the trial court erred in finding that there was not a substantial change in circumstances to warrant modification of the prior custody orders. Yet, given that the trial court's 13 January 2012 order denying plaintiff's motion to modify the prior custody orders indicates that "the issues of modification of child support, contempt[,] and counsel fees are reserved for future proceedings[,]" as an initial matter, we must address the interlocutory nature of this appeal. Because we hold this appeal interlocutory, we do not reach the merits.

The underlying law regarding the appealability of interlocutory orders is well established. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "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). On the other hand, "[a] final judgment is one which disposes of the cause as to all the

parties, leaving nothing to be judicially determined between them in the trial court." *Id.* at 361-62, 57 S.E.2d at 381. Therefore, by definition, the 13 January 2012 order of the trial court that reserved the issue of attorney fees associated with plaintiff's motion to modify the prior custody orders for future proceedings is an interlocutory order and not a final order.[1]

Although interlocutory appeals are not generally appealable,

> immediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay. . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a substantial right.

Sharpe v. Worland, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (internal quotation marks and citations omitted). In the present case, the trial court did not certify its 13 January 2012 order for immediate appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (2011).[2] Plaintiff does, however, contend that, if the trial court's 13 January 2012 order is interlocutory, it affects a substantial right. We do not agree.

"[T]he appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). "The appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate why the order affects a substantial right." *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009). "Whether an interlocutory appeal affects a substantial right is determined on a case by case basis." *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 803 (2002).

A review of North Carolina case law reveals that this Court has never held that a child custody order affects a substantial right except for when the physical well-being of a child is at stake. *See id.* at 625, 566

---

1. We find the reserved issue of attorney fees sufficient to determine the interlocutory nature of the trial court's 13 January 2012 order. Therefore, we need not address the reservation of child support and contempt.

2. All references to Rule 54(b) in this opinion refer to Rule 54(b) of the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1 (2011).

S.E.2d at 804 ("Where as [sic] here, the physical well[-]being of the child is at issue, we conclude that a substantial right is affected that would be lost or prejudiced unless immediate appeal is allowed."). Taking the physical well-being of the child into account, in *McConnell v. McConnell* we held that a substantial right had been affected where "the order . . . involve[d] the removal of the child from a home where the court specifically concluded 'that there is a direct threat that the child is subject to sexual molestation if left in the mother's home.' " *Id.* In the present case, plaintiff alleges the well-being of the children is at stake because of a lack of educational opportunities available to them and dental issues that they have suffered. Plaintiff further asserts that these issues are urgent because the daughters are already in high school and there is limited time to remedy the error. Upon review of the record, we find that the circumstances alleged by plaintiff to warrant immediate appellate review fall well short of the level of physical well-¬being at stake contemplated in *McConnell*. Therefore, we hold plaintiff has failed to show that a substantial right has been affected.

This analysis would ordinarily suffice to determine that the appeal is interlocutory. Yet, because recent case law has complicated the issue, further discussion is necessary.

This discussion begins with *Bumpers v. Cmty. Bank of N. Va.*, 364 N.C. 195, 695 S.E.2d 442 (2010). In *Bumpers*, a borrower filed a suit against a lending bank alleging unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1 and sought attorney fees pursuant to N.C. Gen. Stat. § 75-16.1. *Bumpers*, 364 N.C. at 196, 695 S.E.2d at 443. Upon motion for summary judgment, the trial court entered judgment on all claims except for attorney fees and certified the judgment for immediate appeal pursuant to Rule 54(b), "specifically not[ing] that it had 'not considered an application for attorney fees under [N.C. Gen. Stat. §] 75–16.1, but nonetheless determine[d] that there is no just cause for delay and that the judgment resulting from this order should be entered as a final judgment.' " *Bumpers*, 364 N.C. at 197, 695 S.E.2d at 444. On appeal to this Court, in *Bumpers v. Cmty. Bank of N. Va.*, 196 N.C. App. 713, 675 S.E.2d 697 (2009), we held the trial court's certification was in error and dismissed the appeal as interlocutory. *Id.* at 719, 675 S.E.2d at 700. Our Supreme Court then granted discretionary review. *Bumpers v. Cmty. Bank of N. Va.*, 363 N.C. 580, 682 S.E.2d 207 (2009).

In order to determine "whether the judgment certified for appeal under Rule 54(b) [was] indeed a final, appealable judgment[,]" *Bumpers*, 364 N.C. at 199, 695 S.E.2d at 445, our Supreme Court looked to the fee statute at issue to determine whether the plaintiff's claim for attorney

fees "[was] a substantive issue[] or in any way part of the merits[.]" *Id.* at 204, 695 S.E.2d at 448. The Court then held that, because N.C. Gen. Stat. § 75-16.1 requires that a claimant show that it has prevailed on the merits, the award of attorney fees under N.C. Gen. Stat. § 75-16.1 was not a substantive issue. *Bumpers*, 364 N.C. at 204, 695 S.E.2d at 448. Therefore, the Court "adopt[ed] the bright-line rule that an unresolved claim for attorney fees under [N.C. Gen. Stat. §] 75-16.1 does not preclude finality of a judgment resolving all substantive issues of a claim under [N.C. Gen. Stat. §] 75-1.1." *Bumpers*, 364 N.C. at 204, 695 S.E.2d at 448.[3]

Subsequent to *Bumpers*, in *Lucas v. Lucas*, 209 N.C. App. 492, 706 S.E.2d 270 (2011), this Court addressed whether an outstanding claim for attorney fees pursuant to N.C. Gen. Stat. § 50-16.4 in an action for equitable distribution and alimony precluded finality of judgment for purposes of appeal. *Id.* at 495-97, 706 S.E.2d at 273-74. In *Lucas*, "[t]he trial court purported to certify the order and judgment for immediate appeal pursuant to Rule 54(b)[.]" *Id.* at 495, 706 S.E.2d at 273. Yet, on appeal, the Court found the certification defective in that the trial court did not specifically find that "there is no just reason for delay[.]" *Id.* at 496, 706 S.E.2d at 273. Thus, "[s]ome other basis must exist for appellate jurisdiction." *Id.*

The Court then circumvented the general rule prohibiting an appeal of an interlocutory judgment, unless the judgment is certified or affects a substantial right, so as to reach the merits by applying the *Bumpers* analysis to determine whether the outstanding claim for attorney fees precluded finality of the judgment. The Court held that where an award of attorney fees pursuant to N.C. Gen. Stat. § 50-16.4 is contingent on whether the claimant prevails in the underlying alimony action, attorney fees was not a substantive issue and did not preclude finality for purposes of appeal. *Lucas*, 209 N.C. App. at 497, 706 S.E.2d at 274. The Court then addressed the merits of the appeal notwithstanding the lack of a valid certification or a determination that the judgment affected a substantial right.

---

3. We find it important to note that in *Bumpers*, the Supreme Court did not hold that the appeal was not interlocutory or that certification was not required. Instead, the Court held that the judgment was final for purposes of certification pursuant to Rule 54(b), stating "[i]n appropriate cases, such a final judgment may be certified for immediate appeal under Rule 54(b)." *Bumpers*, 364 N.C. at 204, 695 S.E.2d at 448. In fact, the Supreme Court noted that it was "decid[ing] the issue in the procedural posture in which it [was] presented without passing on whether certification was necessary." *Id.* at 198 n.2, 695 S.E.2d at 445 n.2.

Plaintiff contends that the *Bumpers*' analysis should apply with equal force in the present case.

Yet, subsequent to *Bumpers* and *Lucas*, in *Duncan v. Duncan*, ___ N.C. App. ___, 732 S.E.2d 390 (2012), *disc. review granted*, ___ N.C. ___, 736 S.E.2d 186 (2013), this Court was again faced with the issue of whether an outstanding claim for attorney fees in an alimony action precluded finality of the judgment for purposes of immediate appeal. In *Duncan*, however, the Court determined the fact that the trial court had not certified the judgment as immediately appealable pursuant to Rule 54(b) was dispositive. *Id.* at ___, 732 S.E.2d at 392 ("In the present case, Defendant has failed to even acknowledge the interlocutory nature of his appeal, much less argue that some substantial right of his will be affected absent immediate appeal. Defendant cannot argue that this interlocutory appeal is properly before us pursuant to Rule 54(b) because the trial court did not certify its 18 January 2012 order for immediate appeal."). Thus, the Court dismissed the appeal as interlocutory, stating "[w]e need not address the full applicability of *Bumpers* [] to the facts in the present case because the trial court in the present case did not certify the order for immediate appeal, as required by *Bumpers* []." *Id.*

Upon examination of the cases cited above, we note that North Carolina law regarding the finality of an order or judgment which preserves an issue of attorney fees is not a model of clarity. Furthermore, we note that it is difficult to reconcile *Lucas* with the general prohibition against the immediate appeal of interlocutory orders. Nevertheless, where the trial court's 13 January 2012 child custody order was not certified and where we have found that the order does not affect a substantial right, we follow the lead of *Duncan* and dismiss this appeal as interlocutory. We find this result consistent with the holding in *Bumpers* and the better established law governing the appeal of interlocutory orders and judgments. *See Goldston*, 326 N.C. at 725, 392 S.E.2d at 736; *Veazey*, 231 N.C. at 361-62, 57 S.E.2d at 381; *Sharpe*, 351 N.C. at 161-62, 522 S.E.2d at 579.

Furthermore, assuming *arguendo* that certification was not necessary, we do not think the *Bumpers*' bright-line rule as applied in *Lucas* renders the trial court's 13 January 2012 interlocutory order final and immediately appealable.

The fee shifting statutes at issue in *Bumpers* and *Lucas* awarded fees contingent on whether the claimant was the prevailing party. *See Bumpers*, 364 N.C. at 204, 695 S.E.2d at 448; *Lucas*, 209 N.C. App. at

497, 706 S.E.2d at 274; *see also* N.C. Gen. Stat. § 75-16.1; N.C. Gen. Stat. § 50-16.4. On that basis, the courts held that the issue of attorney fees was "not a substantive issue, or in any way part of the merits[.]" In a child custody action, attorney fees may be awarded at the discretion of the trial court pursuant to N.C. Gen. Stat. § 50-13.6, which provides in pertinent part:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit.

N.C. Gen. Stat. § 50-13.6 (2011). Thus, under the statute, the award of attorney fees in a child custody action is not contingent on the outcome. Instead, the trial court must engage in a more substantive analysis to determine whether the party seeking fees filed the action in good faith. We find that this analysis entails a review of the merits of the case and precludes finality of a child custody order reserving the issue of attorney fees.[4]

Plaintiff has additionally filed a conditional petition for writ of certiorari ("PWC") with this Court. In her PWC, plaintiff repeats the same arguments presented in her brief. For the reasons discussed above, we deny plaintiff's PWC.

III. Conclusion

For the reasons discussed above, we dismiss plaintiff's appeal as interlocutory.

Dismissed.

Judges STEELMAN and STEPHENS concur.

4. We further note that the trial court also reserved its decision on issues of child support and contempt.

IN RE L.C.R.

[226 N.C. App. 249 (2013)]

IN THE MATTER OF L.C.R., O.N.R., J.T.R.

No. COA12-1195

Filed 2 April 2013

Termination of Parental Rights—grounds—willfully left children for more than twelve months

The trial court did not err by concluding that grounds existed to terminate respondent mother's parental rights based on willfully leaving the children in foster care or placement outside the home for more than twelve months without showing reasonable progress under the circumstances to correct the conditions which led to the children's removal.

Appeal by respondent-mother from order entered 25 May 2012 by Judge Michael D. Duncan in Wilkes County District Court. Heard in the Court of Appeals 18 March 2013.

No brief filed for petitioner-appellees.

Robert W. Ewing, for respondent-appellant.

CALABRIA, Judge.

Respondent-mother ("respondent") appeals the trial court's order terminating her parental rights to her minor children Joshua,[1] Ophelia, and Liam (collectively "the children").[2] We affirm.

On 8 February 2008, the Wilkes County Department of Social Services ("DSS") filed juvenile petitions alleging that the children were neglected due to their parents' drug and alcohol abuse. On 11 March 2008, the trial court entered a consent order which adjudicated the children as neglected juveniles and awarded legal custody of the children to DSS. DSS then placed the children in the home of the children's paternal grandparents ("petitioners").

1. Pseudonyms are used to protect the identities of the minor children.

2. The children share a common father, whose parental rights were also terminated. However, the father did not appear at or participate in the termination hearing and is not a party to this appeal.

After a permanency planning review hearing, the trial court entered an order on 3 September 2008 which awarded legal and physical custody of the children to petitioners. The court additionally concluded that the matter should be converted to a civil custody action pursuant to N.C. Gen. Stat. § 7B-911. DSS and the guardian *ad litem* were relieved of any further responsibility for the children.

On 28 September 2011 petitioners filed petitions to terminate the parental rights of the children's parents. On 19 March 2012, a termination hearing was conducted in Wilkes County District Court. Respondent appeared with counsel at the hearing and presented evidence.

On 25 May 2012, the trial court entered an order which terminated respondent's parental rights. The court's order concluded that grounds existed to terminate respondent's right because she (1) willfully left the children in foster care or placement outside the home for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting the conditions which led to the children's removal; (2) was incapable, due to substance abuse, of providing for the proper care and supervision of the children, and there was a reasonable probability that such incapacity will continue for the foreseeable future; and (3) had willfully abandoned the children for at least six consecutive months immediately preceding the filing of the petition. Respondent appeals.

Respondent argues that the trial court erred in concluding that grounds existed to terminate her parental rights. We disagree.

The standard of review for an order terminating parental rights is whether the findings of fact are supported by clear, cogent and convincing evidence and whether the conclusions of law are supported by the findings of fact. *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984). The trial court's conclusions of law are reviewed *de novo*. *In re Pope*, 144 N.C. App. 32, 40, 547 S.E.2d 153, 158, *aff'd per curiam*, 354 N.C. 359, 554 S.E.2d 644 (2001).

Pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), a court may terminate parental rights when "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2) (2011). Thus, this ground requires the trial court to determine that: (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and (2) as of the time of the

hearing, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. *In re O.C. & O.B.*, 171 N.C. App. 457, 464 65, 615 S.E.2d 391, 396 (2005).

This Court has explained that, for purposes of this ground for termination,

> the legislature did not intend for any separation between a parent and a child to trigger the termination ground set forth in G.S. § 7B-1111(a)(2)(failure to make reasonable progress). Instead, we conclude the statute refers only to circumstances where a court has entered a court order requiring that a child be in foster care or other placement outside the home.

In re A.C.F., 176 N.C. App. 520, 525-26, 626 S.E.2d 729, 733-34 (2006). In the instant case, respondent contends that the trial court erroneously concluded that her rights were subject to termination under this ground because the children were not placed outside her home for more than twelve months *pursuant to a court order*. She argues that after the trial court's 3 September 2008 order granted legal and physical custody to petitioners and converted the juvenile case to a civil custody case, the children were "only under a *court order* requiring them to be in an out of home placement for approximately six months."

However, respondent fails to adequately explain why the court's order converting the neglect case into a civil custody case should not qualify as a "court order" under *A.C.F.* N.C. Gen. Stat. § 7B-911(a) specifically authorizes the court to "award custody of the juvenile to a parent or other appropriate person" as a possible disposition in a neglect proceeding. Moreover, by granting physical custody to petitioners, the court necessarily was requiring the children to reside in an out-of-home placement. *See* Black's Law Dictionary, 9th Edition 1263 (2009)(Physical custody in the family law context is defined as "[t]he right to have the child live with the person awarded custody by the court."). Thus, the children were still in an out-of-home placement pursuant to a court order after the trial court's 3 September 2008 order converted the neglect case to a child custody case. Accordingly, the children were in an out-of-home placement for well over twelve months prior to the filing of the termination petition on 28 September 2011.

Respondent additionally argues that N.C. Gen. Stat. § 7B-1111(a)(2) should not be available as a ground for termination in a private termination action where the petitioners are also the custodians of the minor children who are the subject of the petition. In support of her argument,

respondent notes that, in order for a respondent-parent to regain custody under those circumstances, they must show more than the reasonable progress required by N.C. Gen. Stat. § 7B-1111(a)(2). The respondent-parent must also show that returning the children to the respondent-parent's custody is in the children's best interests. *See Hibshman v. Hibshman*, ___ N.C. App. ___, ___, 710 S.E.2d 438, 443 (2011).

However, the issue of whether or not the parent is in a position to actually regain custody of the children at the time of the termination hearing is not a relevant consideration under N.C. Gen. Stat. § 7B-1111(a)(2), since there is no requirement for the respondent-parent to regain custody to avoid termination under that ground. Instead, the court must only determine whether the respondent-parent had made "reasonable progress under the circumstances . . . in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2). Accordingly, the conditions which led to removal are not required to be corrected completely to avoid termination. Only reasonable progress in correcting the conditions must be shown. Thus, the fact that the neglect case had been converted to a child custody case is immaterial to a showing of reasonable progress, and the trial court properly concluded that respondent's parental rights could be terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). Respondent's arguments are overruled.

Because only one ground is required to terminate parental rights, it is unnecessary to address respondent's arguments concerning the other grounds for termination found by the court. *See In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006). The trial court's order is affirmed.

Affirmed.

Judges BRYANT and GEER concur.

NOVAK v. DAIGLE, INC.

[226 N.C. App. 253 (2013)]

GARY NOVAK AND MARY NOVAK, PLAINTIFFS
v.
DAIGLE, INC. D/B/A PLANTATION PROPERTIES, AND BARBARA HOWELL, DEFENDANTS

No. COA12-1206

Filed 2 April 2013

Pretrial Proceedings—Rule 60(b) motion—contradictory statements in order—no hearing

The Superior Court's order on plaintiffs' motion made pursuant to N.C.G.S. § 1A-1, Rule 60(b)(1) was vacated. The order contained contradictory typewritten and handwritten portions and plaintiffs never had a proper hearing on their Rule 60(b) motion.

Appeal by plaintiffs from Order entered 20 April 2011 by Judge James G. Bell in Superior Court, Brunswick County. Heard in the Court of Appeals 14 March 2013.

Tatum & Atkinson, PLLC by Laura E. Conner, for plaintiffs-appellants.

No appellees' brief filed.

STROUD, Judge.

Gary and Mary Novak ("plaintiffs") filed a complaint against Plantation Properties and Barbara Howell ("defendants") on 10 August 2010 alleging breach of contract, unfair and deceptive trade practices, and fraud. Plaintiffs filed an amended complaint on 2 September 2010. Defendant Howell answered on 14 October 2010. Defendant Daigle, Inc. may have been dismissed from the action.[1] The matter was not set for trial.

The Superior Court, Brunswick County, apparently set the case on a 9 March 2012 administrative "clean-up" calendar, although the record before us does not indicate that notice of this court date was given to either plaintiffs or defendant. Neither plaintiffs nor defendant appeared in court on that date, and on 14 March 2012 the trial court entered an order dismissing plaintiffs' complaint with prejudice on a form order

1. Plaintiff mentions in its brief that Daigle was dismissed from the suit, but does not mention when or how, and nothing in the record indicates such a dismissal.

without any findings of fact or other indication that it had considered sanctions less severe than dismissal with prejudice.[2] *Cf. McKoy v. McKoy*, ___ N.C. App. ___, ___, 714 S.E.2d 832, 833 (2011) (requiring the trial court to make findings as to why lesser sanctions would be insufficient before dismissing a plaintiff's action with prejudice for procedural violations). Plaintiffs did not appeal from the order dismissing their action.

On 9 April 2012, Plaintiffs moved for relief from the order dismissing their complaint under N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2011), alleging that the dismissal was due to the excusable neglect of plaintiffs' attorney. Plaintiffs claimed that they had no notice of the 9 March 2012 court date and that they were unaware of the dismissal order until their counsel received it in the mail on 2 April 2012.

The record before us does not indicate that any hearing was noticed or held regarding plaintiffs' motion for relief from the dismissal order. Instead, the Superior Court entered an order on 20 April 2012 regarding plaintiffs' motion.[3] The order had both typewritten provisions and hand-written portions. The typewritten portion reads:

> In the above-entitled action, Plaintiffs, having for good cause shown, made application pursuant to Rule 60(b) for relief from an Order entered by the Court filed March 14, 2012, dismissing the above-entitled action with prejudice:
>
> IT IS NOW ORDERED that Plaintiffs be granted relief from the March 14, 2012 Order, which is hereby set aside.

Then, between the decretal portion of the order and the signature line, there is a hand-written line:

> *Order is not allowed*
>
> *Matter was dismissed on* 3-9-12
>
> [signature] 4-20-12

It is clear from the context of the order that the trial court intended to deny plaintiffs' motion and that the hand-written portion of the order

---

2. The form order also had as an option a check box to dismiss the case "without prejudice," but the trial court clearly marked the dismissal as "with prejudice."

3. It is obvious that the order was entered on 20 April 2012, although we note that the official Brunswick County Clerk of Superior Court file stamp inexplicably indicates 20 April 2011, nearly a full year before plaintiffs' motion was filed.

was actually meant to be the entirety of the court's order.[4] In addition, an "elementary principle of contract interpretation [is] instructive in this case. When a contract is partly written or typewritten and partly printed any conflict between the printed portion and the [type] written portion will be resolved in favor of the latter." *In re B.E.*, 186 N.C. App. 656, 661, 652 S.E.2d 344, 347 (2007) (citation and quotation marks omitted). Plaintiffs treat the order as one denying their Rule 60(b) motion, and clearly the trial court did as well.[5] We also note that even if we were to consider the order exactly as it is written, the result would be the same, as the order would have to be reversed for its contradictory conclusions of law and decrees. Therefore, we will consider the order as one denying plaintiffs' motion.

"It is the duty of the judge presiding at a Rule 60(b) hearing to make findings of fact and to determine from such facts whether the movant is entitled to relief from a final judgment or order." *Hoglen v. James*, 38 N.C. App. 728, 731, 248 S.E.2d 901, 903 (1978).

> When, as in the instant case, the trial court does not make findings of fact in its order denying the motion to set aside the judgment, the question on appeal is whether, on the evidence before it, the court could have made findings of fact sufficient to support its legal conclusion.

Milton M. Croom Charitable Remainder Unitrust v. Hedrick, 188 N.C. App. 262, 266, 654 S.E.2d 716, 719 (2008) (citation and quotation marks omitted).

---

4. It appears the trial court merely wrote its order by hand on a draft order submitted by plaintiffs even though the trial court was not granting the relief plaintiffs sought. "Orders and judgments in civil actions are orders of the court, and not the orders of the parties." *Heatzig v. MacLean*, 191 N.C. App. 451, 461, 664 S.E.2d 347, 354, *app. dismissed*, 362 N.C. 681, 670 S.E.2d 564 (2008). A trial court's order should not include language contrary to its actual ruling and certainly not two precisely opposite decrees. When the trial court uses a draft order submitted by a party, it should be especially careful not to include contradictory provisions. Simply striking out the language to be omitted and initialing and dating the stricken portion would suffice.

5. The record also contains an Alias and Pluries summons which plaintiffs sought to have issued on 23 March 2012 which is marked "not valid case dismissed," although the record does not indicate who made this notation or when it was made. It is unclear whether defendant Daigle, Inc. was ever served. It appears that plaintiffs had six Alias and Pluries summonses issued prior to 23 March 2012, perhaps with the intent of continuing to attempt service upon Daigle, Inc. (defendant Howell had already been served and had filed an answer); plaintiff argues that the summons issued on 4 January 2012 was still "active" at the time of the administrative calendar on 9 March 2012. But we are baffled by this argument since plaintiffs also claim to have dismissed their action against Daigle, Inc.

The trial court here denied plaintiffs' motion without a hearing. Plaintiffs were not even given the opportunity to present any evidence or to make an argument in support of their motion. The trial court's order contains no findings of fact or conclusions of law. Indeed, the only legal conclusion on the face of the order is the typewritten statement that plaintiffs had shown "good cause" for relief, although the court clearly did not mean to adopt that conclusion. The handwritten portion of the order states simply that the "order is not allowed[;] matter was dismissed on 3-9-12."

It appears that the trial court may have been under the mistaken impression that it was without power to consider plaintiffs' Rule 60 motion because the action had been dismissed. Whatever the reason, it is clear that "plaintiff[s] ha[ve] never had the proper hearing on [their] Rule 60(b) motion to which [they are] entitled." *Hoglen*, 38 N.C. App. at 731, 248 S.E.2d at 904. Therefore, we vacate the trial court's order and remand for further proceedings. *See Trent v. River Place*, LLC, 179 N.C. App. 72, 79, 632 S.E.2d 529, 534 (2008) (remanding for a "proper" Rule 60 hearing).

VACATED and REMANDED.

Judges ELMORE and STEELMAN concur.

MARY FRANCES POWE, EMPLOYEE, PLAINTIFF
v.
CENTERPOINT HUMAN SERVICES, EMPLOYER
AND
BRENTWOOD SERVICES, CARRIER, DEFENDANTS

No. COA12-849

Filed 2 April 2013

1. Appeal and Error—prior appeals—previous dispositions

Arguments in the third appeal of a workers' compensation action that disregarded the previous disposition of the case were without merit.

2. Workers' Compensation—contempt—failure to provide medical treatment—discovery sanction—not applicable

The Industrial Commission did not err in a workers' compensation case because it did not hold defendants in contempt under N.C.G.S. § 1A-1, Rule 37(b)(2) for allegedly failing to provide plaintiff with medical treatment pursuant to an order of the Commission. That rule is limited to remedying those instances in which a party fails to make discovery or comply with discovery orders during pretrial proceedings and was not applicable here.

3. Workers' Compensation—findings—supported by the evidence

An argument by the plaintiff in a workers' compensation case that the Industrial Commission's findings were not supported by the evidence was overruled where plaintiff based her argument on a trifling disagreement with how the Commission interpreted the evidence in the record, not a lack of true evidentiary support.

4. Workers' Compensation—disability—effect of temporary payments—vocational rehab—refusal to cooperate

A workers' compensation case was remanded for a determination by the Commission as to whether plaintiff was disabled under *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762. The Commission improperly or accidentally converted defendants' payment of temporary total disability benefits into a wholly unsupported stipulation that plaintiff was totally disabled during the payment periods, and seemingly focused on the vocational rehabilitation issue to the exclusion of the disability issue. The impact of an employee's refusal to cooperate with vocational rehabilitation services on the employee's right to indemnity compensation arises only after she meets her burden of establishing disability.

5. Workers' Compensation—findings—continued rehab beneficial—supporting evidence sufficient

In a case decided on other grounds, the Industrial Commission's finding in a workers' compensation case that plaintiff would benefit from continued rehabilitation was based on competent evidence. Though the evidence was, at best, minimal, it was competent to support the Commission's findings of fact under the applicable deferential standard.

Appeal by Plaintiff and Defendants from amended opinion and award entered 30 May 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 November 2012.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for Plaintiff.

Rudisill White & Kaplan, P.L.L.C., by Stephen Kushner, for Defendants.

STEPHENS, Judge.

Background

Mary Frances Powe ("Plaintiff") and Centerpoint Human Services ("Centerpoint") along with Brentwood Services (collectively, "Defendants") appeal from an opinion and award entered by the Industrial Commission ("the Commission"), which reinstated Plaintiff's temporary total disability compensation at the rate of $461.36 per week, back-dated to 23 February 2008. That opinion also awarded attorneys' fees and the right to designate a board-certified neurosurgeon or pain management physician of Plaintiff's choosing to provide medical treatment for her compensable injuries. The Commission denied Plaintiff's request for temporary total disability benefits accrued before 23 February 2008 on a finding that Plaintiff had not substantially complied with vocational rehabilitation services between 22 June 2006 and 23 February 2008, a period of approximately one year and eight months.

This is the third time this case has made its way to this Court in twice as many years. Issues surrounding Plaintiff's interaction with various vocational rehabilitation professionals have permeated each appeal, including the present one. The underlying facts and procedural history have not changed, are described in detail in the two previous opinions of this Court, and are not repeated here. Instead, we limit our discussion to the developments which led to this appeal following remand by the second panel.[1]

In *Powe II*, we determined that "the Commission made its findings of fact under a misapprehension of law." *Powe II*, __ N.C. App. at __, 715 S.E.2d at 304. As a result, we remanded the case to the Commission and directed it to determine whether Plaintiff "*substantially compl*[*ied*] with [vocational] services and [did] *not significantly interfere*[] with the

1. *See Powe v. Centerpoint Human Servs.*, __ N.C. App. __, 715 S.E.2d 296 (2011), *disc. rev. denied*, __ N.C. __, 721 S.E.2d 230 (2012) [hereinafter *Powe II*]; *Powe v. Centerpoint Human Servs.*, 183 N.C. App. 300, 644 S.E.2d 269 (2007) (unpublished), *available at* 2007 WL 1412447, *disc. rev. denied*, 362 N.C. 237, 659 S.E.2d 738 (2008).

vocational rehabilitation specialist's efforts to assist [her] in returning to suitable employment." *Id.* at __, 715 S.E.2d at 304 (emphasis added).

The full Commission entered its revised opinion on 30 May 2012. In pertinent part, the Commission found: (1) Plaintiff misrepresented her true physical capacity to the vocational rehabilitation specialist, Ms. Sonya Ellington ("Ellington"), specifically with respect to Plaintiff's need to use a cane. (2) Plaintiff's attendance at the vocational rehabilitation meetings was not, in and of itself, sufficient to constitute substantial compliance with vocational rehabilitation. (3) Plaintiff "failed to make a genuine effort to locate employment and to comply with vocational rehabilitation." (4) Plaintiff "significantly interfered with []Ellington's efforts to assist Plaintiff in returning to suitable employment" and "willfully refused vocational rehabilitation through February 22, 2008[.]" (5) Plaintiff's vocational rehabilitation ended, in part, because Ellington felt "she had covered all of the vocational activities that she could help Plaintiff with, and she did not feel like she was effecting any change in Plaintiff." (6) Ellington's decision was not entirely the result of Plaintiff's failure to comply. (7) Plaintiff is capable of earning wages and would have benefitted from continued rehabilitation, especially computer training. Thus, "vocational rehabilitation should have continued after February 22, 2008," and Defendants should have provided it. (8) Because Defendants did not offer or provide vocational rehabilitation after 22 February 2008, Plaintiff's refusal to accept rehabilitation ceased after 22 February 2008.

Based on these findings, the Commission concluded that Plaintiff was prohibited from receiving temporary total disability benefits during the period in which she both significantly interfered and failed to substantially comply with vocational rehabilitation, from 22 June 2006 through 22 February 2008. Because her refusal ceased on 23 February 2008, the Commission concluded that Plaintiff was entitled to temporary total disability benefits "continuing at the rate of $461.36 per week" from that date onward. Both parties appealed.

Standard of Review

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation and quotation

marks omitted). If supported by competent evidence, the Commission's findings are conclusive, even if the evidence might also support contrary findings. *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433–34, 144 S.E.2d 272, 274 (1965). The Commission's conclusions of law are reviewed *de novo*. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113, *disc. rev. denied*, 357 N.C. 460, 585 S.E.2d 760 (2003).

Discussion

I. Plaintiff's Appeal

[1] In her first argument, Plaintiff repeats two points she raised in *Powe II*: (1) that the Commission erred in refusing to reinstate temporary total disability benefits, beginning 22 June 2006, because Plaintiff "demonstrated [that] she was willing to participate with Defendants' vocational rehabilitation efforts[,] and she immediately took affirmative steps to comply"; and (2) that Plaintiff is neither "able to participate, nor required to participate with vocational rehabilitation" because she was "not under the care of an authorized physician, and . . . there was no authorized treating physician [made available] to oversee her vocational rehabilitation." These arguments are wholly without merit and improperly disregard our previous disposition of this case. As we have already resolved these issues, we will not repeat our reasoning here.

[2] Second, Plaintiff asserts that the Commission erred because it did not hold Defendants in contempt for failing to provide her with medical treatment. In support of that assertion, Plaintiff cites to Rule 37(b)(2)(b) of the North Carolina Rules of Civil Procedure for the proposition that the courts may sanction a party for failing to comply with any order. We are unpersuaded.

Rule 37(b) provides, in pertinent part:

> (2) **Sanctions by Court in Which Action is Pending.** — If a party . . . fails to obey an order *to provide or permit discovery*, . . . a judge . . . may make such orders in regard to the failure as are just, [including] the following:
>
> . . .
>
> b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters in evidence[.]

N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(b) (emphasis added). "Rule 37 . . . grants the court discretionary power to impose sanctions for failure to comply with *discovery requests*." *Rose v. Isenhour Brick & Tile Co.*, 120 N.C. App. 235, 240, 461 S.E.2d 782, 786 (1995) (emphasis added). Rule 37 is not so broad, however, that it can be invoked whenever one party is frustrated with its adversary. The Rule is limited to remedying those instances in which a party fails to make discovery or comply with discovery orders during pre-trial proceedings. Plaintiff invokes the Rule in this case because Defendants allegedly failed to provide medical care pursuant to the Commission's opinion and award. This is not a proper use of the rule. Rule 37(b) only applies when one party fails to obey a court order compelling discovery and, therefore, is not applicable here. Because Plaintiff cites no other authority for her second argument, we affirm the Commission's denial of her motion.

[3] Third, Plaintiff contends that certain findings are not supported by competent evidence. We are unpersuaded. Plaintiff bases her argument on trifling disagreement with how the Commission should have interpreted the evidence in the record — not a lack of true evidentiary support. Despite Plaintiff's protestations, it is well settled that "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. The courts may set aside findings of fact only upon the ground they lack evidentiary support." *Anderson*, 265 N.C. at 433¬–34, 144 S.E.2d at 274. Plaintiff's mere disagreement with the Commission's findings, without more, is not sufficient to overturn a decision of the Commission as not based on competent evidence. *Cf. Holcomb v. Butler Mfg. Co.*, 158 N.C. App. 267, 273–74, 580 S.E.2d 376, 380 (2003) ("[T]he mere fact that an appellate court disagrees with the findings of the Commission is not grounds for reversal."). Accordingly, this argument is overruled.

II. Defendants' Appeal

Defendants make two arguments on appeal: (1) that the Commission misapplied this Court's holding in *Powe II* and thereby erred in ordering the resumption of temporary total disability benefits, and (2) that the Commission erred by failing to make a determination as to Plaintiff's disability. Because a determination of whether Plaintiff is disabled and, if so, the extent to which she is disabled, is essential to the determination of the vocational rehabilitation issues, we address disability first.

A. Disability

[4] Shortly after the occurrence of the accident giving rise to this case, Defendants accepted the compensability of Plaintiff's injury by filing an

Industrial Commission Form 60 ("Employer's Admission of Employee's Right to Compensation") and commenced payment of temporary total disability benefits as a result. It is well settled that entering into a Form 60 does not create a presumption of ongoing disability. *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 159–60, 542 S.E.2d 277, 281–82, *disc. rev. denied*, 353 N.C. 729, 550 S.E.2d 782 (2001) ("[A]dmitting compensability and liability, whether through notification of the Commission by the use of a Form 60 or through paying benefits beyond the statutory period . . . does not create a presumption of continuing disability[.]"). Thus, once the continuing status of Plaintiff's disability was disputed, it became Plaintiff's burden to prove that she remained disabled. *See Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765–66, 425 S.E.2d 454, 457 (1993). As this Court has repeatedly explained, an employee can meet the burden of proving disability by producing either: (1) medical evidence that the employee is physically or mentally incapable of work in any employment; (2) evidence that the employee is capable of some work, but has been unsuccessful in her effort to obtain employment after a reasonable effort; (3) evidence that the employee is capable of some work, but it would be futile to pursue other employment because of pre-existing conditions like age, inexperience, or lack of education; or (4) evidence that the employee has obtained other employment at a wage less than that earned before the injury. *Id.* Furthermore, "[w]hile the [C]ommission is not required to make findings as to each fact presented by the evidence, it is required to make specific findings with respect to crucial facts upon which the question of [P]laintiff's right to compensation depends." *Gaines v. L. D. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977). Because the question of her disability affects Plaintiff's right to compensation, the Commission is required to make explicit findings on the existence and extent of that disability when it is in dispute. *Plott v. Bojangle's Rests., Inc.*, 181 N.C. App. 61, 65, 638 S.E.2d 571, 574 (2007), *rev'd on other grounds*, 361 N.C. 577, 578, 652 S.E.2d 920, 920 (2007).

Defendants assert that they have disputed the issue of whether Plaintiff is disabled at "every level" of the protracted litigation in this case. Despite their repeated requests for a determination from the Commission, Defendants argue that the Commission has "analyze[d Plaintiff's] case as if disability was a given," made insufficient factual findings, and reached no conclusions on the disputed question of disability. We agree.

Notwithstanding the tortured procedural history of this case,[2] it appears that at least by 11 December 2008, when Defendants filed a request for hearing before the Commission, they raised the issue of whether Plaintiff was and had been disabled within the meaning of the Workers' Compensation Act. Indeed, the issue of Plaintiff's disability was (1) listed by Defendants in the parties' pretrial agreement before the last evidentiary hearing, conducted in February 2009; (2) acknowledged as an issue in the opinion and award of the deputy commissioner who conducted that hearing; and (3) recognized in the decision of the full Commission at issue in *Powe II*. The issue is currently mischaracterized in the Commission's opinion as a "stipulation" of the parties which asserts that the parties have agreed "Plaintiff has been *totally disabled* and paid indemnity benefits" for various periods of time, including from 13 October 2008 "through the present and continuing." However, a thorough review of the record reveals that Defendants have never stipulated to the existence or extent of Plaintiff's disability, despite having made disability payments to Plaintiff pursuant to the Form 60 and various orders of the Commission. On the contrary and as noted above, Defendants have disputed Plaintiff's disability for more than four years without obtaining a resolution.

While the Commission's opinion and award contains sufficient findings regarding the vocational factors that may impact its disability determination (*e.g.*, Plaintiff's age, educational achievements, and work experience), there are no findings regarding her *physical* capacity to work, beyond one conclusory statement that Plaintiff "is capable of earning wages in some employment[.]" Further, while the Commission correctly cites the *Russell* factors in its first conclusion of law and correctly observes in its second conclusion of law that an employee may lose the right to compensation by failing to cooperate with vocational rehabilitation services "*[a]fter disability has been shown*," it made no conclusion of law as to Plaintiff's disability status. (Emphasis added).

It appears that the Commission has improperly or accidentally converted the fact that Defendants paid temporary total disability benefits into a wholly unsupported stipulation that Plaintiff was totally disabled during the payment periods. Defendants' proper payment of disability

---

2. Defendants filed multiple Form 24 applications to terminate Plaintiff's disability benefits, followed by (1) Plaintiff's motions for reinstatement of her benefits, (2) at least two evidentiary hearings before deputy commissioners, (3) two appearances before the full Commission, (4) two previous appeals to this Court, (5) petitions for discretionary review filed with our Supreme Court, and (6) this Court's remand to the full Commission for further proceedings.

benefits occurred during periods when Plaintiff's disability was not in dispute or when Defendants were under an order to make such payments — despite simultaneously contesting the correctness of the order to do so in hearings and full Commission appeals. The Commission seems to have focused on the vocational rehabilitation issue to the exclusion of the disability issue. As the Commission accurately asserted, however, the impact of an employee's refusal to cooperate with vocational rehabilitation services on that employee's right to indemnity compensation arises only after she has met her burden of establishing disability. *See Russell*, 108 N.C. App. at 765–66, 425 S.E.2d at 457.

The Commission's failure to make a determination of disability affects Plaintiff's right to compensation and must be remedied. *See Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 627, 540 S.E.2d 785, 790 (2000) (requiring remand when the Commission failed to make findings regarding its basis for denying disability compensation). Accordingly, we are obligated to again remand this case for a determination by the Commission as to whether Plaintiff is disabled under *Russell*. If the Commission determines that Plaintiff has not met her burden of proving disability during the contested periods, then the issues regarding Plaintiff's cooperation with vocational rehabilitation efforts will be moot. On the other hand, if the Commission resolves the disability issue in Plaintiff's favor, then the issues raised on this appeal by the Commission's resolution of the vocational rehabilitation questions on remand in *Powe II* are likely to resurface. For that reason, and in the interests of judicial economy, we address the issue of vocational rehabilitation raised by this appeal.

B. Vocational Rehabilitation and Compliance

[5] In *Powe II*, we directed the Commission to determine "why vocational rehabilitation was not being provided." *Powe II*, __ N.C. App. at __, 715 S.E.2d at 305. Though we had already disposed of the case on other grounds, we offered instruction in *obiter dictum* on the question of "whether the Commission may conclude both that [P]laintiff failed to cooperate with vocational services . . . and reinstate temporary total disability benefits" because the issue could "arise again on remand." *Id.* at __, 715 S.E.2d at 304–05; *see also Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby.").

We based our instruction on the Commission's use of N.C. Gen. Stat. § 97-25 ("the Statute"), which stated that an employee's refusal to

accept vocational rehabilitation, when ordered by the Commission, bars that employee from further compensation "until such refusal ceases." N.C. Gen. Stat. § 97-25 (2010).[3] Relying on the language in the Statute, the Commission determined in its 28 April 2010 opinion that Plaintiff had "refused" vocational rehabilitation between 22 June 2006 and 22 February 2008. *See generally Powe II*, __ N.C. App. at __, 715 S.E.2d at 303 ("Conduct rising to the level of sabotage — preventing the very purpose of vocational rehabilitation — would have the same effect as an outright refusal of vocational rehabilitation. Even, however, in the absence of sabotage, an employee's participation may be so minimal that the purpose of vocational rehabilitation cannot be served."). On 23 February 2008, however, Plaintiff's refusal was deemed to have ceased because Defendants stopped providing vocational rehabilitation services. At that time, as the Commission's reasoning goes, Plaintiff was unable to continue to refuse those services because she no longer had access to them. Given that logic, the Commission determined that temporary total disability benefits should be resumed beginning at the point after Plaintiff's ability to refuse was taken away (i.e., 23 February 2008). As we noted in *Powe II*, we are not aware of any authority permitting this approach, and Plaintiff has not cited any such authority. *Powe II*, __ N.C. App. at __, 715 S.E.2d at 305. Obviously, however, Plaintiff's right to compensation as of 23 February 2008 would depend, in the first instance, on whether she met her burden under *Russell* of proving that she remained disabled.

Given that circumstance and tolerating its unusual approach in this case, we directed the Commission to clarify the basis for its reasoning. *Powe II*, __ N.C. App. at __, 715 S.E.2d at 304–05. The Commission's decision at that point had provided little information on why it ordered a resumption of temporary total disability benefits or whether the cessation of vocational rehabilitation was appropriate. *See id.* In order to settle the matter, we tied the validity of the Commission's decision to whether the cessation of services was exclusively the result of Plaintiff's failure to substantially comply. *Id.* at __, 715 S.E.2d at 305. Specifically, we instructed that the Commission's decision to reinstate benefits was in error if Defendants had ceased providing vocational rehabilitation because of Plaintiff's non-cooperation. *Id.* We also suggested that temporary total disability benefits could be reinstated if the catalyst for cessation was something else or if the Commission determined that vocational rehabilitation should have continued. *Id.* Lastly, we required

---

3. Section 97-25 has been amended and no longer applies to vocational rehabilitation. The relevant language can now be found in N.C. Gen. Stat. § 97-32.2 (2011) and remains unchanged.

the Commission to make new findings of fact and conclusions of law that directly supported its determination in either circumstance. *Id.*

In its subsequent order, the Commission based its findings almost exclusively on the testimony of Ellington. That testimony was largely the result of a colloquy between Ellington (here, "A") and counsel for Defendants (here, "Q"):

> Q. You indicated that vocational rehabilitation [("voc rehab")] stopped sometime around February of 2008?
>
> A. Yes, sir.
>
> Q. Why did voc rehab stop at that time?
>
> A. At that time I felt that we had covered all of the vocational activities that I could help her with and I didn't feel like I was affecting any change in [Plaintiff].
>
> Q. What sorts of things would need to happen from [Plaintiff's] standpoint in order to effect change, in your opinion?
>
> A. I feel that a lot of the vocational activities that we did were very one-sided. I would find the job leads, provide them and there was follow up to those leads according to what she documented, but not a lot on her end of finding leads in newspapers, utilizing community, you know, the library for job searching or, you know, going to the Goodwill and the Job Link Center, that kind of thing.
>
> . . . .
>
> Q. [D]oes it hurt the vocational rehabilitation process when you have more of a one-sided situation where you're doing the leg work and finding the jobs and — and while the claimant may be going through with following up on them, is — is not looking for them on their own?
>
> A. I certainly believe it helps to have somebody participate more fully in the process.
>
> . . . .
>
> Q. When you stopped voc rehab in this case did you feel like you were kind of going through the same motions over and over again?

A. Yes.

Q. And did you feel like that was productive or something . . . that was likely to find employment for [Plaintiff]?

A. Of course, I hope that we would find some employment and some good opportunities but it didn't turn out that way.

In addition, the following exchange occurred on cross examination between Ellington (here, "A") and Plaintiff's attorney (here, "Q"):

Q. [H]ow did it come about that your services were cut off . . . because one day you were coming every other week and then all of a sudden it was stopped, . . . what started that?

A. That was me. I decided that we were at the point that I could no longer affect change in [Plaintiff] to be — for her to, you know, lead to a job, I mean, the things that we had tried or I had encouraged her to do, you know, utilized community activities and networking, that type of thing.

. . . .

I believe that . . . I provided services that could help her or assist her in that process. [A]nd there were barriers that she presented to doing some of the activities on her own, independently and at that time I felt that, . . . we had exhausted all of the things, other things or suggestions that I could make to further the process.

Based on this testimony, the Commission concluded on remand that (1) cessation of vocational rehabilitation was not solely due to Plaintiff's non-cooperation and (2) vocational rehabilitation should have continued. In support of those conclusions, the Commission found that "Plaintiff's vocational rehabilitation ended because []Ellington felt, at that time, that she had covered all of the vocational activities that she could help Plaintiff with, and she did not feel like she was effecting any change in Plaintiff." It noted that "Plaintiff [was] capable of earning wages in some employment and . . . would have benefitted from continued vocational counseling, including computer training[.]" Accordingly, the Commission found "that vocational rehabilitation should have continued after February 22, 2008[.]"

Defendants argue on appeal that these determinations are not based on competent evidence. They contend that the cessation of vocational rehabilitation was solely due to Plaintiff's non-cooperation and argue that "there was no evidence given of any reason for the suspension of vocational rehabilitation other than Plaintiff's misbehavior." Thus, Defendants assert, Ellington ended vocational rehabilitation efforts only because "Plaintiff made such a mockery of the process that it was rendered completely meaningless." We are constrained to disagree.[4]

As a matter of policy, Defendants contend that "the law does not allow Plaintiff, through her own non-compliance, to sabotage the process to the point that vocational rehabilitation ceases, and then claim the right to resumption of benefits." We agree and note that this statement represents an accurate characterization of the law under *Powe II*. Despite Plaintiff's substantial non-compliance and significant interference with vocational rehabilitation, however, the Commission found that the evidence failed to indicate that Plaintiff sabotaged vocational rehabilitation to the extent that it could no longer continue. Instead, it determined that Ellington chose to end rehabilitation for reasons in addition to Plaintiff's behavior.

While we may disagree with the Commission's findings, we are bound by those findings "so long as there is any credible evidence to support [them]," even when the record provides evidence to the contrary. *Brooks v. Capstar Corp.*, 168 N.C. App. 23, 26, 606 S.E.2d 696, 698 (2005). "Where any competent evidence exists to support a finding of the Commission, that finding is binding upon this Court. Thus, even though there may be evidence from which a fact finder could determine plaintiff has failed to cooperate with vocational rehabilitation efforts, we must uphold the finding." *Bowen v. ABF Freight Sys., Inc.*, 179 N.C. App. 323, 331, 633 S.E.2d 854, 859–60 (2006) (citation omitted).

As noted above, Ellington testified at the hearings that she "had exhausted all of the things, other things or suggestions that [she] could make to further the process." She also accepted the characterization of Plaintiff's effort to gain employment as "unassertive," but not "uncooperative." When the deputy commissioner pointedly asked if Plaintiff had been cooperative, Ellington responded equivocally by saying: "I think she followed up on the leads that I provided her but I feel that in many aspects of the rehab process, she was very dependent on me leading

4. We note, however, that Ellington is at least the third vocational rehabilitation professional to work with Plaintiff. Issues regarding Plaintiff's behavior and compliance also arose with the other professionals.

the process." This statement indicates that Plaintiff was difficult to work with, motivate, and rehabilitate, but also that she was willing to do some work (*e.g.*, "follow[ing] up on . . . [job] leads") to attain employment. When Ellington was asked whether Plaintiff had done anything to *prevent* herself from getting hired, she answered in the negative.[5] Though this evidence is — at best — minimal, it is competent to support the Commission's findings of fact under our deferential standard. *See Sanhueza v. Liberty Steel Erectors*, 122 N.C. App. 603, 606–07, 471 S.E.2d 92, 94–95 (1996) (citation omitted) ("Although, plaintiff's testimony tended to contradict defendants' evidence, the Commission chose not to believe plaintiff's testimony. The Commission's assessment of witness credibility is conclusive. Accordingly, we conclude that there is competent evidence in the record to support the Commission's determination that plaintiff unjustifiably refused to cooperate with defendants' rehabilitation efforts."); *see also Matthews v. Petroleum Tank Serv., Inc.*, 108 N.C. App. 259, 264, 423 S.E.2d 532, 535 (1992) (citation omitted) ("The Commission is the sole judge of the credibility of witnesses and the weight to be given their testimony, and its determination of these issues is conclusive on appeal."). Though there is ample evidence that Plaintiff's failure to substantially comply with vocational rehabilitation was likely the most significant contributing factor in Ellington's decision to end services, there is also some evidence from Ellington herself to support the Commission's determination that Ellington's decision was premature and due, at least in part, to factors other than Plaintiff's noncompliance.

The Commission also determined that Plaintiff would have benefitted from continued vocational counseling, including computer training and, thus, that rehabilitation services should have continued. Despite Defendants' strenuous contention to the contrary, given Plaintiff's extensive résumé, lack of experience with computers, and the deferential standard that we must employ, we are again constrained to conclude that the Commission's finding that Plaintiff would benefit from continued rehabilitation, including computer training, is based on competent evidence under *Powe II*.

AFFIRMED IN PART; REMANDED IN PART.

Judges STEELMAN and McCULLOUGH concur.

---

5. Ellington never indicated that she made the decision to close the case "due *solely* to [Plaintiff's] non-cooperation[.]" *Powe II*, __ N.C. App. at __, 715 S.E.2d at 305 (emphasis added).

CRYSTAL REEDER, PLAINTIFF
v.
BRIAN D. CARTER, DEFENDANT

No. COA12-1084

Filed 2 April 2013

Specific Performance—settlement agreement—burden to prove requirements

The trial court did not err in a divorce case by denying plaintiff wife's claim for specific performance. The parties' settlement agreement did not extinguish plaintiff's burden to prove the requirements for specific performance.

Appeal by plaintiff from orders entered 20 February 2012 and 24 February 2012 by Judge Robert M. Wilkins in Randolph County District Court. Heard in the Court of Appeals 30 January 2013.

Bell and Browne, P.A., by Charles T. Browne, for plaintiff-appellant.

No brief was submitted for defendant-appellee.

HUNTER, JR., Robert N., Judge.

Crystal Y. Reeder ("Plaintiff") appeals from orders entered 20 February 2012 and 24 February 2012 in Randolph County District Court. The 20 February 2012 order: (i) denied her motion for judgment notwithstanding the verdict; (ii) denied her motion to include specific findings of fact in the trial court's order; and (iii) denied her motion for a new trial. The 24 February 2012 order: (i) denied her claim for specific performance; (ii) granted her claims for damages for unpaid child support, loan payment reimbursement, and attorney's fees; and (iii) denied her claim for unpaid mortgage payments. Upon review, we affirm.

I. Facts & Procedural History

Plaintiff married Brian David Carter ("Defendant") on 31 December 2002. The couple has two minor children born during the marriage. Plaintiff and Defendant separated on 1 June 2008 and divorced on 5 January 2010.

On 15 September 2009, Plaintiff and Defendant executed a separation agreement and property settlement (the "Separation Agreement").

The Separation Agreement gave Plaintiff custody of the two children. Additionally, it required Defendant to pay: (i) $1,200 per month in child support, starting on 1 October 2009; (ii) the taxes, insurance and monthly mortgage payments for the couple's former residence; and (iii) a $56,000 debt owed to Robert Ferguson, Inc. (the "Ferguson Debt"). The Separation Agreement specified that Plaintiff would pay any other extraneous household expenses. It also contained a provision stating:

> [e]ither party shall have the right to compel the performance of provisions of this agreement by suing for specific performance in the Courts where jurisdiction of the parties and subject matter exists. Both parties acknowledge that neither party has a plain, speedy, or adequate legal remedy to compel compliance with the provisions of this agreement; that this agreement is fair and equitable to both parties and that an order of specific performance enforceable by contempt is an appropriate remedy for a breach by either party.

Nothing in the record indicates the Separation Agreement was incorporated into the 5 January 2010 divorce decree.

On 22 December 2010, Plaintiff filed a complaint in Randolph County District Court alleging Defendant breached the Separation Agreement. Specifically, she contended Defendant had failed to pay: (i) $23,000 in mortgage payments;[1] (ii) $12,000 in child support;[2] and (iii) $56,000 for the Ferguson Debt.[3] The complaint sought: (i) specific performance; (ii) damages of $23,000 for the mortgage payments; (iii) damages for all child support arrearages;and (iv) attorney's fees. Defendant did not file an answer.

The case first came on for hearing during the 13 June 2011 Session of Randolph County District Court's Family Court Division. During

1. In the complaint, Plaintiff alleged she paid $23,000 in mortgage payments to avoid foreclosure. Plaintiff later admitted at a hearing that Defendant had actually paid all required monthly mortgage payments subsequent to the Separation Agreement's execution; she clarified that her complaint referenced Defendant's alleged failure to pay mortgage payments for two years prior to the Separation Agreement. Plaintiff further explained that she paid the $23,000 to avoid foreclosure in June 2009, three months prior to the Separation Agreement's execution.

2. Plaintiff alleged Defendant had only paid a total of $2,250 in child support.

3. Plaintiff alleged Defendant had not paid any portion of the Ferguson Debt. Plaintiff and Defendant received notice of default in December 2010. However, Mr. Ferguson only filed a lawsuit against Plaintiff. Plaintiff settled the dispute for $20,000 (an initial $4,000 payment followed by zero-interest monthly installments of $333.33).

the hearing, Plaintiff admitted that Defendant had paid her household expenses despite her obligation under the Separation Agreement. She also acknowledged that Defendant had recently filed for bankruptcy.

On 3 August 2011, the trial court e-mailed both parties with its proposed ruling. With regard to specific performance, it stated Plaintiff had the burden of proving: (i) the remedy at law is inadequate; (ii) the obligee has performed her obligation; and (iii) the obligor has the ability to perform. Based on these requirements, the trial court indicated it would deny Plaintiff's claim for specific performance. It also asked Defendant's counsel to draft the corresponding order. On 22 August 2011, Defendant's counsel submitted a draft order, but Plaintiff objected.

On 24 August 2011, Plaintiff filed: (i) a motion for judgment notwithstanding the verdict (N.C. R. Civ. P. 50(b)); (ii) a motion to include certain findings of fact in the final order (N.C. R. Civ. P. 52); and (iii) a motion for a new trial (N.C. R. Civ. P. 59(a)(8) and 59(a)(9)).[4] In her Rule 50(b) motion, Plaintiff also referenced the trial court's denial of her motion for directed verdict; however, Plaintiff never moved for a directed verdict at the 13 June 2011 hearing. Defendant filed a response on 19 October 2011. The trial court held a motion hearing on 1 November 2011.

On 20 February 2012, the trial court denied Plaintiff's motions. Specifically, it determined the motions for (i) specific findings of fact (N.C. R. Civ. P. 52(b)) and (ii) new trial (N.C. R. Civ. P. 59) were premature because the trial court had not yet entered an order or judgment. The trial court's order further described how Rule 50(b) was the improper method to test evidentiary sufficiency in bench trials; instead, Plaintiff should have sought involuntary dismissal under North Carolina Rule of Civil Procedure 41(b).

On 24 February 2012, the trial court issued a final order: (i) denying Plaintiff's claim for specific performance; (ii) granting Plaintiff damages of $22,950 for unpaid child support; (iii) granting Plaintiff damages of $4,333.33 for Defendant's failure to pay the Ferguson Debt; (iv)

---

4. North Carolina Rule of Civil Procedure 59(a)(8) allows a new trial for "[e]rror in law occurring at the trial and objected to by the party making the motion." N.C. R. Civ. P. 59(a)(8). North Carolina Rule of Civil Procedure 59(a)(9) allows a new trial for "[a]ny other reason heretofore recognized as grounds for new trial." N.C. R. Civ. P. 59(a)(9).

Plaintiff's motion provides the following reasons for new trial: (i) Defendant filed no answer; (ii) Defendant filed no request to file an answer after the deadline had passed; (iii) the allegations in Plaintiff's complaint should have been deemed admitted (N.C. R. Civ. P. 8(d)); (iv) Plaintiff objected to Defendant's contesting the allegations of Plaintiff's complaint; and (v) the trial court overlooked certain controlling precedent.

granting Plaintiff attorney's fees of $832.50; and (v) denying and dismissing Plaintiff's claim of $23,000 for unpaid mortgage payments.

On 2 March 2012, Plaintiff again filed a motion to: (i) set aside the trial court's 20 February 2012 denial of her previous motions (N.C. R. Civ. P. 60(b)); and (ii) grant the requests in her 24 August 2011 motions (N.C. R. Civ. P. 52(b) and 59). On 20 March 2012, while Plaintiff's 2 March 2012 motions were pending, she filed timely written notice of appeal of the trial court's 20 February 2012 and 24 February 2012 orders.

II. Jurisdiction & Standard of Review

A. Jurisdiction

This Court has jurisdiction to hear the instant case pursuant to N.C. Gen. Stat. § 7A-27(c) (2011). Additionally, our jurisdiction is not affected by the pending 2 March 2011 motions under North Carolina Rules of Civil Procedure 52(b), 59, and 60.

According to our Rules of Appellate Procedure, a party must file and serve notice of appeal "within thirty days after entry of judgment." N.C. R. App. P. 3(c)(1). Additionally,

> if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party.

N.C. R. App. P. 3(c)(3). Thus, although "[m]otions entered pursuant to Rule 60 do not toll the time for filing a notice of appeal," *Wallis v. Cambron*, 194 N.C. App. 190, 193, 670 S.E.2d 239, 241 (2008), Plaintiff's Rule 52(b) and Rule 59 motions do toll the time for appeal. N.C. R. App. P. 3(c)(3). However, Plaintiff may still appeal the 24 February 2012 final order within thirty days of its filing. *See generally Lovallo v. Sabato*, __ N.C. App. __, 715 S.E.2d 909 (2011).

In *Lovallo*, a defendant appealed a final order despite pending Rule 52(b), 59, and 60 motions. *Id.* at __, 715 S.E.2d at 910. There, the defendant appealed more than thirty days after the final order, but before the trial court decided the Rule 52(b), 59, and 60 motions. *Id.* In *Lovallo*, we held the defendant did not file a timely appeal. *Id.* at __, 715 S.E.2d at 912. We further determined defendant could have pursued two alternatives for timely appeal: (i) the defendant could have appealed the final order within thirty days of its filing; or (ii) the defendant could have

allowed the trial court to decide the Rule 52(b) and 59 motions and then appeal both the final order and the motions rulings. *Id.* at __, 715 S.E.2d at 911–12. In the instant case, Plaintiff pursued the first route offered in *Lovallo* by timely appealing the 24 February 2012 final order within thirty days of its filing.[5]

B. Standard of Review

"In reviewing a trial judge's findings of fact, 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.' " (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100–01, 655 S.E.2d 362, 369 (2008))(alteration in original)).

"Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal."). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Williams*, 362 N.C. at 632–33, 669 S.E.2d at 294 (quoting *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

III. Analysis

On appeal, Plaintiff argues the trial court erred by denying her claim for specific performance. Upon review, we affirm the trial court's order.

In North Carolina, "[a] marital separation agreement is generally subject to the same rules of law with respect to its enforcement as any other contract." *Moore v. Moore*, 297 N.C. 14, 16, 252 S.E.2d 735, 737

---

5. In her notice of appeal, Plaintiff appealed both the trial court's 20 February 2012 and 24 February 2012 orders. However, Plaintiff's only argument in her appellate brief is that the trial court erred by denying her specific performance claim in its 24 February 2012 order. As such, we only consider that argument. *See Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005) ("It is not the duty of this Court to supplement an appellant's brief with . . . arguments not contained therein.")

(1979), *overruled on other grounds by Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986). As such, "a separation agreement not incorporated into a final divorce decree . . . may be enforced through the equitable remedy of specific performance." *Edwards v. Edwards*, 102 N.C. App. 706, 708, 403 S.E.2d 530, 531 (1991).

To receive specific performance, "the law requires the moving party to prove that [(i)] the remedy at law is inadequate, [(ii)] the obligor can perform, and [(iii)] the obligee has performed [her] obligations." 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 14.35 (5th ed. 2002); *see also Cavenaugh v. Cavenaugh*, 317 N.C. 652, 656–57, 347 S.E.2d 19, 22 (1986) ("Specific performance is available to a party only if that party has alleged and proven that he has performed his obligations under the contract and that his remedy at law is inadequate."); *Condellone v. Condellone*, 129 N.C. App. 675, 682, 501 S.E.2d 690, 695 (1998) ("As a general proposition, . . . courts may not order specific performance where it does not appear that defendant can perform." (quotation marks and citations omitted). We now elaborate on each of these requirements.

First, the movant must prove the legal remedy is inadequate. In *Moore*, our Supreme Court clarified that:

> [a]n adequate remedy is not a partial remedy. It is a full and complete remedy, and one that is accommodated to the wrong which is to be redressed by it. *It is not enough that there is some remedy at law; it must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.*

Moore, 297 N.C. at 16, 252 S.E.2d at 738 (quotation marks and citation omitted). For separation agreements, *Moore* established that damages are usually an inadequate remedy because:

> [t]he plaintiff must wait until payments have become due and the obligor has failed to comply. Plaintiff must then file suit for the amount of accrued arrearage, reduce her claim to judgment, and, if the defendant fails to satisfy it, secure satisfaction by execution. As is so often the case, when the defendant persists in his refusal to comply, the plaintiff must resort to this remedy repeatedly to secure her rights under the agreement as the payments become due and the defendant fails to comply. The expense and delay involved in this remedy at law is evident.

Id. at 17, 252 S.E.2d at 738; *see also Condellone*, 129 N.C. App. at 682, 501 S.E.2d at 695 ("A plaintiff who relies on damages to compensate for the breach of a separation agreement which has not been incorporated into a court order generally does not have an adequate remedy at law."). In this context, even one missed payment can indicate the remedy at law is inadequate. *See Stewart v. Stewart*, 61 N.C. App. 112, 117, 300 S.E.2d 263, 266 (1983).

Second, the movant must prove the obligor has the ability to perform. To meet this burden, the movant need not necessarily present direct evidence of the obligee's current income. For instance, the movant can meet her burden by showing the obligee has depressed his income to avoid payment. *See Condellone*, 129 N.C. App. at 683, 501 S.E.2d at 696. Additionally, if the obligor "has offered evidence tending to show that he is unable to fulfill his obligation under a separation agreement[,] . . . the trial judge must make findings of fact concerning the defendant's ability to carry out the terms of the agreement before ordering specific performance." *Cavenaugh*, 317 N.C. at 657, 347 S.E.2d at 23.

Third, the movant must prove she has not breached the terms of the separation agreement. Still, general contract principles recognize that immaterial breaches do not eliminate the possibility of specific performance. *See Restatement (Second) of Contracts* § 369 (1981) ("[T]he fact that a party has committed a minor breach, one not serious enough to discharge the other party's remaining duties, does not preclude specific performance or an injunction.") Nonetheless, "[t]he party seeking relief may be required to cure the breach as a condition of the decree . . . or may be held accountable for damages caused by [her] breach, either through a payment of money to the other party or by an abatement in the price that the other party is compelled to pay." *Id.*

In the present case, Plaintiff argues the trial court erred by denying her claim for specific performance. Specifically, she contends: (i) the parties agreed to specific performance in the Settlement Agreement; (ii) Plaintiff does not have the burden of proving Defendant's ability to perform; and (iii) Defendant admitted his ability to perform by failing to respond to Plaintiff's complaint. We disagree.

A. Contractual Specific Performance Clause

Plaintiff first argues that the Settlement Agreement expressly requires specific performance upon a party's breach. Upon review, we determine the Settlement Agreement does not extinguish Plaintiff's burden to prove the requirements for specific performance.

The pertinent language in the Settlement Agreement states:

> 18. **BREACH.** Either party shall have the right to compel the performance of provisions of this agreement by suing for specific performance in the Courts where jurisdiction of the parties and subject matter exists. Both parties acknowledge that neither party has a plain, speedy, or adequate legal remedy to compel compliance with the provisions of this agreement; that this agreement is fair and equitable to both parties and that an order of specific performance enforceable by contempt is an appropriate remedy for a breach by either party.

Upon review, we find no North Carolina precedent regarding the enforceability of contractual specific performance clauses in this context.[6] However, in analogous circumstances our Supreme Court has held that parties may not contract around an established legal standard. *See Pinnix v. Toomey*, 242 N.C. 358, 363, 87 S.E.2d 893, 898 (1955) (holding that parties may not contractually create a new standard of care for establishing negligence).

Additionally, numerous other jurisdictions have held that while contractual specific performance clauses may guide a trial court's equitable determinations, they are not binding. *See*, *e.g.*, *Kakaes v. George Washington Univ.*, 790 A.2d 581, 584–85 (D.C. Ct. App. 2002); *Fazzio v. Mason*, 249 P.3d 390, 397 (Idaho 2011) (holding that although a "contract clause which gives a non-breaching party the right to elect the remedy of specific performance does not require a court to award specific performance," it provides "some additional support to finding that specific performance is equitable in this case, as the inclusion of the clause shows that specific performance was within contemplation of the parties"); *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 597 (Tex. 2008) (holding that the trial court would only award specific performance based on equitable principles despite a contractual specific performance clause); *Black v. American Vending Co.*, 238 S.E.2d 420, 421 (Ga. 1977) ("Parties cannot by contract compel a court of equity to exercise its powers in what is really an ordinary case at law."). *But see Stumpf v. Richardson*, 748 So. 2d 1225, 1227 (La. Ct. App. 1999) ("The contract included a

6. We note that in *Martin v. Sheffer*, 102 N.C. App. 802, 403 S.E.2d 555 (1991), this Court upheld a specific performance clause in a commercial contract for the sale of goods. *Id.* at 804, 403 S.E.2d at 556–57. However, the *Martin* court based its decision on provisions in North Carolina's Uniform Commercial Code, which is inapplicable in the instant case. *Id.* at 804, 403 S.E.2d at 556; *see also* N.C. Gen. Stat. § 25-2-102 (2011) (stating that the Uniform Commercial Code only applies to sale of goods).

clause for specific performance. . . . Accordingly, the purchaser's failure to comply with the contract as written entitles the sellers to specific performance."). While these cases from other jurisdictions "are not binding on the courts of this State," we consider them "instructive." *Morton Buildings, Inc. v. Tolson*, 172 N.C. App. 119, 127, 615 S.E.2d 906, 912 (2005)

Therefore, we determine the specific performance clause in the Separation Agreement does not negate Plaintiff's burden of proving the equitable requirements for specific performance.

B. Ability to Perform

Plaintiff's next two arguments address Defendant's alleged ability to perform the terms of the Separation Agreement. Despite Plaintiff's contentions, we determine she has not met her burden of proving Defendant's ability to perform.

Plaintiff initially argues Defendant actually had the burden of proving he did not have the ability to perform. To support this proposition, Plaintiff mistakenly relies on North Carolina precedent stating that " 'when a defendant has offered evidence tending to show that he is unable to fulfill his obligations under a separation agreement or other contract the trial judge must make findings of fact concerning the defendant's ability to carry out the terms of the agreement before ordering specific performance.' " *Edwards*, 102 N.C. App. at 709, 403 S.E.2d at 532 (quoting *Cavenaugh*, 317 N.C. at 657, 347 S.E.2d at 23).

Plaintiff misapplies this statement for two reasons. First, here Defendant did not "offer[] evidence tending to show that he is unable to fulfill his obligation under [the] [S]eparation [A]greement." *Id.* In fact, Defendant did not even testify or offer any evidence at the 13 June 2011 hearing. Second, the cited language only requires the trial court to make findings of fact about ability to perform *before ordering specific performance*.[7] Here, on the other hand, the trial court denied Plaintiff's claim for specific performance. Thus, we determine Plaintiff has the burden of proving Defendant's ability to perform.

Plaintiff next argues Defendant admitted his ability to perform by failing to respond to Plaintiff's complaint. According to North Carolina Rule of Civil Procedure 8(d), "[a]verments in a pleading to which a

7. In her appellate brief, Plaintiff erroneously omits the word "before" from the quoted language in *Edwards* and *Cavanaugh*.

responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." N.C. R. Civ. P. 8(d). Still, even though Defendant admitted Plaintiff's factual allegations by not responding to her complaint, Plaintiff's complaint did not allege facts indicating Defendant's ability to perform.

Plaintiff contends the following statements in her complaint establish Defendant's ability to perform:

> 9. The defendant has failed and refused to abide by the terms of the parties' separation agreement and property settlement and is therefore in breach of said agreement. . . .
>
> 10. The defendant's breach of the parties' separation agreement and property settlement has been willful and without just cause or excuse.[8]

Nonetheless, these statements fail to allege specific facts showing Defendant's ability to perform.

We acknowledge that because Plaintiff's evidentiary burden is "less burdensome than the requirement in the contempt setting," Plaintiff need not necessarily present direct evidence of Defendant's income. 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 14.35 (5th ed. 2002). Still, she must allege some specific facts indicating Defendant's ability to pay. *See Condellone*, 129 N.C. App. at 683, 501 S.E.2d at 696 (holding that although "[t]here is no credible evidence of Defendant's current income," other evidence such as tax returns, retirement plan valuations, and home value indicated ability to perform); *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982) ("If the supporting spouse is deliberately depressing income or engaged in excessive spending, then capacity to earn, instead of actual income, may be the basis of the award.").

Here, Plaintiff has alleged no such facts. In fact, at the 13 June 2011 hearing, she acknowledged that Defendant had recently declared bankruptcy. Therefore, we determine she did not meet her burden of proving Defendant's ability to perform the terms of the Separation Agreement.

Consequently, we conclude the trial court did not err by denying Plaintiff's specific performance claim.

---

8. The trial court also used similar language in its 24 February 2012 order.

IV. Conclusion

For the reasons discussed above, the trial court's order is

AFFIRMED.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA
v.
NICHOLAS BRADY HEIEN

No. COA11-52-2

Filed 2 April 2013

1. Search and Seizure—traffic stop—not unduly prolonged—license returned—consent to search

The trial court did not err in concluding that a traffic stop of defendant for driving with a malfunctioning brake light had not been unduly prolonged. A reasonable motorist or vehicle owner would have understood that with the return of his license, the purpose of the initial stop had been accomplished and he was free to leave, to refuse to discuss matters further, and to refuse to allow a search. The trial court correctly concluded that defendant consented to the subsequent search of his vehicle.

2. Search and Seizure—scope of search not exceeded

A police officer did not exceed the scope of the search of defendant's vehicle as there was no requirement that the officer inform defendant of what he was searching for.

Judge McGEE dissents with a separate opinion.

Appeal by defendant from order dated 25 March 2010 by Judge Vance Bradford Long and judgments entered 26 May 2010 by Judge A. Moses Massey in Surry County Superior Court. Heard in the Court of Appeals 24 May 2011 with opinion filed 16 August 2011, reversing and vacating the trial court's judgments. On remand from the North Carolina Supreme Court on 14 December 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General J. Allen Jernigan, for the State.

Michele Goldman for defendant appellant.

McCULLOUGH, Judge.

Nicholas Brady Heien ("defendant") pled guilty to attempted trafficking in cocaine by transportation and possession in Surry County Superior Court in May 2010, preserving his right to seek review of the denial of his motion to suppress. The trial judge found defendant's prior record level to be Level I and sentenced defendant to ten to twelve months on each count with the sentence on the second count to be served consecutively to the first. Defendant appealed to this Court ("*Heien I*"). That appeal resulted in our Court reversing defendant's conviction. In that case, this Court held that the traffic stop which led to defendant's arrest was not based on reasonable suspicion. The State successfully sought discretionary review of our decision. Our Supreme Court reversed and remanded to this Court so that the remaining issues raised by defendant could be addressed. This appeal addresses defendant's other challenges to the search which resulted in his conviction.

The events which led to defendant's arrest and conviction originated with a traffic stop initiated by Sergeant M.M. Darisse, an officer with the Surry County Sheriff's Department. The facts regarding this stop are more fully set forth in our initial opinion concerning defendant's case, *State v. Heien*, ___ N.C. App. ___, 714 S.E.2d 827 (2011) (*Heien I*), and our Supreme Court's opinion which reversed *Heien I*, *State v. Heien*, ___ N.C. ___, ___ S.E.2d ___ (filed 14 December 2012). The facts will not be repeated in this opinion except to the extent necessary to support this Court's rationale.

In this Court's initial decision concerning defendant's appeal, we reversed defendant's conviction on the basis of the officer's stop, which the lower court found to be valid. There the trial court stated, "[Sergeant] Darisse had a reasonable and articulable suspicion that the . . . vehicle and the driver were violating the laws of this State by operating a motor vehicle without a properly functioning brake light." In *Heien I*, this Court found, after an extensive statutory analysis, that the statute dealing with brake lights as opposed to taillights, only required a vehicle to have one functioning brake light, and thus the officer's belief

that defendant's vehicle must have two functioning brake lights was erroneous. That statute reads:

> (g) No person shall sell or operate on the highways of the State any motor vehicle, motorcycle or motor-driven cycle, manufactured after December 31, 1955, unless it shall be equipped with a *stop lamp* on the rear of the vehicle. The *stop lamp* shall display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake. The *stop lamp* may be incorporated into a unit with one or more other rear lamps.

N.C. Gen. Stat. § 20-129(g) (2011) (emphasis added).

The State appealed and our Supreme Court ruled that the officer's traffic stop was objectively reasonable. *Heien*, ___ N.C. ___, ___ S.E.2d ___. At the Supreme Court, the State accepted this Court's statutory interpretation in *Heien I*. Our Supreme Court stated:

> After considering the totality of the circumstances, we conclude that there was reasonable, articulable suspicion to conduct the traffic stop of the Escort in this case. We are not persuaded that, because Sergeant Darisse was mistaken about the requirements of our motor vehicle laws, the traffic stop was necessarily unconstitutional. After all, reasonable suspicion is a "commonsense, nontechnical conception[] . . . on which reasonable and prudent men, not legal technicians, act," *Ornelas*, 517 U.S. at 695, 116 S. Ct. at 1661, 134 L. Ed. 2d at 918 (citations and internal quotation marks omitted), and the Court of Appeals analyzed our General Statutes at length before reaching its conclusion that the officer's interpretation of the relevant motor vehicle laws was erroneous. After considering the totality of the circumstances, we hold that Sergeant Darisse's mistake of law was objectively reasonable and that he had reasonable suspicion to stop the vehicle in which defendant was a passenger. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for additional proceedings.

Heine, ___ N.C. at ___, ___ S.E.2d at ___.[1]

1. Interestingly, neither party briefed nor argued the applicability of N.C. Gen. Stat. § 12-3(1) which may affect statutory construction when the singular or plural is to be

The case has now been remanded to this Court to address defendant's remaining challenge to the events leading up to his arrest. In defendant's Motion To Suppress, defendant argues:

> 10. No traffic charges were filed, and only a warning ticket was written. The continuation of the investigation after the motor vehicle stopped, including the questioning of the Defendant, was not based on a reasonable articulable suspicion that criminal activity had been committed or was being committed.
>
> 11. The time that lapsed after Officer Darisse learned from the Department of Motor Vehicles computer that as to Mr. [V]asquez, ". . . everything was valid on the license and registration . . ." and wrote the warning ticket, constituted an unreasonably prolonged traffic stop and Defendant was unlawfully detained and his car unlawfully searched.
>
> 12. Under the totality of the circumstances the officers had no just cause to detain the Defendant, question him, or search his vehicle without a warrant.
>
> 13. The questioning and other investigation of the Defendant, the prolonged stop, and the search and seizure of Defendant and his property were in violation of the Fourth Amendment of the United States Constitution as the same is made applicable to the states, and are in violation of Article I, Sections 19 and 20 of the Constitution of the State of North Carolina.
>
> II. SCOPE OF THE VEHICLE SEARCH
>
> 14. The alleged controlled substance was found inside a sandwich bag which was inside a paper towel which was inside a white grocery bag which was inside the side compartment of a duffle bag which was inside the vehicle. Neither Officer Darisse nor Officer Ward advised the Defendant that they were going to search his car for narcotics before he gave verbal consent. The Defendant was entitled to know the object of their search prior to giving consent. Had he known, he would have

---

utilized. As the interpretation of N.C. Gen. Stat. § 20-129(g) is not before this Court, we decline to decide if this statute has any applicability.

> had the opportunity to place explicit limitations on the search. The failure of the officers to explain the object of the search violates Defendant's right to be free from unreasonable searches under the Fourth Amendment to the [United] States Constitution and Articles 19 and 20 of the Constitution of North Carolina, and evidence of items found inside the duffle bag and elsewhere inside the vehicle should be suppressed.

STANDARD OF REVIEW

In reviewing a trial court's order concerning a motion to suppress, this Court utilizes the following test:

> Generally, an appellate court's review of a trial court's order on a motion to suppress "is strictly limited to a determination of whether its findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." Where, however, 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.

State v. Roberson, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004) (citations omitted). "[C]onclusions of law drawn from the findings of fact are . . . reviewable *de novo*." *Huyck Corp. v. Town of Wake Forest*, 86 N.C. App. 13, 15, 356 S.E.2d 599, 601 (1987) (citations omitted).

I. Length of Stop

[1] Defendant argues that the traffic stop was unduly prolonged in his motion. Our analysis begins with the pertinent trial court's findings of fact:

> 8) Darisse upon instigating his blue lights, observed a head "pop up" out of the back seat of the subject vehicle and then disappear.
>
> 9) Darisse upon approaching the vehicle observed the defendant lying in the back seat of the vehicle.
>
> 10) Darisse observed the defendant lying in the back seat underneath a blanket. Darisse informed the driver of the vehicle that he was being stopped for a non-functioning brake light and asked the driver to step out to the rear of the vehicle. The driver complied.

Darisse engaged in a brief conversation with the driver asking the driver if anything was wrong with the person in the back seat, from where the driver began travelling and his ultimate destination. The Driver informed Darisse that the defendant was tired and the pair were going to West Virginia. The driver was informed that the officer intended to issue him a warning citation so long as long documentation provided to Darisse was valid. Darisse took the driver's license and registration then returned to his vehicle. Darisse formed the opinion that the driver appeared nervous to him as he made poor eye contact and he was continuously placing his hair in a ponytail and then removing his hair from a ponytail. Defendant continued to lie in the back of the vehicle and did so through the entire stop until he was later approached by Darisse.

11) Officer Ward arrived at the scene of the stop. Ward was informed by Darisse that a subject was lying in the back of the vehicle underneath a blanket. Ward went to the vehicle and asked defendant for his driver's license in order to determine his identity and check for outstanding warrants. The defendant complied and gave his driver's license to Ward without getting up from his position.

12) The driver continued to stand between Darisse's patrol car and the subject car as Ward asked for the defendant's driver's license.

13) The interaction between Ward and the defendant occurred in approximately one to two minutes.

14) The stop of the subject vehicle was initiated at approximately 7:55:40 a.m.

15) Darisse re-approached the driver and returned his driver's license and any other identifying documents he had received and gave the driver a warning citation. Darisse then asked the driver if he would be willing to answer some questions. The driver indicated by nodding his head that he had no objection to answering questions and stated he would answer

questions. Darisse's tone and manner with the driver of the vehicle was polite, non-confrontational and conversational.

16) The driver denied any type of contraband in the car.

17) The driver denied guns or large sums of cash in the car.

18) This conversation occurred within a period of a minute to two minutes.

19) Darisse then asked for permission to search the vehicle. The driver did not object to searching the vehicle, but informed Darisse that the vehicle was the defendant's, and Darisse should make the request of the defendant. Darisse approached the defend-ant who was still lying in the back of the vehicle and asked for permission to search the vehicle. The defendant informed Darisse that he had no objection to the vehicle being searched, although the officers might have a problem because the inside of the vehicle was messy.

20) The tone and manner of Darisse when asking for per mission to search the vehicle with the defendant was conversational, non-confrontational and polite.

The Fourth Amendment to the United States Constitution as well as Article I, Section 20 of the North Carolina Constitution guarantee the right of people to be secure in their person and property, and free from unreasonable searches. *E.g.*, *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984). A traffic stop is permitted if an officer has a reasonable articulable suspicion that there is criminal activity afoot or when a motorist commits a violation in his or her presence. *Heien*, ___ N.C. ___, ___ S.E.2d ___. In this case our Supreme Court has established that the traffic stop was permissible. The temporary detention of a motorist during a valid traffic stop is recognized as a seizure, but a permissible one, as it is considered reasonable. *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 667 (1979). While it is recognized that the motorist is seized for constitutional purposes, roadside questioning during the encounter does not trigger the need for *Miranda* warnings. *Berkemer v. McCarty*, 468 U.S. 420, 82 L. Ed. 2d 317 (1984). Once the purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay.

E.g., *State v. Falana*, 129 N.C. App. 813, 816, 501 S.E.2d 358, 360 (1998). Generally, the return of the driver's license or other documents to those who have been detained indicates the investigatory detention has ended. The fact that the documents have been returned does not mean that the officer loses all right to communicate with the motorist. Thus, non-coercive conversation is still permitted. An officer may ask questions or request consent to search so long as the individual freely and voluntarily consents to answer questions or to allow his or her property to be searched. *State v. Kincaid*, 147 N.C. App. 94, 100, 555 S.E.2d 294, 299 (2001) (stating that, while it is true that "initial reasonable suspicion evaporated [upon return of defendant's documents], [the officer] was neither prohibited from simply asking if defendant would consent to additional questioning, nor was the officer prohibited from questioning defendant after receiving his consent"). So long as an individual is aware that he is free to leave or free to refuse to answer questions, there is no bright- line rule requiring police to refrain from requesting consent to speak to an individual or request consent to search his or her person or property. *State v. Brooks*, 337 N.C. 132, 142, 446 S.E.2d 579, 585-86 (1994) (citing *Florida v. Bostick*, 501 U.S. 429, 431, 115 L. Ed. 2d 389, 396 (1991)).

Here, the return of documentation would render the encounter between defendant and the officers consensual so long as a reasonable person would believe he was free to leave or refuse the request. *Kincaid*, 147 N.C. App. at 99, 555 S.E.2d at 299. The trial court found the encounter became consensual. The testimony and exhibits at the suppression hearing tend to support the trial court's findings of fact and conclusions of law; thus, we are required to uphold its determination that the defendant freely consented to the search as a reasonable person in his position would not feel coerced under similar circumstances.

Here the encounter was not unduly prolonged. The trial court found that the traffic stop was initiated at 7:55:40 a.m. and that defendant gave his consent to search at 8:08 a.m. During that time the two officers, Ward and Darisse, had discussed the malfunctioning brake light with the driver, had discovered that the two claimed to be going to different destinations (West Virginia or Kentucky), and had observed that defendant engaged in rather bizarre behavior by lying down on the backseat under a blanket, even when approached by Officer Ward who requested his driver's license. After each person's name was checked for warrants, their licenses were returned. Defendant had his license back before the request to search was made. The trial court found that the officer's tone and manner were conversational and non-confrontational. Both

defendant and the driver were unrestrained during this encounter, no guns were drawn and neither individual was searched before the request to search the vehicle was made.

Based on this record we believe the trial court was entitled to conclude that defendant was aware that the purpose of the initial stop had been concluded and that further conversation was consensual. The dissent maintains that there is insufficient evidence in the record to sustain this conclusion, but there is no requirement that a defendant be explicitly informed of his right to refuse a request to search. *Ohio v. Robinette*, 519 U.S. 33, 39-40, 136 L. Ed. 2d 347, 354-55 (1996).

The dissent seems to argue that this defendant was merely a passenger and, as such, would not feel free to leave or deny consent since the record does not establish that defendant knew the driver Vasquez had received his license and a warning ticket had been issued. This argument ignores the fact that defendant was not a mere passenger, but was the owner. It is uncontroverted that defendant's driver's license had been returned to him prior to the consent to search request. We believe that the trial court's conclusion that defendant consented to this search is reasonable and should be upheld, as we further believe a reasonable motorist or vehicle owner would understand that with the return of his license or other documents, the purpose of the initial stop had been accomplished and he was free to leave, was free to refuse to discuss matters further, and was free to refuse to allow a search.

II. Scope of Search

[2] In his motion to suppress, defendant also asserts that the officer should have informed defendant that he was searching for narcotics so that defendant could have issued some limiting instructions. We find this argument unpersuasive. Just as there is no requirement for an officer to explicitly inform defendant of his right to refuse a search, there is no requirement that an officer inform defendant of what he is searching for. We believe that any reasonable person would understand the officer was searching for weapons, cash or contraband. The driver, Vasquez, was asked if any of those items were in the car. Additionally, defendant informed Darisse that it might be difficult to search the vehicle as it was messy. We also believe both the driver and defendant were aware that the search would be somewhat detailed as the driver was asked to identify any objects that did not belong to him. Sergeant Darisse evidently began to search the vehicle and immediately found a bag of marijuana under the front seat and marijuana seeds in the ashtray. At this point, the officers had probable cause to search the entire vehicle as well as

probable cause to arrest both the driver and defendant. The fact that defendant may have wished to limit the search became irrelevant. *See, e.g.*, *Carroll v. U.S.*, 267 U.S. 132, 69 L. Ed. 543 (1925).

CONCLUSION

In the case at bar, defendant's automobile which was being driven by another individual, was properly stopped by officers of the Surry County Sheriff's Department while on routine traffic patrol. After the officer had issued a warning ticket for a non-functioning brake light and both persons had their driver's licenses returned, a request to search the vehicle was made. We conclude that on the record before the trial court there was ample evidence that a reasonable person would understand he was free to leave or refuse to consent to the request. The trial court concluded defendant consented to the search and the trial court's conclusion is supported by the evidence presented at the suppression hearing. Shortly after the search was initiated, probable cause to conduct a more detailed search and to arrest the occupants was obtained. We thus will uphold the trial court's conclusion that this was a consensual encounter and affirm its denial of defendant's Motion To Suppress.

Affirmed.

Judge ERVIN concurs.

Judge McGEE dissents with a separate opinion.

McGEE, Judge.

I respectfully dissent from the majority's conclusion that Defendant "freely consented" to the search of his vehicle, since that conclusion is contrary to binding precedent of our Court in *State v. Jackson*, 199 N.C. App. 236, 681 S.E.2d 492 (2009). "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

A crucial fact, found by the trial court, is that Defendant remained lying on the back seat inside his vehicle while officers questioned the driver, who stood outside Defendant's vehicle between an officer's patrol car and Defendant's vehicle. A crucial fact, not found by the trial court,

is that Defendant knew the traffic stop was over when he consented to the search.

"When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. . . . [A] passenger is seized as well and so may challenge the constitutionality of the stop." *State v. Hernandez*, 208 N.C. App. 591, 597, 704 S.E.2d 55, 59 (2010) (alterations in original) (quoting *Brendlin v. California*, 551 U.S. 249, 251, 168 L. Ed. 2d 132, 136 (2007)). "Once the original purpose of the stop has been addressed, in order to justify further delay, there must be grounds which provide the detaining officer with additional reasonable and articulable suspicion or the encounter must have become consensual." *Jackson*, 199 N.C. App. at 241-42, 681 S.E.2d at 496.

First, we determine at what point the original purpose of the stop had been addressed by the officers. In *Jackson*, the officer stopped the vehicle on suspicion the driver was operating the vehicle without a license. *Jackson*, 199 N.C. App. at 238, 681 S.E.2d at 494. This Court concluded the detention was limited to "confirming or dispelling [the officer's] suspicion that [the driver] was operating his vehicle without a license." *Jackson*, 199 N.C. App. at 242, 681 S.E.2d at 496. The officer, however, continued the interrogation. *Id.*

> Such interrogation was indeed an extension of the detention beyond the scope of the original traffic stop as the interrogation was not necessary to confirm or dispel [the officer's] suspicion that [the driver] was operating without a valid driver's license and it occurred after [the officer's] suspicion that [the driver] was operating without a license had already been dispelled.

Jackson, 199 N.C. App. at 242, 681 S.E.2d at 496-97.

In this case, the original purpose of the stop was the brake light. The detention was limited to confirming or dispelling the suspicion that the brake light did not function. However, after the citation, an officer asked Defendant for consent to search. The request for Defendant's consent was not necessary to confirm or dispel suspicions regarding the brake light. The request to search extended the detention beyond the scope of the original traffic stop.

Second, we decide whether the delay was justified by determining if (1) the encounter between Defendant and the officers became consensual or (2) there were grounds for a reasonable and articulable suspicion. The trial court concluded "the encounter between the officers,

[D]efendant and the driver, became a consensual encounter at the time the driver voluntarily agreed to answer questions, after the warning citation was delivered to the driver and both driver and [D]efendant had all documents returned."

"The test for determining whether a seizure has occurred is whether under the totality of the circumstances a reasonable person would feel that he was not free to decline the officers' request or otherwise terminate the encounter." *State v. Brooks*, 337 N.C. 132, 142, 446 S.E.2d 579, 586 (1994). "[T]he return of documentation would render a subsequent encounter consensual only if a reasonable person under the circumstances would believe he was free to leave or disregard the officer's request for information." *State v. Kincaid*, 147 N.C. App. 94, 99, 555 S.E.2d 294, 299 (2001) (internal quotation marks omitted). The person at issue is this case is Defendant, not the driver. The trial court and the majority conflate the perspectives of the driver and Defendant, resulting in the use of an erroneous standard.

"[A] passenger in a car that has been stopped by a law enforcement officer is still seized when the stop is extended." *Jackson*, 199 N.C. App. at 240, 681 S.E.2d at 495. "A passenger would not feel any freer to leave when the stop is lawfully or unlawfully extended, especially . . . where the officer was questioning the driver away from the vehicle while the passengers waited in the vehicle." *Id.*

No findings show or suggest Defendant was aware that an officer had issued a citation or that the officers had completed the investigation of the brake lights. In fact, the trial court found that Defendant remained in the back seat, inside the vehicle. A reasonable person under the same circumstances would not believe he was free to leave because, from Defendant's perspective inside the vehicle, the stop continued while the driver was questioned outside. Without a finding that Defendant was privy to the same information as the driver, this Court does not impute the driver's knowledge to Defendant.

Because Defendant consented during an unlawful seizure of his person, the consent was ineffective to justify the search. *See Jackson*, 199 N.C. App. at 243, 681 S.E.2d at 497; *Florida v. Royer*, 460 U.S. 491, 508, 75 L. Ed. 2d 229, 243 (1983).

The majority also considers the length of the delay, without holding it to be *de minimis*. To the extent the majority considers the delay's length, I must dissent because the issue is not preserved. Although the State argues on appeal that (1) the delay was *de minimis* and (2)

reasonable articulable suspicion existed to justify the delay, the State did not make such arguments at trial, and the trial court made no ruling on either issue.

An appellee may list proposed issues on appeal "based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C.R. App. P. 10(c) (2011). "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1) (2011). These alternative bases are not preserved for our review.

The majority analyzes a second issue, scope of the search, which Defendant did not argue to this Court. Because this issue regarding the scope of the search is not before us, I dissent from the majority as to its conclusion on that issue as well.

STATE OF NORTH CAROLINA
v.
RODERICK TYNELL RICHARDSON

No. COA11-1581-2

Filed 2 April 2013

Constitutional Law—right to remain silent—improper questioning of defendant—improper closing argument

The trial court committed plain error in an assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a convicted felon case by allowing the State to cross-examine defendant about his failure to make a post-arrest statement to investigating officers and to comment on defendant's decision to refrain from giving such a statement during the prosecutor's closing argument. The case was remanded for a new trial.

Appeal by defendant from judgments entered 19 November 2010 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 May 2012, with an opinion finding no error in the trial court's judgments filed on 21 August 2012. On remand

from the Supreme Court of North Carolina stemming from an order entered on 17 December 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Phillip K. Woods, for the State.

Parish & Cooke, by James R. Parish, for Defendant-appellant.

ERVIN, Judge.

Defendant Roderick Tynell Richardson appeals from judgments entered based upon his convictions for two counts of assault with a deadly weapon with intent to kill inflicting serious injury and one count of possession of a firearm by a convicted felon. On appeal, Defendant argues, among other things, that the trial court committed plain error by allowing the prosecutor to question him and to make comments to the jury concerning his decision to refrain from making a statement to investigating officers. After careful consideration of Defendant's challenge to the trial court's judgments in light of the remand instructions that we have received from the Supreme Court, the record, and the applicable law, we conclude that Defendant is entitled to a new trial.

I. Factual Background

A. Substantive Facts

1. State's Evidence

On the early morning of 20 May 2009, Sherman Cunningham was employed as a bouncer by the Carousel Club, an establishment located on South Boulevard in Charlotte. Mr. Cunningham's duties included checking patrons for guns, drugs, and other undesirable items. Defendant; his friend, Richard Snowden; Marcus Kinard; and Carousel Club employees Bryan Herron, Darwin Springs, and Lakeshia Reed were also present at the Carousel Club.

Although Mr. Kinard and Ms. Reed had once been involved in a romantic relationship, Defendant and Ms. Reed had begun dating after the Kinard-Reed relationship ended. During the evening, Ms. Reed became angry because Defendant was speaking with a dancer known as "Egypt." According to Mr. Cunningham, Ms. Reed had become intoxicated and was flirting with both Defendant and Mr. Kinard.

As the club was closing, Mr. Cunningham saw Defendant enter the passenger side of a car operated by Mr. Snowden which drove away

from the club. Upon returning, Defendant approached Mr. Cunningham to ask about giving "Egypt" a ride home. At about the same time, Mr. Kinard was leaving with Ms. Reed, who kept getting out of Mr. Kinard's car and attempting to start a fight with "Egypt." After Defendant told Ms. Reed to come with him instead, Defendant and Mr. Kinard began arguing.

As Defendant approached Mr. Kinard, Mr. Cunningham saw the butt of a gun protruding from Defendant's pants. After noticing the gun, Mr. Cunningham "told [Defendant] that he needed to go back to the car with that" and informed both men that "this was a stupid argument." As the dispute "escalated," "[Mr. Kinard] stepped closer" and "hit [Defendant]" with his hand. After Mr. Kinard hit him, Defendant "pulled out his gun and started shooting," at which point Mr. Cunningham "jumped behind a car," where he remained during "the time that everybody was shooting." In addition, Mr. Snowden "went to his pocket like he had a gun." As "[Mr. Kinard] was running away[, Defendant] was still shooting at him" despite the fact that Mr. Kinard was unarmed. Defendant left the Carousel Club with Mr. Snowden after the shooting.

Mr. Springs, the head of security for the Carousel Club, testified that, on the evening of 20 May 2009, he was carrying a nine millimeter Glock handgun. After the Carousel Club closed, Mr. Springs went to the parking lot, where he saw a small crowd that included Defendant, Mr. Cunningham, and Mr. Herron. As Mr. Springs approached Defendant, who had been walking towards his car, Defendant "reversed direction and came towards [Mr. Kinard]" even though Mr. Springs was between the two men. Although Mr. Springs tried to stop the men from arguing, Mr. Kinard "was able to reach over the group" and "smack the Defendant." At that point, Mr. Springs "saw the gun being pulled from the waist area of the Defendant," who "began firing" and hit Mr. Kinard. In response, Mr. Springs fired a shot at Defendant, who turned and shot at Mr. Springs. After firing that shot, Mr. Springs' gun jammed, causing him to attempt to hide behind his car. As Mr. Springs ducked behind his vehicle, he was hit in the arm and, about "two seconds" later, in his leg. Although Mr. Springs did not see who shot him, he had seen Defendant and Mr. Herron, but not Mr. Kinard, in the possession of firearms.

Mr. Kinard testified that he went to the Carousel Club on 20 May 2009 to give some CDs to the substitute disk jockey, Mr. Herron. Mr. Kinard, who denied having had a firearm in his possession that evening, had several drinks during his time at the Carousel Club. Mr. Kinard had "messed around off and on for years" with Ms. Reed. Although he had heard that Defendant and Ms. Reed had "messed around," Mr. Kinard "didn't have any problems with that."

After the Carousel Club closed, Mr. Kinard went to the parking lot, where Ms. Reed told him that she would see him later. At that point, Defendant advised Ms. Reed to refrain from speaking with Mr. Kinard. After the two men began arguing, Defendant "flashed a gun" and said, "I've got you." In response, Mr. Kinard removed his jacket and approached Defendant. Although Mr. Cunningham positioned himself between the two men and urged them not to fight, Mr. Kinard stepped "to the side" and "slapped [Defendant]" on the face. At that point, Defendant shot Mr. Kinard "right above [his] ankle" and "above [his] knee." As Mr. Kinard tried to "get behind the car," Defendant "hit [him] four more times."

Mr. Herron testified that, after the Carousel Club closed on 20 May 2009, he retrieved a gun from his truck and started smoking a cigarette in the parking lot. As he stood there, Mr. Herron observed that Defendant and Mr. Kinard had begun arguing about Ms. Reed. As the argument continued, the two men "got closer to each other and the next thing you know [Mr. Kinard] slapped [Defendant]." After Defendant "flashed a gun," Mr. Kinard, who was unarmed, removed his coat and placed it on a car. At that point, when "[Mr. Springs] was about in the middle of [Defendant and Mr. Kinard,]" "[Defendant] pulled out a gun and pointed it at [Mr. Kinard,]" "started shooting from there," and continued to fire at Mr. Kinard even after Mr. Kinard had fallen. When Mr. Herron "saw that [Defendant] wasn't going to stop shooting, [he] pulled [his] gun up and started shooting at [Defendant.]"

At approximately 2:30 a.m. on 20 May 2009, Joseph Willinsky, a Charlotte-Mecklenburg Police Department crime scene investigator, went to the Carousel Club parking lot. At that location, Officer Willinsky collected a Smith and Wesson handgun, a Glock handgun containing several rounds of ammunition and one jammed bullet, and various other items, including bullets and spent shells. More specifically, Officer Willinsky collected several projectiles that had become embedded in a green Ford pick-up truck and a number of nine millimeter and .45 caliber shell casings. According to Todd Nordhoff, a firearms examiner with the Charlotte-Mecklenburg Police Department, the weapons recovered from the parking lot were both 9 millimeter firearms, while the bullets that were removed from Mr. Kinard's leg had been fired from a .45 caliber handgun.

2. Defendant's Evidence

Mr. Snowden, who had been convicted of conspiracy to commit murder in Connecticut in 1999, testified that he and Defendant had been friends for several years and regularly patronized the Carousel Club. At

around 11:30 p.m. on 20 May 2009, Mr. Snowden and Defendant travelled to the Carousel Club in Mr. Snowden's car, where Mr. Snowden had "quite a few drinks" and talked to girls he knew. When the club closed at around 2:00 a.m., Mr. Snowden went to his car while Defendant waited for a dancer named "Egypt" to finish work. After Defendant emerged from the Carousel Club, Mr. Snowden drove Defendant to a nearby gas station before returning to the Carousel Club parking lot.

Upon their return, Defendant got out and walked towards the door from which "Egypt" was expected to emerge. At that point, Mr. Snowden noticed that Mr. Kinard was also in the parking lot. For that reason, Mr. Snowden got out of his car, approached Defendant and Mr. Kinard, and argued with Mr. Kinard. According to Mr. Snowden, there was "just a whole bunch of commotion," during which Mr. Snowden, who did not have a gun, was shot from behind by an unknown assailant. Despite the fact that Defendant "did not have a weapon out," Mr. Snowden saw Mr. Herron "push[Defendant] in the head" with what he thought was a gun. Mr. Snowden believed that Mr. Springs had a weapon in his possession as well. Mr. Snowden never saw Defendant either have a gun in his possession or fire a shot. After being shot, Mr. Snowden and Defendant drove to a nearby hospital for treatment.

Defendant testified that he and Mr. Snowden went to the Carousel Club on 20 May 2009 "to get a female." In view of the fact that Mr. Kinard and Ms. Reed had previously been involved in a romantic relationship, Mr. Kinard bore a certain amount of animosity toward Defendant after he started dating Ms. Reed. At the club, Defendant persuaded "Egypt" to return home with him after work. Defendant's activities angered Ms. Reed, who attempted to fight "Egypt" after the club closed.

At the end of the evening, Defendant and Mr. Snowden went to a nearby gas station for the purpose of buying condoms and then returned to the Carousel Club parking lot to wait for "Egypt." As the women exited the club, there was a "commotion" between Ms. Reed and "Egypt," leading Defendant to get out of the car. However, a Carousel Club employee annoyed Defendant by telling him that "Egypt" could not go with him. At that point, Mr. Kinard "started directing all of his aggressions towards [Defendant] and he started taking his coat and his stuff off." Although Defendant did not approach Mr. Kinard or have any desire to fight with him, Mr. Kinard was "calling names" and making "derogatory remarks" about Defendant.

As Mr. Kinard approached Mr. Snowden, the two "squared off" and "the commotion started." Defendant attempted to pull Mr. Snowden

away from Mr. Kinard, saying "Man, this ain't worth it." Defendant did not flash a gun or have a firearm in his possession. As Defendant "started pulling [Mr. Snowden] back," his friend "kind of fell and [Defendant] ran." After Mr. Snowden was shot, Defendant reentered Mr. Snowden's car, at which point he discovered that he had been shot in the leg, chest, and back. At the hospital, law enforcement officers performed a gunshot residue test on Defendant's hands and arms.

Although Ms. Reed was employed as a bartender at the Carousel Club, she went to that establishment as a customer on 20 May 2009. At the Carousel Club, Ms. Reed drank shots of whiskey until she was "drunk." Upon noticing that Defendant had been talking with another woman, Ms. Reed made a rude gesture towards Defendant. After the other woman called Ms. Reed an offensive name, the two women began arguing.

Ms. Reed left the building at about the same time as Mr. Kinard. After going outside, Ms. Reed realized that Mr. Snowden and Mr. Kinard were about to fight. For that reason, Ms. Reed grabbed Mr. Snowden's arm while a friend tried to restrain Mr. Kinard. As Ms. Reed understood the situation, the fight was between Mr. Snowden and Mr. Kinard, although Defendant had also approached the two men. When Ms. Reed grabbed Mr. Snowden's arm, he "snatched away" and she heard gunshots. As a result, Ms. Reed "just automatically got down and [] didn't see anything." Ms. Reed never saw anyone, including Defendant, with a firearm.

Although Starnecca Brown had previously worked at the Carousel Club, she was present at that location as a customer on 20 May 2009. Ms. Brown left the club at the same time as Ms. Reed and Mr. Kinard. When the group got outside, Ms. Reed began arguing with another woman, causing Ms. Brown to attempt to "calm her down." After Mr. Kinard became upset, Ms. Brown saw him taking off his jacket. Despite the fact that Ms. Brown heard Mr. Snowden and Mr. Kinard arguing, she could not see them. According to Ms. Brown, "[t]hey was arguing and so much commotion outside, so much arguing, and about a few minutes later after the argument started, shots were fired." At the time these shots were fired, Ms. Brown was talking with Defendant.

B. Procedural History

On 20 May 2009, Defendant was arrested for assaulting Mr. Springs and Mr. Kinard with a deadly weapon with the intent to kill inflicting serious injury. On 8 June 2009, the Mecklenburg County grand jury returned bills of indictment charging Defendant with assaulting Mr. Kinard and Mr. Springs with a deadly weapon with the intent to kill inflicting serious injury. On 30 November 2009, the Mecklenburg County grand jury

returned a bill of indictment charging Defendant with possession of a firearm by a convicted felon.

The charges against Defendant came on for trial at the 15 November 2010 criminal session of the Mecklenburg County Superior Court. At the conclusion of the trial, the jury convicted Defendant as charged. Based upon the jury's verdicts, the trial court sentenced Defendant to sixteen to twenty months imprisonment for possession of a firearm by a convicted felon, consolidated the two felonious assault charges for judgment, and sentenced Defendant to a consecutive term of 112 to 144 months imprisonment for assaulting Mr. Kinard and Mr. Springs with a deadly weapon with the intent to kill inflicting serious injury. Defendant noted an appeal to this Court from the trial court's judgments.

On 21 August 2012, this Court filed an unpublished opinion in *State v. Richardson*, __ N.C. App. __, 731 S.E.2d 275, 2012 N.C. App. LEXIS 999 (2012), finding no error in the trial court's judgments. On 21 September 2012, Defendant, acting *pro se*, filed a notice of appeal seeking review of this Court's decision by the Supreme Court of North Carolina. On 3 October 2012, the State filed a motion to dismiss Defendant's notice of appeal for lack of a substantial constitutional question. On 17 December 2012, the Supreme Court entered an order "allow[ing] Defendant's "Notice of Appeal for the limited purpose of remanding to the Court of Appeals for reconsideration in light of our decision in *State v. Moore*, __ N.C. __, 726 S.E.2d 168 (2012)." After conducting the additional review required by the Supreme Court on remand, we now file the present opinion, in which we grant Defendant a new trial.[1]

II. Questions and Comments Concerning Defendant's Silence

In his brief, Defendant argues that the trial court committed plain error by allowing the State to cross-examine him about his failure to make a post-arrest statement to investigating officers and to comment on his decision to refrain from giving such a statement during

1. In his initial brief before this Court, Defendant also argued that the trial court erroneously failed to exercise its discretion in responding to the jury's request to review two witness statements during the course of its deliberations and that the trial court erred by denying his motion to dismiss the charge that he assaulted Mr. Springs with a deadly weapon with the intent to kill inflicting serious injury. We rejected both of these contentions in our initial, unpublished opinion. In view of the fact that the only issue raised in Defendant's notice of appeal was the one discussed in the text of this opinion and the fact that the Supreme Court only required us to reconsider one of these three claims on remand, we conclude that our initial opinion remains in effect with respect to the claims that were not mentioned in the Supreme Court's remand order and that we need not revisit our disposition of either of those claims at this time.

the prosecutor's closing argument. In response, the State argues that the challenged prosecutorial questions and comments all implicated Defendant's pre-arrest, rather than post-arrest, silence and did not, in any event, rise to the level of plain error.[2] After conducting the additional review on remand required by the Supreme Court, we conclude that Defendant's contention has merit.

A. Applicable Legal Principles

> A criminal defendant's right to remain silent is guaranteed under the Fifth Amendment to the United States Constitution and is made applicable to the states by the Fourteenth Amendment. "We have consistently held that the State may not introduce evidence that a defendant exercised his [F]ifth [A]mendment right to remain silent." If a defendant has been given his Miranda warnings, "his silence may not be used against him." The rationale underlying this rule is that "[t]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them."

State v. Moore, __ N.C. __, __, 726 S.E.2d 168, 172 (2012) (citing *State v. Ward*, 354 N.C. 231, 250, 555 S.E.2d 251, 264 (2001) (internal citation omitted), and quoting *State v. Ladd*, 308 N.C. 272, 283, 302 S.E.2d 164, 171 (1983) (internal citations omitted), *State v. McCall*, 286 N.C. 472, 484, 212 S.E.2d 132, 139 (1975) (internal citations ommitted, and *Grunewald v. United States*, 353 U.S. 391, 425, 77 S. Ct. 963, 984-85, 1 L. Ed. 2d 931, 955 (1957) (Black, J., Warren, C.J., Douglas & Brennan, JJ., concurring)). As a result, the extent to which "the State may use a defendant's silence at trial depends on the circumstances of the defendant's silence and the purpose for which the State intends to use such silence." *State v. Boston*, 191 N.C. App. 637, 648, 663 S.E.2d 886, 894, *disc. review denied*, 362 N.C. 683, 670 S.E.2d 566 (2008).

> In Boston, this Court explained that a defendant's pre-arrest silence and post-arrest, pre-*Miranda* warnings silence may not be used as substantive evidence of guilt, but may be used by the State to impeach the defendant by suggesting that the defendant's prior silence is inconsistent with his present statements at trial. A defendant's post-arrest,

---

2. The State has not argued that Defendant opened the door to the challenged questions and comments, so we will not address the extent to which any such contention would have been meritorious.

> post-*Miranda* warnings silence, however, may not be used for any purpose. Because different law applies to the different circumstances surrounding the testimony challenged by defendant, we [must] analyze each circumstance separately.

State v. Mendoza, 206 N.C. App. 391, 395, 698 S.E.2d 170, 173-74 (2010) (citing *Boston*, 191 N.C. App at 648-49, 663 S.E.2d at 894, and *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 2245, 49 L. Ed. 2d 91, 98 (1976)).

At trial, Defendant failed to object to most of the questions and prosecutorial comments upon which his request for appellate relief is predicated. In addition, the limited number of objections that Defendant did make at trial did not include any reference to the constitutional principle upon which he now relies.[3] As a result, our review of Defendant's challenge to the relevant prosecutorial questions and comments is limited to determining whether plain error occurred. *Mendoza*, 206 N.C. App. at 395, 698 S.E.2d at 174 (stating that, since defendant "did not [] object to any of this testimony at trial," "we, therefore, review the admission of the testimony only for plain error").[4]

" 'For error to constitute plain error, a defendant must demonstrate' that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *State v. Lawrence*, __ N.C. __, __, 723 S.E.2d 326, 334 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 103 S. Ct. 381, 74 L. Ed. 2d 513 (1982)).

> The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to

---

3. The hearsay-based objections that Defendant lodged at trial were, for the most part, sustained. At the beginning of Defendant's trial, the trial court specifically instructed the jury that, "[w]hen the Court sustains an objection to a question," it should "disregard the question and the answer if one has been given[.]" "Absent circumstances indicating otherwise, jurors are presumed to follow a trial court's instructions." *State v. McQueen*, 165 N.C. App. 454, 458, 598 S.E.2d 672, 676 (2004) (internal citation omitted), *disc. review denied*, 359 N.C. 285, 610 S.E.2d 385 (2005). As a result, we will presume that the jury disregarded the questions and any ensuing answers to which the trial court sustained Defendant's objections.

4. Although Defendant contends at various points in his brief that he is entitled to relief from his convictions on the basis of the challenged prosecutorial questions and comments "unless the Appellate Court finds that it was harmless beyond a reasonable doubt," his admitted failure to object to most of the questions and comments which underlie his challenge to the trial court's judgments relegate him to plain error review, a fact which he appears to acknowledge in other parts of his brief.

> "plain error," the appellate court must be convinced that[,] absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by N.C. [Gen. Stat.] § 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) (citing *Odom*, 307 N.C. at 661, 300 S.E. 2d at 378-379, and quoting *State v. Black*, 308 N.C. 736, 741, 303 S.E. 2d 804, 806-807 (1983)). In deciding whether the admission of evidence relating to or a decision to allow a prosecutor to comment upon the fact that a defendant exercised his right to remain silent constituted plain error, "[c]onsideration of the way in which the evidence was presented or the prosecutor's use of the evidence is relevant to whether admission of the testimony at issue constituted plain error, but not to the threshold question of whether admission of the testimony was error." *Moore*, __ N.C. at __, 726 S.E.2d at 173.

In *Moore*, a witness made brief, unsolicited comments concerning the Defendant's decision to exercise his right to remain silent. In determining that the challenged comments did not constitute plain error, the Supreme Court stated that:

> In this case the admission of Officer Murphy's statements regarding defendant's post-*Miranda* exercise of his right to remain silent was not plain error. First, the prosecutor did not emphasize, capitalize on, or directly elicit Officer Murphy's prohibited responses. . . . [T]he prosecutor did not emphasize or highlight defendant's exercise of his rights. Moreover, the prosecutor did not mention defendant's exercise of his rights when he cross-examined defendant or in his closing argument. That the prosecutor did not emphasize, capitalize on, or directly elicit Officer Murphy's prohibited responses militates against a finding of plain error. . . . [G]iven the brief, passing nature of the evidence in the context of the entire trial, the evidence is not likely to have "tilted the scales" in the jury's determination of defendant's guilt or innocence.

Moore, __ N.C. at __, 726 S.E.2d at 173-74 (quoting *Black*, 308 N.C. at 741, 303 S.E.2d at 807) (other citations omitted). In addition, the Supreme

Court observed that, "on cross-examination[,] the State impeached defendant's testimony on a number of matters, including how often he had seen [the victim] prior to 2 February, the number and nature of his prior convictions carrying a sentence of more than sixty days imprisonment, and his consumption of alcohol on the day of the alleged incident" and noted that, "[o]n the record before this Court, the jury had reason to doubt defendant's credibility and to believe [the victim's] evidence." *Id.* Finally, the Supreme Court indicated that "[s]ubstantial evidence of a defendant's guilt is a factor to be considered in determining whether the error was a fundamental error rising to plain error" and pointed out in determining no plain error had occurred that "the evidence against defendant was substantial and corroborated by the witnesses." *Id.* at __, 726 S.E.2d at 174-75. As a result, our review of *Moore* suggests that the following factors, none of which should be deemed determinative, must be considered in ascertaining whether a prosecutorial comment concerning a defendant's post-arrest silence constitutes plain error: (1) whether the prosecutor directly elicited the improper testimony or explicitly made an improper comment; (2) whether the record contained substantial evidence of the defendant's guilt; (3) whether the defendant's credibility was successfully attacked in other ways in addition to the impermissible comment upon his or her decision to exercise his or her constitutional right to remain silent; and (4) the extent to which the prosecutor emphasized or capitalized on the improper testimony by, for example, engaging in extensive cross-examination concerning the defendant's post-arrest silence or attacking the defendant's credibility in closing argument based on his decision to refrain from making a statement to investigating officers.[5]

B. Application of General Legal Principles to the Facts

1. Cross-Examination of Defendant

a. Pre-Arrest Silence

After briefly discussing certain frames contained in a surveillance video that had been introduced into evidence, the prosecutor attempted, with limited success, to impeach Defendant on the basis of his pre-arrest silence. More specifically, Defendant acknowledged on cross-examination that, after he had been admitted to the hospital, several

5. Although the remand order that led to the issuance of this opinion does not contain any explanation of the reasoning underlying the Supreme Court's decision to require us to conduct further proceedings in this case, we believe that the Court's remand decision probably rests on our failure to explicitly incorporate either the first or fourth of these criteria into the plain error analysis contained in our original opinion.

law enforcement officers came to see him. However, Defendant was in too much pain to converse with the officers at that time. In addition, the prosecutor asked Defendant whether Detective Redfern had attempted to interview him while he was in the hospital and whether Defendant had made certain statements to Detective Redfern. In response, Defendant denied any recollection of having conversed with Detective Redfern and testified that he did not "even know who [Detective] Redfern is." Finally, Defendant expressly denied having made particular statements to Detective Redfern.

"It is well settled. . . . that 'questions asked by an attorney are not evidence.'" *Kyle v. Holston Grp.*, 188 N.C. App. 686, 693 n.1, 656 S.E.2d 667, 672 n.1 (quoting *State v. Taylor*, 344 N.C. 31, 41, 473 S.E.2d 596, 602 (1996)), *disc. review denied*, 362 N.C. 359, 662 S.E.2d 905 (2008). Similarly, " 'a question in which counsel assumes or insinuates a fact not in evidence, and which receives a negative answer, is not evidence of any kind.' " *State v. Smith*, 289 N.C. 143, 157, 221 S.E.2d 247, 255 (1976) (quoting *State v. Anderson*, 283 N.C. 218, 226, 195 S.E.2d 561, 566 (1973)). As a result of the fact that Defendant denied any recollection of having had a discussion with Detective Redfern and the fact that the State chose not to offer any testimony from Detective Redfern, the record contains no evidence that Detective Redfern attempted to conduct a pre-arrest interview with Defendant or that Defendant declined to answer his questions. Thus, the record contains no indication that the State elicited evidence impeaching Defendant on the basis of his pre-arrest silence as allowed in *Boston*.

b. Post-Arrest Silence

Subsequently, the prosecutor questioned Defendant about the fact that his trial testimony, which had been presented to the jury after the presentation of the State's case, constituted the first statement which Defendant had made since the shootings occurred:

> Q. Now, you sat here through the entire trial and you heard all [of] the State's witnesses testify, right?
>
> A. Yes.
>
> Q. And you heard your own witness testify, didn't you?
>
> A. Yes.
>
> . . . .
>
> Q. Today, today is the very first time that you have given a statement in this case, isn't it?

A. Yes.

Q. And it has been since May the 20th, 2009, that you have had to think about it, isn't it?

A. It has been ever since it happened.

Q. Okay. That was May the 20th, 2009, wasn't it?

A. Yes. No one else came to speak with me.

In addition, the prosecutor stressed the fact that, unlike Defendant, the other witnesses had given a statement to investigating officers immediately after the shootings. The clear import of the prosecutor's questions was that, because Defendant, unlike the other witnesses, chose not to make a statement about the shooting until trial, his account of the incident was inherently less credible than that of the other witnesses. As a result of the fact that Defendant was arrested on 20 May 2009, the prosecutor's questions about Defendant's silence "since May the 20th, 2009" clearly constituted an impermissible inquiry into Defendant's post-arrest silence.[6]

In addition, the prosecutor questioned Defendant extensively about the extent to which Detective Strother, whom the State did not call as a witness, had attempted to interview him and about Defendant's failure to make a statement to her.

Q. Okay. What about Detective Strother, do you remember her coming in?

A. Yes. . . . I remember her.

. . . .

Q. Okay. And she went and spoke to you, didn't she?

A. Yes, in the transporting car.

Q. And before you were transported, she asked you for a statement about your role in this, didn't she?

A. No.

Q. Oh, she didn't ask you about that?

A. She didn't ask me anything about a statement. The

6. For this reason alone, we are unable to accept the State's argument that the prosecutor's questioning of Defendant focused solely on his pre-arrest silence.

question came up about a waiver and she said that I would have to sign a waiver to talk to her, to talk.

Q. Okay. So, before she—before you were arrested she didn't ask you for a statement about your role?

A. I don't recall it, no.

Q. Okay. Well, before you were arrested she—you told her that you didn't want to give her a statement about your involvement, didn't you?

A. I don't recall that, no.

Even so,[7] the prosecutor continued to question Defendant about his interactions with Detective Strother:

Q. Before you were arrested, she explained to you that there were two sides to every story and she wanted to hear what you had to say about the incident, didn't she?

[DEFENSE]: Objection. Objection to what a witness who did not testify in this case said.

COURT: Well, sustained.

Q. Do you recall her telling her, telling you that there were two sides to every story and . . .

[DEFENSE]: Objection.

Q. . . . she wanted to hear from your side?

[DEFENSE]: Objection.

COURT: The objection is sustained.

Q. Do you recall her telling you anything?

A. Yes.

Q. Okay. What did she tell you before you were arrested?

A. I didn't know at what point I was arrested until I asked her, "Am I under arrest?", and that was at the point

7. The fact that Detective Strother insisted that Defendant waive his *Miranda* rights before making a statement establishes that Defendant had, in fact, been advised of the rights in question.

when she was saying about the waiver, and I asked her what the waiver was for and she said that I would be waiving my right to talk to her. I asked her, "Am I under arrest?" and she said, "Yes." Then I said, "I need a lawyer."

Q. And she could ask you for your side of the story, didn't she?

A. Well, at that point - I mean I never heard her say that. I know at that point she turned her tape recorder on to record it.

Q. She was willing to record your statement to get your side of the story, wasn't she?

[DEFENSE]: Well, objection as to what she was willing to try to do.

COURT: Sustained.

Q. She tried to turn a tape recorder on to get your side of the story, didn't she?

[DEFENSE]: Objection.

Q. Didn't she?

[DEFENSE]: Whoa. Objection to that question again.

COURT: The objection is sustained.

Q. You testified that you saw her with a tape recorder, correct?

A. Yes.

Q. And at some point, did she ask you for your side of the story?

A. When she took out the tape recorder.

Q. At some point did she ask you for your side of the story? Yes or no.

A. Yes. And I said -

[PROSECUTOR]: Thank you, sir.

[DEFENSE]: May he finish his answer?

COURT: He may finish his answer.

A. Yes, she did want my side of the story after she asked me to sign the waive[r]. She could not ask me until I signed the waiver before she could ask me.

Q. And you didn't give her your side of the story, did you?

A. She asked me . . .

Q. Did you give her your side of the story? Yes or no.

A. She asked me to sign a . . .

Q. Sir, I am asking you a yes or no question - did you give her your side of the story - yes or no?

[DEFENSE]: Your Honor, I am going to ask that I be heard outside of the presence of the jury, if the Court thinks it is appropriate.

COURT: No. Just answer the question, Mr. Richardson.

A. Well, I guess I was not able to give her my side of the story - no.

Q. Thank you, sir. . . .

We are unable to understand these prosecutorial questions as anything other than an attempt to impeach Defendant by eliciting testimony that he had had an opportunity to make a post-arrest statement to Detective Strother in the event that he was willing to waive his *Miranda* rights and that Defendant failed to "tell his side of the story." As a result, this questioning, which comprised a significant part of the Prosecutor's cross-examination of Defendant and which elicited evidence that Defendant had failed to make a statement after refusing to waive his *Miranda* rights, was clearly impermissible under *Boston* as well.

2. Jury Argument

As a result of the fact that the available forensic evidence, including a blurry videotape, was less than conclusive, the jury's decision concerning the identity of the individual who had shot Mr. Kinard and Mr. Springs was likely to hinge upon the relative credibility of the parties' witnesses, including Defendant himself. For that reason, the State's closing argument centered on the prosecutor's contention that the State's witnesses were more credible than those offered by Defendant.

After reviewing the testimony of the State's witnesses, the prosecutor argued that Defendant "want[s] you to believe" that the State's witnesses were all lying despite the fact that they had no motive to do anything other than tell the truth. In addition, the prosecutor argued that the defense witnesses were not credible in that all of them were either intoxicated, had a criminal record, or were Defendant's friends. Next, the prosecutor argued that:

> You are the judges of the credibility of these witnesses and the things you use to judge whether somebody is being credible in their testimony is how they respond to the questions. [Defense Counsel] asked him, had he ever had a chance to tell his story, and he said no. Well, when I started asking him questions, what did he say? He had some chances and he didn't.
>
> Out of all of these witnesses, Sherman Cunningham, Bryan Herron, DC Springs, Marcus Kinard, Richard Snowden - all of them gave statements to the police. The only one who didn't, and he needed to give a statement, but the only one who didn't was that man right here, Roderick Richardson. Was he hurt and did he not give a statement because he was hurt? He was hurting but so was everybody else. So was Marcus Kinard, so was DC Springs, so was Richard Snowden - they were all shot and they all gave a statement.

As we have already noted, the only evidence which might conceivably support the prosecutor's argument that Defendant "had some chances" to "tell his story" was Defendant's testimony that Detective Strother offered to interview him after his arrest in the event that he agreed to waive his *Miranda* rights. Thus, the prosecutor's final argument to the jury impermissibly emphasized the fact that Defendant chose to remain silent after being placed under arrest and advised of his *Miranda* rights.

C. Plain Error Analysis

After carefully reviewing the record, we conclude that, given the facts at issue here, the trial court's failure to take action to preclude the challenged questions and comments constituted plain error. The prosecutor's cross-examination of Defendant impermissibly focused almost exclusively on Defendant's failure, unlike other witnesses, to make a statement to investigating officers. Similarly, the comments made by the prosecutor during his concluding argument to the jury clearly

constituted an impermissible comment upon Defendant's decision to exercise his constitutional right to remain silent after being placed under arrest. In fact, the prosecutor's challenge to Defendant's credibility was limited to questions and comments concerning his failure, unlike the other witnesses, to "tell his side of the story" during the investigative process. Thus, the challenged questions and comments at issue here, unlike those before the Supreme Court in *Moore*, were not indirect or incidental.

As we have already noted, the only issue in serious dispute at trial was the identity of the individual who shot Mr. Springs and Mr. Kinard. In support of its contention that Defendant shot Mr. Springs and Mr. Kinard, the State offered the testimony of four eyewitnesses, each of whom testified that Defendant drew a weapon and fired at Mr. Kinard and Mr. Springs. On the other hand, Defendant testified that he did not possess a firearm at the time of the shootings and that he had not shot either Mr. Kinard or Mr. Springs. In addition, Defendant offered the testimony of three others present at the scene, none of whom saw Defendant employ a firearm. After carefully reviewing the evidentiary record, we conclude, as we did in our initial opinion in this case, that the State's evidence of Defendant's guilt, taken as a whole and without reference to the impermissible prosecutorial questions and comments, was substantial.

Although the State's witnesses all worked together, there was no evidence that they were any more than co-employees. In addition, while Mr. Kinard had consumed impairing substances and became involved in an altercation with Defendant immediately prior to the shooting, the other witnesses for the State were sober and had no history of antagonism towards or bias against Defendant. Finally, the record does not reflect that any of the State's witnesses had a prior criminal record. On the other hand, Defendant and Mr. Snowden were close friends, Defendant and Ms. Reed were romantically involved, both Defendant and Mr. Snowden had previous felony convictions, and all of the individuals who testified on behalf of Defendant acknowledged consuming alcohol for several hours before the shootings. In addition, although each of the individuals who testified on Defendant's behalf were present at the time of the shooting and had not seen a firearm in Defendant's possession, none of these individuals could identify the person or persons who shot Mr. Springs and Mr. Kinard. Finally, the surveillance video that was introduced into evidence at Defendant's trial, although containing images supportive of the positions espoused by both the State and Defendant, appears to corroborate the testimony of the State's witnesses in a number of respects. As a result, an analysis of the relative weight of the evidence proffered

by the parties, without taking into account the nature and extent of the State's impermissible harping upon Defendant's failure to make a statement, shows that the State's evidence was substantial.

As *Moore* establishes, however, our plain error analysis cannot end with an evaluation of the substantiality of the State's evidence. Instead, the Supreme Court's decision in *Moore* establishes that our plain error analysis must also focus on the nature, extent, and seriousness of the underlying error as well. Unlike the situation at issue in *Moore*, the prosecutor in this case did directly elicit, emphasize, and capitalize upon impermissible information in attacking Defendant's credibility. As a result, given that the relative credibility of the State's witnesses and those proffered by Defendant, including Defendant himself, was the critical issue before the jury at Defendant's trial; the fact that Defendant did elicit a significant amount of evidence, including his own denial of involvement in the assaults upon Mr. Kinard and Mr. Springs; the fact that the State did not elicit any evidence attacking Defendant's credibility (as compared to that of other witnesses) other than his post-arrest silence; and the fact that the prosecutor directly elicited and both emphasized and capitalized upon impermissible information concerning Defendant's decision to invoke his right to remain silent, we are unable, given the analytical framework set out in *Moore*, to reach any conclusion other than that the trial court's failure to preclude the challenged prosecutorial questions and comments rose to the level of plain error despite the fact that the State elicited substantial evidence, taken in isolation, of Defendant's guilt.[8]

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court committed plain error by allowing the State to cross-examine Defendant about his post-arrest silence and to comment on Defendant's failure to give a statement to investigating officers during his closing argument to the jury. As a result, Defendant is entitled to, and is hereby awarded, a new trial.

---

8. As we noted earlier, Defendant's trial counsel objected to several of the State's questions concerning Detective Strother's attempt to obtain Defendant's "side of the story." On one occasion, Defendant both objected to the prosecutor's question and asked to be heard. In response to this objection, the trial court directed Defendant to "answer the question." As a result, even though Defendant failed to properly preserve the issue before us in this case for appellate review, he did direct the trial court's attention to certain of the impermissible prosecutorial questions upon which we have based our decision.

NEW TRIAL.

Judges ROBERT C. HUNTER and STROUD concur.

STATE OF NORTH CAROLINA
v.
TYRON JAUREL ARRINGTON, DEFENDANT

No. COA12-1333

Filed 2 April 2013

1. Satellite—Based Monitoring—reportable defense—child abduction—not parent of minor—sufficiency of evidence

The evidence supported the 2012 finding of a trial court imposing satellite-based monitoring (SBM) for a 2009 child abduction conviction that defendant had been convicted of a reportable offense. Defendant contended that the conviction for abduction required the 2012 court to find that he was not the parent of the minor, but the 2009 trial judge had made that determination at the sentencing hearing and the 2012 SBM trial court had before it the judgments and sentencing forms from defendant's 2009 convictions.

2. Satellite—Based Monitoring—recidivist—sufficiency of evidence—stipulation sufficient

There was sufficient evidence that a defendant convicted of abduction of a child and required to submit to lifetime satellite-based monitoring (SBM) was a recidivist in defendant's prior record worksheet and counsel's stipulation to a conviction for indecent liberties. A stipulation to prior convictions has been held sufficient for determining prior record level in felony sentencing and is also sufficient for purposes of SBM, which is a civil regulatory proceeding.

Appeal by defendant from Order entered on or about 22 March 2012 by Judge Quentin T. Sumner in Superior Court, Nash County. Heard in the Court of Appeals 14 March 2013.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Joseph Finarelli, for the State.

Gerding Blass, PLLC, by Danielle Blass, for defendant-appellant.

STROUD, Judge.

Tyron Arrington ("defendant") appeals from an order entered on or about 22 March 2012 requiring him to enroll in satellite-based monitoring (SBM) for the remainder of his natural life. Defendant was convicted on 29 May 2009 of four counts of abduction of a child. On 28 January 2012, the Department of Correction (DOC) notified defendant that it would seek an SBM hearing after it determined that he was a recidivist based upon a 2005 conviction for indecent liberties with a child. The trial court found him to be a recidivist and ordered him to enroll in SBM for the remainder of his life. Defendant argues that the trial court's findings of fact were unsupported by the evidence. Specifically, he contends that there was insufficient evidence to support a finding that he had been convicted of a reportable offense, and insufficient evidence that he was a recidivist under N.C. Gen. Stat. § 14-208.40 (2011) because the State failed to present evidence of his prior "reportable" conviction.

"The standard of review for the trial court's findings of fact is well-established: The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Kilby*, 198 N.C. App. 363, 366, 679 S.E.2d 430, 432 (2009) (citation and quotation marks omitted).

The trial court held an extremely brief hearing, totaling about five transcript pages. The following exchange was the entirety of the discussion on defendant's convictions:

> [Prosecutor]: Mr. Arrington was convicted of four counts of abduction of children an offense that's arrestable [sic], May 29th of 2009. The State will contend that he is a recidivist and that he had a prior convention [sic] with a child January 5th, 2005.
>
> THE COURT: Yes, sir.
>
> [Defense Attorney]: Judge, we do not deny his convictions that Mr. Arrington has. If the Court will indulge me for a moment. Judge, I had continued this matter from Monday with the attitude that the statutes would apply in this situation.
>
> THE COURT: Yes, sir.
>
> [Defense Attorney]: Myself and [the prosecutor] have talked and I have talked with my client. The first offense

> was January 5th, 2005, of course, before the statute was enacted in August of 2006. It became effective in January of 2007. Judge, I explained to my client what the statutory requirements were based on this GPS Satellite Base Monitoring Statute. I just want to bring something to the Court's attention, Judge. The Court will correct me if I am wrong he is quote the statute by DOC as being a recidivist unquote.
>
> THE COURT: Yes, sir.
>
> [DEFENSE ATTORNEY: Because of these 2009 conviction from a '06 offense and a 2005 conviction from a 2004 offense. . . .

The remainder of the hearing focused on trial counsel's *ex post facto* arguments, which are not raised on appeal.

[1] Defendant first argues that the trial court's finding that he was convicted of a reportable offense was unsupported by the evidence. Defendant contends that because his 2009 conviction for abduction of children falls under the "offense against a minor" portion of the reportable conviction definition, the trial court was required to find that he was not the parent of the minor abducted and that such a finding was not supported by the evidence.

The SBM hearing provisions in N.C. Gen. Stat. § 14-208.40B apply "[w]hen an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4)" and there has not been a prior SBM determination made by a court. N.C. Gen. Stat. § 14-208.40B(a) (2011). N.C. Gen. Stat. § 14-208.6(4) defines a reportable conviction in relevant part as "[a] final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting." N.C. Gen. Stat. § 14-208.6 (4)(a) (2011).

Defendant was convicted of four counts of abduction of children in 2009. The State contends that these convictions were reportable convictions that made defendant eligible for SBM. Abduction of children, N.C. Gen. Stat. § 14-41 (2005), is specifically included in the definition of an "offense against a minor." N.C. Gen. Stat. § 14-208.6(1m) (2011). That statute defines an "offense against a minor" as "any of the following offenses *if* the offense is committed against a minor, *and the person committing the offense is not the minor's parent*: . . . G.S. 14-41 (abduction of children)." *Id.* (emphasis added).

A defendant commits the offense of abduction of children when he "without legal justification or defense, abducts or induces any minor child who is at least four years younger than the person to leave any person, agency, or institution lawfully entitled to the child's custody, placement, or care." N.C. Gen. Stat. § 14-41. Thus, the statutory definition of "offense against a minor" for purposes of SBM requires proof of a fact in addition to the bare fact of conviction–that the defendant is not the minor's parent.

In the context of deciding whether a conviction was an "aggravated offense" for SBM purposes, we have held that "the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction." *State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009), *disc. rev. denied*, 364 N.C. 599, 703 S.E.2d 738 (2010). Davison and the cases following it specifically addressed whether a particular conviction could constitute an aggravated offense. *See*, *e.g.*, *State v. Phillips*, 203 N.C. App. 326, 328-29, 691 S.E.2d 104, 106, *disc. rev. denied*, 364 N.C. 439, 702 S.E.2d 794 (2010), *State v. Singleton*, 201 N.C. App. 620, 630, 689 S.E.2d 562, 567-68, *disc. rev. dismissed as improvidently allowed*, 364 N.C. 418, 700 S.E.2d 226 (2010). They did not address what the trial court may consider in determining whether a conviction qualifies as a reportable "offense against a minor."

The plain language in the definition of "aggravated offense" requires that courts consider the elements of the conviction as it covers

> any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

N.C. Gen. Stat. § 14-208.6(1a) (2011). The definition of "offenses against a minor," by contrast, lists certain, particular offenses, and then adds the requirements that the victim be a minor and that the defendant not be a parent of the victim. *See* N.C. Gen. Stat. § 14-208.6(1m).

Further, in concluding that trial courts are restricted to considering the elements of the offense in determining whether a given conviction was an "aggravated offense" we noted a concern that defendants would be forced to re-litigate the underlying facts of their case even if they pleaded guilty to a lesser offense. *See Singleton*, 201 N.C. App. at 630, 689

S.E.2d at 568. This concern is absent in the context of defining "offenses against a minor." Trial courts in this context do not need to inquire into whether defendant's conduct could have constituted a greater offense, despite a plea to the lesser. They only need decide whether the victim was a minor and whether defendant was a parent of the minor child, facts that will normally be readily ascertainable.

Because the statute explicitly requires that the State show that defendant was not the parent of the minor victim in addition to the fact that defendant was convicted of one of the listed offenses, the statute effectively "mandates that the trial court must look beyond the offense of conviction." *State v. Green*, ___ N.C. App. ___, ___, 710 S.E.2d 292, 295 (2011). Therefore, we hold that in deciding whether a conviction counts as a reportable conviction under the "offense against a minor" provision, the trial court is *not* restricted to simply considering the elements of the offense for which the defendant was convicted to the extent that the trial court may make a determination as to whether or not the defendant was a parent of the abducted child.

Here, although the State did not present any independent evidence at the SBM hearing that defendant was not the parent of the child he abducted, the trial court had previously made this determination at the sentencing hearing. Specifically, the SBM trial court had before it the judgments and sentencing forms from defendant's 2009 convictions. At the 2009 sentencing hearing, the trial court found that defendant's 2009 convictions were reportable offenses. As part of the suspended sentence it imposed on defendant, the trial court also imposed special conditions only applicable to reportable offenses under N.C. Gen. Stat. § 15A-1343(b2) (2009) and ordered that DOC evaluate defendant for SBM. In doing so, it specifically found that "defendant has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4)[.]" Additionally, on its judgment form for sex offender suspended sentences, AOC form CR-615, the trial court specifically found that defendant had been convicted of "an offense against a minor under G.S. 14-208.6(1i), or an attempt, solicitation, or conspiracy to commit such offense, and defendant is not the parent of the victim."[1]

Defendant does not challenge any of these prior findings, nor did he appeal from the judgments. All of these findings were before the trial court at the SBM hearing. We hold that these prior findings support the trial court's finding at the SBM hearing that defendant's conviction for

1. Under the 2007 version of the statute, the definition of offense against a minor was found in N.C. Gen. Stat. § 14-208.6(1i), rather than (1m).

abduction of children was a reportable conviction as an offense against a minor.

[2] As to defendant's recidivism argument, he fails to note that the prior record level worksheet for his 2009 conviction and the Department of Correction notice were submitted to the trial court. Both the prior record worksheet and the notice listed defendant's 2005 offense as indecent liberties with a child. There was no evidence of other convictions that year. The State noted the convictions upon which it was relying, and defendant's counsel stated, "Judge, we do not deny his convictions . . . ." The prior record worksheet and the stipulation by counsel to defendant's prior convictions support a finding that defendant had been convicted of indecent liberties with a child in 2005, even though it appears that the State did not introduce the judgment or record of conviction from that case, or a copy of defendant's criminal history. *See State v. Powell*, 254 N.C. 231, 234, 118 S.E.2d 617, 619 (1961) ("No proof of stipulated or admitted facts, or of matters necessarily implied thereby, is necessary, the stipulations being substituted for proof and dispensing with evidence. While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a proper basis for judicial decision, and it is essential that they be assented to by the parties or those representing them. Silence, under some circumstances, may be deemed assent. These principles apply in both civil and criminal cases." (citations, quotation marks, and ellipses omitted)), *superseded on other grounds by statute, as recognized in State v. Denning*, 316 N.C. 523, 342 S.E.2d 855 (1986).

A stipulation to prior convictions has been held as sufficient for purposes of determining prior record level in felony sentencing, which is a criminal proceeding; we believe that if this proof is sufficient for sentencing purposes, it is also sufficient for purposes of SBM, which is a civil regulatory proceeding. *State v. Powell*, ___ N.C. App. ___, ___, 732 S.E.2d 491, 494 (2012) ("[T]he existence of a prior conviction may be established by, *inter alia*, '[s]tipulation of the parties.' N.C. Gen. Stat. § 15A–1340.14(f)(1).").[2]

We have previously held that a prior conviction for indecent liberties, even one from prior to the enactment of the reporting statute,

2. Although it is not specifically required by the SBM statute, the State could easily use one of the forms of evidence of the criminal record as noted by N.C. Gen. Stat. § 15A-1340.14 (f), which governs felony record level determinations. N.C. Gen. Stat. § 15A-1340.14 (f) (2011) ("The original or a copy of the court records or a copy of the records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts, bearing the same name as that by which the

supports a finding that the defendant is a recidivist for purposes of the SBM statute. *See, e.g.*, *State v. Wooten*, 194 N.C. App. 524, 529, 669 S.E.2d 749, 752 (2008), *disc. rev. denied*, 363 N.C. 138, 676 S.E.2d 308 (2009). A recidivist is "a person who has a prior conviction for an offense that is described in G.S. 14-208.6(4)." N.C. Gen. Stat. § 14-208.6(2b) (2011). N.C. Gen. Stat. § 14-208.6(4) describes a variety of offense classes, including "sexually violent offense[s]." "A sexually violent offense includes the offense of taking indecent liberties with a child as described in N.C. Gen. Stat. § 14-202.1." *Wooten*, 194 N.C. App. at 529, 669 S.E.2d at 752. Therefore, a prior conviction for indecent liberties with a child supports a finding of recidivism under the SBM statute and defendant's arguments to the contrary are unavailing.

Because the evidence at the SBM hearing, including defendant's admissions and the judgments from his 2009 convictions, supports the trial court's findings, both as to the reportability of defendant's 2009 offense and as to recidivism, we affirm the SBM order.

AFFIRMED.

Judges ELMORE and STEELMAN concur.

---

offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true. For purposes of this subsection, 'a copy' includes a paper writing containing a reproduction of a record maintained electronically on a computer or other data processing equipment, and a document produced by a facsimile machine. The prosecutor shall make all feasible efforts to obtain and present to the court the offender's full record. Evidence presented by either party at trial may be utilized to prove prior convictions.").

STATE OF NORTH CAROLINA
v.
MICHAEL TRAVIS BARNES

No. COA12-278

Filed 2 April 2013

1. Constitutional Law—right to confront witness—expert testimony—error cured—subsequent testimony

The trial court did not violate defendant's Sixth Amendment right to confront witnesses against him in a second-degree murder case by allowing the State's expert to give his opinion that the victim's death was caused by methadone toxicity based on the results of a toxicology report from the Chief Medical Examiner's Office. Even assuming arguendo that the trial court erred in allowing this testimony, any error was cured by the subsequent testimony and cross-examination of the doctor who performed the analysis that revealed methadone toxicity in the victim's blood.

2. Evidence—expert testimony—sufficient notice—opportunity to cross-examine—right to discovery not violated—right to reasonable notice not violated

The trial court in a second-degree murder case did not violate defendant's statutory right to discovery or his constitutional right to reasonable notice of evidence by allowing the State to present the testimony of an expert toxicologist. Defendant had the toxicology report for four years, had the report reviewed by two independent experts, was afforded the opportunity to meet privately with the expert for an hour and twenty minutes prior to the *voir dire* hearing, and was afforded a full opportunity to cross-examine the witness on *voir dire*.

3. Homicide—jury instructions—second-degree murder—involuntary manslaughter—sufficient evidence of reckless conduct

The trial court did not err in a second-degree murder trial by instructing the jury on the lesser offense of involuntary manslaughter. The evidence of reckless conduct supported the submission of both the charges of second-degree murder and involuntary manslaughter to the jury.

Appeal by defendant from judgment entered 15 July 2011 by Judge R. Stuart Albright in Rockingham County Superior Court. Heard in the Court of Appeals 29 August 2012.

Attorney General Roy Cooper, by Assistant Attorney General Stanley G. Abrams, for the State.

Brock, Payne & Meece, P.A., by C. Scott Holmes, for defendant-appellant.

STEELMAN, Judge.

Defendant's right of confrontation under the Sixth Amendment of the Constitution was not violated when an expert medical examiner testified that in his opinion the cause of death was methadone toxicity. The trial court did not err in admitting the testimony of the expert toxicologist where the State did not provide defendant with prior notice of its intent to call the witness. The trial court did not err in instructing the jury on the lesser charge of involuntary manslaughter.

I. Factual and Procedural History

On 16 August 2006, Shane Cardwell (Cardwell) was found dead at his home at around 1:30 p.m. by his father. On the previous night, Michael Barnes (defendant) was with Cardwell and sold methadone to Cardwell.

As part of his investigation into Cardwell's death, Dr. Mark Jordan (Dr. Jordan), the local medical examiner, sent a specimen of Cardwell's blood to the Office of the Chief Medical Examiner of North Carolina in Chapel Hill for analysis. Dr. Jordan determined that Cardwell died of a methadone overdose.

Defendant was indicted for the second-degree murder of Cardwell. This matter came on for trial at the 11 July 2011 session of Criminal Superior Court for Rockingham County. During the course of the trial, the trial court allowed Dr. Jordan to testify that in his opinion the cause of Cardwell's death was methadone toxicity, and that his opinion was based upon the blood toxicology report from the Chief Medical Examiner's Office. Defense counsel objected to this testimony on the grounds that it violated defendant's Sixth Amendment right to confront the witnesses against him.

On cross-examination of Dr. Jordan, defense counsel raised the issue of whether the test showing methadone toxicity had been performed at the laboratory of the Chief Medical Examiner in Chapel Hill or at an out-of-state laboratory. Defense counsel also raised an issue as to whether Cardwell consumed Xanax on the night prior to his death. In order to clear up these issues, the State proposed to call Dr. Ruth

Winecker (Dr. Winecker), Chief Toxicologist in the Office of the Chief Medical Examiner, and Jarod Brown (Brown), a toxicologist in the Office of the Chief Medical Examiner who had performed the tests on Cardwell's blood. Defendant objected to this testimony on the grounds that he had not been given reasonable notice that the State intended to call these witnesses in violation of N.C. Gen. Stat. § 15A-903 and his constitutional right to notice. After hearing testimony from Dr. Winecker and Brown on *voir dire*, the trial court ruled that the State could call them as witnesses before the jury. The State only called Brown to testify. Brown testified that he personally performed the analysis of Cardwell's blood and that he found nicotine, methadone, and hydrocodone to be present. He further testified that he did not find Xanax to be present. The trial court limited the jury's consideration of Brown's testimony to it being the basis of Dr. Jordan's opinion testimony.

On 15 July 2011, the jury found defendant guilty of involuntary manslaughter. The trial court sentenced defendant to an active term of imprisonment of 21 to 26 months.

Defendant appeals.

II. Admission of Expert Opinion Testimony

In his first argument on appeal, defendant contends that the trial court erred and violated his Sixth Amendment right to confront witnesses against him by allowing the State's expert, Dr. Jordan, to give an opinion as to the cause of Cardwell's death and to testify concerning the results of the toxicology report. We disagree.

A. Standard of Review

This Court reviews alleged violations of constitutional rights *de novo*. *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007). Under *de novo* review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008). If a defendant shows that an error has occurred, the State bears the burden of demonstrating the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2011).

B. Analysis

During the course of the trial, Dr. Jordan testified that he examined the body of Cardwell. He collected blood and liver samples from Cardwell and sent them to the Office of the Chief Medical Examiner in Chapel Hill for analysis. At the time these samples were sent to the Office

of the Chief Medical Examiner, Dr. Jordan had not formed an opinion as to the cause of death. Upon his review of the results of the toxicology report together with his findings from the autopsy, Dr. Jordan formed an opinion that the cause of Cardwell's death was methadone toxicity. The trial court found that Dr. Jordan's testimony concerning the report was admitted "not for the truth of the matter asserted."

At trial, and now on appeal, defendant argues that the trial court deprived him of his constitutional right of confrontation by allowing Dr. Jordan to testify that he relied on the toxicology report in forming his opinion of the cause of death and to testify as to the results of the report. The issue, as discussed in the cases of *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 174 L. Ed. 2d. 314 (2009), *Williams v. Illinois*, 132 S.Ct. 2221, 183 L .Ed. 2d 89 (2012), and *State v. Locklear*, 363 N.C. 438, 681 S.E.2d 293 (2009), is whether the proffered evidence was testimonial in nature, and whether the defendant had a prior opportunity to examine the declarant. *See Locklear*, 363 N.C. at 452, 681 S.E.2d at 304 (citing *Crawford*, 541 U.S. at 68, 158 L.Ed.2d. at 203).

Whether an expert witness's reliance upon laboratory reports prepared by others in formulating an opinion pursuant to Rule 703 of the North Carolina Rules of Evidence constitutes a violation of a criminal defendant's right to confrontation of witnesses against him under the Sixth Amendment of the United States Constitution is an evolving area of law. The caselaw from the United States Supreme Court and our North Carolina Supreme Court is not fully developed at this time. Based upon the facts of the instant case, we need not, and do not reach this issue. Even assuming *arguendo* that the trial court erred in allowing Dr. Jordan to testify as to the toxicology report, any error was cured by the subsequent testimony and cross-examination of Brown, who performed the analysis that revealed methadone toxicity in Cardwell's blood. We have discussed defendant's contentions that his counsel had inadequate time to prepare for this cross-examination in Section III of this opinion. We hold that since defendant had the opportunity to cross-examine Brown, the admission of Dr. Jordan's testimony concerning the toxicology report as part of the basis for his opinion of Cardwell's cause of death and the results of the report did not violate defendant's right of confrontation.

III. Admission of Testimony of Expert Toxicologist

[2] In his second argument, defendant contends that the trial court violated his constitutional right to reasonable notice of evidence and his

statutory right to discovery by allowing the State to present the testimony of an expert toxicologist. We disagree.

A. Standard of Review

Possible violations of the statutory right to discovery are reviewed for an abuse of discretion. *State v. Cook*, 362 N.C. 285, 294-95, 661 S.E.2d 874, 880 (2008). An abuse of discretion only occurs when the trial court's ruling is "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). When a trial court's "finding of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *See State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

B. Analysis

After Dr. Jordan testified, the State proposed to call Dr. Winecker and Brown to testify concerning the toxicology analysis performed on Cardwell's blood by the Office of the Chief Medical Examiner of North Carolina. Defendant objected to this testimony on the grounds that it violated defendant's constitutional right to notice and N.C. Gen. Stat. § 15A-903 because defendant was not given adequate notice that the State intended to call these witnesses. Upon defendant's objection, the trial court conducted a *voir dire* hearing of these witnesses, heard argument from counsel, and made a detailed ruling containing findings of fact and conclusions of law. The relevant portions of that order are as follows:

> The Court's going to make the following findings: The pathologist in this case, Dr. Jordan, the State's witness who performed the autopsy of the victim in this case opined that the cause of death was Methadone toxicity. Court also finds that the toxicology report — specifically it's been identified as State's Exhibit No. 6[1] — was part of the autopsy and part of the basis for Dr. Jordan's opinion about the cause of death.
>
> Court finds that the defendant has been on notice of the toxicology report, its contents and its results for more than four years.
>
> Court also finds that the defendant has retained two independent experts, Dr. Donald Jason, which has been

1. Although the trial court refers to State's Exhibit No. 6 in its order, the toxicology report of Brown was not offered or received into evidence. During jury deliberations, the jury requested to see a copy of this report. This request was denied because State's Exhibit 6 had never been received into evidence.

reported to the Court . . . that he is a forensic pathologist, . . . the defendant has also retained an independent expert by the name of Dr. Alphonse Poklis, who was reported to the Court to be . . . a toxicologist.

Both of these independent experts obtained by the defendant conducted their own review of this case, including their own review of the toxicology report. Specifically, Dr. Jason's opinions are set forth in Court's Exhibit No. 1 . . . .

Also, I have a copy of Dr. Poklis' . . . report. . . . For lack of a better description, I call it the report. In it he doesn't necessarily state opinions, but he addresses some questions.

In Dr. Jason's report, he comes to the same conclusion that the State's witness, Dr. Jordan, came to and that was the cause of death was Methadone toxicity. Court finds that Dr. Jason did not question the validity of the toxicology report or of the results of the toxicology report, despite having every opportunity to do so.

Court makes the same findings with regard to Dr. Poklis. . . . He didn't question the validity of the toxicology report or the results of the toxicology report.

Court finds that through very capable cross-examination at trial, the defendant has raised questions about the contents of the toxicology report.

Court finds the State has determined that based on questions about the toxicology report raised through cross-examination that it is reasonably necessary to call Mr. Jarod Brown, who was . . . the forensic chemist who actually conducted the analysis . . . and Dr. Ruth Winecker, Mr. Brown's supervisor. Both work at the Office of the Chief Medical Examiner and that the State has determined it reasonably necessary to call those two witnesses to answer the questions raised through cross-examination.

The Court has ordered the State to provide certain records, whether relevant or not, requested by the defendant with respect to Mr. Brown and Dr. Winecker. The State has provided all of those records, with the exception

of raw data related to negative tests of cocaine, opiates and alcohol. . . . Dr. Winecker and Mr. Brown have, in fact, provided the raw data with regard to the Methadone, which, again, it is undisputed that is the cause of death of the victim in this case by both the State and the defense witness.

. . .[T]he Court finds that the State has produced all of the records with the exception of the raw data that I just previously itemized. Court finds the raw data that has not been produced is irrelevant, given the fact that it is undisputed about the cause of death in this case.

The Court further finds that the defendant has interviewed Mr. Jarod Brown and Dr. Ruth Winecker . . . for approximately one hour and 20 minutes, that the defense attorney did so on his own without interference from the State and that Mr. Brown and Dr. Winecker answered all of the defendant's questions, including any questions with respect to any documents that have been turned over to the defendant.

The Court further allowed the defendant to question both Mr. Jarod Brown and Dr. Ruth Winecker under oath after the defendant had reviewed the records that had been provided to the defendant and after the defendant has had the opportunity to speak with Mr. Brown and Dr. Winecker for . . . approximately one hour and 20 minutes. The defendant exercised his option to question Dr. Winecker under oath . . . in the absence of the jury. However, despite having the opportunity to question Mr. Brown under oath, the defendant declined to do so.

Court finds that the defendant has had a reasonable opportunity to ask questions of Mr. Jarod Brown and Dr. Ruth Winecker to discover and to analyze the proposed testimony of both Mr. Jarod Brown and Dr. Ruth Winecker.

Court finds the defendant has already had two experts in this case, Dr. Poklis and Dr. Jason again review the autopsy and toxicology report and, again, neither questioned the validity or results of the toxicology report and, again, Dr. Jason came to the same conclusion as the State's witness regarding the victim's cause of death. The Court finds the victim's cause of death is undisputed.

The Court finds that Dr. Jason, the defendant's expert witness, relied on State's Exhibit 6, the toxicology report, in forming his opinions as set forth in his letter dated June 20th, 2007 . . . .

The Court finds that the State is calling Mr. Brown and Dr. Ruth Winecker to explain in more detail the toxicology report, State's Exhibit No. 6, not to contradict the toxicology report . . . .

The Court finds that the defendant has already retained two experts and has the services of these experts since 2007 and has the opportunity to consult these experts . . . .

The Court has given the defendant broader and more comprehensive discovery regarding the testimony of Mr. Jarod Brown and Dr. Ruth Winecker than that normally allowed by either the Constitution or by the North Carolina General Statutes.

The Court finds that while not necessarily anticipated, there is no surprise to the defendant that the State is calling Mr. Jarod Brown or Dr. Ruth Winecker as witnesses about the very toxicology report that the defendant has known about for more than four years and about the very toxicology report that the defendant's own expert, Dr. Jason, has reviewed and used in his analysis in forming . . . his independent opinion about the cause of death.

Based on all those findings, the Court concludes that the defendant's constitutional rights have not been violated by allowing Mr. Brown and Dr. Winecker to testify and the Court concludes that the criminal discovery statutes in North Carolina have not been violated by allowing Mr. Brown and Dr. Winecker to testify in this case.

As a result of those findings and conclusions, the State's request to add Mr. Jarod Brown and Dr. Ruth Winecker to its witness list and then to subsequently call them as witnesses are allowed.

The Court notes the defendant's timely objection to the Court's rulings; however, the defendant's objections, while noted, are all overruled.

Defendant challenges certain findings of fact on appeal as "not supported by evidence." On appeal, the findings of fact made by the trial court in its ruling, and not challenged by the defendant, are binding upon this Court. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878.

Defendant challenges the following findings of fact: that "the State did not reasonably expect to need to call the toxicologist Dr. Winecker or Mr. Brown;" that the defense experts did not contest the toxicology report even though they had "every opportunity to do so;" that "it is undisputed that [methadone toxicity] is the cause of death;" and that the "Court has given the defendant broader and more comprehensive discovery regarding the testimony of Mr. Jarod Brown and Dr. Ruth Winecker than that normally allowed by either the Constitution or by the North Carolina General Statutes." To the extent that these findings of fact are not conclusions of law, we hold that they are supported by competent evidence in the record. Even assuming arguendo that these findings of fact are not supported by competent evidence, the unchallenged findings of fact support the trial court's conclusions of law that defendant's discovery and constitutional rights were not violated.

We note that although Dr. Winecker and Brown were examined upon *voir dire*, only Brown testified before the jury. Our consideration of defendant's argument on appeal is thus limited to the testimony of Brown. During the course of Brown's testimony, the trial court gave a limiting instruction to the jury that it could only consider Brown's testimony in its evaluation of Dr. Jordan's opinion.

With respect to the alleged statutory discovery violation, we hold that the trial court did not abuse its discretion in the manner in which this issue was handled. The defendant had the toxicology report for four years, had the report reviewed by two independent experts, was afforded the opportunity to meet privately with Dr. Winecker and Brown for an hour and twenty minutes prior to the *voir dire* hearing, and was afforded a full opportunity to cross-examine both witnesses on *voir dire*. We cannot say that the trial court's decision not to exclude the testimony of Brown based upon alleged statutory discovery violations was an abuse of discretion.

Defendant further contends that the trial court's admission of Brown's testimony violated his constitutional right to effective assistance of counsel and to confront the witnesses against him.

We first note that in criminal cases, while there is no common law or constitutional right to discovery, *State v. Haselden*, 357 N.C. 1, 12,

577 S.E.2d 594, 602, *cert. denied* 540 U.S. 988, 157 L.E.2d 382 (2003), our Supreme Court has held:

> Implicit in [the constitutional rights of assistance of counsel and to confront witnesses] is the requirement that an accused have a reasonable time to investigate, prepare and present his defense. Every defendant must be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony.

State v. Tunstall, 334 N.C. 320, 328, 432 S.E.2d 331, 336 (1993) (internal citations omitted). The Supreme Court went on to state that the defendant bears the burden of establishing constitutional error on appeal.

> To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense. To demonstrate that the time allowed was inadequate, the defendant must show how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion. If the defendant shows that the time allowed his counsel to prepare for trial was constitutionally inadequate, he is entitled to a new trial unless the State shows that the error was harmless beyond a reasonable doubt.

Id. at 329, 432 S.E.2d at 337 (internal citations omitted).

In the instant case, the trial court permitted Brown to testify, over defendant's constitutional and statutory objections, with a limiting instruction. Brown identified his report and testified that his analysis of Cardwell's blood revealed the presence of nicotine, methadone, and hydrocodone in the sample of Cardwell's blood. Brown also testified that he did not detect the presence of Xanax in the sample. Defendant contends that he was not afforded adequate time to prepare, but does not show "how his case would have been better prepared" had he been given more time or that "he was materially prejudiced" by the overruling of his objection. *See id.* Based upon the facts that defendant (1) had the toxicology report for four years prior to trial; (2) had two experts review the report; (3) was afforded an opportunity to confer with Brown prior to his testimony; and (4) was afforded an opportunity to cross-examine Brown on *voir dire* prior to cross-examining Brown before the jury, defendant cannot demonstrate constitutional error in this case. We

further hold that the facts of this case do not give rise to a presumption of ineffective assistance of counsel. *Id.* at 329, 432 S.E.2d at 336.

This argument is without merit.

IV. Jury Instructions on Lesser Charge of Involuntary Manslaughter

[3] In his third argument, defendant contends that the trial court erred in instructing the jury on the lesser offense of involuntary manslaughter. We disagree.

A. Standard of Review

"Assignments of error challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002).

B. Analysis

In the instant case, the trial court charged the jury on the indicted charge of second-degree murder, the lesser offense of involuntary manslaughter, and not guilty. At the jury charge conference, defendant objected to the submission of involuntary manslaughter as a lesser offense.

Defendant argues that there was no evidence that he was culpably negligent in providing drugs to Cardwell. He further contends that "[t]he uncontradicted evidence is that the defendant intentionally sold the controlled substance to Shane Cardwell."

Defendant miscomprehends the distinction between second-degree murder and involuntary manslaughter. Our Supreme Court explained in *State v. Rich*:

> The distinction between "recklessness" indicative of murder and "recklessness" associated with manslaughter is one of degree rather than kind.
>
> . . .
>
> . . . Standing alone, culpable negligence supports the submission of involuntary manslaughter. But when that negligence is accompanied by an act which imports danger to another [and] is done so recklessly or wantonly as to manifest

> depravity of mind and disregard of human life, then it is sufficient to support a second-degree murder charge.

351 N.C. 386, 393, 395-96, 527 S.E.2d 299, 303-04 (2000) (alteration in original) (internal citations omitted). When defendant's reckless conduct rises to a level so as to constitute malice, then the defendant is guilty of second-degree murder, but if it does not rise to that level, then the defendant is guilty of involuntary manslaughter. In the context of involuntary manslaughter, "[c]ulpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *State v. Werter*, 273 N.C. 275, 280, 159 S.E.2d 883, 886 (1968) (quoting *State v. Cope*, 204 N.C. 28, 30, 167 S.E. 456, 458 (1933)).

The evidence presented at trial was that defendant sold Cardwell some methadone and that defendant had nearly died the month before from an overdose of methadone. There was no evidence that defendant intended to kill Cardwell by selling him the methadone. This evidence would support a finding by the jury of reckless conduct under either the charge of second-degree murder or that of involuntary manslaughter.

Defendant further argues that under the provision of N.C. Gen. Stat. § 14-17, he could only have been convicted of second-degree murder. The relevant portion of this statute reads:

> All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in G.S. 90–90(1)d., or methamphetamine when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class B2 felon.

N.C. Gen. Stat. § 14-17 (2006). We note that N.C. Gen. Stat. § 14-17 does not relieve the State of the burden of showing malice to support a charge of second-degree murder. *See State v. Liner*, 98 N.C. App. 600, 605, 391 S.E.2d 820, 822 (1990) (holding that the State was required to prove the element of malice in order to support a charge of second-degree murder in the context of a death resulting from the delivery of controlled substances). The relevant portions of N.C. Gen. Stat. § 14-17 were in effect when this Court decided *Liner*. As noted by our Supreme Court in *Rich*, the recklessness required for second-degree murder as opposed

to involuntary manslaughter "is one of degree rather than kind." *Rich*, 351 N.C. at 393, 527 S.E.2d at 303. Such a distinction is properly left to the jury to decide. The evidence of reckless conduct in the instant case supported the submission of both the charges of second-degree murder and involuntary manslaughter to the jury.

This argument is without merit.

NO ERROR.

Judges HUNTER, Robert C. and BRYANT concur.

STATE OF NORTH CAROLINA
v.
JOEY HADDEN, DEFENDANT

No. COA12-922

Filed 2 April 2013

1. Appeal and Error—concession of error by State—not binding

Although the State conceded error by the trial court on a satellite-based monitoring issue, the Court of Appeals was not bound by that concession and reviewed the record to determine whether the trial court did, in fact, commit error.

2. Satellite-Based Monitoring—process—qualification followed by risk assessment

The trial court acted under a misapprehension of the law in ruling that defendant should be subject to satellite-based monitoring (SBM), and that ruling was vacated, where the trial court expressly found that defendant did not fall within any of the statutorily enumerated categories of offenders requiring monitoring, but nonetheless ordered defendant to enroll in the SBM program due to its finding that his probation had been revoked and he had failed to complete his sex offender treatment.

Appeal by defendant from order entered 13 March 2012 by Judge H. William Constangy in Gaston County Superior Court. Heard in the Court of Appeals 29 January 2013.

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

Ryan McKaig for defendant-appellant.

DAVIS, Judge.

Defendant Joey Hadden ("defendant") appeals from an order requiring him to enroll in satellite-based monitoring ("SBM"). After careful review, we vacate the trial court's order and remand the matter for reconsideration.

Factual Background

On 13 November 2006, defendant pled guilty to taking indecent liberties with a child. The trial court entered judgment on defendant's guilty plea and sentenced him to a presumptive range term of 13 to 16 months imprisonment. The court then suspended the sentence and placed defendant on supervised probation for a period of 60 months.

On 28 October 2008, defendant was brought back into court for a determination as to whether he should be required to enroll in SBM. The trial court, finding that defendant had committed an offense involving the physical, mental, or sexual abuse of a minor and that he required the highest possible level of supervision, ordered defendant to submit to monitoring for a period of five years. However, by consent order entered 5 March 2009, the trial court subsequently vacated the 28 October 2008 order and terminated defendant's monitoring pending a new SBM hearing.

On 7 October 2009, defendant's probation officer filed a report alleging that defendant had violated the terms of his probation by failing to complete court-ordered sex offender treatment and by possessing adult pornography and children's toys. After conducting a hearing on the alleged violations, the trial court revoked defendant's probation and activated his sentence.

Defendant's SBM hearing, which had been continued by virtue of the 5 March 2009 order, was reconvened on 29 February 2012. The trial court, after hearing the evidence and arguments of counsel, entered a form order ("First Order"), in which it found that defendant "does not fall into any of the categories requiring satellite-based monitoring under G.S. 14-208.40." Nevertheless, the trial court ordered defendant to "enroll in satellite-based monitoring under Article 27A of Chapter 14 of

the General Statutes for . . . 30 years." The First Order was signed and dated by the trial court on 29 February 2012 and was file stamped by the clerk of court on 13 March 2012.

The trial court also signed a second form order dated 29 February 2012 ("Second Order"), finding that (1) defendant had been convicted of an offense involving the physical, mental, or sexual abuse of a minor; (2) the offense was not an aggravated offense or a violation of N.C. Gen. Stat. § 14-27.2A or N.C. Gen. Stat. § 14-27.4A; (3) defendant was not a recidivist or predator; and (4) defendant, based on the Department of Correction's risk assessment, required the highest possible level of supervision and monitoring. Based on these findings, the court ordered defendant to enroll in SBM for a period of 30 years. The Second Order, while signed and dated by the trial court, bears no indication that it was ever filed with the clerk of court.

Defendant gave notice of appeal to this Court. The State subsequently filed a motion to dismiss defendant's appeal, arguing that this Court lacked jurisdiction to consider the appeal due to defects in the notice of appeal. In response, defendant filed a petition for writ of *certiorari*, requesting review of the trial court's First Order. We denied the State's motion by order entered 7 November 2012 and now deny defendant's petition as moot.

Analysis

[1] Defendant's principal argument on appeal is that the trial court failed to make sufficient findings supporting a conclusion that he should be required to enroll in SBM. While we note that the State concedes error by the trial court on this issue, this Court is not bound by such a concession. Accordingly, we must review the record to determine whether the trial court did, in fact, commit error.

[2] On appeal from an SBM order, this Court " 'review[s] the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found.' " *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (quoting *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004), *cert. denied*, 543 U.S. 1156, 161 L.Ed.2d 122 (2005)).

As an initial matter, we note that the trial court's Second Order is not before this Court for consideration as that order was never entered and, as such, is a nullity. *See State v. Gary*, 132 N.C. App. 40, 42, 510 S.E.2d

387, 388 (" 'Entry' of an order occurs when it is reduced to writing, signed by the trial court, and filed with the clerk of court."), *cert. denied*, 350 N.C. 312, 535 S.E.2d 35 (1999); *West v. Marko*, 130 N.C. App. 751, 755, 504 S.E.2d 571, 573 (1998) ("A judgment is not enforceable between the parties until it is entered."). Accordingly, our analysis relates solely to the trial court's First Order.

Here, the trial court used a form order (AOC-CR-616, Rev. 12/09) provided by North Carolina's Administrative Office of the Courts, labeled "Judicial Findings and Order as to Satellite-Based Monitoring When There Has Been No Prior Determination." The "Findings" section of the form order contains a box that sets out two alternative findings: (a) that the defendant falls within at least one of the enumerated categories of offenders requiring SBM pursuant to N.C. Gen. Stat. § 14-208.40; or (b) that the defendant "does *not* fall into any of the categories requiring satellite-based monitoring under G.S. 14-208.40." (Emphasis added.)

The "Order" section of the form then directs the trial court — if it has found that the defendant does fall into one of the statutorily designated categories of offenders requiring monitoring – to check the box indicating that it is ordering the defendant to "enroll in satellite-based monitoring under Article 27A of Chapter 14 of the General Statutes" for either "the remainder of the defendant's natural life" or for a specified period of time. Conversely, if the trial court finds that the defendant does not fall within one of the categories requiring monitoring, the form directs the court to check the box ordering that "[t]he defendant is *not* required to enroll in satellite-based monitoring under Article 27A of Chapter 14 of the General Statutes." (Emphasis added.)

Here, the trial court, in the Findings section of the form order, determined that defendant "does not fall into any of the categories requiring satellite-based monitoring under G.S. 14-208.40." The court nonetheless ordered defendant to enroll in the SBM program for 30 years, presumably based on its finding, written in by hand on the order, that defendant's "probation was revoked and he has failed to complete his [sex offender] treatment."

The transcript from the 29 February 2012 SBM hearing suggests that the trial court believed that, in determining whether an offender qualifies for enrollment in the SBM program, it possessed the discretion to consider other factors in addition to those expressly set out in N.C. Gen. Stat. § 14-208.40, and, in turn, listed on the form order. Based on this interpretation of the SBM statutes, the court stated from the bench that defendant's probation revocation and failure to complete his sex

offender treatment constituted "other factors" sufficient to warrant an order requiring defendant to enroll in SBM:

> The Court will find that the defendant does not fall into any of the categories requiring satellite monitoring. However, the Court will find that the defendant's probation was revoked and that he has failed to complete his treatment. In the Court's discretion, the Court will order that the defendant shall be enrolled in satellite-based monitoring for 30 years.

We believe that the trial court misconstrued the statutory scheme established by our General Assembly regarding qualification for enrollment in the SBM program. The proceedings in this case are governed by N.C. Gen. Stat. § 14-208.40B due to the fact that an SBM determination was not made when defendant was initially sentenced. *Kilby*, 198 N.C. App. at 367, 679 S.E.2d at 432-33. As this Court has explained, SBM proceedings generally involve two phases: a "qualification" phase, followed by a "risk assessment" phase. *Id.* at 367-68, 679 S.E.2d at 433. This case concerns only the qualification stage.

In the qualification phase, where – as here – the defendant was convicted of a reportable offense as defined by N.C. Gen. Stat. § 14–208.6(4), then

> the district attorney shall present to the court any evidence that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor.

N.C. Gen. Stat. § 14–208.40A(a) (2011). *See* N.C. Gen. Stat. § 14-208.40B(c) (2011).

Upon receipt of the evidence from the State and any contrary evidence from the offender, the trial court is then required to determine "whether the offender's conviction places the offender" in one of the five categories and to

> make a finding of fact of that determination, specifying whether (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an

> aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor.

N.C. Gen. Stat. § 14–208.40A(a). *See* N.C. Gen. Stat. § 14-208.40B(c).

These statutory provisions establish that, during the qualification phase: (1) the evidence must relate to whether the defendant falls within one of the five specified categories of offenders the program was designed to monitor; (2) the trial court must determine whether the defendant falls within one of these categories; and (3) the trial court, if it does so determine, is required to specify into which category the defendant falls. *State v. Causby*, 200 N.C. App. 113, 115, 683 S.E.2d 262, 263 (2009); *Kilby*, 198 N.C. App. at 368, 679 S.E.2d at 433.

It is clear from these statutes that the five categories of offenders referenced therein constitute the only types of offenders that the Generally Assembly has made eligible for enrollment in the SBM program. *See State v. Stokes*, __ N.C. App. __, __, 718 S.E.2d 174, 181 (2011) (explaining that "the determination as to whether SBM is required is to be based upon the relevant statutory language," rather than factors not explicitly provided for in the statute); *see also Evans v. Diaz*, 333 N.C. 774, 779–80, 430 S.E.2d 244, 247 (1993) ("Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list."). Consequently, a trial court, in determining whether a defendant qualifies for SBM, may not consider grounds outside of those enumerated in the SBM statutes.

The trial court in this case expressly found that defendant did not fall within any of the statutorily enumerated categories of offenders requiring monitoring, but nonetheless ordered defendant to enroll in the SBM program due to its finding that his probation had been revoked and he had failed to complete his sex offender treatment. Where, as here, "[t]he trial court clearly heard the evidence and found the facts against [a party] under a misapprehension of the controlling law," the court's findings should be "set aside on the theory that the evidence should be considered in its true legal light." *African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church*, 64 N.C. App. 391, 411-12, 308 S.E.2d 73, 85 (1983). Accordingly, we vacate the trial court's First Order and remand the matter to the trial court for reconsideration.[1]

---

1. Because we are remanding this matter, we need not address defendant's remaining contentions.

Conclusion

For the reasons stated above, we vacate the trial court's 13 March 2012 order and remand the case for reconsideration.

VACATED AND REMANDED.

Judges HUNTER and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
JAMES LAMONT HAZEL

No. COA12-1102

Filed 2 April 2013

1. Drugs—trafficking—constructive possession—sufficient other incriminating circumstances—erroneous testimony not plain error

The trial court did not commit plain error in a drug trafficking case by allowing the State's witnesses to characterize the apartment where the drugs were found as defendant's apartment, and in allowing State's witnesses to refer to the individual who gave consent to enter the apartment as defendant's roommate. Evidence of defendant's repeated statements that the heroin recovered from the apartment belonged to him constituted sufficient other incriminating circumstances for constructive possession to be inferred. Even assuming, *arguendo*, that the admission of the contested testimony constituted error, it did not rise to the level of plain error.

2. Drugs—trafficking—amount of drugs combined

The trial court did not err by denying defendant's motion to dismiss a heroin trafficking charge. The trial court correctly allowed the heroin recovered from defendant's person to be combined with the heroin recovered from the apartment for the purposes of charging defendant with trafficking.

Appeal by Defendant from judgments entered 27 April 2012 by Judge Eric L. Levinson in Superior Court, Mecklenburg County. Heard in the Court of Appeals 11 February 2013.

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

Massengale & Ozer, by Marilyn G. Ozer, for Defendant.

McGEE, Judge.

James Lamont Hazel (Defendant) was indicted on multiple drug charges including, relevant to this opinion, four counts of possession with intent to distribute heroin, four counts of selling heroin, and one count of trafficking in heroin by possession.

Detective Sidney Jerome Lackey (Detective Lackey), an undercover officer for the Charlotte-Mecklenburg Police Department, received a tip from a confidential informant that Defendant was dealing heroin. Detective Lackey used a phone number he obtained from his confidential informant to set up four undercover heroin purchases, an operation known as a "buy/bust." A "buy/bust" on 1 December 2010 was the last of the four phases of the operation. On that day, two officers with the Charlotte-Mecklenburg Police Department were positioned in the parking lot of an apartment complex located at 1605 Ivy Meadow Lane in Charlotte, where the buy was to take place. While in the parking lot, the officers observed Defendant drive into the parking lot at 10:40 a.m. A third officer, Detective Amir Holding (Detective Holding), testified he watched Defendant exit a car and walk over to breezeway number two. Detective Holding then walked over to breezeway number two, where he heard a door close. Detective Holding waited at the breezeway for ten to fifteen minutes, saw Defendant exit Apartment 216 (the apartment) between 11:05 and 11:10 a.m., and walk toward the front of the apartment complex. At the same time, Detective Lackey arrived at the apartment complex and picked Defendant up in front of the apartment complex. Detective Lackey gave Defendant $800.00 in return for 3.97 grams of heroin. Once the transaction was complete, Detective Lackey gave the "takedown" signal. Defendant was read his *Miranda* rights and placed under arrest. Because Detective Lackey was still operating undercover, other officers collected the evidence, including the 3.97 grams of heroin, and interviewed Defendant.

Defendant led officers to the apartment, gave them a key to the apartment, and permission to enter. One of the officers testified he had verbal consent to enter the apartment from another man who said he lived in the apartment; however, the officer failed to write down the man's name

or obtain a recorded statement. The officers testified they did not know if the man who allegedly gave consent to enter the apartment had been in the apartment that day, and they could no longer remember the man's name. There was testimony that the man's name was not on the lease of the apartment.

Defendant directed officers to the only bedroom in the apartment, where they found a clear plastic bag containing Defendant's clothes. Defendant also directed officers to an additional 0.97 grams of heroin in the kitchen, which was packaged in the same manner as the heroin previously sold in the parking lot buy/bust. The total weight of heroin recovered from Defendant and the apartment was 4.94 grams.

Defendant moved to dismiss the trafficking charge on 2 March 2012, arguing that the trial court should dismiss the charge because the drugs purchased from Defendant in the parking lot and the drugs seized from Defendant in the apartment constituted two separate possession charges, rather than one combined trafficking charge. The trial court denied Defendant's motion. Defendant was found guilty of four counts of sale of heroin, four counts of possession with intent to sell or deliver heroin, and one count of trafficking in heroin by possession. Defendant was sentenced to a combined active term of 83-100 months. Defendant appeals.

I.

We first note that Defendant challenges on appeal only his conviction for trafficking in heroin by possession. The issues on appeal are whether: (1) the trial court improperly combined the heroin recovered from Defendant's person with the heroin recovered from the apartment to support the trafficking charge and (2) the trial court committed plain error by failing to *sua sponte* exclude testimony indicating that Defendant had possession or control over the apartment. We address Defendant's second argument first.

II.

[1] Defendant contends the trial court committed plain error in allowing State's witnesses to characterize the apartment as Defendant's apartment, and in allowing State's witnesses to refer to the individual who gave consent to enter the apartment as Defendant's roommate. We disagree.

Specifically, Defendant argues that because "[c]onvincing the jury that [Defendant] constructively possessed the heroin found in [the] [a]partment . . . was critical to the State's case[,]" the admission of this testimony prejudiced him. Because Defendant failed to properly preserve

these issues for appellate review, he now contends that the admission of this testimony rises to the level of 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." [*See also State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)] (stating "that absent the error the jury probably would have reached a different verdict" and concluding that although the evidentiary error affected a fundamental right, viewed in light of the entire record, the error was not plain error). Moreover, because plain error is to be "applied cautiously and only in the exceptional case," the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,"

State v. Lawrence, __ N.C. __, __, 723 S.E.2d 326, 334 (2012) (citations omitted).

Officer Lackey testified that, following the arrest of Defendant and the seizure of the 3.97 grams of heroin from Defendant's person, additional evidence was recovered "from his [Defendant's] apartment." Defendant objected to the characterization of the apartment as belonging to Defendant, and the trial court sustained Defendant's objection. The jury was excused, and Defendant asked for a motion to strike, which the trial court granted. Upon the jury's return, the trial court instructed as follows:

> I will tell you before getting started, I believe the gentleman, the Detective, I think just before lunch may have characterized this residence or this structure that he was describing as, quote, his apartment; I think the reference possibly to [Defendant].
>
> Ladies and Gentlemen, I'm instructing you to disregard those comments from the gentleman that it was — when he described it as his residence. And we're going to continue to move forward. His apartment, I'm instructing you to disregard that.
>
> But if everybody understands what I'm saying, just raise your right hand.

(All jurors raise their right hand.)

Detective Terrance Gerald (Detective Gerald) testified the following morning, answering questions on direct as follows:

> Q And did [Defendant] make any statements?
>
> A. Yes. Detective [Mark] Temple [Detective Temple] asked him about was he staying at that apartment, and he did advise that he was staying there with someone.
>
> Q. And what apartment was that?
>
> A. 216.
>
> MR. ADELMAN: I'll object to that as well, Your Honor.
>
> THE COURT: What's the basis of the objection?
>
> MR. ADELMAN: A general objection.
>
> THE COURT: Overruled.
>
> Q. And did he make any other statements to —
>
> A. Yes, he did. He advised -- Detective Temple asked him if he had any more of the drugs at the residence, and he —
>
> MR. ADELMAN: Objection; hearsay.
>
> THE COURT: Overruled.
>
> A. -- and he advised that he did have additional drugs at the residence.
>
> Q. And what did you do next?
>
> A. At that time we walked over there. There were other detectives standing at the front door. [Defendant] had keys to the residence. Once [Defendant] -- once Detective Temple asked him if he had additional drugs at the residence, he said he did and that he asked if he could go on in and retrieve those drugs.
>
> Q. And what if anything did [Defendant] say?
>
> A. He said yes.
>
> Q. And so what did you do next Detective Gerald?
>
> A. Also Detective Temple called — [Defendant] gave a phone number to the guy he was staying with, so Detective

Temple called him as well.

MR. ADELMAN: Objection to the characterization guy he was staying with.

THE COURT: Mr. D.A., was this — it's important for us that we're, you know, delaying what the officer says or the detective says he recalls actually being said. So if you can try to clarify whether or not this is a characterization by him or whether or not this is words that he's recalling being stated to him.

MR. CLARK: Certainly, Your Honor.

Q. So what did — so were you standing with [Defendant] and Detective Temple?

A. I was.

Q. And you said that — did [Defendant] say he was staying with someone?

A. He did.

Q. And what did Detective Temple do next?

A. [Defendant] —

MR. ADELMAN: Well, objection as to what somebody else did next.

THE COURT: Overruled.

A. [Defendant] provided the phone number to the individual that was staying -- that he was staying with at that apartment, and Detective Temple placed a phone call to him.

Q. And then what did you do next, Detective Gerald?

A. After Detective Temple received consent from the resident, the guy that he was staying with, over the telephone, and also received consent from [Defendant] to treat -- for us to enter the apartment, we moved inside the apartment.

Q. And what did you do when you got inside the apartment?

A. [Defendant] directed us to show us where his clothes were in the apartment, and also where the additional drugs that were in his apartment.

. . . .

Q. And what if any statements did [Defendant] make?

MR. ADELMAN: I'll object to that.

THE COURT: Overruled.

A. [Defendant] kept saying that he didn't want the guy to get in trouble that he was with, that stayed there. He said that he was just staying there, he didn't have anywhere else to stay, and the additional drugs were his [Defendant's].

Defendant's attorney questioned Detective Gerald about the detective's characterization of the apartment as Defendant's apartment, and Detective Gerald responded: "I never said that [Defendant] said that's his apartment. I said [Defendant] said he was staying with someone."

Detective Temple testified that Defendant "gave me consent to enter and search his apartment which he possessed the keys to." Defendant objected to the characterization of the apartment as "his" [Defendant's] apartment, and the trial court again instructed the jury not to interpret Detective Temple's testimony as indicating that the apartment belonged to Defendant. Detective Temple further testified:

A. [Defendant] also stated that there was additional heroin located at the apartment. And at that point I went to retrieve the additional heroin, so I asked for consent to enter and search the apartment, which he did consent for me to enter and search. We then –

Q. Let me stop you right there. Why did you believe that this defendant had the authority to give consent to search another apartment?

A. Because he possessed the keys to that particular apartment.

Q. Did he make any statements about that particular apartment? And what apartment are we talking about?

A. We're talking about 1605, building two, apartment 216.

Q And what if any other statements did he make specifically about that apartment?

A. He told me that that's where he was staying, that he was staying with friends at that apartment, and he had his

> clothes and belongings inside that apartment, in addition to the additional heroin.
>
> Q. And you testified that he produced a key.
>
> A. He did. During the arrest he had keys to that particular apartment on his person. I was informed by the officers on the scene that the keys were on his person during the arrest.

At trial, Defendant also objected to the following answer by Detective Temple:

> Q. And I believe you testified a bit earlier that in addition to getting consent to go into that apartment from the defendant, you also spoke with a roommate and got consent; is that correct?
>
> A. That is correct.
>
> Q. Now, as part of –
>
> MR. ADELMAN: Well, objection to the term roommate, Your Honor.
>
> THE COURT: Overruled at this point. I think that term has been used before. Overruled.

The trial court correctly overruled Defendant's objection to the term "roommate" because that term had been used earlier in the trial without objection. *State v. Anthony*, 354 N.C. 372, 409, 555 S.E.2d 557, 582 (2001).

Defendant argues that testimony indicating the apartment belonged to Defendant, and testimony that the other man claiming control of the apartment was Defendant's roommate, had a probable impact on the jury's determination that Defendant constructively possessed the heroin in the apartment.

In *State v. Neal*, this Court stated:

> Since the defendants did not have actual possession of the cocaine, the State relied upon the doctrine of constructive possession. Under that doctrine, the State is not required to prove actual physical possession of the controlled substance; proof of constructive possession is sufficient and such possession need not be exclusive. Constructive possession exists when a person, while not having actual possession of the controlled substance, has the intent and

> capability to maintain control and dominion over a controlled substance. Where a controlled substance is found on premises under the defendant's control, this fact alone may be sufficient to overcome a motion to dismiss and to take the case to the jury. If a defendant does not maintain control of the premises, however, other incriminating circumstances must be established for constructive possession to be inferred.

State v. Neal, 109 N.C. App. 684, 686, 428 S.E.2d 287, 289 (1993) (citations omitted). It is undisputed that Defendant did not maintain exclusive control over the apartment. However, there was plenary evidence that Defendant was using the apartment: a key to the apartment was on Defendant's key ring; Defendant's clothing was found inside a plastic bag in the bedroom of the apartment; and Defendant was observed entering, and then exiting, the apartment shortly before the final drug transaction. Finally, there was testimony that Defendant stated the apartment was "where he was staying."

Although Defendant did not maintain exclusive control over the apartment, and the degree of control that Defendant did maintain was in dispute, other incriminating circumstances were present, supporting a finding that Defendant constructively possessed the heroin in the apartment at the time of his arrest. Specifically, Defendant told officers he had more heroin, and that it was in the apartment. Defendant gave verbal consent to enter the apartment, which entry was accomplished by the key on Defendant's key ring, voluntarily provided by Defendant. Defendant, according to testimony, led officers directly to the heroin in the kitchen. Defendant then "informed [Detective Temple] that the roommate was not involved in the heroin trade, nor did he have any idea of [Defendant's] involvement in the drug trade."

This evidence of Defendant's repeated statements that the heroin recovered from the apartment belonged to him constitutes sufficient "other incriminating circumstances . . . for constructive possession to be inferred." *Neal*, 109 N.C. App. at 686, 428 S.E.2d at 289. Even assuming, *arguendo*, that the admission of the contested testimony constituted error, it does not rise to the level of plain error. This argument is without merit.

III.

[2] In Defendant's first argument, he contends that the trial court erred by denying his motion to dismiss the trafficking charge. We disagree.

Defendant specifically argues that the trial court erred in allowing the heroin recovered from Defendant's person to be combined with the heroin recovered from the apartment for the purposes of charging Defendant with trafficking. Although Defendant contends this alleged error constituted a violation of his right to due process, and thus argues for *de novo* review by this Court, the appropriate standard of review is that for denial of a motion to dismiss.

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

In *State v. Keys*, as in the case before us, the defendant "was charged and convicted, pursuant to N.C.G.S. § 90-95(h)(4)a, of trafficking in heroin by possession of more than four grams but less than fourteen grams. This crime has two elements: (1) knowing possession (either actual or constructive) of (2) a specified amount [more than 4 grams but less than 14 grams] of heroin." *State v. Keys*, 87 N.C. App. 349, 352, 361 S.E.2d 286, 288 (1987) (citations omitted).

Defendant cites to this Court's opinion in *State v. Rozier*, 69 N.C. App. 38, 316 S.E.2d 893 (1984), to support his fundamentally flawed statement of the law concerning when drugs recovered in separate locations may be combined for the purposes of supporting a trafficking charge. Defendant states in his brief:

> In order to combine drugs found in separate locations into one possession charge, the first burden for the State is to show both sets of drugs were possessed by [Defendant]. The state must then show a single continuing offense. The distinct acts of possession may not be separated in time or space. The drugs must be possessed for the same purpose.

Defendant immediately follows this incorrect assertion of the law with a cite to *Rozier*. In *Rozier*, the defendants are making the opposite argument — that the drugs found on their persons *should have been*

combined with the drugs they had previously sold, and that charging them separately constituted error. *Id.* at 54, 316 S.E.2d at 904. A vital portion of the *Rozier* analysis, not cited by Defendant in the present case, is as follows: "The circumstances of each case will determine whether separate offenses may properly be charged." *Id.* at 55, 316 S.E.2d at 904.

The circumstances in *Rozier* were quite different than those in the case before us. In *Rozier*,

> defendants had sold a large amount of cocaine, and shortly thereafter were found with traces of cocaine in vials for personal use. There was no evidence that defendants had filled their vials out of the larger amount, nor that they had done so and then used the cocaine. There was no evidence that defendants intended to sell the residual cocaine. The transfer of the large amount of cocaine was entirely complete when the subject vials were found. *Under these circumstances*, we hold that the trial court did not err in denying defendants' motions to quash and that they could properly be convicted of both offenses.

Id. (emphasis added).

None of these circumstances indicate universal requirements for deciding the validity of charging defendants for two separate crimes involving drug possession, much less universal requirements for charging defendants with only one crime involving drug possession when drugs are recovered from different locations. The circumstances listed in *Rozier* are just that — particular circumstances from a particular case that this Court held sufficient to support two separate charges related to drug possession in that case.

"In order for the State to obtain multiple convictions for possession of a controlled substance, the State must show distinct acts of possession separated in time and space." *State v. Moncree*, 188 N.C. App. 221, 231, 655 S.E.2d 464, 470 (2008) (citing *Rozier*, 69 N.C. App. at 38, 316 S.E.2d at 893). The converse does not inevitably follow. *Rozier* did not address the requirements for obtaining a single conviction for possession of a controlled substance recovered in different locations and at different times. However, what is clear is that if the State cannot show *distinct* acts of possession, separated in time, then multiple convictions for possession would be improper. *Moncree*, 188 N.C. App. at 232, 655 S.E.2d at 471 (because the defendant simultaneously possessed the marijuana in his shoe and the marijuana in his automobile, the "defendant

should have been charged with only the one count of felony possession of marijuana").

Defendant in the present case was observed entering the apartment immediately before his sale of 3.97 grams of heroin to Detective Lackey. Upon arrest, and after having been read his *Miranda* rights, Defendant volunteered that he had more heroin in the apartment, and provided the key and consent for the officers to enter the apartment where 0.97 grams of additional heroin were recovered. This additional heroin was packaged for sale in the same manner as the heroin actually sold to Detective Lackey. According to testimony, Defendant admitted to being a drug dealer. There was no evidence any of the heroin was for Defendant's personal use.

Defendant possessed the heroin in the apartment simultaneously with the heroin sold to Detective Lackey. Considering these circumstances, we hold there was no error in convicting Defendant on one charge of trafficking instead of two charges of possession. This Court, in an unpublished opinion, has reached the same result on facts nearly identical to those in the present case. *State v. Kornegay*, 153 N.C. App. 201, 569 S.E.2d 33, 2002 WL 31056751 (2002) (unpublished).

As the above argument was Defendant's sole justification for his motion to dismiss the trafficking charge, we hold that the trial court did not err in denying Defendant's motion to dismiss.

No error.

Chief Judge MARTIN and Judge CALABRIA concur.

STATE OF NORTH CAROLINA
v.
JOSHUA RAY HUNNICUTT

No. COA12-1018

Filed 2 April 2013

1. Appeal and Error—appealability—jurisdictional challenge of underlying judgment dismissed—revocation of probation—activation of suspended sentence

On appeal from a judgment revoking probation and activating defendant's suspended sentences, his argument challenging the jurisdictional validity of an underlying judgment against him long after the time for perfection of an appeal of that judgment had expired was not properly before the Court of Appeals.

2. Probation and Parole—activation of sentence—absconded by willfully avoiding supervision

The trial court did not err by activating defendant's sentence on the basis of his having absconded by willfully avoiding supervision. Defendant had notice of his obligation to remain within the jurisdiction of the court and to report as directed to the probation officer. However, the case was remanded for correction of clerical error in the judgments.

3. Probation and Parole—activation of sentence—second probation violation

Nothing in the record supported defendant's contention that the trial court's decision to activate his sentence upon a second probation violation was arbitrary or unjust.

Appeal by defendant from judgment entered 23 March 2012 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 13 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

New Hanover County Assistant Public Defender Brendan O'Donnell, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Joshua Ray Hunnicutt ("Defendant") appeals from a judgment revoking his probation and activating his sentences for several offenses. On appeal, Defendant argues (1) that the trial court lacked jurisdiction in two cases to revoke his probation because of defects in the underlying indictments, (2) that a condition of his probation was invalid, and thus his sentences could not have been activated for a violation of that condition, and (3) that the trial court abused its discretion in both finding Defendant violated his probation and in activating his sentence. For the following reasons, we dismiss Defendant's appeal in part, and affirm the trial court's revocation of Defendant's probation. However, we remand to allow the trial court an opportunity to correct a clerical error.

I. Factual & Procedural History

Defendant was indicted on 17 May 2010 in Guilford County Superior Court under four case numbers on several counts including felony larceny, breaking and entering a motor vehicle, and misdemeanor larceny. While those indictments were pending, Defendant was indicted on 1 June 2010 in Alamance County under thirteen case numbers on multiple counts of breaking and entering a motor vehicle, misdemeanor larceny, and possession of stolen property. These cases were eventually consolidated for judgment in Guilford County under two case numbers, and in Alamance County under four cases numbers. Defendant pleaded guilty to multiple offenses and received suspended sentences with probation in all six cases. Defendant's probation supervision in the Alamance County cases was transferred to Guilford County, where Defendant resided.

On 3 August 2011, Defendant was found in Guilford County Superior Court to be in willful violation of his probation conditions in three of the six cases. Although the court imposed minor modifications to Defendant's probation conditions, the original judgments otherwise remained in effect and Defendant was continued on probation.

On 26 December 2011, Defendant was served with six new Violation Reports charging him in each of the six cases with violating two conditions of probation. The Violation Reports read in pertinent part:

> Of the conditions of probation imposed in [the] judgment, the defendant has willfully violated:
>
> 1. Condition of Probation "Report as directed by the Court or the probation officer to the officer at reasonable times and places . . ." in that THE DEFENDANT FAILED TO REPORT TO HIS SUPERVISING OFFICER AS DIRECTED ON 11/10/2011 AND 11/21/2011.

> 2. Condition of Probation "Remain within the jurisdiction of the Court unless granted written permission to leave by the Court or the probation officer" in that DESPITE NUMEROUS ATTEMPTS BY THE SUPERVISING OFFICER, THE DEFENDANT REFUSES TO REPORT AS DIRECTED AND DOES NOT RESPOND TO CONTACT NOTICES LEFT BY THE SUPERVISING OFFICER. THE DEFENDANT HAS RENDERED HIMSELF UNAVAILABLE FOR SUPERVISION.

A hearing was held before the Hon. R. Stuart Albright in Guilford County Superior Court on 23 March 2012. At the revocation hearing, Defendant admitted that he missed the scheduled appointment on 10 November 2011, but denied the remaining allegations. The State's evidence, offered through the testimony of Guilford County probation officer Cathy Crutchfield ("Ms. Crutchfield"), tended to show the following.

Defendant's case was transferred to Guilford County in June 2011. After having some difficulty contacting Defendant, Ms. Crutchfield went to Defendant's residence on 8 August 2011 with a surveillance officer.[1] Defendant told Ms. Crutchfield at that time that he had been advised by his previous probation officer to report to Ms. Crutchfield, but "he had forgot [sic]." An appointment was scheduled for 9 August 2011. At that appointment, Ms. Crutchfield reminded Defendant about the conditions of his probation and stressed the importance of staying in contact with her and attending their scheduled appointments.

Defendant failed to appear for a scheduled appointment on 6 September 2011, attended an appointment on 11 October 2011, and once again failed to appear on 10 November 2011. Ms. Crutchfield called Defendant several times, but received no response. On 19 November 2011, Ms. Crutchfield spoke with Defendant's mother, and advised her that Defendant needed to come to her office on 21 November 2011. That day, Defendant called Ms. Crutchfield and told her that he would not be able to attend the appointment because he had "other appointments" that day. Ms. Crutchfield told Defendant that she needed to see him and that he could come to the office when he finished his other appointments. Defendant eventually arrived at Ms. Crutchfield's office while she was in a meeting with her supervisor. Ms. Crutchfield advised Defendant that she would be finished "in a few minutes," and asked "him

1. It is does not appear from the record that Ms. Crutchfield's difficulty in contacting Defendant formed the basis of the court's 3 August 2011 finding that Defendant had violated the conditions of probation.

to stay there." When she was finished with the meeting, Defendant was gone. He did not leave any explanation for his departure. Ms. Crutchfield attempted to call Defendant, but received no response. Ms. Crutchfield completed the Probation Violation Report that day. She acknowledged that Defendant had kept his monthly appointments from the time of his arrest for the December violation until the time of the revocation hearing, and had provided notice of changes in his residence and employment during that time.

Defendant did not present any evidence at the hearing. At the conclusion of the hearing, the trial court found that "there is a willful violation without lawful excuse of both of the violations as set forth in the violation report" and that "that the defendant did abscond. It's not that he made his whereabouts unknown, it's that he absconded by willfully avoiding supervision." The trial court then revoked Defendant's probation and activated his sentences consecutively in all six cases, imposing an aggregate sentence of 34 to 44 months imprisonment. Judge Albright entered a written Judgment and Commitment upon Revocation in each case, dated 23 March 2012. Defendant gave oral notice of appeal in open court.

II. Jurisdiction & Standard of Review

N.C. Gen. Stat. § 7A-27(b) (2011) vests jurisdiction in this Court to hear appeals "[f]rom any final judgment of the superior court." As a judgment activating a probationer's sentence is a "final judgment," we have jurisdiction to hear the instant appeal. *See* N.C. Gen. Stat. § 15A-1347 (2011) ("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, [a] defendant may appeal under [N.C. Gen. Stat. § 7A-27]").

> "A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion 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. The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion."

State v. Young, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citation and quotation marks omitted).

III. Analysis

Defendant raises three issues, which we address in turn.

A. Validity of Underlying Indictments

[1] Defendant first argues that the trial court lacked jurisdiction to revoke his probation in two of his cases because the indictments underlying those offenses are facially defective, and thus invalid. However, we need not address whether these indictments are in fact defective, because Defendant is precluded from challenging them in this appeal.

"A valid bill of indictment is essential to the jurisdiction of the Superior Court to try an accused for a felony and have the jury determine his guilt or innocence, 'and to give authority to the court to render a valid judgment.' " *State v. Moses*, 154 N.C. App. 332, 334, 572 S.E.2d 223, 226 (2002) (quoting *State v. Ray*, 274 N.C. 556, 562, 164 S.E.2d 457, 461 (1968)). However, " '[w]hile 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.' " *State v. Jamerson*, 161 N.C. App. 527, 529, 588 S.E.2d 545, 547 (2003) (emphasis added) (alteration in original) (quoting *State v. Absher*, 329 N.C. 264, 265 n.1, 404 S.E.2d 848, 849 n.1 (1991) (per curiam)). Thus, "[a] defendant on appeal from an order revoking probation may not challenge his adjudication of guilt," *State v. Cordon*, 21 N.C. App. 394, 397, 204 S.E.2d 715, 717 (1974), as "[q]uestioning the validity of the original judgment where sentence was suspended on appeal from an order activating the sentence is . . . an impermissible collateral attack." *State v. Noles*, 12 N.C. App. 676, 678, 184 S.E.2d 409, 410 (1971).

Defendant contends that a challenge to the validity of an indictment, and thus the subject matter jurisdiction of the trial court, is not subject to the foregoing analysis, due to our Supreme Court's longstanding observation that "where an indictment is alleged to be invalid on its face . . . 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). However, we read Wallace and the other cases cited by Defendant as addressing the question of whether a challenge to an indictment must be preserved at the trial level in order to be raised on direct appeal. This is a different question than the one presented by the instant case, in which Defendant attempts to challenge the jurisdictional validity of an underlying judgment against him long after the time for perfection of an appeal of that judgment has expired.

Furthermore, a recently published opinion of this Court has addressed a similar argument to the one presented by Defendant, and held it to be an impermissible collateral attack on an underlying judgment. *See State v. Long*, __ N.C. App. __, 725 S.E.2d 71, *disc. rev. denied*, __ N.C. __, 726 S.E.2d 836 (2012). In Long the defendant sought to challenge on appeal from the activation of his sentence the trial court's jurisdiction to enter the original judgment, citing not the insufficiency of the indictment, but rather the absence of one. *See Long*, __ N.C. App. at __, 725 S.E.2d at 72 ("Specifically, defendant contends the trial court lacked jurisdiction to accept his plea and to suspend and later activate the sentences . . . because [he] was not indicted on these offenses and did not effectively waive the State's responsibility to charge him by a bill of indictment."). This Court dismissed the appeal, holding that the defendant's challenge was an impermissible collateral attack on the original judgment. *Id.* at __, 725 S.E.2d at 73. The Court explained that:

> in the present case, defendant could have appealed his 2 July 2010 judgments as a matter of right or by petition in accordance with the procedures set forth in our statutes and appellate rules. However, because defendant did not timely appeal by right or by petition from the 2 July 2010 judgments entered upon his guilty plea and only now attempts to attack these sentences imposed and suspended in 2010 in an appeal from the 7 March 2011 judgments revoking his probation, we conclude, consistent with three decades of Court of Appeals precedent, that this challenge is an impermissible collateral attack on the original judgments. Accordingly, this appeal must be dismissed.

Id. (quotation marks, alterations, and citations omitted)

"Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). As noted, our Supreme Court has not addressed this particular factual scenario. Accordingly, we are bound by the previous decision of this Court in *Long*.[2]

---

2. Defendant notes several unpublished decisions of this Court issued prior to the opinion in Long which come to the opposite conclusion. "Unpublished opinions are not, however, controlling authority and cannot bind later panels of this Court." *State v. Mabry*, __ N.C. App. __, __, 720 S.E.2d 697, 702 (2011).

In the alternative, Defendant argues the instant case is distinguishable from *Long* in that "[u]nlike the appellant in *Long*, [Defendant] does not seek on this appeal to vacate the underlying criminal judgments . . . . He asks this court only to vacate the judgment revoking probation and activating his sentences in those cases." However, "[w]hen the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Satanek*, 190 N.C. App. 653, 657, 660 S.E.2d 623, 626 (2008) (quotation marks and citations omitted) (alteration in original). As such, if Defendant's argument was properly before this Court, and was found to be meritorious, we would necessarily have to vacate the original judgments entered upon those indictments. However, as stated above, Defendant's argument is not properly before us on appeal from a judgment revoking probation and activating his suspended sentences. *Long*, __ N.C. App. at __, 725 S.E.2d at 73. Accordingly, as this appeal is not the proper vehicle to raise the issue, Defendant's argument is dismissed.[3]

B. Invalid Condition of Probation

[2] Defendant next argues that the trial court erred when it activated his sentence on the basis of Defendant having "absconded by willfully avoiding supervision." Defendant contends that no such condition was ever imposed upon him, that he had no notice of such a condition, and that the trial court had no authority to impose any condition prohibiting "absconding by willfully avoiding supervision." Defendant's argument is without merit.

In 2011 the General Assembly passed the Justice Reinvestment Act (JRA), which modified our probation statutes in two important ways. First, the JRA made the following a regular condition of probation: "Not to abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer." *See* N.C. Gen. Stat. § 15A-1343(b)(3a) (2011). Second, the JRA revised N.C. Gen. Stat. § 15A-1344 to provide that a trial court may only revoke probation if the defendant commits a criminal offense or "absconds" as defined by the revised Section 15A-1343(b)(3a). *See* N.C. Gen. Stat. § 15A-1344(a) (2011). The JRA initially made both provisions effective for probation violations occurring on or after 1 December 2011. *See*

3. Therefore, we also reject Defendant's related arguments that a lack of jurisdiction on the part of either court (1) renders the conditions of his probation per se invalid, and/or (2) that revocation on the basis of violations of those conditions constitutes an abuse of discretion.

2011 N.C. Sess. Laws 192, sec. 4.(d). The effective date clause was later amended, however, to make the new absconding condition applicable only to *offenses* committed on or after 1 December 2011, while the limited revoking authority remained effective for probation violations occurring on or after 1 December 2011. *See* 2011 N.C. Sess. Laws 412, sec. 2.5.

Neither of these modifications applies to Defendant, as both the offenses and the probation violations at issue occurred prior to 1 December 2011. Defendant contends, however, that the trial court activated his sentence on the basis of having found him to have violated the new regular condition implemented by the JRA discussed above, which mandates that a probationer shall "[n]ot . . . abscond, by willfully avoiding supervision or by willfully making [their] whereabouts unknown to the supervising probation officer." N.C. Gen. Stat. § 15A-1343(b)(3a) (2011). Defendant bases this assertion on two facts. First, that the trial court found "that defendant did abscond. It's not that he made his whereabouts unknown, it's that he absconded by willfully avoiding supervision." Secondly, Defendant notes that the trial court checked box number 5 on the form judgments, indicating that Defendant had "abscond[ed] from supervision" pursuant to "G.S. 15A-1343(b)(3a)." Defendant argues these facts indicate that the trial court revoked his probation for violating a condition that was not, nor could have been, imposed upon him. We disagree that the record suggests the trial court improperly revoked Defendant's probation.

Although N.C. Gen. Stat. § 15A-1343(b)(3a) introduced the term "abscond" into our probation statutes for the first time, the term "abscond" has frequently been used when referring to violations of the longstanding statutory probation conditions to "remain within the jurisdiction of the court" or to "report as directed to the officer." *See, e.g.*, *State v. Brown*, __ N.C. App. __, 731 S.E.2d 530 (2012); *State v. High*, 183 N.C. App. 443, 645 S.E.2d 394 (2007); *State v. Coffey*, 74 N.C. App. 137, 327 S.E.2d 606 (1985). Both are regular conditions of probation under N.C. Gen. Stat. § 15A-1343 and, therefore, "are in every circumstance valid conditions of probation." N.C. Gen. Stat. § 15A-1342(g) (2011).

Defendant had notice of his obligation to "remain within the jurisdiction of the court" and to "report as directed to the [probation] officer" as each of the original judgments entered upon his convictions noted:

> If the defendant is on supervised probation, the defendant shall also: (5) Remain within the jurisdiction of the Court unless granted written permission to leave by the Court or

> the probation officer. (6) Report as directed by the Court or the probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment.

The violation reports filed against Defendant alleged violations of both of these two conditions:

> Of the conditions of probation imposed in [the] judgment, the defendant has willfully violated:
>
> 1. Condition of Probation "Report as directed by the Court or the probation officer to the officer at reasonable times and places . . ." in that THE DEFENDANT FAILED TO REPORT TO HIS SUPERVISING OFFICER AS DIRECTED ON 11/10/2011 AND 11/21/2011.
>
> 2. Condition of Probation "Remain within the jurisdiction of the Court unless granted written permission to leave by the Court or the probation officer" in that DESPITE NUMEROUS ATTEMPTS BY THE SUPERVISING OFFICER, THE DEFENDANT REFUSES TO REPORT AS DIRECTED AND DOES NOT RESPOND TO CONTACT NOTICES LEFT BY THE SUPERVISING OFFICER. THE DEFENDANT HAS RENDERED HIMSELF UNAVAILABLE FOR SUPERVISION.

At the conclusion of the revocation hearing, the trial court stated:

> THE COURT: Okay. Based on my review of the evidence in this case, my consideration of the sworn testimony, and the statements and positions of the parties, the Court finds there is a willful violation without lawful excuse of both of the violations as set forth in the violation report.
>
> The Court finds with regard to the absconding, that the defendant did abscond. It's not that he made his whereabouts unknown, it's that he absconded by willfully avoiding supervision.
>
> The Court finds among other things with regard to the testimony on July 8, 2011, when the probation officer called the defendant he hung up on her.

. . . .

> The Court also finds that on November 21st, 2011 you did not report — although you reported to the probation officer's office, you did not report as directed. You reported on your own time, not when directed by the probation officer. Notwithstanding that, the probation officer was making a reasonable accommodation by asking you to stay there until she finished her meeting. Upon completion of the meeting the defendant in effect left the building without any explanation whatsoever.
>
> The Court finds there's been absolutely nothing to justify you simply leaving the building. You showed up on your own time and then left when you decided it was okay to leave. Court finds you willfully avoided supervision based on all the evidence in this case.
>
> Court also finds this is your second probation violation hearing. You've already been here once in court for failing to comply with terms of your probation. At that time the judge did exactly what's being asked of this Court now and continued you on probation.
>
> Based on the violations in this case Court finds you not to be a good candidate for probation. Court will activate the sentence[.]

Despite its colloquial and perhaps imprecise usage of the term "abscond," it is clear from the record that the trial court activated Defendant's sentence on the basis of Ms. Crutchfield's testimony explaining the circumstances surrounding the violations listed in the reports. Accordingly, Defendant's argument that the trial court retroactively engrafted the condition created by the JRA onto his existing probation conditions is overruled.

We do note, however, that the trial court incorrectly checked box number 5 on the form judgments, which, without the benefit of the entire record, would suggest that Defendant had indeed "abscond[ed] from supervision" pursuant to "G.S. 15A-1343(b)(3e)." Therefore, we remand for correction of this clerical error in the judgments. *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.'") (citation omitted).

C. Abuse of Discretion in Activating Sentence

[3] Without regard to his first two arguments, Defendant lastly argues that the trial court abused its discretion in both finding a violation and revoking his probation. Specifically, Defendant contends that activation of his sentence was "unreasonable" because his "alleged violation . . . consisted of failing to keep one appointment with the probation officer and leaving the next appointment early." We disagree.

A defendant convicted of an offense is not entitled to probation under the United States or North Carolina Constitutions. Rather, receiving a suspended sentence and being placed on probation "comes as an act of grace to one convicted of crime." *State v. Hewett*, 270 N.C. 348, 351, 154 S.E.2d 476, 478 (1967). A probationer's sentence may be activated if the evidence presented at the hearing "be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended." *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967). "The breach of any single valid condition upon which the sentence was suspended will support an order activating the sentence." *State v. Braswell*, 283 N.C. 332, 337, 196 S.E.2d 185, 188 (1973) (citation omitted).

The violation reports alleged that Defendant violated the conditions of his probation by failing to report to his supervising officer as directed on 10 and 21 November 2011. Defendant acknowledges that the evidence presented at the revocation hearing showed that he failed to attend a scheduled appointment with his probation officer on 10 November 2011, and that he prematurely left Ms. Crutchfield's office after she requested he briefly wait for her to finish another meeting on 21 November 2011. Defendant had already violated the terms of his probation once, and had been continued on probation. We find nothing in the record supporting Defendant's contention that the trial court's decision to activate his sentence upon a second violation was "willful," "arbitrary," or "unjust."

IV. Conclusion

For the foregoing reasons, Defendant's appeal is dismissed in part, and the judgment of the trial court revoking Defendant's probation is affirmed in part. We remand, however, to allow the trial court to correct the clerical error noted herein.

DISMISSED IN PART; AFFIRMED IN PART; REMANDED.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA
v.
FAWN QUEONEZ PHIFER

No. COA12-1124

Filed 2 April 2013

Search and Seizure—reasonable suspicion—nervous pacing—insufficient to justify detention

The trial court erred in a possession of a firearm by a felon case by denying defendant's motion to suppress. The fact that defendant was moving around and appeared nervous after he had been temporarily detained by an officer and warned about impeding the flow of traffic was not sufficient to justify his continued detention and search.

Appeal by defendant from judgment entered 10 May 2012 by Judge Larry G. Ford in Rowan County Superior Court. Heard in the Court of Appeals 27 February 2013.

Leslie C. Rawls for defendant.

Attorney General Roy Cooper, by Special Deputy Attorney General J. Allen Jernigan, for the State.

ELMORE, Judge.

Fawn Quenez Phifer (defendant) appeals from a judgment entered upon a guilty plea of possession of a firearm by a felon and habitual felon status, sentencing him 70 to 96 months imprisonment. Prior to entering his guilty plea, defendant unsuccessfully moved to suppress evidence of a firearm found on his person. Defendant preserved the right to appeal the suppression ruling prior to his guilty plea. After careful consideration, we conclude that defendant's motion to suppress should have been granted. We therefore reverse the trial court's denial of the suppression motion and vacate the judgments entered upon defendant's guilty plea.

I. Background

Around 2:00 P.M. on 16 January 2011, Officer Wesley Lane of the Salisbury Police Department was driving his patrol car on East Cemetery

Street when he observed two men walking in the road around the 500 block. That portion of the road was known as a high crime area with shootings, drug complaints, drug transactions, and fights. There had also been numerous complaints of people walking down the middle of the road and not moving for oncoming traffic. Officer Lane approached the men, and asked them to stand in front of his patrol car. One of the men complied with Officer Lane's command; the other man, who was later identified as defendant, did not. Rather, defendant kept moving around, and he asked Officer Lane the reason for the stop. Officer Lane explained that a city ordinance and state law mandated that a person may not walk in the street or impede traffic. Defendant kept moving back and forth and refused to stand still. According to Officer Lane, defendant appeared "hyper" and was "pacing" nervously. Officer Lane told both men that he was going to give them a warning and check for outstanding warrants, of which he found none. Officer Lane then informed both men that he was going to frisk them for weapons. He asked defendant if he had any weapons on him, and defendant replied "yes, but it's not mine." Officer Lane then asked defendant to put his hands on the hood of the car, handcuffed him, and patted him down. Officer Lane found a firearm in defendant's pocket, and he placed defendant under arrest.

On 16 January 2011, defendant was indicted with possession of a firearm by a felon and of habitual felon status. On 8 May 2012, defendant filed a motion to suppress evidence relating to the firearm found on his possession. In that motion, defendant argued that "[t]he seizure of defendant upon the public street . . . was an investigatory stop not justified by reasonable suspicion and based upon objective facts that [he] was involved in criminal activity" and thus violated his constitutional rights.

On 10 May 2012, the trial court entered an order denying defendant's motion. In that order, the trial court concluded that "the stop and arrest were legitimate" because defendant violated G.S. 20-174.1, a statute which prohibits a person from standing in the street in such as a manner as to impede the regular flow of traffic. Defendant then pled guilty, preserving his right to appeal the trial court's order denying his motion to suppress. Defendant was then sentenced to 70-96 months imprisonment, and he now appeals both the 10 May 2012 order and the judgment entered upon his guilty plea.

II. Analysis

Having preserved his right to challenge the suppression ruling, defendant now presents three arguments on appeal. He argues 1) that the trial court erred in denying his motion to suppress, 2) that the trial

court erred in its interpretation of N.C. Gen. Stat. § 20-174.1, and 3) that the trial court's order denying his suppress motion was insufficient. We agree that the trial court erred when it denied defendant's motion to suppress, thus we will not address the remaining issues.

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).

Here, defendant sought to suppress evidence relating to a firearm discovered on his person following a frisk by Officer Lane. Police limitations on the search of a person without a warrant in limited circumstances were first articulated in *Terry v. Ohio*:

> where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself . . . to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons . . . and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

392 U.S. 1, 30-31, 20 L. Ed. 2d 889, 911 (1968). Since *Terry*, our Supreme Court has elaborated that in North Carolina, "[a]n officer has reasonable suspicion if a reasonable, cautious officer, guided by his experience and training, would believe that criminal activity is afoot based on specific and articulable facts, as well as the rational inferences from those facts." *State v. Williams*, __ N.C. __, __, 726 S.E.2d 161, 167 (2012) (internal quotations and citations omitted).

Here, the trial court's findings of fact establish that Officer Lane stopped defendant "to warn [him] about impeding the flow of traffic[.]" After issuing this warning, Officer Lane "wanted to frisk the defendant because of his suspicious behavior." That suspicious behavior was being that defendant "appeared to be nervous and kept moving back and

forth." Defendant argues that the fact that he was moving around and appeared "nervous" was "not legally significant or sufficient to justify his continued detention and search." We agree.

In *State v. Pearson*, our Supreme Court held that a nonconsensual search of the person is not justified by the mere presence of "nervous and excited" behavior around police. 348 N.C. 272, 275, 498 S.E.2d 599, 600 (1998). In *Pearson*, not only was the suspect nervous, but he also made inconsistent statements to police when questioned and had an odor of alcohol on his breath. *Id.* at 276, 498 S.E.2d at 600. Regardless, our Supreme Court nonetheless held that the officers lacked reasonable articulable suspicion that the defendant was armed and dangerous. *Id.* at 276-77, 298 S.E.2d at 600-01.

In *State v. McClendon*, our Supreme Court clarified that "[n]ervousness, like all other facts, must be taken in light of the totality of the circumstances." 350 N.C. 630, 638, 517 S.E.2d 128, 134 (1999). In that case, the suspect was so nervous that he "exhibited more than ordinary nervousness; [he] was fidgety and breathing rapidly, sweat had formed on his forehead, he would sigh deeply, and he would not make eye contact with the officer." *Id.* Our Supreme Court held that his nervousness combined with other factors, like his inability to state the owner of the vehicle in which he was driving, gave the officers reasonable suspicion to search him. *Id.* at 637, 517 S.E.2d at 133. In applying *McClendon*, this Court has held that while extreme nervousness can be a factor considered by police in examining the totality of the circumstances, nervous behavior alone is not sufficient to establish reasonable suspicion. *See, e.g.*, *State v. Myles*, 188 N.C. App. 42, 50, 654 S.E.2d 752, 757-58, *aff'd*, 362 N.C. 344, 661 S.E.2d 732 (2008) ("Although our Supreme Court previously has stated nervousness can be a factor in determining whether reasonable suspicion exists, our Supreme Court has never said nervousness alone is sufficient to determine whether reasonable suspicion exists when looking at the totality of the circumstances.").

Turning to the order at issue here, the findings of fact make no mention of any factors in addition to defendant's nervousness which might have given rise to reasonable suspicion for the search. In fact, the findings indicate that "this was not a drug interdiction stop," "[t]here is no evidence of any drug buy," defendant was "merely walking down the street," "no traffic was actually impeded by" defendant, and defendant was "very cooperative and did not offer any resistance" to Officer Lane. Therefore, we agree with defendant that the nervous pacing of a suspect, temporarily detained by an officer to warn him not to walk in the street,

is insufficient to warrant further detention and search. Accordingly, we conclude that the trial court erred in denying defendant's motion to suppress. As such, we vacate the judgment and reverse the order.

Vacated and reversed.

Judges BRYANT and ERVIN concur.

STATE OF NORTH CAROLINA
v.
TRAVIS DORAN RAMSEUR

No. COA12-62

Filed 2 April 2013

1. Discovery—discovery violation—no prejudice

The trial court did not err in a capital first-degree murder, attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and conspiracy to commit first-degree murder case by concluding that the State's failure to disclose in discovery more than 1,800 pages of material to which defendant was entitled did not infringe upon defendant's constitutional rights. Defendant failed to show a reasonable probability that, but for the nondisclosure, he likely would have received a different verdict from the jury.

2. Criminal Law—jury instructions—self-defense—defense of others—imperfect self-defense—insufficient evidence

The trial court did not err in a capital first-degree murder, attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and conspiracy to commit first-degree murder case by failing to instruct the jury on self-defense, defense of others, or voluntary manslaughter based upon imperfect self-defense or defense of others. There was insufficient evidence to support instructions on any of these theories.

Appeal by Defendant from judgments entered 10 September 2010 and amended order entered 8 October 2012 by Judge Richard D. Boner in Iredell County Superior Court. Heard in the Court of Appeals 6 June 2012.

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

Glenn Gerding for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

This appeal arises from a 2004 shooting that left two men dead and another seriously injured. Defendant Travis Doran Ramseur was tried in the superior court in Iredell County on two counts of capital first-degree murder and one count each of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and conspiracy to commit first-degree murder.

The evidence at trial tended to show the following: On 16 November 2004, four men from Statesville, Deleon "Scoot Rock" Dalton, Oderia Chipley, and two other men (collectively, "the Dalton group") visited a liquor house in Belmont. There the Dalton group encountered another group of men, Angelo Stockton, Timothy Cook, Charles Summers, and Desmond Thompson, (collectively, "the Stockton group") with whom they had a "beef." There was tension between the groups, and eventually, the Dalton group left the Belmont liquor house[1] for a local liquor house in Statesville known as "Mr. Wimp's." Later, the Stockton group also made its way to Mr. Wimp's. Stockton, Cook, and Summers all carried firearms concealed in the waistbands of their pants.

When the Stockton group entered Mr. Wimp's, Dalton told Chipley to call a friend named Al Bellamy and ask Bellamy to bring some guns to Mr. Wimp's. Chipley also called Defendant and told him "he might want to come over." As the men continued drinking, a dispute arose between members of the groups, which then turned into a physical fight between Dalton and Stockton. During the fight, Cook and Summers brandished their guns and warned everyone else not to get involved with their own weapons. Chipley and another man broke up the fight, and "Mr. Wimp" threw Stockton, Cook, and Summers out of the liquor house and locked the door. Cook warned those present they were going to "learn from their mistakes." Stockton, Cook, and Summers beat on the door and yelled for

1. According to a media report citing law enforcement authorities, a liquor house is a location, often in a residential community, that illegally sells unregulated liquor and other forms of alcohol. *See* Liquor Houses Havens for Crime, Police Say, http://www.wsoctv.com/news/news/liquor-houses-havens-for-crime-police-say/nGQQT/ (last visited Mar. 4, 2013).

Dalton to come outside. Chipley, who was still inside Mr. Wimp's, again spoke with Defendant about what was taking place at the liquor house.

Parish Reinhardt, a friend of Defendant's, testified that, on the night of the shootings, he, Defendant, and Bellamy had been dropped off near Mr. Wimp's. Defendant had a shotgun and a handgun with him, and Bellamy also had a firearm. Defendant, Bellamy, and Reinhardt positioned themselves across the street from Mr. Wimp's in a line of trees. Defendant, Bellamy, and Reinhardt saw Stockton, Cook, and Summers leaving the liquor house and yelling at the occupants. Stockton, Cook, and Summers eventually walked across the street toward where Defendant, Bellamy, and Reinhardt were hiding. When the three men reached the sidewalk, Defendant fired the first shot toward the three men; Bellamy and Reinhardt then began shooting at Stockton, Cook, and Summers. Stockton, Cook, and Summers returned fire causing Defendant and his accomplices to flee the area.

When law enforcement officers arrived at the scene, they found Stockton, Cook, and Summers had been wounded. When asked who had shot him, Stockton replied, "Scoot" and "Scoot Rock." Stockton died soon after making these statements. Cook also died from his wounds. Defendant did not present any evidence at trial.

The jury found Defendant guilty of all charges and recommended sentences of life imprisonment without the possibility of parole on the first-degree murder convictions. The trial court imposed two sentences of life imprisonment without parole for the murder convictions and an additional active sentence of 288 to 355 months for the remaining convictions, all to be served consecutively. Defendant gave notice of appeal in open court.

On 24 February 2012, while his appeal was pending in this Court, Defendant filed a motion for appropriate relief ("MAR") alleging serious discovery violations during his trial. By order entered 13 June 2012, this Court stayed the appeal and remanded the matter to the superior court in Iredell County for consideration of Defendant's MAR. On remand, the trial court held a hearing on 4 and 5 September 2012, and subsequently, on 27 September 2012, entered an order denying Defendant's MAR. On 8 October 2012, the court entered an amended order correcting minor typographic errors. The trial court concluded that the State *did* violate the requirements of N.C. Gen. Stat. § 15A-903 by failing to provide more than 1,800 pages of documents to Defendant, but also concluded that the State did not violate Defendant's constitutional rights and that Defendant was not entitled to a new trial or any other relief

because Defendant had failed to show a reasonable possibility that the outcome of his trial would have been different but for the nondisclosure. Following delivery of the transcript of the MAR hearing on 24 December 2012, Defendant filed his supplemental brief on 14 January 2013. The State filed its supplemental brief on 6 February 2013. We affirm the trial court's denial of Defendant's motion for appropriate relief and find no error in his trial.

Defendant's MAR

[1] We first address Defendant's arguments that the trial court erred in failing to grant him a new trial where the State failed to disclose in discovery more than 1,800 pages of material to which Defendant was entitled. Specifically, Defendant argues the court erred in concluding that the State's discovery violations did not infringe upon Defendant's constitutional rights because Defendant failed to show a reasonable probability that, but for the nondisclosure, he likely would have received a different verdict from the jury. We are not persuaded by Defendant's argument.

> When considering rulings on motions for appropriate relief, we review the trial court's order to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.

State v. Frogge, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (citation and quotation marks omitted). "When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion." *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation and quotation marks omitted). In addition, the trial court's unchallenged findings of fact are binding on appeal. *State v. Jacobs*, 162 N.C. App. 251, 254, 590 S.E.2d 437, 440 (2004). "However, the trial court's conclusions are fully reviewable on appeal." *Lutz*, 177 N.C. App. at 142, 628 S.E.2d at 35 (citation and quotation marks omitted).

In criminal cases, our General Statutes require that

> [o]n a timely basis, law enforcement and investigatory agencies shall make available to the prosecutor's office a complete copy of the complete files related to the investigation of the crimes committed or the prosecution of the defendant for compliance with this section and any

> disclosure under G.S. [‘] 15A-902(a). Investigatory agencies that obtain information and materials listed in subdivision (1) of subsection (a) of this section shall ensure that such information and materials are fully disclosed to the prosecutor’s office on a timely basis for disclosure to the defendant.

N.C. Gen. Stat. § 15A-903(c) (2011). In considering a defendant’s right to relief from alleged non-constitutional errors such as statutory violations, our General Statutes further provide:

> (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.

N.C. Gen. Stat. § 15A-1443 (2011). For constitutional violations, in contrast, the same statute specifies a presumption of prejudice with the burden of proof on the State to demonstrate otherwise:

> (b) A violation of the defendant’s rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

Id. However, in the context of discovery violations, our Supreme Court has further observed:

> The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. However, . . . the United States Supreme Court rejected the idea that every nondisclosure automatically constitutes reversible error and held that prejudicial error must be determined by examining the materiality of the evidence. The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

> different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. We have also held that when determining whether the suppression of certain information was violative of a defendant's constitutional rights, the focus should not be on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, but rather should be on the effect of the nondisclosure on the outcome of the trial. The defendant has the burden of showing that the undisclosed evidence was material and affected the outcome of the trial.

State v. Tirado, 358 N.C. 551, 589-90, 599 S.E.2d 515, 540-41 (2004) (citations and quotation marks omitted).[2] Accordingly, to obtain relief on the basis of the State's discovery violations, whether they are properly characterized as statutory, constitutional, or both, Defendant must demonstrate prejudice: that there exists "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 589, 599 S.E.2d at 540 (citation and quotation marks omitted).

Here, Defendant does not challenge any of the trial court's findings of fact on the MAR, arguing only that the court erred in concluding that he failed to establish prejudice. Accordingly, all of those findings of fact are binding. *Jacobs*, 162 N.C. App. at 254, 590 S.E.2d at 440. On appeal, Defendant asserts prejudice in the nondisclosure of three specific items: (1) evidence he contends pointed to Dalton as one of the liquor house shooters, (2) a copy of a letter from informant Randall Stovall and related notes taken by investigator David C. Ramsey of the Iredell County Sheriff's Department during an interview with Stovall, (3) information about a non-attribution agreement signed by Chipley, and (4) information about acts of retribution by Cook's friends and family agianst someone other than Defendant.

I. Evidence about Dalton

Defendant argues prejudice in the State's failure to disclose Ramsey's handwritten notes about a statement by Willie Miller that Dalton had asked Miller to "go get" a .40 caliber gun for him on the night of the shooting. In unchallenged finding of fact 35, however, the

---

2. Tirado's trial and appeals up through the North Carolina Supreme Court review cited here included his co-defendant, Eric Devon Queen. Following the decision of our Supreme Court, Queen sought a writ of *certiorari* in the United States Supreme Court. That petition was denied. *See Queen v. North Carolina*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). However, Tirado did not petition for such review.

trial court found that this information was also contained in a report about the interview with Miller which was timely provided to Defendant. Further, in unchallenged finding of fact 36, the court found that Ramsey had testified at the MAR hearing that Dalton himself had clarified to Ramsey that he asked Miller to bring him the gun after the shootings, but never received it because Dalton turned himself in to police as soon as he heard he was a suspect. As noted *supra*, unchallenged findings of fact are binding on appeal. *Id.* In light of these unchallenged findings of fact, we cannot conclude that Defendant has shown a reasonable probability that the outcome of his trial would have been altered if he had received Ramsey's notes before trial.

In a related argument, Defendant notes that the State failed to disclose a report of Ramsey's interview with Milton Gaines in which Gaines stated that Dalton referred to himself as "Guns." Defendant contends this information prejudiced him because it could have been used to establish Dalton's propensity to carry a gun. We are not persuaded. As the court noted in unchallenged finding of fact 39, Defendant did receive information in discovery that Dalton had been convicted of possession of a firearm by a felon and was on parole for that conviction at the time of the liquor house shootings. In light of this evidence about Dalton's propensity to carry guns, we cannot conclude that there is a reasonable probability that the outcome of his trial would have been different had Defendant known of Dalton's nickname.

II. Letter from Randall Stovall

The letter from Stovall stated, *inter alia*, "Plus I need you to let Ramsey know I've found him a [sic] eyewitness to the murder at [the liquor house] that I can get to talk." As noted by the State, Stovall's letter does not identify the eyewitness nor does it state that the eyewitness would provide information exculpatory to Defendant, to wit, by stating that Defendant was not one of the shooters. For this reason, we find the case relied on by Defendant inapposite. In *State v. Canady*, the trial court denied a defense motion to require the State to disclose "the name of an informant who implicated five other people as being involved in the murders and indicated where the murder weapon could be found[,]" as well as the name and address of another person who had made statements implicating someone other than the defendant in the crimes. 355 N.C. 242, 252, 559 S.E.2d 762, 767 (2002). Our Supreme Court found prejudice and awarded a new trial because the nondisclosure concerned "material, exculpatory information that someone other than [the] defendant committed the offenses." *Id.*

Here, in contrast, the withheld information was only about the existence of an alleged eyewitness. It is purely speculative to assume that if Defendant had known of Stovall's letter, he would have (1) convinced Stovall to disclose the name of the witness, (2) located the witness, (3) obtained exculpatory information from the witness, and (4) been able to introduce such exculpatory information at trial.

Further, we are mindful of our Supreme Court's direction that

> when determining whether the suppression of certain information was violative of a defendant's constitutional rights, *the focus should not be on the impact of the undisclosed evidence on the defendant's ability to prepare for trial*, but rather should be on the effect of the nondisclosure on the outcome of the trial.

Tirado, 358 N.C. at 589, 599 S.E.2d at 541 (citation and quotation marks omitted; emphasis added). Thus, the question is not whether the information in Stovall's letter would have provided a possibly valuable lead to Defendant in preparing for trial, but whether, in light of the evidence that *was* introduced at trial, information about a possible eyewitness would have led to a different verdict from the jury. We note that the evidence against Defendant at trial included, *inter alia*, extensive testimony from Reinhardt about Defendant's role in recruiting Reinhardt and Bellamy to arm themselves and then lie in wait outside the liquor house, in what was essentially an ambush of Stockton, Cook, and Summers. In light of the evidence against him, we cannot conclude that there is a reasonable probability the outcome of Defendant's trial would have been altered even if Defendant had known about Stovall's stated knowledge of an alleged eyewitness.

III. Chipley's signed non-attribution agreement

Defendant asserts that Chipley was a "significant witness" in the case against him and that attacking Chipley's "credibility was critical." As Defendant acknowledges, he received a copy of an unsigned non-attribution agreement between Chipley and the State. Actually, Chipley had signed a non-attribution agreement covering statements made at the time of Chipley's interview with Ramsey. The State did not disclose the signed agreement or Ramsey's notes which indicate the agreement had been signed. Defendant now contends that the outcome of his trial would probably have been altered if he was aware that Chipley had actually signed the agreement. We are unconvinced.

The non-attribution agreement at issue states that Chipley was providing statements to law enforcement officers about the liquor house shootings "in conjunction with charging decisions and plea discussions" in the matter. The agreement further provides that any unsworn statements made by Chipley to law enforcement officers could only be used against him (1) for impeachment purposes should he testify in a criminal proceeding related to the liquor house shootings, (2) in a proceeding against Chipley for perjury or false statements, or (3) in connection with a criminal proceeding against Chipley for homicides or violent crimes other than the liquor house shootings, to the extent Chipley's statements pertained to any such crimes. Thus, the agreement covered only Chipley's interview with investigators and did not apply to his trial testimony.

At trial, on the morning Chipley was set to begin his testimony for the State, defense counsel asked the court for an opportunity to question Chipley out of the presence of the jury. During that *voir dire*, one of Defendant's attorneys asked Chipley, "I believe you were told, were you not, that — by Assistant District Attorney Jason Parker *that the non[-]attribution agreement that you had signed* did not cover any possible state charge of accessory before the fact of murder. Do you remember that?" (Emphasis added). This question makes clear that Defendant was aware of at least one non-attribution agreement with the State which Chipley *had signed*. We are unable to determine from the record on appeal whether the signed non-attribution agreement referred to by defense counsel on *voir dire* was the same agreement upon which Defendant bases this argument. In any event, once trial resumed, defense counsel cross-examined Chipley specifically about the consideration he received for his testimony against Defendant:

> Q. When you were prosecuted in federal court for this drug conspiracy case that you're currently serving time on, what was the original sentence that you were facing?
>
> A. 240 months.
>
> Q. 240 months. Which would be right at about 20 years; is that right?
>
> A. Yes.
>
> Q. And now you are actually serving half of that time; is that correct?
>
> A. Yes.

> Q And you got that time cut from the federal government for your agreement to testify against [Defendant], didn't you?
>
> A. There was a couple cases.
>
> Q Is that a [sic], sir?
>
> A. A couple cases.
>
> Q. Yes, you agreed to testify against him in a couple of cases?
>
> A. Yes.
>
> Q And so you received that benefit and your time was cut in half. You come to us having received that gift from the Federal Government; is that right?
>
> A. Yes.

On appeal, Defendant does not explain what further impeachment of Chipley he would have undertaken if Ramsey's notes or the signed agreement had been disclosed to him before trial. In sum, (1) the jury was made aware that Chipley was testifying as part of a deal which cut his lengthy federal prison sentence in half, (2) defense counsel was aware of at least one signed non-attribution agreement between Chipley and the State, and (3) the State had turned over an unsigned version of a non-attribution statement between Chipley and the State. In light of these facts, we simply cannot conclude that Defendant has demonstrated the required prejudice to obtain relief.

IV. Notes about retribution by Cook's family toward Torrie Miller

Defendant also argues prejudice in the nondisclosure of notes about interviews regarding Torrie Miller. Miller was identified by at least one witness as having shot Cook. In addition, undisclosed notes from Ramsey regarding his interview with Stovall indicate that family and friends of Stockton committed a drive-by shooting targeting Miller in retribution for Stockton's death. However, Defendant concedes that he received notes from the State that Stovall had told another witness that he had heard that Stockton's family retaliated against Miller for the shooting of Cook. In light of the evidence that Defendant did receive about family and friends of a decedent who apparently blamed Miller for the shooting and undertook a drive-by shooting in retribution, we cannot hold that there is a reasonable probability that the State's non-disclosure of notes regarding interviews about Torrie Miller altered the

outcome of Defendant's trial. Accordingly, we affirm the trial court's denial of Defendant's MAR.

Defendant's Direct Appeal

[2] In his direct appeal, Defendant argues only a single issue: that the trial court erred in failing to instruct the jury on self-defense, defense of others, or voluntary manslaughter based upon imperfect self-defense or defense of others. We disagree.

We review a trial court's denial of a request for jury instructions *de novo*. *State v. Cruz*, 203 N.C. App. 230, 235, 691 S.E.2d 47, 50 (2010). However, where a defendant fails to request an instruction,

> we will review the record to determine if the instruction constituted plain error.
>
> Under a plain error analysis, defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result. Even when the plain error rule is applied, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.

State v. Hardy, 353 N.C. 122, 131-32, 540 S.E.2d 334, 342 (2000) (citations and quotation marks omitted), *cert. denied*, *sub. nom. Hardy v. North Carolina*, 534 U.S. 840, 151 L. Ed. 2d 56 (2001).

Here, at the charge conference, Defendant requested that the trial court submit voluntary manslaughter to the jury as to the two murder charges, contending that the evidence could support imperfect self-defense or imperfect defense of others. We review Defendant's arguments that the trial court erred in denying that request *de novo*. Defendant did not request an instruction on imperfect self-defense or imperfect defense of others as to the attempted murder or assault with a deadly weapon with intent to kill inflicting serious injury charges. Defendant also did not request an instruction on perfect self-defense or defense of others as to any of the charges against him. Accordingly, we review those arguments on appeal only for plain error.

> In North Carolina, a defendant is entitled to have the jury consider acquittal by reason of *perfect* self-defense when the evidence, viewed in the light most favorable to the defendant, tends to show that at the time of the killing it appeared to the defendant and []he believed it to

be necessary to kill the decedent to save h[im]self from imminent death or great bodily harm. That belief must be reasonable, however, in that the circumstances as they appeared to the defendant would create such a belief in the mind of a person of ordinary firmness. Further, the defendant must not have been the initial aggressor provoking the fatal confrontation. A killing in the proper exercise of the right of perfect self-defense is always completely justified in law and constitutes no legal wrong.

Our law also recognizes an *imperfect* right of self-defense in certain circumstances, including, for example, when the defendant is the initial aggressor, but without intent to kill or to seriously injure the decedent, and the decedent escalates the confrontation to a point where it reasonably appears to the defendant to be necessary to kill the decedent to save h[im]self from imminent death or great bodily harm. Although the culpability of a defendant who kills in the exercise of *imperfect* self-defense is reduced, such a defendant is *not justified* in the killing so as to be entitled to acquittal, but is guilty at least of voluntary manslaughter.

. . . . The trial court [i]s not required to instruct on *either* form of self-defense unless evidence was introduced tending to show that at the time of the killing the defendant reasonably believed h[im]self to be confronted by circumstances which necessitated [the] killing . . . to save h[im]self from *imminent* death or great bodily harm. . . .

. . . .

The killing of another human being is the most extreme recourse to our inherent right of self-preservation and can be justified in law only by the utmost real or apparent necessity brought about by the decedent. For that reason, our law of self-defense has required that a defendant claiming that a homicide was justified and, as a result, inherently lawful by reason of perfect self-defense must establish that []he reasonably believed at the time of the killing []he otherwise would have immediately suffered death or great bodily harm. Only if defendants are required to show that they killed due to a reasonable belief that death or great bodily harm was imminent can the justification for homicide remain clearly and firmly rooted

> in necessity. The imminence requirement ensures that deadly force will be used only where it is necessary as a last resort in the exercise of the inherent right of self-preservation. It also ensures that before a homicide is justified and, as a result, not a legal wrong, it will be reliably determined that the defendant reasonably believed that absent the use of deadly force, not only would an unlawful attack have occurred, but also that the attack would have caused death or great bodily harm. The law does not sanction the use of deadly force to repel simple assaults.
>
> The term "imminent," as used to describe such perceived threats of death or great bodily harm as will justify a homicide by reason of perfect self-defense, has been defined as immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of the law. Our cases have sometimes used the phrase "about to suffer" interchangeably with "imminent" to describe the immediacy of threat that is required to justify killing in self-defense.

State v. Norman, 324 N.C. 253, 259-61, 378 S.E.2d 8, 12-13 (1989) (citations and some quotation marks omitted) (emphasis in original).

> The elements of perfect defense of another are essentially the same as those for perfect self-defense. In general one may kill in defense of another if one believes it to be necessary to prevent death or great bodily harm to the other and has a reasonable ground for such belief, the reasonableness of this belief or apprehension to be judged by the jury in light of the facts and circumstances as they appeared to the defender at the time of the killing. The right to kill in defense of another cannot exceed such other's right to kill in his own defense as that other's right reasonably appeared to the defendant.

State v. Perry, 338 N.C. 457, 466, 450 S.E.2d 471, 476 (1994) (citations and quotation marks omitted). Likewise, imperfect defense of others can reduce a defendant's culpability where the defendant used excessive force or was the initial aggressor. *Id.* at 466-67, 450 S.E.2d at 476-77 (citations omitted).

Here, Defendant contends that, in the light most favorable to him, the evidence tended to show that he was acting in self-defense or in

defense of the Dalton group and others inside Mr. Wimp's when he fired on Stockton, Cook, and Summers. We are not persuaded. Our review of the evidence reveals nothing that would support a reasonable belief by Defendant that he or the people inside Mr. Wimp's were in *imminent* danger of death or great bodily harm unless Defendant fired on Stockton, Cook, and Summers. There was evidence before the jury that those inside Mr. Wimp's were afraid and that Stockton, Cook, and Summers had been yelling threats and banging on the door of the liquor house, but nothing suggested Stockton, Cook, and Summers were about to gain access to Mr. Wimp's again. Further, at the time Defendant started shooting, Stockton, Cook, and Summers had stepped away from the liquor house and were on the sidewalk. As for Defendant's claim of self-defense, there was no evidence that Stockton, Cook, or Summers were even aware of Defendant's presence on the scene, much less evidence that Defendant's life was in imminent danger when he fired the first shot.

> The trial court [i]s not required to instruct on *either* form of self-defense unless evidence was introduced tending to show that at the time of the killing the defendant reasonably believed h[im]self to be confronted by circumstances which necessitated [the] killing . . . to save h[im]self from *imminent* death or great bodily harm.

Norman, 324 N.C. at 260, 378 S.E.2d at 12 (citation omitted). Defendant was not entitled to a jury instruction on perfect or imperfect self-defense or perfect or imperfect defense of others. Accordingly, we find no error in Defendant's trial.

AFFIRMED IN PART; NO ERROR IN PART.

Judges BRYANT and McCULLOUGH concur.

STATE v. RENKOSIAK

[226 N.C. App. 377 (2013)]

STATE OF NORTH CAROLINA
v.
HELEN B RENKOSIAK, DEFENDANT

No. COA12-975

Filed 2 April 2013

1. Evidence—denial of motion in limine—willfully misapplied employer's funds—charge cards—insurance

The trial court did not abuse its discretion in an embezzlement case by denying defendant's motion in limine to exclude evidence related to BP charge cards and AFLAC insurance. The evidence showed that defendant "willfully misapplied" her employer's funds.

2. Embezzlement—motion to dismiss—sufficiency of evidence

The trial court did not err in an embezzlement case by denying defendant's motion to dismiss. The State introduced substantial evidence of each of the elements of embezzlement.

Appeal by defendant from judgment entered on or about 16 July 2011 by Judge Milton F. Fitch, Jr. in Superior Court, Dare County. Heard in the Court of Appeals 31 January 2013.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Harriet F. Worley, for the State.

Phillip H. Hayes, for defendant-appellant.

STROUD, Judge.

Defendant appeals her conviction for embezzlement, arguing that the trial court erred in denying her motions in limine and to dismiss. For the following reasons, we find no error.

I. Background

The State's evidence tended to show that Mr. Carlos Gomez was the founder of Coastal Engineering and Surveying. ("Coastal"). In 2001, Mr. Gomez hired defendant as a "bookkeeper controller" for Coastal. Defendant's duties included making day-to-day financial decisions for Coastal such as paying Coastal's invoices. In this capacity, defendant had full authority to sign checks drawn upon Coastal's bank account. In 2003, Mr. Gomez directed defendant to close Coastal's BP charge cards;

she failed to do so and these cards remained open and charges continued to be incurred on them. By 2007, Mr. Gomez had noticed some financial irregularities. Among other issues, Mr. Gomez discovered that Coastal had been paying for the BP charge cards that he had previously ordered defendant to close and for AFLAC insurance for defendant. When Mr. Gomez confronted defendant with the irregularities, she stated that "she meant to pay every bit of it, and it's just that they are so tight at her house, and her husband doesn't make enough money, and she has to work so many jobs." Defendant offered to pay Mr. Gomez $15,000.00. The evidence showed that defendant misappropriated a total sum of $116,885.77. A jury found defendant guilty of embezzling more than $100,000.00. Defendant was sentenced to 73 months to 97 months imprisonment. Defendant appeals.

II. Motion in Limine

[1] Defendant first contends that the trial court erred in denying her motion in limine to exclude evidence related to BP charge cards and AFLAC insurance. "When reviewing a trial court's ruling on a motion *in limine*, this Court's standard of review is abuse of discretion." *State v. Wilson*, 183 N.C. App. 100, 103, 643 S.E.2d 620, 622 (2007), *modified and aff'd*, 362 N.C. 162, 655 S.E.2d 359 (2008).

A. BP Charge Cards

Defendant contends that because the evidence does not show that defendant was personally physically entrusted with the BP charge cards and that she personally incurred the charges by physically using the charge cards, the State failed to prove embezzlement.

The essential elements of embezzlement are:

> (1) the defendant, older than 16, acted as an agent or fiduciary for his principal, (2) he received money or valuable property of his principal in the course of his employment and through his fiduciary relationship, and (3) he fraudulently or knowingly and willfully misapplied or converted to his own use the money of his principal which he had received in a fiduciary capacity.

State v. Newell, 189 N.C. App. 138, 140-41, 657 S.E.2d 400, 403 (2008).

Defendant's argument misapprehends the charges against her: she was not charged with wrongfully possessing the BP charge cards themselves; she was charged with misapplication of her employer's funds by paying bills she knew to be not for Coastal's benefit and specifically not

authorized by her employer. Defendant does not dispute that the State's evidence shows that defendant paid BP bills which she knew were not authorized by Coastal or for Coastal's benefit with Coastal's funds. An embezzlement charge against defendant required the State to show fraudulent or knowing misapplication of "money . . . of [defendant's] principal . . . which [defendant] had received in a fiduciary capacity;" the State did not also need to show that defendant converted Coastal's funds to her own use, although the evidence does indicate that she did. *Id.* Here, the evidence shows that defendant "willfully misapplied" her employer's funds by paying BP bills which she knew were incurred without Coastal's authorization on accounts she was instructed to close. *Id.*

Defendant also contends the evidence regarding BP was irrelevant, unfairly prejudicial, confusing and misleading to the jury. For the reasons noted above, the evidence was certainly relevant, and certainly prejudicial to defendant, but not unfairly so. *See* N.C. Gen. Stat. § 8C-1, Rule 401 (2007). We fail to see how this evidence may be confusing or misleading. The trial court properly exercised its discretion in its denial of defendant's motion in limine. *Wilson*, 183 N.C. App. at 103, 643 S.E.2d at 622.

B. AFLAC Insurance

Defendant also claims that

> the conduct of the defendant alleged to constitute embezzlement is the failure to deduct from her compensation for AFLAC premiums paid by the company. This is inconsistent with the charge of embezzlement which requires the affirmative act of converting to one's own use the asset of another while entrusted with it as an agent or employee of that other person or entity.

Contrary to defendant's argument, the State's evidence does show defendant's knowing or willful misapplication of Coastal's funds as to the AFLAC insurance. The State showed that defendant was in charge of the finances for Coastal; Mr. Gomez did not authorize defendant to pay for her personal AFLAC insurance with Coastal funds without a corresponding deduction from her own paycheck; when defendant was confronted about the financial discrepancies, she stated "she meant to pay every bit of it, and it's just that they are so tight at her house, and her husband doesn't make enough money, and she has to work so many jobs" and offered to pay $15,000.00.

Defendant also makes essentially the same arguments as to relevance, unfair prejudice, and confusion regarding the AFLAC insurance evidence as she made regarding the BP evidence, although with the AFLAC insurance, the personal benefit to defendant is obvious. Again, the evidence regarding AFLAC insurance was relevant in establishing the elements of embezzlement, *see Newell*, 189 N.C. App. at 140-41, 657 S.E.2d at 403, so the trial court properly determined that it was not irrelevant or unfairly prejudicial; nor did it confuse and mislead the jury. *See* N.C. Gen. Stat. § 8C-1, Rule 401. This argument is overruled.

III. Motion to Dismiss

[2] Defendant also argues that the trial court erred in denying her motion to dismiss. "A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense." *State v. Johnson*, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010). Defendant repeats her arguments that the State failed to show that she was personally entrusted with the BP cards or that she incurred each expense on the cards and that her failure to make a deduction from her own paycheck for her AFLAC insurance is not an "affirmative act" of embezzlement; for the same reasons as stated above, these arguments fail. Defendant also argues that without the evidence regarding the BP charge cards and the AFLAC insurance, the sum misappropriated by defendant is less than $100,000.00; while this may be correct, we have already determined that the evidence regarding the BP charge cards and AFLAC insurance was properly admitted and was evidence of embezzlement. As the State introduced substantial evidence of each of the elements of embezzlement, this argument is overruled.

IV. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges STEPHENS and DILLON concur.

STATE v. SESSOMS

[226 N.C. App. 381 (2013)]

STATE OF NORTH CAROLINA
v.
BOBBY LEE SESSOMS, DEFENDANT

No. COA12-1232

Filed 2 April 2013

1. Criminal Law—assault—court's reference to "victim"

There was no plain error in an assault prosecution where the trial court referred to the person who was assaulted (Mr. Griffin) as the victim. Although defendant raised the issue of self-defense, the evidence showed that defendant came to Mr. Griffin's house, got out of his van, and cut Mr. Griffin with a machete while Mr. Griffin had no weapon of his own.

2. Evidence—police officer's testimony—credibility of victim

There was no plain error in an assault prosecution where a police officer testified that the testimony of a specific prosecution witness was unbiased and would be valuable. Even assuming *arguendo* that the trial court erred, such error did not rise to the level of plain error in light of the State's other evidence.

3. Criminal Law—defense of others—instruction not given

There was no plain error in an assault prosecution where the trial court did not instruct the jury on defense of others. Defendant's lone statement that he was defending himself, his vehicle, and his wife was not evidence from which the jury could find that the defendant reasonably believed a third person was in immediate peril of death or serious bodily harm at the hands of another.

4. Evidence—description of defendant—not evidence of bad character

The trial court did not allow improper character evidence in an assault prosecution where the victim's brother described defendant as a man riding around with a machete. The statement was not "character evidence" pursuant to N.C.G.S. § 8C-1, Rule 404(b), but rather a description of what the witness saw and his reason for calling for help. Wielding a machete is not a character trait.

Appeal by defendant from judgment entered on or about 21 September 2011 by Judge Claire V. Hill in Superior Court, Bladen County. Heard in the Court of Appeals 28 February 2013.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Jane L. Oliver, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender John F. Carella, for defendant-appellant.

STROUD, Judge.

Defendant appeals from a judgment entered upon his conviction of assault with a deadly weapon inflicting serious injury. For the following reasons, we find no error.

I. Background

The State's evidence tended to show that on 8 August 2009, John Marcus Griffin, Jr. returned to his home to find defendant in his driveway in a van. Mr. Griffin asked defendant to leave, but defendant refused. Defendant got out of the van and cut Mr. Griffin in the shoulder with a machete. A jury found defendant guilty of assault with a deadly weapon inflicting serious injury. Defendant was sentenced to 42 to 60 months imprisonment. Defendant appeals.

II. Plain Error

Defendant contends that the trial court committed plain error as to three issues.

> 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).

A. Improper Opinion Expressed by the Trial Court

[1] Defendant first contends that "the trial court committed plain error and expressed an improper opinion by repeatedly referring to Jon 'Doc' Griffin as 'the victim,' when the question of whether . . . [defendant] acted

in self[-]defense was at issue." (Original in all caps.) Our Supreme Court has previously determined that referring to the prosecuting witness as "the victim" is not plain error. *See State v. McCarroll*, 336 N.C. 559, 566, 445 S.E.2d 18, 22 (1994) ("We cannot hold that the reference to the prosecuting witness as the victim was an error so basic and lacking in its elements that justice could not have been done."). In this case, defendant raised the issue of self-defense and thereby challenged whether Mr. Griffin was actually a victim, but we still do not believe the use of the term "victim" rose to the level of plain error in light of the evidence which showed defendant came to Mr. Griffin's house, got out of his van, and cut Mr. Griffin with a machete while Mr. Griffin had no weapon of his own. S*ee Lawrence* at ___, 723 S.E.2d at 334. This argument is overruled.

B. Improper Opinion Expressed by a Police Officer

[2] Defendant next contends that "the trial court committed plain error by allowing a police officer to give impermissible opinion testimony by stating that a specific prosecution witness' testimony was unbiased and 'would be most valuable' here today.'" (Original in all caps.) Although defendant's argument is unclear, he seems to suggest that the police officer was testifying as an expert witness. Here, the police officer testifying was not an expert witness, but even assuming *arguendo* that the trial court erred in allowing "a police officer to give impermissible opinion testimony" as to the credibility of another witness, such error does not rise to the level of plain error in light of the State's other evidence demonstrating that defendant came to Mr. Griffin's home, got out of his van, and cut Mr. Griffin with a machete. *See Lawrence* at ___, 723 S.E.2d at 334; *see also State v. Lawson*, 159 N.C. App. 534, 542, 583 S.E.2d 354, 360 (2003) ("Defendant also cites *State v. Holloway*, 82 N.C. App. 586, 347 S.E.2d 72 (1986), which is also distinguishable from the case before us. In *Holloway*, expert witnesses testified that a State's witness was telling the truth. This Court held that such testimony constituted plain error as it invaded the province of the jury to determine the credibility of witnesses. In the present case, *Officer Wilson's testimony was not that of an expert as to credibility*; further, he was not invading the province of the jury as he was not commenting on the credibility of a witness. As noted above, Officer Wilson was testifying to the circumstances of the traffic stop and the reason for defendant's detention. The above testimony by Officer Wilson does not rise to the level of plain error. This argument is overruled." (emphasis added) (citations omitted)). This argument is overruled.

C. Jury Instruction on Defense of Others

[3] Defendant also argues that "the trial court committed plain error by failing to instruct the jury on defense of others[,]" an instruction defendant did not request. (Original in all caps.)

> Persons in a family relation, and persons in the relation of master and servant, have the reciprocal right to come to the aid and defense of the person in that relation when faced with an assault. The law does not allow this interference as an indulgence of revenge, but merely to prevent injury. The assistant's act may not be in excess of that which the law would allow the assisted party, for they are in a mutual relation one to another.
>
> . . . .
>
> In any event there must be some evidence pertaining to the doctrine before the Court is required to charge about it. Where there is no evidence from which the jury could find that the defendant reasonably believed a third person was in immediate peril of death or serious bodily harm at the hands of another, it would be improper for the Court to instruct on defendant's defense of a third person as justification for the assault.

State v. Moses, 17 N.C. App. 115, 116, 193 S.E.2d 288, 289 (1972) (citations omitted).

Here, the sole evidence defendant directs this Court's attention to as evidence to support an instruction for defense of others is defendant's testimony that " 'I took the machete and done like that to defend myself and my vehicle and my wife,'" after explaining that Mr. Griffin "attacked him and tried to open the door to his minivan while he was sitting inside next to" his wife. We are not aware of any evidence that demonstrated that Mr. Griffin had a weapon, defendant believed Mr. Griffin had a weapon, or Mr. Griffin threatened or in any way acted as though he was going to touch defendant's wife. Accordingly, defendant's lone statement that he was defending "myself and my vehicle and my wife" is not "evidence from which the jury could find that the defendant *reasonably believed a third person was in immediate peril of death or serious bodily harm at the hands of another*," and the trial court did not commit error in failing to instruct the jury on defense of others. *Id.* (emphasis added). This argument is overruled.

III. Character Evidence

[4] Citing North Carolina General Statute § 8C-1, Rule 404(b), defendant also contends that "the trial court erred by allowing Jason Griffin to testify to improper bad character evidence by stating that . . . [defendant] was 'a man with a machete riding around.'" (Original in all caps.) North Carolina General Statute § 8C-1, Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2009). Here the following exchange took place during defendant's trial between the State and Jason Griffin, Mr. Griffin's brother, who had witnessed the incident:

> Q. And you had called for help?
>
> A. Yes, sir.
>
> Q. And was that because your brother had been hurt and needed some attention?
>
> A. Yes. And also I didn't want anybody else to get hurt by a man with a machete riding around.

Mr. Jason Griffin's statement was not "character evidence" pursuant to North Carolina General Statute § 8C-1, Rule 404(b), but rather his description of what he saw and his reason for calling for help; wielding a machete is not a character trait. *See id.* North Carolina General Statute § 8C-1, Rule 404(b) is inapplicable, and this argument is without merit.

IV. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges STEPHENS and DILLON concur.

STATE OF NORTH CAROLINA
v.
BILLY WAYNE WARD

No. COA12-1125

Filed 2 April 2013

1. Constitutional Law—right to confrontation—testimony—chemical analysis performed by another agent

The trial court did not commit plain error in a trafficking oxycodone by possession case by allowing a SBI chemical analyst to testify to the results of the chemical analysis performed by another SBI agent. Because defendant stipulated that the pills contained oxycodone, any error in the admission of the evidence as to the nature of the substance could not rise to the level of plain error.

2. Constitutional Law—effective assistance of counsel—claim dismissed without prejudice

Defendant's effective assistance of counsel claim was dismissed without prejudice to the right of defendant to file a motion for appropriate relief in the trial court.

Judge STEELMAN concurring in separate opinion.

Appeal by defendant from judgment entered 29 February 2012 by Judge Howard E. Manning in Alamance County Superior Court. Heard in the Court of Appeals 27 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General Jay L. Osborne, for the State.

Heather L. Rattelade, for defendant-appellant.

HUNTER JR., Robert N., Judge.

Billy Wayne Ward ("Defendant") appeals from a judgment sentencing him to 90-117 months imprisonment following a jury verdict convicting him of Trafficking Oxycodone by Possession. On appeal, Defendant argues the trial court committed plain error by allowing a "substitute analyst to testify concerning lab results," in violation of his Sixth Amendment right to confrontation. Additionally, Defendant contends he was denied the effective assistance of counsel. For the

following reasons, we dismiss without prejudice Defendant's ineffective assistance of counsel claim, and find no prejudicial error with respect to Defendant's other arguments.

I. Factual & Procedural History

On 12 April 2010, Defendant paid Sergeant Brandon Jones ("Sergeant Jones"), an undercover narcotics investigator with the Alamance County Sherriff's Office, seven pills of oxycodone in exchange for property that was represented as stolen. Defendant paid Sergeant Jones two pills for wood products and five pills in exchange for a freezer. These seven pills were sent to the State Bureau of Investigation ("SBI") Lab for analysis. Special Agent Kristin Kirkland ("Agent Kirkland") performed an analysis of the seven pills on 12 April 2010. Agent Kirkland's analysis determined that the seven pills contained 3.2 grams of oxycodone, a schedule II opium derivative. Agent Kirkland's analysis was transcribed into an SBI Lab report labeled State's Exhibit No. 10.

Also on 12 April 2010, Magistrate Wendy N. Sheldon issued a search warrant for Defendant's residence. The warrant was executed on 13 April 2010. The search yielded, among other things, two medicine bottles and an envelope with pills enclosed. Jennifer Lindley ("Ms. Lindley"), a chemical analyst with the SBI, analyzed the contents of the two medicine bottles. One bottle contained fourteen tablets; the other contained twenty-two tablets. Ms. Lindley's analysis found that the combined thirty-six tablets from the two bottles contained a total of 16.4 grams of oxycodone. Ms. Lindley did not analyze the eight tablets found in the envelope, pursuant to the SBI's policy of ceasing further analysis once a sufficient drug weight to sustain a trafficking charge has been reached. The analysis of the pills found in Defendant's home formed the basis of Defendant's indictment for Trafficking by Possession. The transaction between Defendant and Sergeant Jones formed the basis of Defendant's indictment for Delivery of Oxycodone.

The matters came on for trial together at the 27 February 2012 session of Alamance County Superior Court. At trial, Ms. Lindley testified regarding her personal analysis of the contents of the two medicine bottles. Shortly thereafter, Judge Manning excused the jury from the courtroom to conduct a *voir dire* examination of Ms. Lindley.

During *voir dire*, Ms. Lindley was asked about the SBI Lab Report prepared by Agent Kirkland detailing the analysis of the seven pills obtained by Sergeant Jones on 12 April 2010, which constituted the

primary evidence related to Defendant's Delivery of Oxycodone charge.[1] Ms. Lindley stated she had not reviewed Agent Kirkland's notes.

Judge Manning then informed Defendant's attorney ("Mr. Watkins") that Ms. Lindley would not be testifying as to Agent Kirkland's report or to the contents of pills Agent Kirkland analyzed. Nevertheless, Judge Manning emphasized to Mr. Watkins that Ms. Lindley had already testified that the pill bottles she had personally analyzed contained an amount of oxycodone sufficient to sustain the trafficking conviction.

Mr. Watkins then informed the court that Defendant would stipulate that the pills analyzed in Agent Kirkland's report were indeed oxycodone, noting that "all of [the pills] are the same." Judge Manning then asked Defendant directly if he would stipulate that the pills Defendant gave to Sergeant Jones were oxycodone. Defendant said "[y]es."

The State then discussed with Judge Manning how to properly introduce Agent Kirkland's lab report. Judge Manning concluded the *voir dire* and allowed the jury back into the courtroom. Upon the jury's return, the State questioned Ms. Lindley regarding Agent Kirkland's report (State's Exhibit No. 10). Agent Kirkland's report was subsequently admitted into evidence without objection.

On 29 February 2012, a jury convicted Defendant of (1) Trafficking by Possession and (2) Delivery of Oxycodone. The trial court sentenced Defendant to 90-117 months imprisonment for the Trafficking by Possession conviction. At the State's request, the trial court arrested judgment on Defendant's conviction for Delivery of Oxycodone. Defendant filed a notice of appeal on 2 March 2012.

II. Jurisdiction & Standard of Review

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

This Court reviews alleged violations of constitutional rights *de novo*. *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007). Under *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re 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)).

---

1. Agent Kirkland was unavailable as a witness.

III. Analysis

We first note that Defendant is objecting only to the introduction of evidence related to his conviction for Delivery of Oxycodone, for which judgment has been arrested at the request of the State. The admission of the challenged evidence (the Kirkland Report and Ms. Lindley's testimony regarding it) had no bearing on the admissibility of Ms. Lindley's testimony regarding her own analysis of the pills which formed the basis of Defendant's Trafficking by Possession conviction. Accordingly, we are confused as to why Defendant's appellate counsel concludes in her brief that the "judgment for trafficking should be vacated and remanded." Nevertheless, we address the merits of Defendant's arguments.

[1] Defendant first contends that the trial court committed plain error by allowing Ms. Lindley to testify to the results of the chemical analysis performed by Agent Kirkland (the "Kirkland report"). Defendant argues allowing Ms. Lindley to testify in this manner violated his Sixth Amendment right to confront and cross-examine the witnesses against him, which he had not waived. We disagree.

"The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citing *Crawford v. Washington*, 541 U.S. 36, 68 (2004)). The U.S. Supreme Court has applied the holding in *Crawford* to "testimonial" lab reports, holding that "[t]he Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits, and the admission of such evidence [is] error." *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 329 (2009). Nevertheless, "[t]he 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 314 n.3.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Furthermore, "[a] constitutional issue not raised at trial will generally not be considered for the first time on appeal." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (citing *State v. Nobles*, 350 N.C. 483, 495, 515 S.E.2d 885, 893 (1999); *Porter v. Suburban Sanitation Serv., Inc.*, 283 N.C. 479, 490, 196 S.E.2d 760, 767 (1973)).

When a criminal defendant fails to properly object at trial, "the burden is on the party alleging error to establish its right to review; that is, that an exception, 'by rule or law was deemed preserved or taken without any such action,' *or that the alleged error constitutes plain error.*" *State v. Walker*, 316 N.C. 33, 37, 340 S.E.2d 80, 82 (1986) (emphasis added).

Plain error is "always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done' . . . ." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (emphasis in original). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

Here, Defendant made no objection to either Ms. Lindley's testimony regarding the Kirkland report or the subsequent admission of the Kirkland report itself into evidence. Indeed, Defendant stipulated that the pills given to Sergeant Jones and subsequently analyzed by Agent Kirkland contained oxycodone. Because Defendant stipulated that the pills contained oxycodone, "any error in the admission of the evidence as to the nature of the substance . . . cannot rise to the level of plain error." *State v. Baldwin*, 161 N.C. App. 382, 389, 588 S.E.2d 497, 503 (2003). Accordingly, Defendant's argument in this respect is overruled.

Defendant additionally contends the State failed to comply with the notice requirements of N.C. Gen. Stat. § 90-95(g) (2011). Section 90-95(g) allows the State to admit into evidence a certified SBI chemical analysis report without relying on the testimony of the analyst who actually performed the analysis. However, before doing so, the State must (1) notify the Defendant of its intent to use the report fifteen business days prior to the proceeding; and (2) Defendant's attorney must have failed to file a written objection to the report. *See* N.C. Gen. Stat. § 90-95(g).

In the case *sub judice*, the record is not clear as to whether the State gave Defendant the requisite fifteen-day notice regarding its intent to introduce the Kirkland report. In his appeal, Defendant notes, "[i]t 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." *State v. Whittington*, __ N.C. App. __, __, 728 S.E.2d 385, 390 (2012). However, this case is readily distinguishable from *Whittington*.

Unlike *Whittington*, the record in the instant case confirms Defendant failed to object at all to Ms. Lindley discussing the Kirkland report. In fact, both Defendant and Defendant's counsel stipulated to the very substance of the Kirkland report (i.e., that the seven pills given to Sergeant Jones were in fact oxycodone). Thus, Defendant has not preserved the issue for appellate review. *See* N.C. R. App. P. 10(a)(1); *see also State v. Davis*, 202 N.C. App. 490, 497, 688 S.E.2d 829, 834 (2010) (noting that by failing to object at trial to the admission of a testimonial lab report, the defendant failed to preserve the issue for appeal).

Defendant also claims his "stipulation was not a knowing and intelligent waiver of his right to confront Agent Kirkland." However, this Court has previously rejected the contention that the "acceptable consent [for an in-trial concession] requires the same formalities as mandated by statute for a plea of guilty." *State v. Perez*, 135 N.C. App. 543, 548, 522 S.E.2d 102, 106 (1999). Where a Defendant has been "advised of the need for his authorization for the concession," has "discussed the concession with his counsel," and has "acknowledged that his counsel had made the argument desired by him," such consent has been held to not violate the Sixth Amendment right against self-incrimination. *Id.* (citing *State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991)).

Here, the record belies Defendant's contention that his stipulation was not a "knowing and intelligent waiver." The trial court was explicit in announcing to Defendant that Ms. Lindley would not testify as to Agent Kirkland's report without Defendant's consent. Nevertheless, Defendant's attorney stated, "my client says that he'll stipulate that they're oxycodone. He says all of [the pills] are the same." The trial judge then asked Defendant to confirm that he would stipulate that the pills Defendant gave to Sergeant Jones in exchange for the freezer and wood products (i.e. the pills subsequently analyzed by Agent Kirkland) were oxycodone. Defendant said "[y]es," to this inquiry, admitting that the pills were oxycodone.

This on-the-record exchange suggests that Defendant had discussed this stipulation with his attorney, was aware of the need for his verbal consent, and that the attorney was arguing Defendant's case in a manner of which Defendant had approved. *See Perez*, 135 N.C. App. at 548, 522 S.E.2d at 106; *State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991). As such, we hold Defendant's actions to be a knowing and intelligent waiver of his right to confront Agent Kirkland.

[2] Finally, Defendant alleges he was denied the effective assistance of counsel. 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 [that ineffective assistance of counsel] 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." *Id.* at 554, 557 S.E.2d at 547 (quotation marks and citation omitted).

In the instant case, we are limited to the record before us to determine whether trial counsel's decision to allow his client to stipulate as to the contents of the pills 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.

NO ERROR.

Judge GEER concurs.

Judge STEELMAN concurs with separate opinion.

STEELMAN, Judge, concurring.

I concur in the majority opinion in this case, but write separately because I believe that the arguments raised by counsel for the defendant on appeal are disingenuous, and that counsel should be sanctioned.

On appeal, counsel has a duty to make a fair presentation of the case to the Court. *See* N.C.R. App. P. 34(a)(3). While counsel has the duty to zealously represent his or her client, the duty does not grant to counsel *carte blanche* to distort the facts of a case or to make misleading arguments.

On appeal, defendant asks that his "conviction and judgment for Delivering Schedule II Controlled Substance Oxycodone to Undercover Officer . . . be vacated and dismissed and the defendant's conviction and judgment for trafficking should be vacated and remanded for a new trial."

Since the trial court arrested judgment in case 10 CRS 52312, delivery of oxycodone to an undercover officer, that case is not properly before this Court. However, in the case that is properly before this Court, case 10 CRS 52305, trafficking in opium, defendant argues that the admission of Kirkland's report was in error and mandates a new trial. However, Kirkland's report did not deal with the drugs that were the basis of the trafficking charge. As to that charge, the analyst that tested those drugs, Lindley, testified at trial.

In arguing cases before an appellate court, counsel has a duty to apply the law to the facts of the case, not to twist the facts so that they fit a legal theory that will allow them to prevail in the case.

I would impose sanctions upon counsel for the defendant pursuant to N.C.R. App. P. 34(a)(3) based upon a gross disregard of "the requirements of a fair presentation of the issues to the appellate court." I would further require that counsel for the defendant submit a copy of this opinion to the Office of the Appellate Defender.

STATE OF NORTH CAROLINA
v.
DAVID LARRY WILLIAMS, DEFENDANT

No. COA12-1034

Filed 2 April 2013

1. Stalking—continuous course of conduct—effective date of new statute

In a stalking prosecution for conduct that extended over the time in which a new statute was enacted, the trial court erred by not specifically instructing the jury that it must decide whether the State proved that defendant committed a criminal act after the date of enactment of the new statute beyond a reasonable doubt and render a special verdict as to that issue.

2. Stalking—continuous course of conduct—new statute—instructions—plain error

A stalking conviction was vacated and remanded where there was plain error in the trial court's failure to instruct the jury to render a special verdict as to whether defendant's conduct extended beyond the enactment of the new stalking statute under which

defendant was indicted. Given the jury instructions and the verdict form, the Court of Appeals could not tell whether the jury convicted defendant on the basis of any post-enactment conduct, which implicated defendant's due process right to be free from retroactive judicial application of a criminal statute. Furthermore, because of the lack of evidence that defendant continued to stalk the victim after the effective date of the new statute, it could be said that the instructional mistake had a probable impact on the jury's finding.

3. Domestic Violence—violation of protective order—presence at shopping center

The evidence was insufficient to establish that defendant knowingly violated a domestic violence protective order (DVPO) and the trial court should have granted his motion to dismiss. Defendant was present during regular business hours at a public location with numerous stores other than the salon at which the victim was working that day. The salon had not been specifically noted on the DVPO and was not the victim's usual workplace. A reasonable deduction that defendant might *likely* violate the DVPO if he was in a large shopping center and he was aware that the victim was nearby is not the same as a reasonable inference that he did, in fact, knowingly violate the order. Even taken in the light most favorable to the State, the evidence here only raised a suspicion of guilt.

Appeal by defendant from judgments entered on or about 20 April 2011 by Judge Michael J. O'Foghludha in Superior Court, Wake County. Heard in the Court of Appeals 28 February 2013.

Attorney General Roy A. Cooper, III by Assistant Attorney General Amanda P. Little, for the State.

Leslie C. Rawls, for defendant-appellant.

STROUD, Judge.

David Larry Williams ("defendant") appeals from judgments entered on or about 20 April 2011 in Superior Court, Wake County. Defendant argues that the trial court committed plain error in its instructions to the jury as to the charge of stalking and that the trial court should have granted his motion to dismiss the charge of violating a domestic violence protective order because of insufficient evidence. For the following reasons, we agree.

I. Introduction

Defendant was indicted on 20 April 2009 for one count of violating a domestic violence protective order and one count of felony stalking. The original stalking indictment tracked the language of N.C. Gen. Stat. § 14-277.3 (2007), which was repealed and replaced by a new stalking statute, N.C. Gen. Stat. § 14-277.3A (2009), effective 1 December 2008. On 4 January 2011, the stalking indictment was superseded by one tracking the new statutory language.

Defendant pleaded not guilty and the State proceeded to jury trial on both charges. At trial, the evidence tended to show that defendant began dating Tammy Smith[1] in August of 2008. They dated for approximately four to five weeks before Ms. Smith ended the relationship. Over the next several months, defendant repeatedly attempted to communicate with Ms. Smith, despite her express wishes to be left alone. On several occasions, he hid near a place he knew she would be and then attempted to talk to her when she appeared. In one instance, Ms. Smith was walking to her car in a shopping center when defendant came out of the nearby woods and tried talking to her. Ms. Smith screamed when she saw him and defendant ran off. On another night, defendant again approached Ms. Smith as she was leaving her apartment. She told him again to leave her alone. Despite her repeated attempts to rebuff defendant, defendant persisted in following, observing, and communicating with her.

After Ms. Smith attempted to procure a Domestic Violence Protective Order (DVPO), an unknown woman called her pretending to be from "victims' services." When Ms. Smith returned the call, defendant answered and said "gotcha." Ms. Smith testified that at one point, she even saw defendant attempting to climb up to her balcony on a ladder in the middle of the night. She testified that she moved to a different apartment because she was frightened by defendant's behavior to the point that she feared for her safety.

She and defendant signed, and the Wake County District Court entered, a consent DVPO on 18 November 2008. After that point, she no longer saw defendant, but her car and those of her friends and family were vandalized several times. Finally, on 21 January 2009, Mr. Smith, Ms. Smith's father, saw defendant at the parking deck at the North Hills shopping center. Ms. Smith worked as a receptionist for a chain of salons

1. To protect the identity and privacy of the victim, we will refer to her and her father by pseudonym.

in the Raleigh area. She primarily worked at a different location, but on 21 January she was working at the salon at North Hills. Although no one testified about the size or configuration of the shopping area, Mr. Smith testified that there was a hotel, a large retail store, and a variety of other establishments at North Hills.

At the close of the State's evidence, defendant moved to dismiss both charges. The trial court denied the motion and the jury returned verdicts of guilty as to both charges. Defendant was sentenced to 150 days in the Department of Adult Correction for the violation of a domestic violence protective order and a consecutive sentence of 39-47 months for the stalking conviction. Defendant did not give notice of appeal in open court. On 15 February 2012, defendant filed a petition for writ of certiorari with this Court. We granted defendant's petition by order entered 2 March 2012. Therefore, we have jurisdiction to consider defendant's appeal.

II. Stalking Conviction

Defendant first argues that the trial court committed plain error by instructing the jury on the crime of stalking under N.C. Gen. Stat. § 14-277.3A (2009) when the bulk of the conduct constituting the offense was alleged to have taken place while the old stalking statute, N.C. Gen. Stat. § 14-277.3 (2007), was still in effect and the evidence failed to show that defendant continued to harass the victim after the new statute came into effect. Although our Supreme Court has addressed a similar *ex post facto* issue in the context of murder prosecutions, this case appears to be one of first impression in North Carolina. *See*, *e.g.*, *State v. Detter*, 298 N.C. 604, 638, 260 S.E.2d 567, 590 (1979) (holding that for *ex post facto* purposes the law at the time of the murderous act applies, rather than the law at the time the victim perished). For the following reasons, we agree that the trial court erred in instructing the jury and that this error constitutes plain error. We therefore vacate defendant's conviction for stalking and remand for a new trial.

The trial court instructed the jury in accord with the superseding indictment, which tracked the language of N.C. Gen. Stat. § 14-277.3A. That indictment charged defendant with stalking under the new statute, alleging that from October 2008 to February 2009 defendant harassed Ms. Smith and "engaged in a course of conduct directed at [Ms. Smith], when the defendant knew or should have known that the harassment and course of conduct would cause a reasonable person to fear for the person's safety or safety of their immediate family and close personal associates or suffer substantial emotional distress by placing that person in fear of death, bodily injury or continued harassment."

The crime of stalking requires proof of a continuing course of conduct. By definition, a single stalking offense consists of more than one act under the new statute, as it did under the old statute. *See* N.C. Gen. Stat. § 14-277.3 (2007); N.C. Gen. Stat. § 14-277.3A (2009). The new stalking statute came into effect on 1 December 2008. 2008 N.C. Sess. Laws ch. 167. Defendant argues that the evidence did not show that he either harassed or engaged in a course of conduct toward Ms. Smith after 1 December 2008 that could constitute stalking and therefore to instruct the jury using the 2008 amendments is imposition of the law *ex post facto*.

"The United States and North Carolina Constitutions prohibit *ex post facto* laws. U.S. Const. art. I, § 10, cl. 1; N.C. Const. art. I, § 16. . . . [T]he federal and state constitutional *ex post facto* provisions are evaluated under the same definition." *State v. Bowditch*, 364 N.C. 335, 341, 700 S.E.2d 1, 5 (2010) (citations and quotation marks omitted). "There are two critical elements to an *ex post facto* law: that it is applied to events occurring before its creation and that it disadvantages the accused that it affects." *State v. Barnes*, 345 N.C. 184, 234, 481 S.E.2d 44, 71 (1997) (citation omitted), *cert. denied*, 523 U.S. 1024, 140 L.Ed. 2d 473 (1998).

Defendant labels his argument an *ex post facto* challenge, but the issue he raises is more properly classified as one of due process. The prohibition of *ex post facto* laws only applies to "legislative enactments." *Id.* The statute here clearly states that the amendments to the stalking statute only apply to "offenses" committed after 1 December 2008. It is not a retroactive law, and therefore there is no true *ex post facto* issue. Nevertheless, "the Fifth and Fourteenth Amendments to the Constitution of the United States also forbid the retrospective application of an unforeseeable judicial modification of criminal law to the detriment of the defendant." *Id.* at 234, 481 S.E.2d at 71-72. This rule applies to jury instructions that permit the jury to erroneously apply a criminal statute retroactively. *See United States v. Marcus*, ___ U.S. ___, ___, 176 L.Ed. 2d 1012, 1019 (2010) ("[I]f the jury, which was not instructed about the [statute's] enactment date, erroneously convicted [the defendant] based exclusively on noncriminal, preenactment conduct, [the defendant] would have a valid due process claim."); *United States v. Marcus*, 628 F.3d 36, 38 n.1 (2d Cir. 2011) ("[The defendant's] claim is properly labeled a due process claim because the potential retroactive application of the [statute] to [his] conduct was the result of an erroneous jury instruction rather than an act of Congress.").[2]

2. "Decisions by the federal courts as to the construction and effect of the due process clause of the United States Constitution are binding on this Court . . . ." *McNeill v. Harnett County*, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990). We may also refer to

The application of a criminal statute is not considered retroactive when the crime charged is a continuing course of conduct, such as conspiracy, that continued past the date of enactment, even if the course of conduct began before the enactment of that statute. *See United States v. Monaco*, 194 F.3d 381, 386 (2d Cir. 1999) ("It is well-settled that when a statute is concerned with a continuing offense, the Ex Post Facto clause is not violated by application of a statute to an enterprise that began prior to, but continued after, the effective date of the statute." (citation and quotation marks omitted)), *cert. denied*, 529 U.S. 1077, 146 L.Ed. 2d 501 (2000); *People v. Grant*, 973 P.2d 72, 75 (Cal. 1999) ("In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was *completed* before the law's effective date." (citations omitted)); *People v. McDade*, 804 N.E.2d 714, 716 (Ill. App. Ct. 2004) (holding that a continuing course of conduct is not complete until the last act is accomplished and that if the last act of a continuing course of conduct occurs after a statutory enactment, that statute may be applied without violating the *ex post facto* prohibition, even if the course of conduct began prior to enactment).

But it would violate a defendant's due process rights to convict him solely on conduct that ended prior to a new statutory enactment. *See Marcus*, ___ U.S. at ___, 176 L.Ed. 2d at 1019. The United States Supreme Court has observed that proper jury instructions as to the timing of the offense and date of enactment would "minimize, if not eliminate," the risk of a due process violation. *Id.* The same logic holds true for modifications of criminal statutes "that . . . disadvantage[] the accused that it affects." *Barnes*, 345 N.C. at 234, 481 S.E.2d at 71; *see State v. Robinson*, 335 N.C. 146, 150, 436 S.E.2d 125, 128 (1993) ("If defendant is prosecuted for murder based on our abrogation of the 'year and a day' rule subsequent to the assault but prior to the time the victim died, he is deprived of a defense that was allowed by the law in effect at the time of his murderous acts, and consequently his conviction could be obtained on less evidence than required of the State at the time of those acts. Such retroactive application of judicial action deprives defendant of due process of law under the United States Constitution . . . .").

Here, the statutory modification lessened the burden on the State and disadvantaged defendant by requiring only that the State prove that defendant knew or should have known "that the harassment or course

---

opinions from other jurisdictions as persuasive authority. *See, e.g.*, *State v. Pennington*, 327 N.C. 89, 100-01, 393 S.E.2d 847, 854 (1990) (considering appellate decisions from other states).

of conduct would" cause a reasonable person to fear for their safety or that of their "close associates" or cause that person substantial emotional distress by placing her "in fear of death, bodily injury, or continued harassment." N.C. Gen. Stat. § 14-277.3A. The prior version required that the State prove that defendant specifically intended the above result. N.C. Gen. Stat. § 14-277.3 (2007). "The word 'knowingly' . . . means that defendant knew what he was about to do, and, with such knowledge, proceeded to do the act charged." *State v. Aguilar-Ocampo*, ___ N.C. App. ___, ___, 724 S.E.2d 117, 125 (2012) (quoting *State v. Stephenson*, 218 N.C. 258, 264, 10 S.E.2d 819, 823 (1940)) (brackets omitted). If the statute requires specific intent, by contrast, "the State . . . must show that the defendant intended for his action to result in the" consequences outlined by the statute. *State v. Keel*, 333 N.C. 52, 58, 423 S.E.2d 458, 462 (1992).

Applying such a change retroactively would "permit his conviction upon less evidence than would have been required to convict him of that crime at the time [of the offense] . . . and would, for that reason, violate the principles preventing the application of *ex post facto* laws." *State v. Vance*, 328 N.C. 613, 622, 403 S.E.2d 495, 501 (1991) (citation omitted). "The change in the statute, therefore, can only be applied to a continuing offense if the illegal conduct continued into the period after enactment." *United States v. Williams-Davis*, 90 F.3d 490, 511 (D.C. Cir. 1996) (citations omitted), *cert. denied*, 519 U.S. 1128, 136 L.Ed. 2d 867 (1997); *see United States v. Fishman*, 645 F.3d 1175, 1195 (10th Cir. 2011) (holding that there was no plain error because there was evidence that the charged conspiracy continued post-enactment), *cert. denied*, ___ U.S. ___, 181 L.Ed. 2d 740 (2012); *Selsor v. Workman*, 644 F.3d 984, 1013 (10th Cir. 2011) (holding that "because the 1976 murder statute required fewer elements of proof than the 1973 murder statute, the state trial court's instructional error clearly had an *ex post facto* effect on Selsor" and violated his due process rights), *cert. denied*, ___ U.S. ___, 182 L.Ed. 2d 184 (2012).

The issue defendant raises here, however, is not whether his conviction violated his due process rights, but whether the trial court correctly instructed the jury in light of those due process concerns. "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Smith*, 206 N.C. App. 404, 416, 696 S.E.2d 904, 911 (2010) (quoting *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973)).

Generally, in criminal prosecutions "time is not of the essence except where an alibi, the statute of limitations, or some other defense

predicated on time is involved." *State v. Partridge*, 66 N.C. App. 427, 429, 311 S.E.2d 53, 55, *disc. rev. denied*, 310 N.C. 629, 315 S.E.2d 695 (1984). Nevertheless, where, as here, a defendant is indicted for a continuing conduct offense that began prior to a statutory modification that disadvantages the defendant and the indictment tracks the new statute's disadvantageous language, "the question of whether the violation extended beyond the effective date of the statute is one that has to be resolved by the jury." *United States v. Munoz-Franco*, 487 F.3d 25, 55 (1st Cir. 2007) (quoting *United States v. Tykarsky*, 446 F.3d 458, 480 (3d Cir. 2006)) (brackets omitted), *cert. denied*, 552 U.S. 1042, 169 L.Ed.2d 514 (2007); *accord United States v. Julian*, 427 F.3d 471, 481-82 (7th Cir. 2005) ("[B]ecause the alleged conspiracy spanned two different versions of the statute with different maximum penalties, the question of whether the conspiracy extended beyond the effective date of the amended version was one that had to be resolved by the jury rather than the judge.").

The procedural mechanism of a special verdict is particularly apt for resolving such issues in a manner clear to all parties and to reviewing courts.

> A special verdict is a common law procedural device by which the jury may answer specific questions posed by the trial judge that are separate and distinct from the general verdict. Despite the fact that the General Statutes do not specifically authorize the use of special verdicts in criminal trials, it is well-settled under our common law that special verdicts are permissible in criminal cases.
>
> Special verdicts, however, are subject to certain limitations. After the United States Supreme Court decision in *United States v. Gaudin*, a special verdict in a criminal case must not be a "true" special verdict-one by which the jury only makes findings on the factual components of the essential elements alone-as this practice violates a criminal defendant's Sixth Amendment right to a jury trial. 515 U.S. 506, 511-15, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); Kate H. Nepveu, Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials, 21 Yale L. & Pol'y Rev. 263, 263 (2003) [hereinafter Nepveu]; *cf.* N.C. R. Civ. P. 49(a) (allowing a "true" special verdict in civil cases, defining it as "that by which the jury finds the facts only."). Thus, trial courts using special verdicts in criminal cases must require juries to apply law to the facts they find, in some cases "straddl [ing] the line between facts and law"

> as a "mini-verdict" of sorts. *See* Nepveu at 276 (noting the "most common and widely recognized" use of "special verdicts that combine facts and law" is in RICO and continuing criminal enterprise prosecutions).
>
> Furthermore, requests for criminal special verdicts must require the jury to arrive at its decision using a "beyond a reasonable doubt" standard, since a lesser standard such as "preponderance of the evidence" would violate a defendant's right to a jury trial. Aside from these limitations, however, we are aware of no limits on our trial courts' broad discretion to utilize special verdicts in criminal cases when appropriate.

State v. Blackwell, 361 N.C. 41, 46-47, 638 S.E.2d 452, 456-57 (2006) (citations, quotation marks, and brackets omitted), *cert. denied*, 550 U.S. 948, 167 L.Ed. 2d 1114 (2007).

We have instructed our trial courts to use special verdicts to have the jury explicitly determine a specific issue of fact necessary for conviction, such as the location of the offense when jurisdiction is contested. *See*, *e.g.*, *State v. Bright*, 131 N.C. App. 57, 62, 505 S.E.2d 317, 320 (1998) ("If the trial court preliminarily determines that sufficient evidence exists from which a jury could find beyond a reasonable doubt that the crime was committed in North Carolina, the court is obligated to instruct the jury that unless the State has satisfied it beyond a reasonable doubt that the crime occurred in North Carolina, a verdict of not guilty should be returned. The trial court should also instruct the jury that if it is not so satisfied, it must return a special verdict indicating a lack of jurisdiction. Failure to charge the jury in this manner is reversible error and warrants a new trial." (citations, quotation marks, and brackets omitted)), *disc. rev. dismissed as improvidently granted*, 350 N.C. 82, 511 S.E.2d 639 (1999).

Without a specific instruction on this issue, reviewing courts cannot discern whether the jury found that the State had proven any criminal acts post-enactment. *See Marcus*, ___ U.S. at ___, 176 L.Ed. 2d at 1019. Therefore, the trial court must specifically instruct the jury that they must decide whether the State has proven that the defendant committed a criminal act after the date of enactment beyond a reasonable doubt and render a special verdict as to that issue. We hold that the trial court's failure to so instruct the jury here was error.

We must now decide whether it was plain error. Under the plain error rule as articulated by our Supreme Court, we must "examine the entire record and determine if the instructional error had a probable

impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983) (citation omitted). If the jury probably convicted defendant solely on pre-enactment conduct, defendant's conviction must be vacated and we must remand for a new trial. *See Marcus*, 628 F.3d at 44 (after remand from the Supreme Court, vacating the defendant's conviction for sex trafficking because "the conduct supporting the sex trafficking charge differed materially before and after [the date of enactment], such that there is a reasonable probability that the erroneous jury charge affected the outcome of the trial and affected the fairness, integrity or public reputation of the proceedings."); *see also Mitchell*, 49 F.3d at 781 (concluding that there was no plain error where the evidence was such that there was no probability that the jury would have come to a different conclusion if instructed on timing).

Here, the State presented a great deal of evidence about defendant's actions before 1 December 2008. Ms. Smith testified that after about five weeks of dating, she broke up with defendant. Defendant persisted in calling her and Ms. Smith soon asked defendant to stop calling. Defendant continued calling Ms. Smith frequently even after she had asked him to stop. One night defendant called and asked Ms. Smith to meet for a drink. She told him no and ended up staying at a friend's house. The next day, Ms. Smith returned to her apartment and saw that it had been broken into, but that nothing had been stolen. At that point, Ms. Smith went to get a restraining order against defendant, but was not able to get him served until the end of November.

Sometime before the restraining order was served, but after the break-in, Ms. Smith was walking to her car in a shopping center when defendant came out of the nearby woods and tried to talk to her. Ms. Smith screamed when she saw him and defendant ran off. Around midnight on or about 9 October 2008, defendant came to Ms. Smith's apartment and knocked on her door. Around 2 a.m. the next morning, Ms. Smith woke up to clinking sounds on her balcony. She went over and saw that defendant had propped a ladder up to her balcony and was climbing up to the railing. Defendant ran away when Ms. Smith went to call the police. Because of these events, Ms. Smith feared for her life and would stay from time to time with friends and family.

Around 22 October, Ms. Smith received a call from a woman claiming to be from "Victims' Services." The next day, she called the number back, but defendant answered and said "Gotcha." Ms. Smith testified that she was scared and felt "violated" by this ruse. After this incident, Ms. Smith went to stay with her father. She had never taken defendant to her father's apartment, but one night when she went to the apartment

gym, defendant came out from where he was hiding under the stairs near the apartment and again tried talking to her. She told him, "Leave me alone, Larry, just leave me alone."

After the incident at her father's apartment, Ms. Smith decided to move to a new location. Only one or two days after she moved, Ms. Smith noticed a car behind her that seemed to be following her. She parked briefly, and then followed the car to see who had been following her. When she approached, she could see that defendant was driving the car. The next night around 10:45 p.m., defendant again approached Ms. Smith as she was leaving her apartment. She told him again to leave her alone. He responded, "Will you please come to my truck, I've got money in my truck for you, because I know it wasn't cheap moving into this apartment." When she refused, he called her "vulgar names."

Defendant was finally served with the *ex parte* temporary restraining order around 7 November 2008 and a consent DVPO was entered on 18 November 2008. After that point, Ms. Smith did not see or hear from defendant anymore, though various acts of vandalism continued to occur to her property and to that of her close friends and family. Ms. Smith's car and that of a friend were both "keyed". Someone scratched "FU" into the car of one of her friends. The above evidence shows multiple acts of harassment before 18 November 2008.

There was, by contrast, no evidence showing that defendant harassed, communicated with, followed, or observed the victim after 1 December 2008. The State concedes that most of the evidence involved acts prior to that date, but argues that there was some evidence of later criminal conduct. On 2 December, someone again "keyed" Ms. Smith's car. Someone then threw a rock through the window of her father's car. There was no evidence that defendant was in the vicinity of these vehicles when they were vandalized and there was no other evidence linking him to those incidents.

On 21 January 2009, Ms. Smith's father had come to escort his daughter to her car when she left work. As he was driving through the parking deck near the J.C. Penney's store, he saw defendant walking in the parking deck away from the shopping center. He watched defendant walk to his truck, get in, and drive away. He did not see defendant in the vicinity of the salon, nor was there any evidence that defendant attempted to observe or communicate with Ms. Smith that day. After Mr. Smith told Ms. Smith that he had seen defendant in the parking deck, she called the police to report his presence. Unlike the evidence of the prior incidents concerning defendant's presence in Ms. Smith's apartment complex,

there could be a number of innocent reasons for defendant to be present at the North Hills shopping area parking deck.

Around 25 January 2009, Mr. Smith discovered a GPS tracking device attached underneath the bumper of Ms. Smith's car. No physical evidence was taken from the scene that implicates defendant. The GPS tracking device had never been activated and the police were unable to determine who purchased it.

The evidence of post-enactment conduct is substantially weaker than the evidence about defendant's conduct prior to December. The only thing connecting the vandalism and GPS device to defendant is supposition and speculation based on his conduct before December. The only post-enactment evidence that directly implicates defendant was Mr. Smith's testimony that he saw defendant at the North Hills parking deck while Ms. Smith was working there on 21 January 2009. There was no evidence presented that defendant communicated with her in any way, that he was following her, or that he even was in a position to see her. In fact, she never would have been aware of his presence if her father had not seen him and informed her. The evidence only showed that defendant was seen walking to his car in a parking structure of a large public shopping center where Ms. Smith happened to be working in one of many nearby businesses on that particular day, and that she normally worked at a different location.

Although we are only considering whether the erroneous instruction had a probable impact on the jury's verdict, the sufficiency of the evidence analysis in *State v. Lee* is informative. In that case, the body of the defendant's wife was found "several miles from defendant's home in a clearing in the woods;" she had been shot twice. *State v. Lee*, 294 N.C. 299, 301, 240 S.E.2d 449, 450 (1978). "The State's evidence show[ed] that defendant probably beat the victim on two occasions just before her death, and it further show[ed] that defendant threatened to kill the victim a day or two before her death." *Id.* at 303, 240 S.E.2d at 451. The police were able to establish that the victim had been killed by a gun, but not the type or caliber. *Id.* at 300-01, 240 S.E.2d at 450. The defendant had been seen in possession of a gun the day after the victim was murdered. *Id.* at 302, 240 S.E.2d at 450. The defendant had even told someone that he was going to kill the victim. *Id.* at 301, 240 S.E.2d at 450. Nevertheless, our Supreme Court held that the evidence,

> considered in the light most favorable to the State, show[ed] that the defendant had the opportunity, means and perhaps the mental state to have committed this murder. Such facts,

> taken in the strongest view adverse to defendant, excite suspicion in the just mind that he is guilty, but such view is far from excluding the rational conclusion that some other unknown person may be the guilty party.

Id.

The evidence introduced here as to defendant's alleged actions after 1 December 2008 was far less substantial than that in *Lee*. Although several suspicious property crimes were committed against Ms. Smith and her associates, and the evidence showed that defendant had the "means and perhaps the mental state" to have committed these acts, there was no evidence connecting defendant to those events.

Defendant was indicted under the new N.C. Gen. Stat. § 14-277.3A. The new statute lessened the burden on the State by eliminating the requirement of proving specific intent and therefore disadvantaged defendant. The charged conduct straddled the date of enactment. Therefore, the trial court should have instructed the jury that they must find that defendant's continuing course of conduct included at least one predicate act of stalking after 1 December 2008 in order to convict him of stalking as charged, under the new statute. We only address the issue that is before us – whether the trial court erred in failing to instruct the jury as outlined above and whether that error probably impacted the jury's verdict. The sufficiency of the evidence as to this charge has not been raised by defendant and is not before us.

Given the jury instructions and the verdict form, we simply do not know whether the jury convicted defendant on the basis of any post-enactment conduct, which implicates defendant's due process right to be free from retroactive judicial application of a criminal statute. Further, because of the lack of evidence that defendant continued to harass, follow, observe, or attempt to communicate with Ms. Smith after 1 December 2008, "it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (citation and quotation marks omitted); *see Marcus*, 628 F.3d at 42-43 (concluding that there was no probability of a different outcome because there was sufficient evidence of post-enactment conduct and there was no discernible difference between the post-enactment and pre-enactment conduct). Accordingly, we vacate defendant's stalking conviction and remand for a new trial.[3]

---

3. We note that "[a] defendant waives his constitutional protection against double jeopardy when a verdict or judgment against him is set aside at his own instance either on

III. Violation of Domestic Violence Protective Order

The next issue presented by defendant requires us to examine the semantics of the words to "stay away from" in detail. Defendant argues that the evidence was insufficient to establish that he knowingly violated the DVPO and that therefore the trial court should have granted his motion to dismiss as to this charge. We agree.

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

State v. Teague, ___ N.C. App. ___, ___, 715 S.E.2d 919, 923 (2011) (citation and quotation marks omitted), *disc. rev. denied*, ___ N.C. ___, 720 S.E.2d 684 (2012).

The elements of an offense under N.C. Gen. Stat. § 50B-4.1 are: (1) there was a valid domestic violence protective order, (2) the defendant violated that order, and (3) did so knowingly. *See* N.C. Gen. Stat. § 50B-4.1 (2008). "The word 'knowingly' . . . means that defendant knew what he was about to do, and, with such knowledge, proceeded to do the act charged." *Aguilar-Ocampo*, ___ N.C. App. at ___, 724 S.E.2d at 125 (quoting *State v. Stephenson*, 218 N.C. 258, 264, 10 S.E.2d 819, 823 (1940)) (brackets omitted).

The only instance in which defendant was alleged to have violated the DVPO was on 21 January 2009, when defendant went to North Hills. The indictment alleged that defendant violated the DVPO by "being outside the victim's place of work." To determine if defendant "knowingly"

---

motion in the lower court or on a successful appeal. This is also true where he merely asks that a judgment against him be vacated but the court goes beyond what he asks and orders a new trial. In such a case, the defendant may be tried anew on the same indictment for the same offense of which he was convicted, or he may be prosecuted on a new information charging the offense." *State v. Gainey*, 265 N.C. 437, 439, 144 S.E.2d 249, 251 (1965) (citations and quotation marks omitted).

violated the DVPO, we must first consider what the DVPO directed defendant not to do.

The 18 November 2008 DVPO was a consent order agreed to by defendant and Ms. Smith. The District Court found that

> On Oct. 2 2008, the defendant
>
> . . . .
>
> (c) placed in fear of continued harassment that rises to such a level as to inflict substantial emotional distress by *. . . confronting her in parking lot at Lynnwood Grill & calling her workplace on Oct. 14 at around 8 am to try to talk to her.*[4]

The District Court concluded that "defendant has committed acts of domestic violence against the plaintiff" and ordered as follows:

> 1. the defendant shall not assault, threaten, abuse, follow, harass (by telephone, visiting the home or workplace or other means interfere with the plaintiff.
>
> . . . .
>
> 7. the defendant shall stay away from the plaintiff's residence or any place where the plaintiff receives temporary shelter.
>
> . . . .
>
> 8. the defendant shall stay away from the following places:
>
> (a) the place where the plaintiff works
>
> . . . .
>
> (e) Other: (name other places)
>
> *Lynnwood Grill on Glenwood Ave.*
>
> . . . .
>
> 14. Other: (specify)

4. The order was on a form, AOC-CV-306, Rev. 2/06. The printed language of the form is in regular type; the handwritten additions to the form are in italics.

> *Defendant may go to Brier Creek Shopping Center (and stores restaurants therein), wild wings and Blinko's. The plaintiff will not enforce this order in those places.*

The DVPO did not identify Ms. Smith's workplace and did not require defendant to stay away from the North Hills shopping center or any specific distance away from any particular location or from Ms. Smith.

The State's claim that defendant violated the DVPO by "being outside" Ms. Smith's workplace could be interpreted as a violation of either paragraph 1 of the DVPO's decree requiring defendant not to "visit" her workplace or of paragraph 7, which required defendant to "stay away" from "the place where plaintiff works." Thus the State would be required to present evidence that defendant knowingly "visited" Ms. Smith's workplace or that he knowingly failed to "stay away" from "the place where [she] works." As the term "visit" implies a closer approach to the workplace than failure to "stay away" from the workplace, evidence that the defendant "visited" the workplace would seem to satisfy both, while evidence that defendant merely failed to "stay away" from the workplace would not necessarily mean that he "visited" it. In any event, the State does not argue that defendant "visited" Ms. Smith's workplace on 21 January 2009, only that he knowingly failed to "stay away" from it, so we will address this issue only.

Ms. Smith testified that she normally worked at the Stonehenge salon location, but that she would work at the North Hills location from time to time. On 21 January, she worked at Stonehenge from 8:30 a.m. until 4:30 p.m., then she worked at North Hills from 4:30 until 8:00 p.m. Her father came to escort Ms. Smith to her car when she got off work, and as he drove into the older part of the North Hills parking deck, behind J.C. Penney's, he saw defendant in the parking deck walking from the general direction of Ms. Smith's salon. Mr. Smith admitted that many other stores were also in that area. Mr. Smith did not testify that he saw defendant near Ms. Smith's workplace or her car, nor did he testify regarding the actual distance from the salon to the place where he saw defendant.

What does it mean to "stay away" from a workplace? Although this Court has differentiated between the phrase "stay away" and other similar phrases, we have not defined what the phrase means in the context of a DVPO. In *State v. Gilley*, in addressing a double jeopardy argument, we stated that an order directing the defendant to "stay away" from a residence was not the same as domestic criminal trespass, defined as "enter[ing] after being forbidden to do so or remain[ing] . . . upon the

premises occupied by a present or former spouse." *State v. Gilley*, 135 N.C. App. 519, 530, 522 S.E.2d 111, 118 (1999) (quoting N.C. Gen. Stat. § 14-134.3 (1993)), *disc. rev. denied*, 353 N.C. 528, 549 S.E.2d 860 (2001). In another case, *State v. Dye*, also addressing a double jeopardy argument, this Court noted that " 'stay' has been defined as 'to halt an advance; remain,' and the word 'away' as 'from this or that place[.]' " *State v. Dye*, 139 N.C. App. 148, 152, 532 S.E.2d 574, 577 (2000) (citations omitted). We then observed that "an order containing the directive to 'stay away' from a residence might arguably be violated by travel on a public street passing in front of the residence, or entry into the neighborhood or even the town wherein the residence is located." *Id.* We did not, however, purport to interpret the meaning of "stay away" for purposes of a DVPO. *Dye* only differentiated a "stay away" provision from an order directing the defendant to "not come to [a] residence," which we observed was the same as the prohibition of entering a location under the domestic criminal trespass statute; it did not define "stay away" for DVPOs generally. *Id.* at 153, 532 S.E.2d at 577-78. These cases indicate that "stay away" is different from both "do not enter" and "do not go to". Neither case, however, defined precisely what it means to stay away from a particular location. Given the ambiguity in "stay away," as noted in *Dye*, *see id.* at 152-53, 532 S.E.2d at 577, it is useful to consider the purpose of DVPOs.

Protective orders are intended to "restrain[] the defendant from further acts of domestic violence." N.C. Gen. Stat. § 50B-3 (2007). Under Chapter 50B, the court may

> [o]rder a party to refrain from doing any or all of the following:
>
> a. Threatening, abusing, or following the other party.
>
> b. Harassing the other party, including by telephone, visiting the home or workplace, or other means.
>
> c. Otherwise interfering with the other party.

N.C. Gen. Stat. § 50B-3 (a)(9). Additionally, the court may "[i]nclude any additional prohibitions or requirements the court deems necessary to protect any party or any minor child." N.C. Gen. Stat. § 50B-3(a)(13).

Thus, where a court orders a defendant to "stay away" from a particular location, it does so to prevent the defendant from threatening, abusing, following, interfering with, or harassing the protected party. It is possible that a defendant may not actually set foot upon the workplace premises but could harass or interfere with a victim by lurking so near as to impede the victim's ability to travel from place to place—indeed,

defendant herein did just that several times prior to December 2008—but the area to "stay away" from is not without boundaries. We need not determine the precise contours of what it means to "stay away" because it is clear that there was insufficient evidence here that defendant failed to "stay away" from Ms. Smith's place of work, and no evidence that defendant *knowingly* did so.

The indictment alleges defendant was "outside" Ms. Smith's workplace, and although technically the area "outside" of Ms. Smith's workplace could include any place in the world outside the walls of the salon, obviously such an interpretation is absurd. Certainly the order must mean that defendant could not be so close to Ms. Smith's workplace that he would be able to observe her, speak to her, or intimidate her in any way, but we cannot define the exact parameters of the term "stay away." It is clear only that defendant was not seen in an area that could reasonably be described as "outside" of Ms. Smith's salon, nor was there evidence that he was in a location that would permit him to harass, communicate with, follow, or even observe Ms. Smith at her salon, which might reasonably constitute a failure to "stay away" from her place of work. There was also no evidence that he was in proximity to Ms. Smith's vehicle or that he was in a location which might be along the path she would take from the salon to her vehicle.

Additionally, there was no evidence that defendant was aware that Ms. Smith worked at the North Hills salon, or that he otherwise knew that he was supposed to stay away from North Hills. The order did not identify North Hills as one of the locations that defendant was supposed to stay away from. The order specified no distance that defendant was supposed to keep between himself and Ms. Smith or her workplace. Defendant was seen walking in the parking structure of a public mall at some unknown distance from the salon where Ms. Smith was working on the night in question.

The State argues that the jury could infer that defendant knew that Ms. Smith worked at other locations, including North Hills, from the fact that defendant dated Ms. Smith for four weeks and that defendant could have parked anywhere else around the shopping center. The State ignores the fact that there was no evidence that anyone ever told defendant that Ms. Smith worked at different salon locations or at the North Hills location specifically. The State also presented no evidence that defendant was otherwise aware of that fact. The DVPO itself gives no indication whatsoever that Ms. Smith's "workplace" varied or that it might be in North Hills. In fact, the only shopping area specifically mentioned in the DVPO is Brier Creek, and the order allowed defendant

to go to that area and to particular restaurants in that area. Neither the DVPO nor the evidence presented at trial reveals to us why the Brier Creek shopping center was mentioned specifically in the DVPO.

The State further argues that the "jury could have legitimately deduced that the likelihood of the defendant violating the protective order increased significantly . . . because of the potential of Ms. Smith leaving work and going to her car parked in the same parking lot as the defendant's around closing time." But there was no evidence that defendant went near Ms. Smith's parked car either. Although the evidence need not "point unerringly toward the defendant's guilt so as to exclude all other reasonable hypotheses," *State v. Steelman*, 62 N.C. App. 311, 313, 302 S.E.2d 637, 638 (1983) (citation omitted), it is well established that "[e]vidence which is sufficient only to raise a suspicion or conjecture of guilt is insufficient to withstand" a motion to dismiss. *Lee*, 294 N.C. at 302, 240 S.E.2d at 451. A reasonable deduction that defendant might *likely* violate the DVPO if he was in a large shopping center and he was aware that Ms. Smith was nearby is not the same as a reasonable inference that he did, in fact, knowingly violate the order.

Even taken in the light most favorable to the State, the evidence here only raises a suspicion of guilt and is inadequate for a reasonable mind to support the conclusion that defendant went to North Hills that night knowing that Ms. Smith was working there and that he failed to "stay away" from her place of work. This case is not one where the State presented evidence from which it could be reasonably inferred that defendant was aware the protected party was present and working at that location. Such knowledge cannot be inferred from the mere fact that he was present during regular business hours at a public location with numerous stores other than the salon that had not been specifically noted on the DVPO and was not Ms. Smith's usual workplace. Therefore, we reverse the trial court's order denying defendant's motion to dismiss the charge of violating the domestic violence protective order. As a result, we need not reach defendant's evidentiary arguments.

IV. Conclusion

Instructing the jury based on the new stalking statute, which changes the *mens rea* required, without specifically instructing the jury on the date of enactment is error when the charged course of conduct occurred both before and after the enactment. Because the evidence of post-enactment conduct was significantly weaker than that of pre-enactment conduct, it is probable that the jury convicted defendant solely on the pre-enactment conduct. Therefore, failure to properly instruct the

jury here was plain error. Additionally, there was insufficient evidence to support defendant's conviction for violating the domestic violence protective order. We accordingly vacate defendant's conviction for stalking and remand for a new trial; we reverse the trial court's denial of defendant's motion to dismiss the violation of a protective order.

NEW TRIAL, in part; REVERSED, in part.

Judges STEPHENS and DILLON concur.

KATHERINE WILLIAMS, EMPLOYEE, PLAINTIFF
v.
BANK OF AMERICA, EMPLOYER, AIG CLAIM SERVICES, INC., CARRIER, DEFENDANTS

No. COA12-965

Filed 2 April 2013

1. Workers' Compensation—motion to dismiss appeal to full Commission—untimely Form 44 or brief—no abuse of discretion—waiver of rules in interest of justice

The Industrial Commission did not err in a workers' compensation case by denying plaintiff's motion to dismiss defendants' appeal to the full Commission based on their failure to file a timely Form 44 or brief identifying the grounds for their appeal. The Commission's decision to exercise its discretion under Workers' Compensation Rule 801 to waive a violation of its own rules in the interest of justice, under these circumstances, did not constitute an abuse of discretion.

2. Workers' Compensation—causation—migraine headaches

The Industrial Commission did not err in a workers' compensation case by determining that plaintiff's migraine headaches were causally related to her work-related injury. The work-related injury need not be the sole cause of the problems to render an injury compensable as long as the work-related accident contributed in some reasonable degree to plaintiff's disability.

3. Workers' Compensation—temporary total disability—disability from date of termination

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff was disabled and thus

entitled to continuing temporary total disability benefits. Plaintiff's testimony, sufficient in itself to establish disability from the date of termination under *Russell's* first prong, was supported by the testimony of her neurologist and her vocational expert.

Appeal by plaintiff from order entered 9 March 2012 and by defendants from opinion and award entered 4 May 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 January 2013.

Ramsay Law Firm, P.A., by Martha L. Ramsay, for plaintiff.

Hedrick Gardner Kincheloe & Garofalo, LLP, by J. A. Gardner, III and M. Duane Jones, for defendants.

DAVIS, Judge.

Plaintiff-employee Katherine Williams ("plaintiff") appeals from the Industrial Commission's order denying her motion to dismiss the appeal by defendant-employer Bank of America ("BofA") and defendant-carrier AIG Claim Services, Inc. (collectively, "defendants") from the deputy commissioner's opinion and award to the Full Commission. Defendants appeal from the Full Commission's opinion and award determining that plaintiff is entitled to temporary total disability benefits. For the reasons stated below, we affirm both the Commission's order denying plaintiff's motion to dismiss and its opinion and award.

Factual Background

At the time of the proceedings before the deputy commissioner, plaintiff was 59 years old, with a Bachelor of Arts degree in special education. Prior to working for BofA, plaintiff worked for several years as a special education and second grade teacher. In 1995, plaintiff began working for BofA as a customer service representative. During her tenure, she worked in various departments, including the associate banking, business banking, daylight overdraft, and database departments.

On 8 April 2004, plaintiff was working in BofA's daylight overdraft department. She was training a new employee at a computer terminal, and when she got up to switch chairs with the new employee, the chair was pulled out from under her. She fell to the floor, hitting her back on the chair and her arm on a desk, and "snapp[ing]" her neck. Plaintiff immediately developed a headache.

Plaintiff's supervisor, who witnessed the incident, had plaintiff complete a written incident report. That same day, defendants instructed plaintiff to visit Concentra Medical Center, where she reported back pain, a headache, and numbness in her left leg and foot. She was diagnosed with contusions on her buttocks, thorax, and upper arm, as well as cervical strain and left trapezius pain. She was prescribed medication and told to return to her regular duties. Plaintiff returned to work and completed her shift. Defendants accepted plaintiff's claim on a medical basis only.

Plaintiff's neck was very stiff the next morning and she was unable to turn her head. She returned to Concentra Medical Center on 12 April 2004 and reported relief from her prescription medication and improvement in her back, neck, and left arm. Plaintiff was released to her regular duties and released from care.

Plaintiff subsequently began experiencing migraine headaches that started at her neck and traveled to her eyes. She indicated that these headaches were the same type as the headache she experienced immediately after the 8 April 2004 fall. Due to continued neck pain and headaches, plaintiff presented to her family physician, Dr. Lori Taylor ("Dr. Taylor"), with Cotswold Family Physicians in June 2004. She was prescribed medication to control her headaches.

Plaintiff continued to experience migraine headaches and used over-the-counter medications to manage the pain associated with the headaches and neck pain. Because the over-the-counter medications did not provide relief, plaintiff returned to Dr. Taylor on 12 January 2005, who administered an injection of Demerol for the pain and prescribed Relpax. Dr. Taylor noted that the over-the-counter medications were not working to control plaintiff's headaches and that plaintiff had reported that she had her "worse ever headache" and that "nothing she took helped."

At defendants' request, plaintiff was evaluated by several physicians, including Dr. Bruce Darden ("Dr. Darden") with OrthoCarolina, and Dr. T. Kern Carlton ("Dr. Carlton") with The Rehab Center. Plaintiff was first seen by Dr. Darden on 27 May 2005, complaining of consistent headaches and neck pain following an injury at work on 8 April 2004. An X-ray revealed degenerative changes at C6-C7. Dr. Darden ordered an MRI and recommended physical therapy. Dr. Darden also referred plaintiff to Dr. Anthony Wheeler ("Dr. Wheeler") with Pain and Orthopedic Neurology for pain management.

Plaintiff began physical therapy with HealthSource on 2 June 2005, reporting that her continued headaches and neck pain were gradually worsening. She also reported that she had difficulty working, particularly when performing tasks requiring her to look down at paper or at a computer monitor.

On 5 June 2005, plaintiff's MRI revealed advanced degenerative disc disease at C6-C7 with disc protrusion causing mild central canal stenosis. Later that month, plaintiff was seen by Dr. Wheeler and complained of chronic neck pain and daily headaches. Dr. Wheeler diagnosed plaintiff with chronic cervical-thoracic segmental and soft tissue dysfunction and classic regional myofascial pain syndrome. Dr. Wheeler noted that plaintiff's condition was "traumatic rather than degenerative."

Concerned that plaintiff was suffering from rebound headaches due to her prolonged use of pain medication, Dr. Wheeler tried alternating her headache medication. Dr. Wheeler noted on 30 August 2005 that plaintiff had been able to decrease the use of Relpax but that she still had clusters of days when she had to use it consecutively. On those days, due to the intensity of the headaches and the effects of the medication, she would have to go home and go straight to bed.

Plaintiff was evaluated by Dr. Carlton in September 2006. Plaintiff reported a history of immediate stiff neck and development of headaches after a chair was pulled out from under her and she fell to the floor. Plaintiff's physical examination revealed a moderate decrease in cervical range of motion and some marked improvement in pain when pressure was taken off the cervical spine. Dr. Carlton noted that plaintiff's pain was reproduced when she turned her head. Plaintiff was diagnosed with cervical strain and degenerative disc disease.

Plaintiff continued to have difficulty performing her regular job duties due to her migraines making it hard for her to handle her workload. As a result, plaintiff was transferred to the database team, a position that was less stressful and demanding than her pre-injury position.

On 12 November 2006, Dr. Richard Park ("Dr. Park") took over plaintiff's pain management care. Dr. Park ordered trigger point injections in an effort to provide relief of plaintiff's chronic headaches and migraines. After the course of injections, plaintiff continued to have right-sided neck pain and headaches. Consequently, Dr. Park administered a right greater occipital nerve block. Plaintiff reported that her headaches improved initially but later returned. Dr. Park commented on plaintiff's difficulty in continuing to work, noting: "I suspect that she

will have increased headaches that will be incapacitating at times and work will be an issue." Dr. Park ordered a CT scan and referred plaintiff to Dr. T. Erik Borresen ("Dr. Borresen") with Mecklenburg Neurological Associates for headache management. Dr. Park restricted plaintiff from work pending her evaluation with Dr. Borresen.

Plaintiff presented to Dr. Borresen, a neurologist, on 24 May 2007. Dr. Borresen diagnosed plaintiff with post-traumatic headaches and cervical disc disease, recommended complete withdrawal of Relpax, and prescribed different medications to address her headaches. Plaintiff, however, did not immediately begin the recommended treatment plan as she was undergoing acupuncture treatment and had experienced improvement in her symptoms. When her headaches began increasing in July 2007, plaintiff returned to Dr. Park, who recommended that plaintiff begin Dr. Borresen's treatment plan.

In August 2007, plaintiff began Dr. Borresen's treatment regimen. While her headaches and neck pain improved, she was unable to tolerate the medication due to dizziness, nausea, sedation, and lack of energy. Dr. Borresen wrote plaintiff out of work for two weeks to allow her time to adjust to the medication. On 30 August 2007, plaintiff returned to work after being cleared by Dr. Borresen. In September 2007, plaintiff experienced a rapid increase in her liver enzymes, which resulted in Dr. Borresen discontinuing the recommended medications. Plaintiff's headaches subsequently returned and she began taking Relpax on a daily basis.

Due to plaintiff's failure to respond to standard medications, Dr. Borresen recommended therapy with Botox injections. Plaintiff received two rounds of injections in her head, forehead, neck, and shoulders in October 2007. Plaintiff's headaches improved after the injections, but she had an allergic reaction to the Botox, and, consequently, a variation of Botox called Myobloc was used.

On 1 June 2008 plaintiff was laid off by BofA as a result of a reduction in force. Plaintiff obtained a severance package that allowed her to collect severance pay and unemployment benefits. While receiving unemployment benefits, plaintiff applied for positions with approximately eight banking institutions. However, as of the time of the proceedings before the Full Commission, plaintiff had not worked since she was laid off by BofA.

Following her termination, plaintiff continued to be treated by Dr. Borresen for her headaches and neck pain. She underwent further

injections, additional physical therapy, a functional restoration program, and various medication changes. Plaintiff experienced a significant increase in her symptoms in October 2008. She began suffering headaches more frequently – 12 within a 14-day period. The headaches required her to lie down and were often accompanied by increased neck pain and a stabbing sensation in her eyes.

Plaintiff received another Myobloc injection, which provided improvement for roughly two months. Afterwards, Dr. Borresen administered 11 injections to plaintiff's head and neck. Plaintiff's headaches did not improve with the increased level of injections. Dr. Borresen noted that the most recent Myobloc injections had not provided any "impressive" results and that he was concerned that plaintiff's headaches had become medication refractory.

On 22 September 2009, Dr. Borresen concluded that plaintiff was unable to work due to cervical disc disease and intractable posttraumatic headaches and thus recommended that she apply for Social Security disability benefits. In a subsequent affidavit, Dr. Borresen opined that plaintiff had reached maximum medical improvement and would require lifetime medical management of her headaches.

Plaintiff presented to Dr. Theodore Belanger ("Dr. Belanger") for an Independent Medical Evaluation on 27 October 2009. Dr. Belanger believed that the changes on plaintiff's MRI were not the cause of her neck pain. Based on his examination of plaintiff and review of her MRI scan, Dr. Belanger concluded that plaintiff was not a surgical candidate and offered no further treatment recommendations. Dr. Belanger did not address plaintiff's ability to work.

On 7 February 2011, a hearing was conducted by Deputy Commissioner Myra L. Griffin on plaintiff's claim for benefits. The deputy commissioner issued an opinion and award on 7 November 2011, awarding plaintiff temporary total disability benefits and ordering defendants to pay plaintiff's ongoing medical treatment expenses. Counsel for defendants filed a notice of appeal from the deputy commissioner's decision on 15 November 2011, and, on 8 December 2011, the transcript of the hearing was transmitted electronically to the parties by the Industrial Commission.

On 16 January 2012, plaintiff's counsel filed a motion to dismiss defendant's appeal for failure to timely file a Form 44 and appellants' brief. On 24 January 2012, counsel for defendants filed a response to plaintiff's motion, as well as a Form 44 and appellants' brief. In an order

entered 9 March 2012, the Commission denied plaintiff's motion to dismiss but sanctioned defendants by waiving their oral argument before the Commission.

The Commission subsequently issued an opinion and award on 4 May 2012, in which it affirmed the deputy commissioner's decision with minor modifications. Plaintiff appealed to this Court from the Commission's 9 March 2012 order denying her motion to dismiss defendants' appeal, and defendants appealed from the Commission's 4 May 2012 opinion and award.

Analysis

I. Plaintiff's Appeal

[1] Plaintiff's sole contention on appeal is that the Commission erred in denying her motion to dismiss defendants' appeal to the Full Commission from the deputy commissioner's opinion and award. More specifically, plaintiff argues that the Commission should have dismissed defendants' appeal based on their failure to file a timely Form 44 or brief identifying the grounds for their appeal from the deputy commissioner's opinion and award. We disagree.

Industrial Commission Rule 701 governs appeals taken from decisions issued by deputy commissioners to the Full Commission. The rule provides, in pertinent part, as follows:

> (2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant a Form 44 Application for Review upon which appellant must state the grounds for the appeal. The grounds must be stated with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded. Failure to state with particularity the grounds for appeal shall result in abandonment of such grounds, as provided in paragraph (3). Appellant's completed Form 44 and brief must be filed and served within 25 days of appellant's receipt of the transcript or receipt of notice that there will be no transcript, unless the Industrial Commission, in its discretion, waives the use of the Form 44. . . .
>
> (3) Particular grounds for appeal not set forth in the application for review shall be deemed abandoned, and

> argument thereon shall not be heard before the Full Commission.

Workers' Comp. R. of N.C. Indus. Comm'n 701(2)-(3) (2012).

Industrial Commission Rule 801, however, states as follows:

> In the interest of justice, these rules may be waived by the Industrial Commission. The rights of any unrepresented plaintiff will be given special consideration in this regard, to the end that a plaintiff without an attorney shall not be prejudiced by mere failure to strictly comply with any one of these rules.

Workers' Comp. R. of N.C. Indus. Comm'n 801 (2012).

Our Supreme Court has explained:

> The North Carolina Industrial Commission has the power not only to make rules governing its administration of the [Workers' Compensation Act], but also to construe and apply such rules. Its construction and application of its rules, duly made and promulgated, in proceedings pending before the said Commission, ordinarily are final and conclusive and not subject to review by the courts of this State, on an appeal from an award made by said Industrial Commission.

Winslow v. Carolina Conference Ass'n, 211 N.C. 571, 579-80, 191 S.E. 403, 408 (1937).

Although the Industrial Commission has the discretionary authority under Rule 801 to waive violations of its own rules in the interest of justice, *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 251, 652 S.E.2d 713, 717 (2007), our courts have been careful to emphasize that the Commission may do so "only 'where such action does not controvert the provisions of the statute.' " *Chaisson v. Simpson*, 195 N.C. App. 463, 474, 673 S.E.2d 149, 158 (2009) (quoting *Hyatt v. Waverly Mills*, 56 N.C. App. 14, 25, 286 S.E.2d 837, 843 (1982)).

Our analysis of plaintiff's appeal is guided by our prior decisions in *Roberts v. Wal-Mart Stores, Inc.*, 173 N.C. App. 740, 619 S.E.2d 907 (2005), *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 652 S.E.2d 713 (2007), and *Soder v. CorVel Corp.*, 202 N.C. App. 724, 690 S.E.2d 30, *cert. denied*, 364 N.C. 327, 700 S.E.2d 924 (2010). Accordingly, we discuss these three cases in detail.

In *Roberts*, this Court addressed Rule 701's requirement that a party appealing to the Full Commission file a Form 44 and an appellant's brief. In appealing the deputy commissioner's denial of her claim to the Full Commission, the plaintiff in *Roberts* failed to file a Form 44, an appellant's brief, or any other document setting out with particularity the grounds for her appeal. *Roberts*, 173 N.C. App. at 744, 619 S.E.2d at 910. The Commission, after waiving oral arguments and stating that it would render a decision based on a review of the record, entered an opinion and award in favor of the plaintiff. *Id.* at 742-43, 619 S.E.2d at 909.

On appeal, the defendants argued that they were prejudiced by the Full Commission's decision to allow the appeal to go forward despite the plaintiff's total noncompliance with Rule 701. *Id.* at 743-44, 619 S.E.2d at 910. In reversing and vacating the Commission's decision, this Court recognized that while the Industrial Commission may waive the requirement that a Form 44 be submitted, Rule 701(2) " 'specifically requires that grounds for appeal be set forth with particularity.' " *Id.* at 744, 619 S.E.2d at 910 (quoting *Adams v. M.A. Hanna Co.*, 166 N.C. App. 619, 623, 603 S.E.2d 402, 405–06 (2004)). Consequently, this Court held:

> [T]he portion of Rule 701 requiring appellant to state with particularity the grounds for appeal may not be waived by the Full Commission. Without notice of the grounds for appeal, an appellee has no notice of what will be addressed by the Full Commission. The Full Commission violated its own rules by failing to require that plaintiff state with particularity the grounds for appeal and thereafter issuing an Opinion and Award based solely on the record.

Id. Notably, the applicability of Rule 801 was raised neither by the parties nor by this Court in *Roberts*.

In *Wade*, the plaintiff filed a notice of appeal from the deputy commissioner's decision but failed to file a Form 44, an appellant's brief, or any other document specifying the grounds for appeal. *Wade*, 187 N.C. App. at 247, 652 S.E.2d at 714-15. In its opinion and award, the Full Commission invoked Rule 801 to waive the requirements of Rule 701, denied the defendants' motion to dismiss the appeal, and awarded the plaintiff disability compensation. *Id.* at 247-48, 652 S.E.2d at 714-15.

On appeal, this Court began its discussion of the interplay between Rules 701 and 801 by noting that, based on *Roberts*, "the penalty for noncompliance with the particularity requirement is waiver of the grounds [for appeal], and, where no grounds are stated, the appeal is abandoned."

Id. at 249, 652 S.E.2d at 715-16. After discussing the "interest of justice" component of Rule 801, the Court held that Rule 801 does not enable the Industrial Commission to waive total noncompliance with Rule 701's requirement that the appellant state with particularity the grounds for review. *Id.* at 252, 652 S.E.2d at 718.

In *Soder*, 202 N.C. App. at 725-26, 690 S.E.2d at 31, the plaintiff timely noticed appeal from the deputy commissioner's denial of his claim; however, he filed his Form 44 and appellant's brief beyond the 25-day deadline set out in Rule 701. Citing Rule 701 and Roberts, the Commission granted the defendant's motion to dismiss the appeal. *Id.* at 730, 690 S.E.2d at 33-34. Although the plaintiff requested that the Commission exercise its discretion under Rule 801 to excuse his untimely filing, the plaintiff failed to obtain a ruling on that request. *Id.* at 730-31, 690 S.E.2d at 33-34.

The plaintiff argued on appeal that Rule 701 authorizes dismissal only where no Form 44 and appellant's brief are filed at all. *Id.* at 726, 690 S.E.2d at 31. This Court – after discussing both *Roberts* and *Wade* – rejected that contention. With regard to the plaintiff's additional argument that Rule 801 required the Commission to consider a lesser sanction before dismissing the appeal, this Court declined to address the applicability of Rule 801 in light of (1) the plaintiff's failure to obtain a ruling from the Commission as to his request for relief under Rule 801; and (2) his failure to properly argue that the Commission erred in not ruling on the request. *Id.* at 731, 690 S.E.2d at 34. Accordingly, this Court affirmed the Commission's decision. *Id.*

Thus, the issue presented here is distinct from the issues addressed by this Court in *Roberts*, *Wade*, and *Soder* – namely, whether the Commission has discretion under Rule 801 to allow a party's appeal to go forward despite the party's failure to strictly comply with the time limitations contained in Rule 701. We conclude that the Commission does possess such discretion. Moreover, as we held in *Soder*, " '[o]ur standard of review of the Commission's exercise of a discretionary power is a deferential one, and the Commission's decision will not be overturned absent an abuse of discretion.' " *Id.* at 730, 690 S.E.2d at 33 (quoting *Wade*, 187 N.C. App. at 251, 652 S.E.2d at 717).

We note that the concerns raised in *Wade*, 187 N.C. App. at 252, 652 S.E.2d at 717-18, about the need for proper notice to the appellee and the inappropriateness of the Industrial Commission's assumption of the roles of both advocate and adjudicator are wholly absent in this case. In her brief to this Court, plaintiff does not contend that the Commission's

reliance on Rule 801 to waive strict compliance with the time limitations in Rule 701 provided her with less than adequate notice of the particular grounds that defendants were attempting to raise before the Full Commission. Nor does she contend that, under the circumstances, she had less than sufficient time to respond to these grounds in her appellee's brief to the Full Commission.

Accordingly, we cannot say that the Commission's decision to exercise its discretion under Rule 801, under these circumstances, constituted an abuse of discretion. As such, we affirm the Commission's order denying plaintiff's motion to dismiss defendants' appeal.

II. Defendants' Appeal

A. Standard of Review

We now consider defendants' appeal from the Industrial Commission's opinion and award. Appellate review of a decision by the Commission is limited to "reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). As the fact-finding body, the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998). The Commission's findings of fact are thus conclusive on appeal when supported by competent evidence, despite the existence of evidence in the record that might support contrary findings. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004). The Commission's conclusions of law are, however, reviewed *de novo*. *Id.*, 597 S.E.2d at 701.

B. Causation

[2] Defendants first argue that the Commission erroneously determined that plaintiff's migraine headaches are causally related to her work-related injury. In particular, defendants challenge the Commission's findings regarding Dr. Borresen's medical opinion that plaintiff's work-related injury caused her headaches:

> 38. Dr. Borresen opined that Plaintiff's fall on April 8, 2004 was a significant contributing factor in aggravating her pre-existing degenerative disc disease at C6-7. Dr. Borresen further opined that Plaintiff's fall on April 8, 2004 could have either caused transmitted forces to travel up her back to her neck or she could have sustained a

> hyper-flexion or hyperextension injury, like a whiplash. He was also of the opinion that, based on his training, education, experience and evaluation of Plaintiff[,] that her accident either directly caused or was a significant contributing factor to her post-traumatic headaches.
>
> . . . .
>
> 41. The Full Commission has reviewed and weighed all of the evidence and the testimony, including that of Drs. Borresen, Carlton and Park. Dr. Borresen is a neurologist, who has continued to evaluate and treat plaintiff since 2007. Based on his medical specialty and his treatment of plaintiff, Dr. Borresen is in a better position to determine the causal relationship between plaintiff's workplace fall and her headaches. Therefore, the Full Commission gives greater weight to the testimony and opinions of Dr. Borresen on the issue of causation over any contrary medical opinion testimony.
>
> 42. Based upon a preponderance of the evidence, the Full Commission finds that on April 8, 2004, Plaintiff suffered an injury by accident due to a fall arising out of and in the course of her employment resulting in the aggravation of her pre-existing cervical condition and which directly caused or significantly contributed to the onset of her post-traumatic headaches. . . .

Based on these findings, the Commission concluded as a matter of law that, "[a]s a direct and natural consequence flowing from Plaintiff's injury by accident, Plaintiff developed post-traumatic headaches."

Under the Workers' Compensation Act, the plaintiff bears the burden of "produc[ing] competent evidence establishing each element of compensability, including a causal relationship between the work-related accident and his or her injury." *Castaneda v. Int'l Leg Wear Grp.*, 194 N.C. App. 27, 31, 668 S.E.2d 909, 913 (2008), *aff'd per curiam*, 363 N.C. 369, 677 S.E.2d 454 (2009). "The quantum and quality of the evidence required to establish *prima facie* the causal relationship will of course vary with the complexity of the injury itself." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). In cases involving complicated medical questions, "only an expert can give competent opinion evidence as to the cause of the injury." *Id.* Where expert opinion testimony is necessary, "medical certainty is not required," but

"an expert's 'speculation' is insufficient to establish causation." *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003).

As defendants acknowledge, Dr. Borresen testified regarding causation as follows:

> Based on my training, education and experience, and evaluation of Ms. Williams, I am of the opinion, to a reasonable degree of medical certainty, that Ms. Williams' accident on the job either directly caused her post-traumatic headaches, or her accident was a significant contributing factor in the development of her post-traumatic headaches. . . .

This Court has held repeatedly that testimony of this nature is sufficient to establish causation. *See, e.g.*, *Rose v. N.C. Dep't of Corr.*, __ N.C. App. __, __, 727 S.E.2d 708, 711 (2012) (relying on doctor's deposition testimony that, to a "reasonable degree of medical certainty," it was "more likely than not" that plaintiff's back injury "relate[d]" to fall at work); *Javorsky v. New Hanover Reg'l Med. Ctr.*, 208 N.C. App. 644, 650, 703 S.E.2d 761, 765-66 (2010) (concluding that doctor's opinion, based on experience, and to a "reasonable degree of medical certainty," that plaintiff's shoulder pain was "related" to her compensable neck injury was sufficient to "take[] the case out of the realm of conjecture and remote possibility and provides sufficient, competent evidence of a proximate causal relation").

Defendants nonetheless argue that Dr. Borresen's testimony is insufficient to satisfy plaintiff's burden of proof of establishing causation. In support of their argument, defendants rely on the Supreme Court's statement in *Holley* that expert testimony is insufficient to prove causation "when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." 357 N.C. at 233, 581 S.E.2d at 753 (citation and quotation marks omitted). Defendants claim that Borresen's testimony does not meet the "standard set out in *Holley*," because, according to them, he failed to rule out potential causal factors other than plaintiff's work-related injury, and because he stated, as a general matter, medical science was not aware of all the possible mechanisms that could "trigger" migraines.

Holley is inapposite. In that case, one of the plaintiff's doctors testified that there was a "low possibility" that the plaintiff's accident caused her injury. *Id.* Another doctor testified, "I am unable to say with any degree of certainty whether or not [the injury] is related to the development of her [medical condition]" and "I don't really know what caused [the plaintiff's medical condition]." *Id.*, 581 S.E.2d at 753-54. Based on

the speculative nature of the doctors' testimony, the Supreme Court concluded that the evidence was not sufficiently reliable to establish causation. *Id.* at 234, 581 S.E.2d at 754.

Here, in contrast, Dr. Borresen's affidavit and deposition testimony establish that he considered the possible causes of plaintiff's migraines. Based on his review of the medical records, his treatment of plaintiff, and plaintiff's history, he ultimately testified to a reasonable degree of medical certainty that the work-related injury caused plaintiff's migraines. This testimony was not speculative but rather was sufficient evidence of causation supporting the Commission's determination. *See Springs v. City of Charlotte*, 209 N.C. App. 271, 277, 704 S.E.2d 319, 324 (2011) (finding expert testimony sufficient where "[a]lthough [doctor] acknowledged that, as a general matter, there are various possible causes for [plaintiff's condition], he testified that, in his opinion, to a reasonable degree of medical certainty, the accident caused or aggravated [plaintiff's] condition").

Defendants also contend that the evidence in the record suggesting that plaintiff had pre-existing degenerative disc disease and that she might be genetically predisposed to migraine headaches undermines the Commission's determination of causation. Defendants cite no authority in support of this position. Indeed, our appellate courts have repeatedly held to the contrary, stating that " '[t]he work-related injury need not be the sole cause of the problems to render an injury compensable. If the work-related accident contributed in some reasonable degree to [the] plaintiff's disability, [the plaintiff] is entitled to compensation.' " *Smith v. Champion Int'l*, 134 N.C. App. 180, 182, 517 S.E.2d 164, 166 (1999) (quoting *Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 465–66, 470 S.E.2d 357, 359 (1996)). Defendants' arguments concerning causation are, therefore, overruled.

C. Disability

[3] Defendants' final argument on appeal is that the Commission erred in concluding that plaintiff is disabled and thus entitled to continuing benefits. In order to support a conclusion of compensable disability, the Commission must find:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that

> this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). Under this test, the employee "bears the burden of showing that [he or] she can no longer earn [his or] her pre-injury wages in the same or any other employment, and that the diminished earning capacity is a result of the compensable injury." *Gilberto v. Wake Forest Univ.*, 152 N.C. App. 112, 116, 566 S.E.2d 788, 792 (2002).

An employee may meet his or her burden of proving disability in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

With respect to plaintiff's burden of establishing disability, the Commission found:

> 43. On the issue of disability, Dr. Borresen opined that Plaintiff is unable to work due to her cervical disc disease and intractable post-traumatic headaches. He further opined that her work related injuries have completely disabled her from any type of gainful employment and she would not be a reliable employee since she could not sustain a consistent performance, would require sheltered employment and could only work when she was able. Dr. Borresen concluded that Plaintiff was totally disabled from any employment as of June 1, 2008.
>
> 44. Plaintiff testified that she is not able to return to competitive employment as a result of her post-traumatic

headaches. She described her headaches as disabling, accompanied by light and noise sensitivity, nausea and intolerance of activity that requires her to lie down. Plaintiff testified that she is also unable to participate in pre-injury activities of daily living. She believes that she would not be able to keep up with the work assigned and stay focused as she has difficulty concentrating and her medication makes her excessively drowsy and sedates her for hours.

45. Patrick Clifford, a vocational expert, testified that it would be futile for Plaintiff to seek employment as she would be unable to consistently perform and attend work as required. Mr. Clifford opined that a majority of employers would not allow employees to be out of work or perform at a reduced capacity on a long term basis.

46. Based upon a preponderance of the evidence from the entire record, including the testimony of Dr. Borresen and Plaintiff's own credible testimony concerning the disabling effect of her post-traumatic headaches as a result of her work related injuries, the Full Commission finds that as of June 1, 2008 Plaintiff was totally incapable of earning wages in any capacity.

47. As a direct and proximate result of her April 8, 2004 injury by accident and resulting headaches, Plaintiff has been temporarily totally disabled from employment from June 1, 2008 through the close of the record herein and continuing.

Based on these findings, the Commission concluded that "Plaintiff has satisfied the first prong of Russell with competent medical evidence that she is physically, because of her work-related injuries, incapable of any work in any employment," and thus plaintiff was "entitled to temporary total disability benefits beginning June 1, 2008 and continuing until further order of the Commission."

Although defendants suggest in passing that the Commission's findings are not supported by competent evidence, defendants' primary complaint is that "[w]hile Plaintiff claims that she cannot work, she provided no explanation for why she was able to work for over four years following the accident and immediately upon her layoff could no longer work." In *Joyner v. Mabrey Smith Motor Co.*, 161 N.C. App. 125, 587

S.E.2d 451 (2003), this Court addressed a similar argument. There, the plaintiff, who worked for the defendant-employer as a car mechanic, was injured while test driving a car he was repairing when he was hit from behind. *Id.* at 127, 587 S.E.2d at 453. The plaintiff was diagnosed with a cervical strain. *Id.* Over time, the plaintiff's condition worsened, and he was placed on medical restrictions by his treating doctor, missing work periodically as a result of dizziness, blurred vision, and headaches associated with the accident. *Id.*

Subsequently, the plaintiff had his wife call the defendant to report that he was unable to come to work due to a headache. *Id.* The next day, when the plaintiff showed up for work, he was terminated by the defendant for failing to follow personnel policy by having his wife call in sick for him. *Id.*

On appeal from the Commission's decision awarding the plaintiff disability benefits, the defendant argued that the Commission had erred in concluding that the plaintiff was disabled "because [the] plaintiff came to work the day he was terminated; therefore . . . [the] plaintiff could not have been unable to work." *Id.* at 130, 587 S.E.2d at 455. This Court rejected that argument, relying on the Commission's determination "that [the] plaintiff had not worked since the date of his termination 'as a result of problems associated with his injury by [the] accident on July 6, 1998' and [that the] plaintiff was entitled to total disability benefits from that date." *Id.*

Similarly here, the Commission determined that plaintiff was entitled to disability benefits from the date of her termination because of the "disabling effect of her post-traumatic headaches as a result of her work related injuries . . . ." This finding, as noted by the Commission, is supported by plaintiff's own testimony regarding the debilitating effect of her post-traumatic headaches, which are accompanied by light and noise sensitivity, nausea, and intolerance of activity. Plaintiff further testified that she would not be able to keep up with the workload in a new position because she has difficulty concentrating and her medication makes her excessively drowsy.

Plaintiff's testimony, sufficient in itself to establish disability under *Russell's* first prong, is supported by the testimony of her neurologist, Dr. Borresen, and her vocational expert, Patrick Clifford ("Clifford"). *See Joyner*, 161 N.C. App. at 130-31, 587 S.E.2d at 455 (noting that "further competent evidence [was] not required" to establish disability where "plaintiff expressly testified that his efforts to obtain subsequent employment were thwarted by his medical restrictions resulting from

the accident and no one would consider him because of those restrictions"). Dr. Borresen stated in his affidavit that plaintiff's post-traumatic headaches prevented her from being a "reliable employee" due to the fact that she could not maintain "consistent performance" and could "only work when she was able." He further indicated that, due to her work-related injuries, plaintiff would require "sheltered employment," which prevented her from "secur[ing] another job."

Clifford similarly stated during his deposition that, in his experience, most employers have a probationary period for new employees, during which time absence from work will automatically result in termination. In light of such policies, Clifford opined that "it would be futile for [plaintiff] to seek employment, because I don't believe she could maintain it."

The testimony of plaintiff, Dr. Borresen, and Clifford support the Commission's findings, which, in turn, support its conclusion that plaintiff successfully established under *Russell's* first prong that she was disabled from the date of termination and thus entitled to temporary total disability benefits. It is not the role of this Court to assume the role of the Commission in evaluating the credibility of witnesses. *See Joyner*, 161 N.C. App. at 131, 587 S.E.2d at 455 ("Whether we would have reached a different result on the evidence is irrelevant, and more importantly, beyond the scope of our review.").

Defendants further assert that plaintiff, in order to obtain unemployment benefits from the Employment Security Commission, certified that she was, in fact, able to work. Contrary to defendants' contention, however, this Court has held that "receipt of unemployment benefits standing alone may not bar receipt of workers' compensation benefits." *Fletcher v. Dana Corp.*, 119 N.C. App. 491, 498, 459 S.E.2d 31, 36, *disc. review denied*, 342 N.C. 191, 463 S.E.2d 235 (1995). Similarly, we have held that a certification of ability to work does not estop an employee from recovering disability benefits, nor is it binding on the Commission on the issue of disability. *Dolbow v. Holland Indus., Inc.*, 64 N.C. App. 695, 699, 308 S.E.2d 335, 337 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984). The evidence of plaintiff's receipt of unemployment benefits was before the Commission but ultimately was not viewed as dispositive in light of the other competent evidence in the record. As this Court cannot "re-weigh the evidence" on appeal, *Martin v. Martin Bros. Grading*, 158 N.C. App. 503, 506, 581 S.E.2d 85, 87, cert. denied, 357 N.C. 579, 589 S.E.2d 127 (2003), we affirm the Commission's opinion and award.

Conclusion

For the reasons set out above, we affirm both the Industrial Commission's 9 March 2012 order denying plaintiff's motion to dismiss defendants' appeal and its 4 May 2012 opinion and award.

AFFIRMED.

Judges STROUD and HUNTER, Jr. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 APRIL 2013)

ARROW v. PINE LAKE PREPARATORY, INC. No. 12-1004	Iredell (11CVS3513)	Dismissed in part; affirmed in part
AVENT v. PLT CONSTR. No. 12-1107	N.C. Industrial Commission (W77053)	Affirmed
BOOKMAN v. BRITTHAVEN, INC. No. 12-663	Wilson (11CVS1575)	Remanded in part and dismissed in part
CAROLINA COAST & LAKES, INC. v. THE SHORES AT LANDS END HOMEOWNERS No. 12-998	Perquimans (09CVS98)	Reversed and Remanded
CROWELL v. DAVIS No. 12-859	Buncombe (11CVS4521)	Affirmed
FURR v. PORTERS NECK COUNTRY CLUB, INC. No. 12-1095	New Hanover (11CVS3465)	Dismissed
HAYNESWORTH v. AM. EXPRESS TRAVEL No. 12-472	Guilford (11CVS9490)	Dismissed
IN RE A.C. No. 12-1342	Greene (10JA33-35)	Affirmed
IN RE D.A.D. No. 12-1091	Ashe (12JA6)	Affirmed
IN RE J.M. No. 12-1340	Mitchell (10JT37)	Affirmed
IN RE P.L.R No. 12-1341	Randolph (10JT80-85)	Affirmed
IN RE T.R. No. 12-1291	Yadkin (11JT18)	Affirmed
IN RE Z.K.M. No. 12-1161	Randolph (11JT75-77)	Affirmed in part, remanded in part

R.D. FURR CONSTR., INC. v. PORTERS NECK COUNTRY CLUB, INC. No. 12-1092	NewHanover (11CVS3464)	Dismissed
RAINEY v. GOODYEAR TIRE & RUBBER CO. No. 12-588	N.C.Industrial Commission (468408)	Affirmed
STATE v. BURROUGHS No. 12-955	Mecklenburg (05CRS224248)	No error in part; affirmed in part
STATE v. BURROUGHS No. 12-1015	Durham (09CRS47588)	No prejudicial error
STATE v. CLUBB No. 12-1185	Gaston (03CRS22145)	Appeal Dismissed
STATE v. FINNEY No. 12-997	Moore (11CRS50365)	No Error
STATE v. GAFFNEY No. 12-707	Mecklenburg (10CRS260744-45)	Affirmed
STATE v. JENKINS No. 12-1085	Guilford (11CRS92446)	No Error
STATE v. KIRKPATRICK No. 12-1198	Mecklenburg (10CRS249555)	No Error
STATE v. MAYHEW No. 12-866	Mecklenburg (10CRS223715) (10CRS56717)	No Error
STATE v. MCGHEE No. 12-782	Granville (11CRS50598) (11CRS50623)	No Error
STATE v. MCLEAN No. 12-502	Wake (10CRS213344)	New Trial
STATE v. MCMILLIAN No. 12-1170	Moore (11CRS2564-65)	No Error
STATE v. MEDLEY No. 12-900	Durham (10CRS61652) (11CRS1464)	Dismissed

STATE v. MILANESE No. 12-1061	Cumberland (04CR66513) (04CR66515) (06CR57024) (09CRS62831)	Affirmed
STATE v. MOLL No. 12-755	Onslow (09CRS58119)	No Error
STATE v. NAVARRETE-GARCIA No. 12-1039	Forsyth (10CRS57773-74)	No Error
STATE v. SCRIVEN No. 12-1188	Wayne (10CRS51581)	No Error
STATE v. SHULER No. 12-986	Catawba (10CRS56071) (11CRS1028)	Dismissed
STATE v. SIMPSON No. 12-1024	Transylvania (10CRS52280)	No Error
STATE v. STEVENS No. 12-843	Wayne (10CRS1636) (12CRS910)	Affirmed
STATE v. TAYLOR No. 12-945	Mecklenburg (10CRS253443-44) (11CRS3165)	No Error
STATE v. WINGO No. 12-1156	Union (10CRS56682) (10CRS56683-84) (10CRS56685)	Judgment arrested and remanded for resentencing in part; No error in part
WILLIAMS v. CW PETERS, LLC No. 12-1079	NewHanover (11CVS1408)	Affirmed

CITY OF WILSON, PLAINTIFF-APPELLEE
v.
THE BATTEN FAMILY, L.L.C.; BRANCH BANKING & TRUST; AND BB&T COLLATERAL SERVICES CORPORATION, TRUSTEE, DEFENDANTS-APPELLANTS

No. COA12-1103

Filed 16 April 2013

Eminent Domain—first hearing—all issues except compensation determined—request for second hearing

The denial of defendant's motion for a second hearing in a condemnation action was affirmed where there had been a first hearing determining all issues except compensation and the motion for a second hearing raised an access issue not raised before. A party must argue all issues of which it is aware or reasonably should be aware in an N.C.G.S. § 136-108 hearing. Furthermore, a determination of access in the first hearing would have been an issue concerning title and area taken and thus would have required immediate appeal.

Appeal by Defendants from order entered 4 January 2012 by Judge James C. Cole in Superior Court, Wilson County. Heard in the Court of Appeals 11 February 2013.

Cauley Pridgen, P.A., by James P. Cauley, III and Christopher L. Beacham, for Plaintiff-Appellee.

Narron & Holdford, P.A., by I. Joe Ivey; Farris & Farris, P.A., by Brian Paxton, for Defendants-Appellants.

McGEE, Judge.

The City of Wilson (Plaintiff), pursuant to Article 9 of Chapter 136 of the North Carolina General Statutes, filed a complaint on 30 June 2008, to acquire by condemnation a portion of real property owned by The Batten Family, L.L.C. (Defendant) in order to obtain a utility easement.[1] Plaintiff sought a permanent easement of right-of-way to "construct,

1. "Pursuant to G.S. 136-66.3(g) a municipality is vested with the same authority to acquire rights-of-way for any state highway system as is granted to DOT. In the acquisition of these rights-of-way the municipality may use the procedure provided for in Article 9 of Chapter 136." *City of Albemarle v. Security Bank and Trust Co.*, 106 N.C. App. 75, 76, 415 S.E.2d 96, 98 (1992); *see also City of Charlotte v. BMJ of Charlotte, LLC*, 196 N.C. App. 1, 6, n. 6, 675 S.E.2d 59, 63, n. 6 (2009).

install, operate, utilize, inspect, rebuild, repair, replace, remove, and maintain overhead and/or underground facilities consisting of electric, gas or other fuel products, communication, or other utilities within [the] easement area[.]" Plaintiff's easement was located on the portion of Defendant's property that bordered Bloomery Road. Defendant filed an answer on 25 June 2009. Plaintiff amended its complaint and declaration of taking multiple times, including filing a Second Amended Complaint on 9 July 2010, adding Branch Banking and Trust and BB&T Collateral Service Corporation, Inc. as Defendants.[2] Plaintiff filed a "Motion for Determination of All Issues Other Than Damages," pursuant to N.C. Gen. Stat. § 136-108, on 26 February 2010. Defendant also filed a motion, requesting a determination of all issues other than compensation, on 21 March 2010.

The trial court conducted a hearing on 8 July 2010, "on the parties' motions pursuant to N.C. Gen. Stat. § 136-108 for an Order to determine and resolve any and all issues raised by the pleadings and amended pleadings in this action other than the issue of damages[.]" Plaintiff's original complaint listed only two parcels of real property owned by Defendant that would be affected by the taking. The sole issue argued at the hearing was whether nine parcels of real property, rather than two, should comprise one contiguous and commonly owned parent tract for purposes of the taking. Plaintiff and Defendant agreed that the only issue before the trial court was "whether there[] [was] unity of use of all these properties." During the hearing, Plaintiff elicited testimony from Dr. Frank Batten regarding access to Bloomery and Packhouse Roads. Dr. Batten affirmed that he still had access to both roads at that time. Defendant did not request that the trial court rule on the matter of access to either Bloomery or Packhouse Roads during the hearing.

Following the 8 July 2010 hearing, the trial court issued an order (the first order) ruling that the real property affected by the taking consisted of all nine parcels owned by Defendant; that the "nature of the title acquired by Plaintiff from Defendants is an easement interest[;]" and that the "only issue remaining [was] that of just compensation." In support of its ruling, the trial court made a number of findings of fact, including two relevant to this appeal:

> 9. The original [c]omplaint included as the "entire tract" only . . . the [two] tax parcels which have direct access to

2. It does not appear that Branch Banking and Trust and BB&T Collateral Service Corporation, Inc. participated in the hearings, and they have not appealed in this matter, so we use "Defendant" solely in this opinion to refer to The Batten Family, L.L.C.

> Bloomery Road and which the taking area crosses.
>
> . . . .
>
> 13. When [Defendant] acquired [five particular parcels], they were landlocked. They now have access through the remaining properties to both Bloomery Road and Packhouse Road.

Neither party appealed the first order.

Defendant filed another motion for hearing pursuant to N.C.G.S. § 136-108, on 17 November 2011, requesting that the trial court "determine all issues other than the issue of damages, to wit; whether Defendant['s] access to Bloomery Road has been materially and irrevocably altered by the Plaintiff['s] taking of a utility easement." Plaintiff filed a response to Defendant's motion on 29 November 2011, arguing that "one Superior Court judge may not correct another's errors of law," and that Defendant was not entitled to compensation for loss of access.

The trial court held a hearing on Defendant's motion on 29 and 30 November 2010. The trial court heard arguments from both parties' counsel, as well as testimony from Dr. Batten, regarding Defendant's loss of access to Bloomery Road. Dr. Batten testified that, "[f]rom the date of the taking" on 30 June 2008, the issue of access to Batten Road has "always been a concern." Plaintiff's counsel argued that the trial court had "already made a ruling" on the issue of access in the first order, and that one superior court judge could not overrule another. The trial court stated at the hearing that it was going to deny Defendant's motion for a N.C.G.S. § 136-108 hearing. Defendant asked the trial court the following: "So is it the [c]ourt's ruling that [the first] order which was a 108 hearing that that has decided the issue of loss of access?" The trial court responded: "That's correct." Defendant's counsel objected and stated Defendant's intention to appeal.

Plaintiff made a "motion in limine to exclude any evidence or testimony regarding the loss of access" from the trial on just compensation. However, because Defendant was appealing the denial of its motion for a second N.C.G.S. § 136-108 hearing, the parties and the trial court agreed that ruling on Plaintiff's motion would be inappropriate until after the appeal was decided.

The trial court entered an order on 10 January 2012 (the second order) denying Defendant's motion for a second N.C.G.S. § 136-108 hearing to determine all issues other than compensation. The trial court ruled that the first order "determined that . . . Defendant's property now has access

to Bloomery Road and Packhouse Road," and that the only remaining issue was determination of just compensation. Defendant appeals.

I.

Defendant argues three issues on appeal: (1) that the first order did not determine the issue of access to Bloomery Road, (2) that even if the first order did determine the issue of access to Bloomery Road, the trial court failed to make sufficient findings of fact to support any conclusion and decretal order that Defendant had access and, (3) because the first order did not decide the issue of access, the second order was "devoid of sufficient findings of fact and conclusions of law to deny Defendant's motion for a hearing pursuant to G.S. § 136-108." We hold that the trial court correctly denied Defendant's motion for a second hearing pursuant to N.C.G.S. § 136-108, but for reasons different than those found by the trial court.

II.

When a municipality deems a condemnation necessary, it must "institute a civil action by filing in the superior court of any county in which the land is located a complaint and a declaration of taking." N.C. Gen. Stat. § 136-103 (2011). The landowner may then file an answer "praying for a determination of just compensation." N.C. Gen. Stat. § 136-106 (2011).

"The [municipality], within 90 days from the receipt of the answer shall file in the cause a plat of the land taken and such additional area as may be necessary to properly determine the damages[.]" N.C. Gen. Stat. § 136-106(c) (2011). "After the filing of the plat, the judge, upon motion and 10 days' notice by either the [municipality] or the owner, *shall* . . . hear and determine *any and all* issues raised by the pleadings other than the issue of damages." N.C. Gen. Stat. § 136-108 (2011) (emphasis added). The issue of just compensation alone is then submitted to the jury. *Dep't of Transp. v. Rowe*, 351 N.C. 172, 173-74, 521 S.E.2d 707, 708 (1999). Rulings under N.C.G.S. 136-108 are typically interlocutory in that they do " 'not determine the issues but direct[] some further proceeding preliminary to final decree.' " *Rowe*, 351 N.C. at 174, 521 S.E.2d at 708 (quoting *Greene v. Laboratories, Inc.*, 254 N.C. 680, 693, 120 S.E.2d 82, 91 (1961)).

Generally, parties may not seek appeals of interlocutory orders before a final judgment is rendered. *Id.* at 174, 521 S.E.2d at 709. However, a party may immediately appeal an interlocutory order if that order "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." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950); *see also* N.C. Gen. Stat. 1-277 (2011). Our Supreme Court recognized in *Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (1967), that "orders from a condemnation hearing concerning title and area taken are 'vital preliminary issues' that *must* be immediately appealed pursuant to N.C.G.S. § 1–277, which permits interlocutory appeals of determinations affecting substantial rights." *Rowe*, 351 N.C. at 176, 521 S.E.2d at 709 (citation omitted) (emphasis added); *see also Nuckles*, 271 N.C. at 14, 155 S.E.2d at 784; *N.C. Dep't of Transp. v. Stagecoach Village*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005); *Progress Energy Carolinas, Inc. v. Strickland*, 181 N.C. App. 610, 612-13, 640 S.E.2d 856, 858 (2007). When appeal is mandatory, the right will be lost if appeal is not made within thirty days after entry of judgment. N.C.R. App. P. 3(c)(1).

In requiring immediate appeal of interlocutory orders involving issues of title and area taken, the *Nuckles* Court opined:

> One of the purposes of G.S. 136-108 is to eliminate from the jury trial any question as to what land [Plaintiff] is condemning and any question as to its title. Therefore, should there be a fundamental error in the judgment resolving these vital preliminary issues, ordinary prudence requires an immediate appeal, for that is the proper method to obtain relief from legal errors. G.S. 1-277. It may not be obtained by application to another Superior Court judge.

Nuckles, 271 N.C. at 14, 155 S.E.2d at 784. The Supreme Court added that it "would be an exercise in futility, completely thwarting the purpose of G.S. § 136-108" to have the jury assess just compensation without knowledge of the nature or extent of the condemnation. *Id.*

III.

The sole issue presented at the first hearing was whether the real property affected by the taking included only two of the parcels of real property owned by Defendant or all nine parcels. The trial court ruled that all nine parcels owned by Defendant, as opposed to only two, comprised the "entire tract" or area affected by the taking.

Despite testimony from Dr. Batten that he considered access to Bloomery Road to have been an important issue "[f]rom the date of the taking" on 30 June 2008, Defendant did not argue this issue in the N.C.G.S. § 136-108 hearing on 8 July 2010.

The first order did not make any conclusions of law concerning the issue of loss of access to Bloomery Road, did not mention access in the decretal portion of the order, but did conclude that "[t]he only issue remaining is that of just compensation." Because the first order is "from a condemnation hearing" and concerns issues of "title and area taken," the correct mechanism for review of the first order was an appeal to this Court within thirty days of judgment pursuant to N.C.R. App. P. 3(c)(1).

Further,

> "[The] parties to a condemnation proceeding must resolve all issues other than damages at a hearing pursuant to N.C.G.S. § 136-108." [*Rowe*,] 351 N.C. at [176], 521 S.E.2d at [710]. N.C. Gen. Stat. § 136-108 provides:
>
> > After the filing of the plat, the judge, upon motion and 10 days' notice by either the [municipality] or the owner, *shall*, either in or out of term, hear and determine *any and all issues raised by the pleadings other than the issue of damages*, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken. (Emphasis added.)

DeHart v. N.C. Dep't of Transp., 195 N.C. App. 417, 420-21, 672 S.E.2d 721, 723 (2009) (citation omitted) (some emphasis added). Defendant was required to argue "any and all" issues raised by the pleadings, other than just compensation, in the 8 July 2010 N.C.G.S. § 136-108 hearing, including issues of access to Bloomery Road. Instead, Defendant waited more than a year after the first hearing, and filed a motion requesting a second N.C.G.S. § 136-108 hearing to address this issue. Defendant appealed the second order, and now, approximately thirty-two months after the 8 July 2010 hearing, the issue is before this Court. We do not believe N.C.G.S. § 136-108 contemplates affording a party multiple hearings, at least not when the party had every opportunity to argue all relevant issues in a single N.C.G.S. § 136-108 hearing.

We hold that, at a minimum, a party must argue all issues of which it is aware, or reasonably should be aware, in a N.C.G.S. § 136-108 hearing. Defendant knew access across the easement was an issue before it moved for the first N.C.G.S. § 136-108 hearing, but did not argue access at that hearing. We leave undecided whether a second hearing, pursuant to N.C.G.S. § 136-108, might be appropriate in some circumstances. We

affirm the denial of Defendant's 17 November 2011 motion for a hearing pursuant to N.C.G.S. § 136-108, for the reasons just stated.

Furthermore, a determination of what, if any, access Defendant had to Bloomery Road would have been an issue "concerning title and area taken" and thus would have required immediate appeal pursuant to *Nuckles. Department of Transp. v. Roymac P'ship*, 158 N.C. App. 403, 406-07, 581 S.E.2d 770, 773 (2003). In the first order, the trial court included the following findings:

> 9. The original [c]omplaint included as the "entire tract" only [the two] tax parcels . . . which have direct access to Bloomery Road and which the taking area crosses.
>
> . . . .
>
> 13. When [Defendant] acquired [five particular parcels], they were landlocked. They now have access through the remaining properties to both Bloomery Road and Packhouse Road.

The trial court also concluded and decreed in the first order: "The only issue remaining is that of just compensation."

Defendant moved for a hearing to "determine any and all issues raised by the pleadings other than the issue of damages." N.C.G.S. § 136-108. Defendant, as demonstrated by Dr. Batten's testimony, was aware that access to Bloomery Road was an issue at the time it moved for the hearing. Following the hearing, the trial court, in its first order, twice affirmed that the only issue remaining was that of just compensation for the parcels taken. If Defendant believed it had properly argued the issue of access to Bloomery Road in the N.C.G.S. § 136-108 hearing, but that the trial court either (1) failed to address this issue in the first order, or (2) improperly determined that Defendant had access to Bloomery Road, Defendant was required to appeal from the first order and make those arguments to this Court. Because Defendant failed to appeal from the first order within thirty days of entry, it has lost that right. N.C.R. App. P. 3(c)(1).

We affirm only the denial of Defendant's 29 November 2011 motion for a second N.C.G.S. § 136-108 hearing. We base our decision on the analysis above, and not on the trial court's ruling that the first order determined the issue of access. "Where 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).

As such, we do not address the merits of Defendant's arguments regarding the findings of fact in the first order concerning access to Bloomery Road, and we vacate conclusion of law (2) and decretal paragraph (1) of the second order. This matter is remanded to the trial court for a determination of just compensation pursuant to Article 9 of Chapter 136 of the North Carolina General Statutes. The parties may argue to the trial court what issues should be considered by the jury in determining just compensation, including the issue of access to Bloomery Road.

Affirmed in part, vacated in part, and remanded.

Chief Judge MARTIN and Judge CALABRIA concur.

JEFFREY HIGGINBOTHAM, PLAINTIFF
v.
THOMAS A. D'AMICO, M.D., AND DUKE UNIVERSITY HEALTH SYSTEM, INC., DEFENDANTS

No. COA12-1099

Filed 16 April 2013

1. Medical Malpractice—expert testimony—national standard of care

The trial court erred by directing a verdict in favor of defendants on plaintiff's medical malpractice claim. The mere use of the phrase "national standard of care" was not fatal to the expert's testimony that otherwise met the demands of N.C.G.S. § 90-21.12.

2. Medical Malpractice—battery—recognized complication from surgical procedure

The trial court did not err by granting summary judgment in favor of defendants on plaintiff's battery claim in a medical malpractice case. All of the standard of care evidence was that the resulting event was a recognized complication of the consented-to surgical procedure.

Appeal by Plaintiff from order entered 19 September 2011 by Judge Carl R. Fox and judgment entered 14 December 2011 by Judge G. Wayne Abernathy in Durham County Superior Court. Heard in the Court of Appeals 28 February 2013.

Cranford, Buckley, Schultze, Tomchin, Allen & Buie, P.A., by Paul I. Klein, for Plaintiff.

Yates, McLamb, & Weyher, L.L.P., by Dan J. McLamb and Lori Meyerhoffer, for Defendants.

STEPHENS, Judge.

Procedural History and Factual Background

This appeal arises from a professional liability case brought by Plaintiff Jeffrey Higginbotham, a former patient of Defendant Thomas A. D'Amico, M.D., a board-certified thoracic surgeon employed by Defendant Duke University Health System, Inc. ("Duke"). Plaintiff brought a civil action against Defendants, alleging medical malpractice, battery by performance of an unauthorized operation, and failure to obtain informed consent for a medical procedure, all of which led to serious injury. By order entered 19 September 2011, the trial court granted summary judgment to Defendants on the battery claim. The informed consent claim was dismissed by the trial court on 13 December 2011. At the close of Plaintiff's case on Defendants' alleged medical malpractice, the trial court granted Defendants' motion for a directed verdict in their favor. Plaintiff appeals from the directed verdict judgment and the order granting summary judgment in favor of Defendants on the battery claim.

In 2004, Plaintiff lived in Charleston, West Virginia, and drove a delivery truck. Plaintiff began experiencing pain and numbness in his left arm. Failing to receive a satisfactory diagnosis from several West Virginia physicians, Plaintiff was referred to a major medical center and chose Duke. At Duke, Plaintiff was diagnosed with thoracic outlet syndrome ("TOS"), which, *inter alia*, indicates that the thoracic outlet above the first rib is inadequate to allow necessary nerve supply. Plaintiff was eventually referred to D'Amico, whose proposed cure was to surgically remove the first rib to alleviate the nerve compression. Excision of the first rib was the procedure agreed to on the informed consent form signed by Plaintiff.

Plaintiff's surgery took place on 8 October 2004 and the operative notes indicated all went as planned. However, x-rays taken after surgery showed the left second (rather than first) rib had been removed. Plaintiff was not informed of this outcome. After surgery, Plaintiff returned home. A subsequent surgical infection brought Plaintiff to a local hospital

where treatment measures included an x-ray which revealed the missing second rib, much to the shock of Plaintiff. Plaintiff reported this discovery to D'Amico's assistant at his first port-operative visit on 4 November 2004; D'Amico was not present at the clinic that day. At a subsequent post-operative visit, D'Amico told Plaintiff he needed another operation immediately, but Plaintiff declined further surgery by D'Amico.

Plaintiff's TOS symptoms were not relieved and, in addition, he suffered a long thoracic nerve injury which required daily pain medication. Ultimately, in January 2005, Richard Sanders, M.D., a vascular surgeon in Colorado, performed a surgical procedure involving a different approach which did not require removal of a rib. However, even after that surgery, Plaintiff continued to suffer pain and limited mobility of his left arm. This action ensued.

Discussion

On appeal, Plaintiff argues that the trial court erred in (1) directing a verdict in favor of Defendants on the medical malpractice claim and (2) granting summary judgment to Defendants on Plaintiff's battery claim. As to Plaintiff's first argument, we agree and reverse. We affirm summary judgment for Defendants on Plaintiff's battery claim.

I. Directed verdict on medical malpractice claim

[1] Plaintiff first argues that the trial court erred in directing a verdict in favor of Defendants on Plaintiff's medical malpractice claim. We agree.

> This Court reviews a trial court's grant of a motion for directed verdict *de novo*. Therefore, we must determine whether, upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence was sufficient to be submitted to the jury. When a defendant moves for a directed verdict in a medical malpractice case, the question raised is whether [the] plaintiff has offered evidence of each of the following elements of his claim for relief: (1) the standard of care; (2) breach of the standard of care; (3) proximate causation; and (4) damages.

Kerr v. Long, 189 N.C. App. 331, 334, 657 S.E.2d 920, 922 (citations, quotation marks, and brackets omitted), *cert. denied*, 362 N.C. 682, 670 S.E.2d 564 (2008).

The basis for Defendants' motion for a directed verdict was that Plaintiff's expert testified only to a "national" standard of care and did not establish sufficient familiarity with Duke and Durham so as to meet the well-established requirements of section 90-21.12:

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

N.C. Gen. Stat. § 90-21.12 (2009).[1] Where, as here, a directed verdict was granted on the basis that a doctor's testimony was to a national rather than a community standard of care,

> the critical inquiry is whether the doctor's testimony, *taken as a whole*, meets the requirements of N.C. Gen. Stat. § 90-21.12. In making such a determination, a court should consider *whether an expert is familiar with a community that is similar to a defendant's community in regard to physician skill and training, facilities, equipment, funding, and also the physical and financial environment of a particular medical community.*

Pitts v. Nash Day Hosp., Inc., 167 N.C. App. 194, 197, 605 S.E.2d 154, 156 (2004) (citation omitted; emphasis added), *affirmed per curiam*, 359 N.C. 626, 614 S.E.2d 267 (2005). The mere use of the phrase "national standard of care" is not fatal to an expert's testimony if the expert's testimony otherwise meets the demands of section 90-21.12. *Id.*

In the alternative, "[w]here the standard of care is the same across the country, an expert witness familiar with that standard may testify despite his lack of familiarity with the defendant's community." *Haney v. Alexander*, 71 N.C. App. 731, 736, 323 S.E.2d 430, 434 (1984), *cert. denied*, 313 N.C. 329, 327 S.E.2d 889 (1985); *see also Cox v. Steffes*,

---

1. This section was amended effective 1 October 2011 with the amendments being applicable to causes of action arising on or after that date. Accordingly, the amended version of the statute is not applicable in this case.

161 N.C. App. 237, 244, 587 S.E.2d 908, 913 (2003), *disc. review denied*, 358 N.C. 233, 595 S.E.2d 148 (2004). For example, in *Cox*, the expert

> testified that the standard of care at issue in th[at] case was in fact the same across the nation. As to post-operative care, [the expert] first testified, "I think it is universally accepted the standard of care." He then agreed more specifically that with respect to post-operative care "the standard of care applicable for that would be the same across the US in 1994 for any board-certified surgeon[.]"

Id. (alteration in original).

Here, Plaintiff's expert, Robert Streisand, M.D., a vascular and thoracic surgeon from New York, repeatedly used the phrase "national standard of care" in his testimony.[2] As noted repeatedly by the appellate courts of this State, use of this phrase in and of itself does not prevent a medical expert's testimony from meeting the standard set forth in section 90-21.12. *See, e.g.*, *Pitts*, 167 N.C. App. at 197, 605 S.E.2d at 156. Rather, we must consider whether, taking his testimony as a whole, Streisand evinced familiarity with Duke "in regard to physician skill and training, facilities, equipment, funding, and also the physical and financial environment of a particular medical community" or testified that the standard of care was the same across the United States. *Id.; Haney*, 71 N.C. App. at 736, 323 S.E.2d at 434. After careful review, we conclude that, taken as a whole, Streisand's testimony met the requirements of section 90-21.12.

Streisand testified that Duke "had a fine reputation as a medical institution." He further opined that the standard of care at Duke would be "the national standard of care that's applied to all finer institutions." Streisand went on to describe the standard of care for Duke as the same as that at UCLA and Johns Hopkins: "the top level of teaching hospitals in urban settings." Streisand also agreed that Duke, like UCLA and Johns Hopkins and "other major university hospitals[,]" would have the "highest standard of care of the best hospitals in the nation[.]" This testimony does not suggest that Streisand was asserting a national standard of care which would be the same at hospitals in every community across the country. On the contrary, Streisand testified that the standard of care at Duke was the same as found at other "top level . . . teaching hospitals in urban settings" and "other major university hospitals[,]" such as UCLA

2. Streisand was not available to testify during the presentation of Plaintiff's case at trial. Defendants consented to having Streisand's discovery deposition testimony read aloud to the jury in place of Streisand's live testimony.

and Johns Hopkins, to wit, the "highest standard of care of the best hospitals in the nation[.]"

We find this testimony analogous to that of the medical expert in *Rucker v. High Point Mem'l Hosp.*, 285 N.C. 519, 206 S.E.2d 196 (1974). In that case, the plaintiff's expert on standard of care was excluded by the trial court for the reason that he was not familiar with the medical staff and facilities at the defendant hospital. *Id.* at 526, 206 S.E.2d at 200. Our Supreme Court affirmed this Court's award of a new trial to the plaintiff, noting that the plaintiff's expert

> testified he was familiar with the standards of practice and procedures in duly accredited hospitals and that they were essentially the same throughout the United States. However, the plaintiff alleged and both defendants admitted that the defendant High Point Memorial Hospital was engaged, at all times herein mentioned, in operating and maintaining "a fully accredited hospital" in the City of High Point.

Id. at 526, 206 S.E.2d at 201 (emphasis omitted); *accord Baynor v. Cook*, 125 N.C. App. 274, 277, 480 S.E.2d 419, 421 (noting that "*Rucker* allowed an expert to testify because he was familiar with accredited hospitals across the country and that the treatment of gunshot wounds was the same at all such hospitals, not because North Carolina had adopted a national standard of care"), *disc. review denied*, 346 N.C. 275, 487 S.E.2d 537 (1997). Thus, in *Rucker*, our Supreme Court specifically held that expert standard of care testimony met the requirements of section 90-21.12 where the "same or similar communit[y]" was a group of the defendant's *peer* institutions in the sense of "physician skill and training, facilities, equipment, funding, and also the physical and financial environment of a particular medical community." *Pitts*, 167 N.C. App. at 197, 605 S.E.2d at 156.

Here, instead of testifying to the standard of care at fully accredited hospitals, Streisand testified to the standard of care at top teaching hospitals associated with a major university. We observe particularly that Defendants' contention that Streisand should have been familiar with the *community of Durham* is entirely unconvincing. It cannot be reasonably maintained that the standard of care at Duke is better approximated by comparison to community hospitals in Durham or similarly sized cities than to other renowned, "top level teaching hospitals" attached to major universities, such as UCLA and Johns Hopkins. *In the light most favorable to Plaintiff*, Streisand's testimony addressed the

applicable standard of care at Duke. *See Kerr*, 189 N.C. App. at 334, 657 S.E.2d at 922. The trial court erred in concluding otherwise. Accordingly, we reverse the directed verdict granted in favor of Defendants.

II. Summary judgment on battery claim

[2] Plaintiff next argues that the trial court erred in granting summary judgment to Defendants on Plaintiff's battery claim. We disagree.

> 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. A trial court's grant of summary judgment receives de novo review on appeal, and evidence is viewed in the light most favorable to the non-moving party.
>
> Upon a motion for summary judgment, the moving party carries the burden of establishing the lack of any triable issue and may meet his or her burden by proving that an essential element of the opposing party's claim is nonexistent. If met, the burden shifts to the nonmovant to produce a forecast of specific evidence of its ability to make a *prima facie* case, which requires medical malpractice plaintiffs to prove, in part, that the treatment caused the injury.

Cousart v. Charlotte-Mecklenburg Hosp. Auth., 209 N.C. App. 299, 302, 704 S.E.2d 540, 542-43 (citations, quotation marks, brackets, and ellipsis omitted), *disc. review denied*, 365 N.C. 330, 717 S.E.2d 375 (2011).

> Where a medical procedure is *completely* unauthorized, it constitutes an assault and battery, i.e., trespass to the person. . . . *If, however, the procedure is authorized, but the patient claims a failure to disclose the risks involved*, the cause of action is bottomed on negligence. Defendants' failure to make a proper disclosure is in the nature of malpractice (negligence) . . . .

Nelson v. Patrick, 58 N.C. App. 546, 550, 293 S.E.2d 829, 832 (1982) (citations omitted; emphasis added).

Before trial, Plaintiff moved for summary judgment on his battery claim. The trial court denied that motion. Defendants then orally moved for summary judgment on the same claim, and the trial court granted that motion.

Plaintiff notes that among the evidence before the court on summary judgment were the depositions of D'Amico and a defense expert on consent, both acknowledging that D'Amico did not have Plaintiff's consent to perform an operation removing Plaintiff's second rib. We agree with Plaintiff that this evidence exists. However, Plaintiff admits he consented to a procedure which involved removal of the first rib. Plaintiff's own expert, Streisand, specifically testified that the resection of the second rather than the first rib was "a recognized complication" of the procedure and that, if it had been noticed in the recovery room immediately after surgery, it would be "a complication, but not really a breach in the standard of care." In addition, Defendants' experts on standard of care provided depositions stating that an inadvertent resection of the second rib is a reported, non-negligent complication of the surgery to which Plaintiff consented. Thus, *all* of the standard of care evidence was that the resulting event was a recognized complication of the consented-to surgical procedure. As a result, the trial court's grant of summary judgment on Plaintiff's claim of battery was proper.

REVERSED IN PART; AFFIRMED IN PART.

Judges GEER and DILLON concur.

IN THE MATTER OF K.H.

No. COA12-1253

Filed 16 April 2013

Juveniles—delinquency—dispositional order—failure to consider risk and needs assessment— harmless error

Although the trial court erred in a juvenile delinquency case by entering a disposition order without receiving or considering the risk and needs assessments, respondent juvenile failed to show prejudice caused by the error.

Appeal by Respondent from order entered 13 March 2012 by Judge Regan A. Miller in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General Josephine N. Tetteh, for the State.

Jon W. Myers, for Respondent.

DILLON, Judge.

The juvenile, E.K.H. (Respondent), appeals from a level three dispositional order placing Respondent in a youth development center, challenging the failure of the trial court to receive and consider Respondent's risk and needs assessments as mandated by N.C. Gen. Stat. § 7B-2413 (2011). We conclude the trial court erred. However, as Respondent has failed to carry his burden of showing any prejudice by the error, we affirm the dispositional order of the trial court.

The evidence of record tends to show the following: On 27 November 2011, four individuals, including Respondent, entered the home of Ernesto Perez (Perez) without permission and demanded money from Perez. At the time, Respondent was on probation.

On 23 January 2012, Respondent entered an admission to the charge of common law robbery. Hearings were held on 23 January 2012 and 6 March 2012. At the second hearing, the trial court ordered that Respondent be committed to the Division of Juvenile Justice for placement in a youth development center for an indefinite commitment not to exceed his eighteenth birthday, a level three disposition. From this dispositional order, Respondent appeals.

I: Risk and Needs Assessment

Respondent's sole argument on appeal is that the trial court erred by entering a dispositional order without receiving or considering the risk and needs assessments, or in the alternative, without making findings of fact that the risk and needs assessments were not necessary in violation of N.C. Gen. Stat. § 7B-2413. While we agree that the trial court erred by entering a dispositional order without receiving or considering the risk and needs assessments, we conclude that Respondent was not prejudiced by the error.

"On appeal, we will not disturb a trial court's ruling regarding a juvenile's disposition absent an abuse of discretion, which occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re J.B.*, 172 N.C. App. 747, 751, 616 S.E.2d 385, 387, *aff'd*, 360 N.C. 165, 622 S.E.2d 495 (2005) (citation and quotation marks omitted).

N.C. Gen. Stat. § 7B-2413 (2011), provides the following:

> The court shall proceed to the dispositional hearing upon receipt of the predisposition report. A risk and needs assessment, containing information regarding the juvenile's social, medical, psychiatric, psychological, and educational history, as well as any factors indicating the probability of the juvenile committing further delinquent acts, shall be conducted for the juvenile and shall be attached to the predisposition report. In cases where no predisposition report is available and the court makes a written finding that a report is not needed, the court may proceed with the dispositional hearing. . . .

Id. "This Court has held that use of the language 'shall' is a mandate to trial judges[.]" *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001) (citations omitted).

As a preliminary matter, we note that Respondent did not object to the lack of the risk and needs assessments at the disposition hearing. "As a general rule, [a] defendant's failure to object to alleged errors by the trial court operates to preclude raising the error on appeal." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (citations omitted). However, "[w]hen a trial court acts contrary to a statutory mandate, the right to appeal the court's action is preserved, notwithstanding the failure of the appealing party to object at trial." *State v. Golphin*, 352 N.C. 364, 411, 533 S.E.2d 168, 202 (2000) (quotation marks omitted).

In the case *sub judice*, the court received and considered the predisposition report. *See* N.C. Gen. Stat. § 7B-2413. However, neither the risk assessment nor the needs assessment was attached to the predisposition report.[1] The disposition and commitment order further reflects that while the trial court "received and considered" the predisposition report, it neither received nor considered the risk and needs assessments. There is no other indication in the record that the trial court either received or considered the risk and needs assessments. The trial court, therefore, violated N.C. Gen. Stat. § 7B-2413, which mandates that the risk and needs assessments "*shall* be conducted for the juvenile

1. The transcript reveals that Respondent "and his mother did complete the comprehensive clinical assessment[,]" and "[t]he recommendations from the assessment were that [Respondent] . . . be placed out of home." However, the transcript is otherwise silent with regard to any risk or needs assessments.

and *shall* be attached to the predisposition report[,]"[2] when it entered a dispositional order without receiving or considering the risk and needs assessments. *Id.* (emphasis added).

Not every statutory violation, however, is grounds for reversal. Under N.C. Gen. Stat. § 15A-1443 (2011), Respondent is prejudiced by errors other than constitutional errors "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." *Id.* "The burden of showing such prejudice under this subsection is upon the [respondent]." *Id.*

In the case *sub judice*, although Respondent argues in his brief that "the trial court committed reversible error by conducting his dispositional hearing without receiving a risk and needs assessment and without making the required findings of fact that such a report was not necessary pursuant to N.C. Gen. Stat. § 7B-2413," Respondent fails to articulate any specific prejudice from the trial court's conducting the disposition hearing without the benefit of the risk and needs assessments. Moreover, a report by Sherri McGruder (McGruder), of the Department of Juvenile Justice, was received and considered by the trial court in this case. It is not clear in the record on appeal whether this report was the "predisposition report[.]" *See* N.C. Gen. Stat. § 7B-2413. However, the report states, "[t]o be used for [d]isposition [p]urposes [o]nly," and the report contains much of the information contemplated by N.C. Gen. Stat. § 7B-2413. The report includes information regarding Respondent's court history, which consists of thirteen total offenses, nine of which were dismissed, three of which were adjudicated, and one – the common law robbery offense that is the subject of the dispositional order in the case *sub judice* – which the report notates, "[p]ending." The report contains additional information regarding Respondent's "social, medical, psychiatric, psychological, and educational history[,]" *see* N.C.

---

2. We note that the trial court did not make a finding of fact that the risk and needs assessments were not necessary. However, because we conclude that Respondent has failed to show any prejudice by the trial court's failure to receive and consider the risk and needs assessments, we do not reach the question of whether the trial court's failure to make findings of fact was error. N.C. Gen. Stat. § 7B-2413 mandates that the risk and needs assessments "*shall be conducted for the juvenile and shall be attached to the predisposition report[,]*" and N.C. Gen. Stat. § 7B-2413 further requires that "[i]n cases where no *predisposition* report is available and the court makes a written finding that a report is not needed, the court may proceed with the dispositional hearing[.]" *Id.* (emphasis added). However, N.C. Gen. Stat. § 7B-2413 is silent as to any requirement for findings of fact with regard to an unavailability of the risk and needs assessments. The statute only mandates that the assessments be "*conducted*" and "*attached*[.]" *Id.* (emphasis added).

Gen. Stat. § 7B-2413, including Respondent's psychiatric diagnoses and prescriptions, Respondent's behavior in his home, Respondent's behavior at school, Respondent's involvement in a neighborhood gang called the "Piru Crips" Bloods, and Respondent's suspensions from school for "using profanity towards his teacher and walking out of class[,]" and for "tripping a young lady[.]" The report also contains some indication of "the probability of the juvenile committing further delinquent acts[,]" *see* N.C. Gen. Stat. § 7B-2413, including a social worker's comment that "[d]uring the time that I have worked with [Respondent,] his charges have become more serious and dangerous[,]" and "[h]e is a danger to himself and the community[,]" and Respondent's mother's "feel[ing] that once [Respondent] is kicked out of placement[,] he will be back home doing the same things."

In light of the information that *is* contained in the record in this case in McGruder's report, and in light of the complete absence of any argument by Respondent in his brief as to how the lack of the risk and needs assessments has prejudiced him, we hold that the trial court's error – entering a dispositional order without first receiving and considering risk and needs assessments – was harmless.

AFFIRMED.

Judge STEPHENS and Judge STROUD concur.

IN THE MATTER OF K.C.

NO. COA12-1157

Filed 16 April 2013

1. Appeal and Error—writ of certiorari granted—insufficient evidence of sexual battery—mere touching

The Court of Appeals exercised its discretion under N.C. R. App. P. 2 and determined that the trial court erred by denying defendant juvenile's motion to dismiss the charge of sexual battery at the close of the State's evidence. Evidence that defendant merely touched a classmate's buttocks, without showing a sexual purpose, was not sufficient to raise more than a suspicion or possibility of sexual battery.

2. Appeal and Error—writ of certiorari denied—sufficient evidence of simple assault

Though there was contradictory evidence as to whether defendant juvenile intended to make contact with his classmate when he touched her buttocks, the mere fact that he touched her without her consent was sufficient to preclude further review of a simple assault charge by the Court of Appeals under N.C. R. App. P. 2.

3. Juveniles—delinquency—adjudication order—simple assault

The trial court's juvenile delinquency adjudication order satisfied N.C.G.S. § 7B-2411, and thus, its simple assault adjudication was supported by sufficient findings of fact.

4. Juveniles—delinquency—disposition order

The trial court erred in a juvenile delinquency case by failing to enter its disposition in accordance with N.C.G.S. § 7B-2501 because it did not address certain factors required by statute.

5. Constitutional Law—ineffective assistance of counsel—claim dismissed without prejudice—record unclear

Defendant juvenile's ineffective assistance of counsel claim was dismissed without prejudice to his ability to file a motion for review and further pursue this claim. The record was unclear on whether the performance of the juvenile's attorney fell below an objective standard of reasonableness or prejudiced his case as to the charge of simple assault.

Appeal by Juvenile K.C. from Order entered 19 July 2012 by Judge Regan A. Miller in Mecklenburg County District Court. Heard in the Court of Appeals 14 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General Peggy S. Vincent, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Amanda S. Zimmer, for Juvenile.

STEPHENS, Judge.

Factual Background and Procedural History

This matter arises out of the filing of juvenile petitions alleging the offenses of simple assault and sexual battery. The case was heard at

a session for juvenile hearings in District Court, Mecklenburg County, on 19 July 2012. Evidence offered at the hearing tended to show the following:

Juvenile Keith[1] attends high school with the prosecuting witness, Karen, where they share classes. Both Keith and Karen are fifteen years old. The two typically sit far away from each other, but on 29 February 2012 they had a substitute teacher, and Keith was not sitting in his usual place. At one point during the day, Karen got up from her seat to shelve a book. Karen testified at the adjudicatory hearing that she bent over to place the book where it belonged when Keith "touched and grabbed [her]." Karen reacted by informing Keith: "Don't do that." Keith did not respond.

Karen went to the substitute teacher and reported the incident. The substitute teacher informed the school resource officer, Scott Gallman, who investigated the matter and took statements from Karen and Keith. At the hearing, Officer Gallman testified that Karen had seemed "a little upset" when she informed him that Keith "grabbed and squeezed [her buttocks]." Officer Gallman further testified that Keith had admitted to touching Karen on the buttocks, "but he said it was an accident."

Testifying in his own defense, Keith largely corroborated Karen's testimony leading up to the moment of contact. He explained that he had been sitting in his seat and "I had dropped my pencil and when I picked my pencil up, I accidentally hit [Karen's] butt, but I didn't squeeze it." Keith stated that he was seated during the entire event, having come into contact with Karen during the process of leaning down to get his pencil.

At the close of the State's evidence, Keith moved to dismiss the charge of sexual battery. The district court denied that motion. Keith did not renew his motion at the close of all the evidence. He was subsequently adjudicated "delinquent with respect to the offense of misdemeanor sexual battery." At the end of the hearing, he gave notice of appeal in open court. The court said nothing during the hearing regarding the charge of simple assault. In its written order, however, the court concluded that Keith was delinquent with regard to sexual battery and simple assault. Keith was determined to be a Level 1 offender and placed on 9 months of probation. He was also directed "to submit to a juvenile sex offender evaluation and [comply] with treatment recommendations."

---

1. Pseudonyms are used to protect the juveniles' identities.

Discussion

On appeal, Keith argues that: (1) the district court erred by failing to dismiss the charge of sexual battery at the close of the State's evidence because that charge is not supported by sufficient evidence; (2) the district court should have dismissed the charge of simple assault as not based on sufficient evidence; (3) the district court failed to make sufficient findings of fact on both counts; and (4) he was denied effective assistance of counsel at the hearing. We vacate the court's adjudication of sexual battery as based on insufficient evidence, affirm the district court's adjudication of simple assault, and remand the case for insufficient findings of fact on the court's simple assault disposition. We do not reach the merits of Keith's final argument, ineffective assistance of counsel.

I. Sufficiency of the Evidence

A. Sexual Battery

[1] Keith contends that the district court erred by denying his motion to dismiss the charge of sexual battery at the close of the State's evidence. Because Keith did not renew his motion to dismiss at the close of all the evidence, he requests that we review his appeal under Rule 2 of the North Carolina Rules of Appellate Procedure.

As a general rule, "a defendant [in a criminal case] may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action . . . is made at [the hearing]." N.C.R. App. P. 10(a). If the motion is made at the close of the State's evidence and denied by the court, the "defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged" if he "fail[ed] to move to dismiss the action . . . at the close of all the evidence." *Id.*; *In re Hodge*, 153 N.C. App. 102, 107, 568 S.E.2d 878, 881 (2002) ("[I]f a defendant fails to move to dismiss the action . . . at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.").

We may suspend this prohibition under Rule 2, however, "[t]o prevent manifest injustice to a party[.]" N.C.R. App. P. 2. "[W]hen this Court firmly concludes, as it has here, that the evidence is insufficient to sustain a criminal conviction . . . it will not hesitate to reverse the conviction, *sua sponte*, in order to prevent manifest injustice to a party." *State v. Booher*, 305 N.C. 554, 564, 290 S.E.2d 561, 566 (1982) (citations and quotation marks omitted); *see also State v. Gayton-Barbosa*, 197 N.C. App. 129, 134, 676 S.E.2d 586, 590 (2009) ("The Supreme Court and this

Court have regularly invoked [Rule 2] in order to address challenges to the sufficiency of the evidence to support a conviction.") (citation omitted). Because we conclude that the evidence against Keith is insufficient to support an adjudication of delinquency as to sexual battery, we review Keith's appeal in order to prevent manifest injustice despite his failure to move to dismiss that charge at the end of all the evidence.

"We review a . . . 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 . . . 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) (citation and 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). Here, Keith argues that the evidence offered by the State is insufficient to support an adjudication of delinquent with regard to sexual battery. We agree.

A juvenile can be found delinquent of sexual battery if, "for the purpose of sexual arousal, sexual gratification, or sexual abuse, [the juvenile] engages in sexual contact with another person . . . [b]y force and against the will of the other person[.]" N.C. Gen. Stat. § 14-27.5A (2011). Keith argues that, in this case, there is not sufficient evidence to support a finding of either sexual contact or sexual purpose.

Sexual contact occurs when, among other things, a juvenile touches the sexual organ, anus, breast, groin, or buttocks of another person. N.C. Gen. Stat. § 14-27.1(5) (2011). "[T]ouching without penetration is sufficient to support the element of sexual contact necessary for the crime of sexual battery." *State v. Viera*, 189 N.C. App. 514, 517, 658 S.E.2d 529, 531 (2008). Here, Karen informed the court that Keith "touched and grabbed [her]." At the end of Karen's testimony, the district court clarified that "when [she] said [Keith] touched her, [Karen] [made] a gesture with her hand that indicated a squeezing motion." Later in the hearing, Keith rebutted Karen's testimony with his own statement, avowing that he "accidentally hit her butt, but []didn't squeeze it." The testimony of both parties is consistent with their previous statements to Officer Gallman, who confirmed Keith's prior statement that the touching was accidental. As both parties testified to the fact that Keith made contact with Karen's buttocks, we conclude that there was sufficient evidence of sexual contact.

On the question of sexual purpose, however, this Court has previously held — in the context of a charge of indecent liberties between children — that such a purpose does not exist "without some evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting[.]" *In re T.S.*, 133 N.C. App. 272, 277, 515 S.E.2d 230, 233 (1999). Otherwise, "sexual ambitions must not be assigned to a child's actions." *Id.* The element of purpose "may not be inferred solely from the act itself." *Id.*; *In re D.S.*, __ N.C. App. __, 699 S.E.2d 141 (2010) (unpublished disposition), *available at* 2010 WL 3464278 (applying the reasoning from *In re T.S.* to sexual battery).[2] Rather, factors like age disparity, control by the juvenile, the location and secretive nature of the juvenile's actions, and the attitude of the juvenile should be taken into account. *In re T.C.S.*, 148 N.C. App. 297, 302–03, 558 S.E.2d 251, 254 (2002) (finding sufficient evidence to support the court's denial of the juvenile's motion to dismiss a charge of indecent liberties between children when the almost twelve-year-old juvenile was seen holding hands with a five-year-old victim while coming out of the woods; the juvenile appeared to put his hands on the victim's private parts while she was taking off her clothes). The mere act of touching is not enough to show purpose. *See In re T.S.*, 133 N.C. App. at 277, 515 S.E.2d at 233.

When Karen was asked why she believed the contact was intentional, she responded: "[Y]ou can't touch and grab someone and not be accident [sic] and especially if you're a boy." She also testified that Keith had said certain "nasty stuff" to her at the beginning of the school year. Specifically, Karen described an instance in which Keith purportedly asked her, "When are you going to let me hit?," which Karen took to mean, "[W]hen are you going to let me have sex with you?" When Keith was asked if he had ever "talked to [Karen] about anything in a sexual nature," he avowed that he had not.

This evidence is not sufficient to raise more than a suspicion or possibility that Keith committed sexual battery. The question of whether the contact between Keith and Karen was intended "for the purpose of sexual arousal, sexual gratification, or sexual abuse" is disputed by the parties and there is no third party observer to provide additional context. Keith and Karen are the same age and there is no evidence that

---

2. *In re D.S.* is an unpublished opinion and, therefore, holds no precedential value. N.C.R. App. P. 30(e)(1). Because the reasoning used by that panel is particularly persuasive in this circumstance, however, we employ it here. *See generally State ex rel. Moore Cnty. Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 222, 606 S.E.2d 907, 909 (2005) ("[C]itation to unpublished opinions is intended solely in those instances where the persuasive value of a case is manifestly superior to any published opinion.").

Keith exercised any particular control over the situation. The incident occurred in a public school room during the school day. Keith contends that the touching was accidental and also made a statement to that effect directly after the event. Further, Keith's alleged request to "hit" was made months before the moment of contact between him and Karen, with no evidence of any contact of any sort between the two of them from the beginning of the school year, presumably in late August, through late February.[3] There is no other evidence connecting that statement (or any other statement) to the events on 29 February 2012. Because the mere act of touching is not enough to show purpose, we vacate the court's adjudication as to sexual battery.

B. Simple Assault

[2] Keith also contends that the district court erred by finding that he committed simple assault. Because Keith did not move to dismiss the charge of simple assault at the hearing, he requests that we review his appeal under Rule 2 of the North Carolina Rules of Appellate Procedure.

When a battery has occurred, assault may be proven by a finding of either assault or battery on the victim. *See State v. West*, 146 N.C. App. 741, 743, 554 S.E.2d 837, 839–40 (2001) (citation omitted) ("Assault on a female may be proven by finding either an assault on or a battery of the victim."); *see also McCracken v. Sloan*, 40 N.C. App. 214, 216, 252 S.E.2d 250, 252 (1979) ("It has been said that assault and battery which are two separate common law actions 'go together like ham and eggs.' ").[4] Assault is defined as "an overt act or attempt, with force or violence, to do some immediate physical injury to the person of another, which is sufficient to put a person of reasonable firmness in fear of immediate physical injury." *State v. Bagley*, 183 N.C. App. 514, 526, 644 S.E.2d 615, 623 (2007). This "rule places emphasis on the intent or state of mind of the person accused." *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967). "A battery always includes an assault, and is an assault whereby any force is applied, directly or indirectly, to the person of another." *State v. Britt*, 270 N.C. 416, 418, 154 S.E.2d 519, 521 (1967); *see generally State v. Thompson*, 27 N.C. App. 576, 577, 219 S.E.2d 566, 568, *cert. denied*, 289 N.C. 141, 220 S.E.2d 800 (1975) ("While every battery includes an assault, every assault does not include a battery.").

3. As the contact at issue occurred in late February, it can be presumed that the statement Karen is referring to occurred some five-to-six months beforehand, near the beginning of the school year.

4. Instead of ham and eggs, we suggest: 'peas and carrots,' 'salt and pepper,' 'sugar and spice,' 'peanut butter and jelly,' or, perhaps, 'tempeh and scrambled tofu.'

"[A] battery is the actual unlawful infliction of violence on the person of another, and may be proved by evidence of any unlawful touching of plaintiff's person, whether by defendant himself or by any substance put in motion by him." *State v. Sudderth*, 184 N.C. 753, 756, 114 S.E. 828, 829 (1922) (citations and quotation marks omitted); *see also* N.C.P.I.—Crim. 120.20 ("Provided there is a battery involved, . . . [a]n assault is an intentional application of force, however slight, directly or indirectly, to the body of another person without that person's consent [or] an intentional, offensive touching of another person without that person's consent."). "Where the evidence discloses an actual battery[, as it does here,] whether the victim is put in fear is inapposite." *Thompson*, 27 N.C. App. at 578, 219 S.E.2d at 568 (citation and quotation marks omitted). "The gist of the action for battery is not the hostile intent of the defendant, but rather the absence of consent to the contact on the part of the plaintiff." *McCracken*, 40 N.C. App. at 216–17, 252 S.E.2d at 252.

In this case, both parties admit that Keith touched Karen's buttocks. Though there is contradictory evidence as to whether Keith intended to make contact with Karen, the mere fact that he touched her without her consent is sufficient to preclude further review under Rule 2 and our assault and battery jurisprudence. *See generally West*, 146 N.C. App. at 742–44, 554 S.E.2d at 839–40 (finding no error, when the defendant touched the victim's breast, on the juvenile court's amended instruction to the jury that battery may exist when, *inter alia*, "the Defendant intentionally touched, however slight, the body of the alleged victim") (brackets omitted).

II. The District Court's Findings of Fact on Simple Assault

A. The Adjudication Order

[3] Keith also contends that the court's adjudication of simple assault is not supported by sufficient findings of fact under the court's duty to make such findings. We disagree and affirm the simple assault adjudication.

We addressed a similar issue in the case of *In re J.V.J.*, 209 N.C. App. 737, 707 S.E.2d 636 (2011) [hereinafter *J.V.J.*]. There we examined the court's fact-finding duty under N.C. Gen. Stat. § 7B-2411 (2011), which governs the requirements of juvenile adjudications in cases of undisciplined and delinquent juveniles. N.C. Gen. Stat. § 7B-1600, 1601. Section 7B-2411 provides:

> If the court finds that the allegations in the petition have been proved [beyond a reasonable doubt], the court shall so state in a written order of adjudication, which shall

> include, but not be limited to, the date of the offense, the misdemeanor or felony classification of the offense, and the date of adjudication.

N.C. Gen. Stat. § 7B-2411. In *J.V.J.*, the court made the following findings in its written order of adjudication:

> Based on the evidence presented, the following facts have been proven beyond a reasonable doubt:
>
> The court finds that Joseph is responsible.

J.V.J., 209 N.C. App. at 740, 707 S.E.2d at 638 (brackets omitted). Because section 7B-2411 requires the court to state in a written order that the allegations of the petition are proved beyond a reasonable doubt and because the adjudication order in *J.V.J.* did "not even summarily aver that 'the allegations in the petition have been proved[,]' " we held that the adjudication order in that case was deficient for failing to include appropriate findings of fact. *Id.* at 740–41, 707 S.E.2d at 638. (holding that the court "fail[ed] to include the requisite findings in its adjudication order" and noting that, "[r]ather than addressing the allegations in the petition in the [adjudication order], the court [merely] . . . indicate[d], through a fragmentary collection of words and numbers, that an offense occurred and []state[d] that Joseph was 'responsible' ").

This case is distinct from *J.V.J.* Here, Keith's written adjudication order regarding the simple assault charge states the following:

Offense Date	**Offense** . . .	**Date Petition Filed**	**F/M**	**Class**	**Status**
02/23/2012	SIMPLE ASSAULT	04/13/2012	M	2	☐ Delinq./Admit ☒ Delinq./Hearing ☐ Lesser ☐ Amended ☐ Dismissed

. . . .

> The following facts have been proven beyond a reasonable doubt: . . .
>
> After hearing all testimony in this matter the court finds beyond a reasonable doubt that the juvenile committed the offense of Sexual Battery and Simple Assault and he is ADJUDICATED DELINQUENT.

The order also includes the judge's signature, the date it was signed, and a stamp indicating that it was filed on 19 July 2012. Keith alleges that the order is insufficient because it fails to make appropriate findings and "apply the elements of the offense to the evidence." We are unpersuaded.

Unlike *J.V.J.*, the district court's adjudication in this case satisfies the minimum requirements of section 7B-2411. It provides the date of the offense,[5] the fact that the assault is a class 2 misdemeanor, the date of the adjudication, and clearly states that the court considered the evidence and adjudicated Keith delinquent as to the petition's allegation of simple assault beyond a reasonable doubt. Accordingly, the court's adjudication order satisfies section 7B-2411, and we affirm its simple assault adjudication as supported by sufficient findings of fact.

B. The Disposition Order

[4] Keith also argues that the district court failed to enter its disposition in accordance with section 7B-2501 because it did not address certain factors required by the statute. We agree and remand to the district court for further findings of fact as to disposition.

Section 7B-2501(c) provides that,

> [i]n choosing among statutorily permissible dispositions, the court shall select the most appropriate disposition both in terms of kind and duration for the delinquent juvenile. Within the guidelines set forth in G.S. [§] 7B-2508, the court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile, based upon:
>
> (1) The seriousness of the offense;
>
> (2) The need to hold the juvenile accountable;
>
> (3) The importance of protecting the public safety

5. Keith notes in his brief that there is a discrepancy in the record concerning the actual date of the alleged offense. While the transcript and petition indicate that the events giving rise to this case occurred on 29 February 2012, the adjudication order lists the dates as 23 February 2012 for the simple assault allegation and 22 February 2012 for the sexual battery allegation. Because the evidence in the transcript supports the conclusion that the events occurred during one full day, not two, we presume for the purposes of this opinion that 29 February 2012 is the correct date. In either circumstance, we instruct the district court to clarify this confusion on remand; however, this clerical mistake is not sufficient to invalidate its simple assault adjudication order under section 7B-2411.

(4) The degree of culpability indicated by the circumstances of the particular case; and

(5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501. The State argues that the court properly considered these factors for the following reasons: First, the court categorized Keith's simple assault offense as "minor." Second, the court discussed in the hearing

> [the] need to deal with [Keith] understanding the significance of victimizing other people and the consequences of that, okay, now, so that it doesn't continue into his adult life. . . . I mean I can even chart what he did there to adolescence [sic] exuberance or something of that nature. But, again, you know, young ladies shouldn't have to put up with that from young men.

Third, the court required Keith to complete a juvenile sex offender evaluation and comply with treatment recommendations.[6] The State provides no evidence whatsoever that the court considered factors three and four or based its determination concerning Keith's rehabilitative and treatment needs on a then-existing risk and needs assessment.

We review a lower court's alleged statutory errors *de novo*. *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011). Section 7B-2512 requires that the juvenile court's "dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law [and that the] court shall state with particularity, both orally and in the written order of disposition, the precise terms of the disposition . . . ." N.C. Gen. Stat. § 7B-2512. We have interpreted that language to require the juvenile court "to make findings demonstrating that it considered the N.C.G.S. § 7B-2501(c) factors in a dispositional order entered in a juvenile delinquency matter." *In re V.M.*, __ N.C. App. __, __, 712 S.E.2d 213, 215 (2011) (citation omitted).

Assuming *arguendo* that the court's categorization of Keith's simple assault offense as "minor" and its statement that Keith needs to "learn the significance of victimizing people and learn the consequences of

6. Though the State does not make a distinction in its brief, this argument appears to apply exclusively to the charge of sexual battery, which we have vacated. Accordingly, it is not relevant to our consideration of the court's disposition as to simple assault.

that," sufficiently addressed the first two factors required by the statute, the record before this Court does not establish that the trial court considered the last three factors set out in section 7B-2501 — (3) the importance of protecting the public safety, (4) the degree of culpability indicated by the circumstances of the case, and (5) the rehabilitative and treatment needs of the juvenile based on a risk and needs assessment. Though there is evidence that the parties discussed a certain "report" with the juvenile court during disposition, that document was not identified or described in any way at the hearing and was not supplied in the record on appeal. We are thus unable to discern the nature of the report, and, accordingly, we hold that the court failed to make sufficient findings of fact under section 7B-2501 and remand to the district court for additional findings of fact on disposition.

III. Ineffective Assistance of Counsel ("IAC")

[5] Finally, Keith argues that he received IAC because his counselor "failed to make proper motions to preserve the issue of sufficiency of the evidence for appellate review." We refrain from addressing this question as to either sexual battery or simple assault.

First, as to sexual battery, we refrain from addressing Keith's argument of IAC because it is moot. "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cnty. Realtors Ass'n*, 344 N.C. 394, 398–99, 474 S.E.2d 783, 787 (1996). Because we have vacated Keith's delinquency adjudication as to sexual battery, a decision on the question of IAC would have no practical effect on the existing controversy and is therefore moot.

Second, as to simple assault, we refrain from addressing Keith's argument of IAC because it is premature. IAC requires that the defendant party show that (1) his attorney's performance was deficient and (2) such 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) (citation omitted). To establish deficient performance, Keith must show that his attorney's representation fell below "an objective standard of reasonableness." *Id.* To establish prejudice, Keith must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result in the proceeding would have been different." *Id.* "Decisions concerning which defenses to pursue . . . are not generally second-guessed by [the appellate] Court." *State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003).

In order to make such a showing, Keith must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland v. Washington*, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 694–95 (1984) (citation and quotation marks omitted). That presumption is substantial and "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 687–88, 80 L. Ed. 2d at 694.

"[B]ecause of the nature of IAC claims, defendants likely will not be in a position to adequately develop [those] claims on direct appeal." *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). "[S]hould the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for review] proceeding." *Id.*

In this case, the record is unclear on whether the performance of Keith's attorney fell below an objective standard of reasonableness or prejudiced his case as to the charge of simple assault. Accordingly, we dismiss this issue without prejudice to Keith's ability to file a motion for review and further pursue this claim.

VACATED IN PART; AFFIRMED IN PART; REMANDED IN PART; and DISMISSED IN PART.

Judges STROUD and DILLON concur.

IN RE McCLAIN

[226 N.C. App. 465 (2013)]

IN THE MATTER OF KEVIN MCCLAIN

No. COA12-1258

Filed 26 April 2013

Sexual Offenders—sex offender registry—denial of request to terminate registration requirement

The trial court did not err by denying a petition for removal from the sex offender registry. Even if petitioner's argument that the provision under N.C.G.S. § 14-208.12A(a1)(2) that incorporated the Adam Walsh Act was unconstitutional as an improper delegation of legislative authority had merit, the trial court could still have exercised its discretion to deny petitioner's request to terminate his registration requirement.

Appeal by petitioner from order entered 13 June 2012 by Judge Walter H. Godwin, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 11 March 2013.

Roy Cooper, Attorney General, by William P. Hart, Jr., Assistant Attorney General, for the State.

Staples S. Hughes, Appellate Defender, by John F. Carella, Assistant Appellate Defender, for petitioner–appellant.

MARTIN, Chief Judge.

Petitioner Kevin McClain pled guilty to the felony offense of indecent liberties with a child on 29 January 2001. He was sentenced to fifteen to eighteen months imprisonment, thirty-six months of supervised probation, and was required to register as a sex offender under the North Carolina Sex Offender and Public Protection Registration Program, N.C.G.S. §§ 14-208.7–19A, which he did on 7 August 2001.

After ten years, McClain petitioned the Superior Court of New Hanover County to be removed from the sex offender registry. Petitioner admitted at the subsequent hearing on 13 June 2012 that during the past ten years he was "convicted of a felony for failure to comply with obligations under the sex offender registry law and served a period of imprisonment," and as a result, he did not have a "clean record." The court denied McClain's petition for removal from the registry on the grounds

that the requested relief did not comply with federal standards as outlined in N.C.G.S. § 14-208.12A(a1)(2).

On appeal, petitioner McClain contends it was error for the trial court to deny his petition for removal from the sex offender registry on the basis that it did not comply with N.C.G.S. § 14-208.12A(a1)(2), because the incorporation of the Adam Walsh Child Protection and Safety Act of 2006 ("the Adam Walsh Act") and the federal Sex Offender Registration and Notification Act ("SORNA") into N.C.G.S. § 14-208.12A(a1)(2) is an unconstitutional delegation of legislative authority under the North Carolina Constitution.

Although another panel of this Court recently decided *In re Hamilton*, __ N.C. App. __, 725 S.E.2d 393 (2012) (incorporating and applying the requirements of the Adam Walsh Act under N.C.G.S. § 14-208.12A(a1)(2)), both parties agree that the constitutionality of the incorporation of those federal standards was not raised in that case. Therefore, because the instant case presents a question distinct from that at issue in *In re Hamilton*, we now consider petitioner's constitutional argument. *Cf. In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36–37 (1989) (holding that a court is bound by the decision of prior panels of the same court on the same issue). After careful consideration, we affirm the trial court's order.

We review this issue *de novo*. *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."). "This Court presumes that any act promulgated by the General Assembly is constitutional and resolves all doubt in favor of its constitutionality." *Guilford Cty. Bd. Of Educ. v. Guilford Cty. Bd. Of Elections*, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684 (1993).

After ten years on North Carolina's sex offender registry, "a person required to register under [N.C.G.S. § 14-208.7] may petition the superior court to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article." N.C. Gen. Stat. § 14-208.12A(a) (2011). The court "may" grant this relief if, among other conditions being met, "[t]he requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State." N.C. Gen. Stat. § 14-208.12A(a1)(2).

The federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program ("the Jacob Wetterling Act"), which set up guidelines for state sex offender registration programs, was enacted on 26 November 1997. 42 U.S.C. § 14071(a)(1) (1997) (repealed 2006). Initially, under the Jacob Wetterling Act, "[a] person required to register under subsection (a)(1) of this section shall continue to comply with this section . . . until 10 years have elapsed since the person was released from prison or placed on parole, supervised release, or probation . . . ." 42 U.S.C. § 14071(b)(6)(A) (repealed 2006). In October 1998, the Jacob Wetterling Act was amended to include additional requirements under the Pam Lynchner Sexual Offender Tracking and Identification Act of 1996 ("the Pam Lynchner Act"). 42 U.S.C. § 14072 (repealed 2006). On 27 July 2006, the Jacob Wetterling and Pam Lynchner Acts were repealed, effective "the later of 3 years after July 27, 2006, or 1 year after the date on which the software described in [42 U.S.C. § 16923] is available." Act of July 27, 2006, Pub. L. No. 109-248, tit. I, § 129(b), 120 Stat. 600.

On the same day, the Adam Walsh Child Protection and Safety Act of 2006 was enacted to "protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below," and to "establish[] a comprehensive national system for the registration of those offenders." 42 U.S.C. § 16901 (2006). The Adam Walsh Act makes it clear that it is intended to expand on and replace the Jacob Wetterling Act.[1] The Adam Walsh Act covers substantially the same subject matter previously covered by the Jacob Wetterling Act; in particular, it outlines and updates the requirements for sex offender registration and notification in Part A of the statute. Pursuant to the Adam Walsh Act, the full registration period for what it deems a Tier 1 sex offender is fifteen years; it can be reduced to ten years, however, if the offender is not convicted of another sex offense or of an offense for which imprisonment of more than a year can be imposed, i.e., they have a "clean record," and if the offender successfully completes any periods of supervised release, probation, and parole and an appropriate sex offender treatment program. 42 U.S.C. § 16915 (2006).

---

1. Jacob Wetterling is the first victim listed as inspiring the legislation in § 16901, which declares the purpose of the statute. 42 U.S.C. § 16901(1) (2006). Moreover, § 16902 of the Adam Walsh Act states "[t]his chapter establishes the Jacob Wetterling, Megan Nicole Kanka, and Pam Lynchner Sex Offender Registration and Notification Program." 42 U.S.C. § 16902 (2006).

Petitioner contends that incorporating the "clean record" requirement of the Adam Walsh Act into the North Carolina Sex Offender and Public Protection Registration Program, as was done in *In re Hamilton* by referring to "the Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State" in N.C.G.S. § 14-208.12A(a1)(2) is an unconstitutional delegation of the North Carolina General Assembly's lawmaking authority. Specifically, petitioner argues that the statutory reference to "the Jacob Wetterling Act, as amended" and the "federal standards" language improperly incorporates future federal enactments to be promulgated by Congress.

Under article II, section 1 of the North Carolina Constitution, the General Assembly may not abdicate or delegate its authority to make law to departments of government or administrative agencies. *See* N.C. Const. art. II, § 1; *N.C. Tpk. Auth. v. Pine Island, Inc.*, 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965). Constitutional delegation of limited legislative authority occurs when the legislature has "declared the policy to be effectuated and has established the broad framework of law within which it is to be accomplished and standards for the guidance of the administrative agency," and simply "delegate[s] to such agency the authority to make determinations of fact upon which the application of a statute to particular situations will depend." *Foster v. N.C. Med. Care Comm'n*, 283 N.C. 110, 119, 195 S.E.2d 517, 523 (1973). Simply defining when particular conduct is unlawful by reference to an external standard, on the other hand, has not been deemed an unconstitutional delegation of legislative authority. *See State v. Rhoney*, 42 N.C. App. 40, 43, 255 S.E.2d 665, 667 (1979) (holding that an ordinance which gives authority to the Superintendent to approve the use of school property for certain extracurricular activities is not unconstitutional as a delegation of legislative authority).

Here, the legislature is not creating a framework and then asking Congress or another federal agency to determine facts or fill in that framework; these statutes comprise two parallel sex offender notification and registration programs, state and federal, existing side-by-side. Rather than abdicating or delegating legislative authority to make new guidelines to the federal government, the North Carolina legislature is attempting to bring its program in line with the external federal standards with which it needs to comply in order to receive federal funding.

The Adam Walsh Act explicitly requires jurisdictions to "substantially implement" its requirements in order to receive federal funds, as

long as doing so is not unconstitutional under its state Constitution. 42 U.S.C. § 16925 (2006). Accordingly, there are provisions in N.C.G.S. § 14-208.7 *et seq.* which directly implement aspects of the Adam Walsh Act; these provisions, however, are spelled out and do not refer to the federal statute or requirements, they simply adopt the requirements specifically in the text of the statute.[2] The offending reference to "federal standards" in N.C.G.S. § 14-208.12A(a1)(2) of which the petitioner complains is the legislature's attempt to substantially implement the Adam Walsh Act's requirements by bringing North Carolina's conditions for removal from the sex offender registry in line with those recommended by the federal government in the Adam Walsh Act. Because we hold this action by the North Carolina legislature is not an unlawful delegation of its authority, we review the court's denial of the petition for removal using the framework employed by the Court in *In re Hamilton*.

Here, both parties agree that petitioner is a tier 1 sex offender pursuant to 42 U.S.C. § 16911.

> Thus, under the terms of section 16915, [p]etitioner's full registration period would be 15 years (subsection (a)), which could be reduced by five years (subsection (b)(3)(A)) if, after a period of ten years (subsection (b)(2)(A)), [p]etitioner had not committed another sex offense or other serious offense and had successfully completed any "periods of supervised release, probation, and parole" and "an appropriate sex offender treatment program" (subsection (b)(1)).

In re Hamilton, __ N.C. App. at __, 725 S.E.2d at 399.

Petitioner first registered pursuant to N.C.G.S. § 14-208.7 on 7 August 2001. He petitioned the trial court for removal on 29 May 2012, more than ten years later. Based on evidence at the hearing, the trial court found that evidence supported that petitioner had satisfied all the requirements for removal except the requirement that the relief he requested complied with the provisions of the federal Jacob Wetterling Act, as amended, and "any other federal standards applicable to the termination of [the] registration requirement," because petitioner admitted at trial that he did not have a "clean record." Based on these findings of fact, the court correctly concluded that petitioner is not entitled to the relief requested, and must continue to maintain registration.

---

2. 42 U.S.C. §§ 16913 and 16916 require in-person initial registration and in-person updates to keep an offender's registration current; N.C.G.S §§ 14-208.7 and 14-208.9 added these requirements as well.

Moreover, we must also note that even if petitioner's argument that the provision incorporating the Adam Walsh Act was unconstitutional as an improper delegation of legislative authority had merit, the trial court could still have exercised its discretion to deny petitioner's request to terminate his registration requirement. *See In re Hamilton*, __ N.C. App. at __, 725 S.E.2d at 399 (holding that "after making findings of fact" the trial court is "free to employ its discretion in reaching its conclusion of law whether [p]etitioner is entitled to the relief he requests" because N.C.G.S. § 14-208.12A(a1) states that the trial court "may" grant petitioner relief if the terms of the statute are met). The trial court's order denying petitioner McClain's petition is affirmed.

Affirmed.

Judges HUNTER and STEPHENS concur.

RIADH KATY, ADMINISTRATOR OF THE ESTATE OF AZIZA KATY, PLAINTIFF
v.
MICHAEL JOHN CAPRIOLA, M.D., JOHN DAVID RISER, P.A., KEVEN ROBERT CHUNG, M.D., AND MCDOWELL EMERGENCY PHYSICIANS, P.L.L.C., DEFENDANTS

No. COA12-625

Filed 16 April 2013

1. Witnesses—standard of care—physician's assistant—testimony by physician

The trial court abused its discretion in a medical malpractice action by excluding a doctor's standard of care opinion concerning a physician's assistant where the doctor, although not formally recognized as an expert, had the necessary educational and professional background and had been permitted to offer a standard of care opinion as to his own care of the deceased. The exclusion was prejudicial because of plaintiff's closing argument and because the witness was defendant's supervisor.

2. Medical Malpractice—contributory negligence—failure to seek further treatment

In a medical malpractice case that was remanded for a new trial on another issue, the trial court erred in granting a directed verdict in favor of plaintiff on the issue of contributory negligence.

The deceased did not seek further medical treatment, contrary to explicit instructions, when her condition continued to deteriorate.

3. Medical Malpractice—special instruction—proximate cause—chance of recovery

In a medical malpractice action in which a new trial was granted on other grounds, the trial court erred by not giving a requested special instruction that plaintiff had the burden to prove more than a mere increased chance of recovery and survival in order to establish proximate cause.

4. Evidence—collateral source rule—spouse's remarriage—excluded

In a medical malpractice action in which a new trial was granted on another issue, the trial court properly excluded evidence of the surviving spouse's remarriage under the collateral source rule.

5. Evidence—opened door—remand on other grounds—argument not considered

An argument about whether the door was opened to evidence otherwise properly excluded was not considered where a new trial was granted on other grounds. The same testimony may not necessarily recur during the new trial.

Appeal by defendants John David Riser, P.A. and McDowell Emergency Physicians, P.L.L.C. from judgment entered 14 November 2011 and order entered 14 October 2011 by Judge Joseph Crosswhite in McDowell County Superior Court. Heard in the Court of Appeals 28 November 2012.

Elam & Rousseaux, P.A., by William R. Elam and William H. Elam, for plaintiff-appellee.

Carruthers & Bailey, P.A., by Joseph T. Carruthers, for defendant-appellants.

CALABRIA, Judge.

John David Riser, P.A. ("Riser") and McDowell Emergency Physicians, P.L.L.C. (collectively, "defendants") appeal from a judgment entered upon a jury verdict finding defendants liable for medical malpractice for their treatment of Aziza Katy ("Mrs. Katy") and awarding

Riadh Katy, as administrator of the Estate of Mrs. Katy ("plaintiff"), monetary damages and costs. Defendants are entitled to a new trial.

I. Background

On 9 February 2008, Mrs. Katy gave birth to twins at McDowell Hospital in Marion, North Carolina. Two days later, Dr. Richard Salsman ("Salsman"), Mrs. Katy's obstetrician, ordered an abdominal x-ray that indicated Mrs. Katy could be suffering from pneumonia. Mrs. Katy was treated with antibiotics and discharged on 13 February 2008. On 15 February 2008, Mrs. Katy experienced shortness of breath and went to Salsman's office for treatment. Salsman referred her to the McDowell Hospital Emergency Room ("the ER") for further evaluation. After Dr. Keven Chung ("Chung") and Dr. David Craig ("Craig") reviewed Mrs. Katy's frontal and lateral chest x-rays, she was diagnosed with pneumonia, given a different class of antibiotics, and discharged from the ER the same day.

On 22 February 2008, Mrs. Katy returned to the ER, complaining of shortness of breath. Riser, a physician's assistant in the ER, briefly examined her and then ordered a flu swab, strep test, and a chest x-ray. The flu swab and strep test were negative. Riser consulted with Dr. Michael Capriola ("Capriola") about the chest x-ray. Both believed Mrs. Katy suffered from pneumonia. Riser prescribed an antibiotic that provided broader coverage than the one she had previously taken and then discharged her with instructions to return to the ER if her symptoms continued and/or worsened.

Mrs. Katy's 22 February 2008 chest x-ray was not officially interpreted until Monday, 25 February 2008, because there were no radiologists on duty at McDowell Hospital from Friday evening until Monday morning. When a radiologist interpreted the chest x-ray, his diagnosis was different from that of Riser and Capriola. After reviewing Mrs. Katy's x-ray, the radiologist provided the ER with a report that, in his opinion, Mrs. Katy was probably suffering from worsening congestive heart failure. On 27 February 2008, Chung received the radiologist's report and instructed one of the ER nurses to contact Mrs. Katy with a warning that she should see her primary care physician "ASAP." The nurse called and left a voicemail message for Mrs. Katy that day and spoke to plaintiff on 28 February 2008. Plaintiff was unable to schedule a visit with a cardiologist or internist until mid-March, and so the nurse recommended returning to the ER. Although Mrs. Katy was feeling badly and wanted to go to the ER, plaintiff convinced her to wait. On 1 March 2008, Mrs. Katy returned to McDowell Hospital and was admitted. On 2 March 2008,

she was transferred to Mission Hospital ("Mission") in Asheville. On 4 March 2008, Mrs. Katy suffered an embolus to her kidney, and the doctors at Mission began coagulation therapy. On 7 March 2008, Mrs. Katy suffered a stroke. Thereafter, she continued to decline until her death on 23 March 2008. According to Mrs. Katy's death certificate, her death was a result of complications from her stroke.

Plaintiff filed this action in his capacity as administrator of Mrs. Katy's estate on 18 May 2009. Plaintiff's complaint alleged medical malpractive by Capriola, Chung, Riser, and others at McDowell ER in negligently delaying the diagnosis of Mrs. Katy's congestive heart failure and further alleged that the delay caused or contributed to her subsequent stroke and death.

Beginning 29 August 2011, plaintiff's claims were tried by a jury in McDowell County Superior Court. On 13 September 2011, the jury returned a verdict finding that Mrs. Katy's death was not caused by any negligence on the part of Capriola and Chung. However, the jury found that Mrs. Katy's death was caused by the negligence of Riser and awarded plaintiff damages in the amount of $667,000. On 15 September 2011, defendants filed a motion for judgment notwithstanding the verdict or, in the alternative, a motion for a new trial. The trial court denied both motions, but reduced the damage award based upon a settlement between plaintiff and McDowell Hospital. Final judgment was entered on 14 November 2011. Defendants Riser and McDowell Emergency Physicians, P.L.L.C. appeal.

II. Standard of Care Testimony

Defendants argue that the trial court erred in ruling that Capriola, who was permitted to offer an opinion on the standard of care with respect to his own decisions regarding Mrs. Katy's treatment, was not permitted to offer a standard of care opinion with respect to Riser. We agree.

[1] Generally, standard of care testimony is limited to whether a particular medical care provider's actions conformed "to the standard of professional competence and care customary in similar communities among [medical care providers] engaged in his field of practice." *Whitehurst v. Boehm*, 41 N.C. App. 670, 674, 255 S.E.2d 761, 765 (1979). Because the practice of medicine ordinarily requires highly specialized knowledge beyond that of the average person, the applicable standard of care in a medical malpractice case must be established through expert testimony. *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 20, 564 S.E.2d 883, 886 (2002).

Expert testimony is governed by Rule 702 of the North Carolina Rules of Evidence, which provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2011). Pursuant to Rule 702(d),

> a physician who qualifies as an expert under subsection (a) of this Rule and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for . . . physician assistants . . . may give expert testimony in a medical malpractice action with respect to the standard of care of which he is knowledgeable of . . . physician assistants licensed under Chapter 90 of the General Statutes. . . .

N.C. Gen. Stat. § 8C-1, Rule 702(d) (2011). Thus, under this Rule, a physician may testify regarding the applicable standard of care for a physician assistant if the physician "is familiar with the experience and training of the defendant and either (1) the physician is familiar with the standard of care in the defendant's community, or (2) the physician is familiar with the medical resources available in the defendant's community and is familiar with the standard of care in other communities having access to similar resources." *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 478, 624 S.E.2d 380, 384 (2006) (quoting *Barham v. Hawk*, 165 N.C. App. 708, 712, 600 S.E.2d 1, 4 (2004), *aff'd per curiam by an equally divided court*, 360 N.C. 358, 625 S.E.2d 778 (2006)). "[T]he trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984).

In the instant case, Capriola testified that he was licensed to practice medicine in North Carolina. Additionally, he stated that he treated

ER patients as a physician in Maine from 2001 to 2004, completed a family practice residency at Wake Forest, and was board certified in family medicine, a practice specialty which also includes emergency medicine. By virtue of this educational and professional background, Capriola possessed the qualifications necessary to testify as an expert under Rule 702.

Although the trial court did not formally recognize Capriola as an expert, it nonetheless allowed Capriola to offer expert testimony by permitting him to offer a standard of care opinion with respect to his treatment of Mrs. Katy. Specifically, Capriola was able to testify, without objection, that he complied with the applicable standard of care when he interpreted Mrs. Katy's chest x-ray and discharged her. Capriola testified that he used his best judgment consulting with Riser regarding his evaluation and diagnosis of Mrs. Katy. He also stated that he used "reasonable care and diligence in the application of [his] knowledge and skill" in his evaluation and diagnosis of Mrs. Katy. By allowing Capriola to testify regarding whether his treatment of Mrs. Katy complied with the applicable standard of care, the trial court implicitly allowed Capriola to testify as an expert under Rule 702(a). *See Cato Equipment Co. v. Matthews*, 91 N.C. App. 546, 552, 372 S.E.2d 872, 876 (1988)("[I]n the absence of a request by the appellant for a finding by the trial court as to the qualification of a witness as an expert, it is not essential that the record show a specific finding on this matter, the finding being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness." (citation omitted)).

After the court allowed Capriola to testify regarding his own standard of care, it refused to allow him to testify as to whether Riser complied with the standard of care for physician assistants. The trial court provided no basis for the exclusion of Capriola's expert testimony regarding Riser's standard of care on the record, and we can discern no logical reason why it did so. Capriola worked directly with Riser and testified on *voir dire* that he was familiar with the standard of care for physician assistants. Therefore, he met the requirements to testify regarding Riser's standard of care under Rule 702(d). Since Capriola was equally qualified to give an expert opinion regarding both his own standard of care and Riser's standard of care under Rule 702, the trial court abused its discretion by requiring Capriola to limit his testimony to his own standard of care.

At trial and in his brief, plaintiff argues that since Capriola could not be formally recognized as an expert witness in the presence of the jury pursuant to our Supreme Court's opinion in *Sherrod v. Nash General Hosp., Inc.*, 348 N.C. 526, 500 S.E.2d 708 (1998), he could not offer expert

testimony at trial regarding Riser's standard of care. However, neither Rule 702 nor any cases from this Court require a formal recognition of a witness as an expert in the presence of the jury before the expert may provide opinion testimony. *See Waynick Constr. v. York*, 70 N.C. App. 287, 292, 319 S.E.2d 304, 307 (1984)("[A] formal tender [of a witness as an expert] is not an essential prerequisite to eliciting an opinion."); *Cato*, 91 N.C. App. at 552, 372 S.E.2d at 876.

Furthermore, contrary to plaintiff's contentions, Sherrod does not support his argument. In *Sherrod*, the defendant testified as an expert in his own defense, and the trial court declared to the jury, "I find that the [defendant physician] is an expert in the field of general psychiatry. He will be permitted to testify as to such matters touching upon his expertise." *Id.* at 532, 500 S.E.2d at 712. Our Supreme Court held that the trial court's statement was prejudicial error because the statement amounted to "an expression of opinion by the court with reference to the professional qualifications of the defendant" and "[t]he slightest intimation from the judge as to the weight, importance or effect of the evidence has great weight with the jury." *Id.* at 532-33, 500 S.E.2d at 712 (citations omitted). Nevertheless, the Court made clear that the defendant could have testified as an expert so long as the trial court did not make an announcement to the jury regarding his expertise. *Id.* at 533, 500 S.E.2d at 713. In the instant case, defendants only sought to have Capriola testify as an expert on behalf of Riser; they made no attempt to have the trial court recognize him as an expert in the presence of the jury. Thus, Capriola's excluded testimony would not have violated the rule articulated in *Sherrod*.

It is possible that the trial court excluded Capriola's expert testimony regarding Riser's standard of care for a physician assistant based upon plaintiff's flawed argument at trial that the lack of formal recognition before the jury precluded Capriola from testifying as an expert. If so, then the trial court's action was based on a misapprehension of the law and was erroneous. *See Maloney v. Hosp. Sys.*, 45 N.C. App. 172, 179-80, 262 S.E.2d 680, 684 (1980)(Holding that the trial court's exclusion of expert testimony due to a misapprehension of the law constituted reversible error). Ultimately, Capriola should have been permitted to testify at trial regarding Riser's adherence to the standard of care for physician assistants.

Nevertheless, plaintiff contends that the trial court's exclusion of Capriola's testimony was not prejudicial to defendants, because it was merely cumulative. However, during plaintiff's closing argument, plaintiff's counsel specifically emphasized to the jury that defendants had

presented "only one expert," Dr. James Hoekstra, who testified that Riser had not breached the standard of care. By making a point to emphasize that only one expert testified on behalf of Riser, plaintiff magnified the importance of Capriola's excluded testimony. In *Barham v. Hawk*, this Court found that the defense counsel's emphasis on improperly admitted expert testimony during his closing argument was prejudicial error, because the defendant's emphasis indicated the importance of the testimony to the outcome of the case.[1] 165 N.C. App. at 718, 600 S.E.2d at 7. Similarly, in the instant case, plaintiff's emphasis on defendants' presentation of "only one expert" demonstrates the importance of Capriola's testimony to the determination of whether Riser's treatment met the standard of care for physician assistants.

In addition, we note that Capriola was Riser's supervising physician and worked directly with him in evaluating and diagnosing Mrs. Katy. Consequently, his opinion as to Riser's performance would potentially carry great weight with a jury tasked with determining whether Riser was negligent. Based upon these considerations, we must conclude that the trial court erred by excluding Capriola's testimony and "a different result would have likely ensued had the error not occurred." *Suarez v. Wotring*, 155 N.C. App. 20, 30, 573 S.E.2d 746, 752 (2002). Accordingly, the exclusion of Capriola's testimony was prejudicial error and we must grant defendants a new trial.

III. Contributory Negligence

[2] While we have granted defendants a new trial, we still address additional issues raised by defendants that could reoccur during the new trial. Defendants also contend that the trial court erred in granting a directed verdict in favor of plaintiff on the issue of contributory negligence. We agree.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991). "A directed verdict for the plaintiff on the issue of his contributory negligence must be sustained by the appellate court unless there is substantial evidence the plaintiff's negligence was a proximate cause of his injuries." *Andrews v. Carr*, 135 N.C. App. 463, 467, 521 S.E.2d 269, 272 (1999). "If there is more than a scintilla of evidence that plaintiff is contributorily negligent, the issue is

1. While the opinion in *Barham* has no precedential value, we find its prejudicial error reasoning persuasive.

a matter for the jury, not for the trial court." *Cobo v. Rata*, 347 N.C. 541, 545, 495 S.E.2d 362, 365 (1998).

Defendants cite our Supreme Court's decision in *McGill v. French* in support of their argument. In *McGill*, the plaintiff alleged that the defendant had committed medical malpractice by failing to inform him that he had prostate cancer, which eventually resulted in his death. 333 N.C. 209, 215, 424 S.E.2d 108, 112 (1993). Our Supreme Court held that the trial court properly submitted the issue of the plaintiff's contributory negligence to the jury based upon evidence that the plaintiff had failed to keep appointments and report his worsening symptoms to the defendant "during a crucial time of his illness." *Id.* at 220, 424 S.E.2d at 114. In a subsequent case, the Supreme Court explained that "[i]n *McGill*, this Court noted that a patient has an active responsibility for his own care and well-being." *Cobo*, 347 N.C. at 546, 495 S.E.2d at 366.

In response, plaintiff contends that the instant case is controlled by this Court's opinion in *Andrews*. In that case, the plaintiff engaged in activities contrary to the defendant-physician's post-operation instructions after undergoing a negligent hernia operation. 135 N.C. App. at 468, 521 S.E.2d at 273. The *Andrews* Court upheld the entry of a directed verdict in favor of the plaintiff on the issue of contributory negligence, reasoning that because the plaintiff's activities occurred subsequent to the completion of the defendant's negligent treatment, they did not constitute contributory negligence. *Id.* Plaintiff argues that *Andrews* controls because any alleged negligence on the part of Mr. and Mrs. Katy only occurred five days subsequent to Riser's negligent treatment.

The evidence presented at trial showed that Mrs. Katy had been experiencing symptoms since the birth of her twins. On 19 February 2008, Salsman assessed Mrs. Katy with "resolving pneumonia," and she presented to the ER three days later because her symptoms had worsened. Upon being diagnosed with pneumonia and discharged with a second round of antibiotics on 22 February 2008, Mrs. Katy was instructed to contact her doctor or return to the ER if she did not feel better or developed new symptoms. These instructions demonstrate that, unlike the plaintiff in *Andrews*, Mrs. Katy's treatment for her condition was not completed and that she potentially required further treatment if her condition either did not improve or worsened.

However, when Mrs. Katy's condition continued to deteriorate, she failed to immediately seek medical attention. Instead, despite the explicit instructions from the ER physicians, Mrs. Katy delayed reporting her symptoms until 1 March 2008 when she returned to the ER.

Mrs. Katy's actions provide more than a scintilla of evidence that she, like the plaintiff in *McGill*, failed to take "an active responsibility for h[er] own care and well-being[,]" *Cobo*, 347 N.C. at 546, 495 S.E.2d at 366, "during a crucial time of h[er] illness." *McGill*, 333 N.C. at 220, 424 S.E.2d at 114. Accordingly, this issue should have been presented to the jury, and the trial court erred in granting plaintiff's motion for a directed verdict on defendants' contributory negligence claim.

IV. Special Jury Instruction

[3] Defendants argue that the trial court erred in failing to instruct the jury that plaintiff had the burden to prove more than a mere increased chance of recovery and survival in order to establish proximate cause. We agree.

> When reviewing the refusal of a trial court to give certain instructions requested by a party to the jury, this Court must decide whether the evidence presented at trial was sufficient to support a reasonable inference by the jury of the elements of the claim. If the instruction is supported by such evidence, the trial court's failure to give the instruction is reversible error.

Ellison v. Gambill Oil Co., 186 N.C. App. 167, 169, 650 S.E.2d 819, 821 (2007) (citations omitted), *aff'd per curiam and disc. rev. improvidently allowed*, 363 N.C. 364, 677 S.E.2d 452 (2009).

> A specific jury instruction should be given when "(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury."

Outlaw v. Johnson, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (quoting *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274 (2002)).

In the instant case, defendants requested that the following special instruction be added to the pattern jury instruction on proximate cause:

> It is not enough for plaintiff to show that earlier hospitalization of Aziza Katy would have improved her chances of survival and recovery. Rather, plaintiff must prove that it is probable that a different outcome would have occurred with earlier hospitalization. Plaintiff must prove by the

> greater weight of the evidence that the alleged delay in hospitalization more likely than not caused the stroke and death.

Defendants' requested instruction was based upon this Court's opinion in *White v. Hunsinger*, 88 N.C. App. 382, 363 S.E.2d 203 (1988). In *White*, the Court affirmed the trial court's entry of summary judgment in favor of the defendant-physician because

> [the] plaintiff could not prevail at trial by merely showing that a different course of action would have improved [the decedent]'s chances of survival. Proof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient's chances of recovery.
>
> . . .
>
> [The] plaintiff has failed . . . to forecast any evidence showing that had [the defendant] referred [the decedent] to a neurosurgeon when [the decedent] was first brought to the hospital, [the decedent] would not have died. The connection or causation between the negligence and death must be probable, not merely a remote possibility.

Id. at 386-87, 363 S.E.2d at 206. Defendants' requested instruction is consistent with this language from *White*, and thus, as a correct statement of the law, meets the first prong of the test for a special instruction.

The second prong of the test was also met, as there was evidence presented at trial that would have supported the special instruction. Although plaintiff points to evidence sufficient to show that a different outcome probably would have occurred with earlier hospitalization, the record also contains evidence that would allow the jury only to find that earlier hospitalization would have possibly given Mrs. Katy an improved chance of survival.

Finally, we must determine if "the instruction given, considered in its entirety, failed to encompass the substance of the law requested and . . . such failure likely misled the jury." *Outlaw*, 190 N.C. App. at 243, 660 S.E.2d at 559 (internal quotation and citation omitted). In the instant case, the trial court instructed the jury by utilizing the pattern jury instruction on proximate cause:

> The plaintiff not only has the burden of proving negligence, but also that such negligence was a proximate

> cause of Aziza Katy's death. Proximate cause is a cause which in a natural and continuous sequence produces a person's injury and is a cause which a reasonable and prudent health care provider would have foreseen would probably produce such injury or similar injurious result. There may be more than one proximate cause of an injury. Therefore, the plaintiff need not prove that the defendant's negligence was the sole proximate cause of Aziza Katy's death. The plaintiff must prove by the greater weight of the evidence only that the defendant's negligence was a proximate cause.

While this instruction accurately defines proximate cause, it does not make clear to the jury that "[p]roof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient's chances of recovery." *White*, 88 N.C. App. at 386, 363 S.E.2d at 206. At trial, there was a significant amount of conflicting testimony as to whether the eight-day delay in Mrs. Katy's treatment proximately caused her injuries. Plaintiff presented multiple witnesses who testified that Mrs. Katy's risk of stroke increased due to the delay, and defendants also presented multiple witnesses who testified that the delay in Mrs. Katy's treatment made no difference. Thus, it was a disputed issue as to whether or not it was probable that Mrs. Katy's risk of stroke increased due to the delay in her treatment. Under such circumstances, the trial court's failure to give the jury a more specific instruction on the disputed proximate cause issue likely misled the jury. Consequently, the trial court's failure to give defendants' requested special instruction was error.

V. Admissibility of Plaintiff's Remarriage

[4] Finally, defendants argue that the trial court erred by granting plaintiff's motion *in limine* to exclude evidence of plaintiff's remarriage for purposes of mitigating plaintiff's damages. We disagree.

"A motion *in limine* seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial; its determination will not be reversed absent a showing of an abuse of the trial court's discretion." *Warren v. Gen. Motors Corp.*, 142 N.C. App. 316, 319, 542 S.E.2d 317, 319 (2001).

Pursuant to N.C. Gen. Stat. § 28A-18-2(b), damages for wrongful death include, *inter alia*,

> (4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected;
>
> a. Net income of the decedent,
>
> b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,
>
> c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered.

N.C. Gen. Stat. § 28A-18-2(b) (2011). The statute further provides that "[a]ll evidence which reasonably tends to establish any of the elements of damages included in subsection (b), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act." N.C. Gen. Stat. § 28A-18-2(c) (2011).

Both parties acknowledge that there is no North Carolina case which discusses the admissibility of remarriage of the surviving spouse in an action for wrongful death. However, North Carolina has long adhered to the collateral source rule, which "provides '[a] tort-feasor [sic] should not be permitted to reduce his own liability for damages by the amount of compensation the injured party receives from an independent source.' " *Muscatell v. Muscatell*, 145 N.C. App. 198, 201, 550 S.E.2d 836, 837-38 (2001)(quoting *Fisher v. Thompson*, 50 N.C. App. 724, 731, 275 S.E.2d 507, 513 (1981)). We find this rule requires the exclusion of evidence of plaintiff's remarriage in the instant case. Defendants should not be permitted to reduce their liability for the damages caused by Mrs. Katy's death simply because plaintiff has remarried. Indeed, many jurisdictions have used the collateral source rule as a justification to exclude evidence of remarriage by the decedent's spouse in a wrongful death action. *See, e.g.*, *Seaboard Coast Line R.R. Co. v. Hill*, 270 So.2d 359, 360-61 (Fla. 1972); *Westfall v. Caterpillar, Inc.*, 821 P.2d 973, 979 (Idaho 1991); *Pape v. Kansas Power and Light Co.*, 647 P.2d 320, 324-25 (Kan. 1982); *Addair v. Bryant*, 284 S.E.2d 374, 380 (W.Va. 1981). Thus, we conclude that the trial court properly excluded evidence of plaintiff's remarriage.

[5] Defendants also argue that, even if evidence of plaintiff's remarriage was inadmissible, plaintiff "opened the door" to testimony regarding his remarriage during his testimony at trial. However, defendants' argument

is based upon plaintiff's specific testimony at trial, and this same testimony will not necessarily reoccur during the new trial. Consequently, we do not address this portion of defendants' argument.

VI. Conclusion

The trial court erred in excluding testimony from Capriola regarding his opinion with respect to Riser's standard of care as a physician assistant in treating Mrs. Katy. The trial court also erred in failing to submit the issue of contributory negligence to the jury and in denying defendants' request for a special jury instruction. The trial court properly excluded evidence of plaintiff's remarriage for the purposes of calculating plaintiff's damages. Due to the trial court's prejudicial errors, we must remand for a new trial.

New Trial.

Judges BRYANT and GEER concur.

LAKE TOXAWAY COMMUNITY ASSOCIATION, INC.,
A NORTH CAROLINA NON-PROFIT CORPORATION, PLAINTIFF
v.
RYF ENTERPRISES, LLC, DEFENDANT

No. COA12-422

Filed 16 April 2013

1. Contracts—implied in fact—acceptance of benefits—agreement to pay for upkeep, maintenance, and repair

The trial court did not err by concluding that there was a contract implied in fact between plaintiff and defendant. The uncontested findings of fact supported the trial court's conclusion that implicit in defendant's acceptance of the benefits of using the pertinent roads and lake was an agreement to pay for the upkeep, maintenance, and repair of the roads and lake.

2. Unjust Enrichment—retained benefits without payment—reasonable value of benefits

The trial court did not err by concluding that it would be inequitable and unjust for defendant to retain benefits provided by plaintiff without payment of the reasonable value of said benefits. Defendant

accepted a measurable benefit from plaintiff, and as a result, was unjustly enriched.

3. Contracts—implied in fact—reasonable value of services

The trial court did not err by concluding that the amounts charged by plaintiff were a reasonable value of services for a contract implied in fact. The pertinent findings of fact supported the conclusion that the amounts invoiced to defendant represented a reasonable value of the services rendered by plaintiff to defendant.

4. Appeal and Error—preservation of issues—failure to present issue at trial

Although plaintiff contended that the trial court erred by disregarding lots that were combined by owners to avoid multiple assessments, this assignment of error was not preserved under N.C. R. App. P. 10(a)(1) because plaintiff did not present this issue at trial.

5. Contracts—implied in fact—maintenance fees

The trial court did not err by concluding that plaintiff could require defendant to pay maintenance fees as a condition of defendant's right to place a boat on Lake Toxaway. The parties had a contract implied in fact based on the conduct of the parties.

6. Costs—expert witness fees—travel expenses—time spent at trial

The trial court did not err by taxing expert witness fees against defendant. N.C.G.S. § 7A-314(b) and (d) gives the trial court discretion to award travel expenses and fees for time the witness spent at trial when not testifying.

7. Easements—appurtenant—sufficiency of findings of fact

The trial court's findings of fact supported its conclusions of law that defendant possessed an easement appurtenant to use Lake Toxaway.

8. Trespass—criminal and civil penalties—common law doctrine of lex neminem cogit ad vana seu inutilia peragenda

Although plaintiff contended the trial court had the option of imposing criminal and civil penalties for trespassing, the trial court did not err by concluding that the common law doctrine of *lex neminem cogit ad vana seu inutilia peragenda* (the law compels no one to do vain or useless things) applied. The evidence supported the trial court's finding that it would be practically impossible to restrict property owners, including defendant, from using Lake Toxaway

since it covered approximately 640 acres of lake bed and 14 miles of shoreline.

Appeal by defendant and cross-appeal by plaintiff from judgments entered 30 September and 20 October 2011 by Judge James U. Downs in Transylvania County Superior Court. Heard in the Court of Appeals 26 September 2012.

Van Winkle, Buck, Wall, Starnes and Davis, PA., by Craig D. Justus, for plaintiff-appellee and cross-appellant.

K & L Gates, LLP, by Roy H. Michaux, Jr., for defendant-appellant and cross-appellee.

BRYANT, Judge.

Where the trial court's conclusions of law – that there was a contract implied in fact between the parties, that defendant accepted the benefits provided by plaintiff, and that the amounts invoiced from plaintiff to defendant were a reasonable value for services rendered – were supported by its findings of fact, and where the trial court's order of expert witness fees against defendant was not made in error, we affirm the order of the trial court. Defendant's remaining issue on appeal is dismissed. Where, on cross-appeal by plaintiff, the trial court's findings of fact support its conclusions of law that defendant possessed an easement appurtenant to use Lake Toxaway and that the doctrine of *lex neminem cogit ad vana seu inutilia peragenda* applied, we affirm the order of the trial court.

Facts and Procedural History

On 13 April 2009, plaintiff Lake Toxaway Community Association, Inc., filed a complaint for money owed against defendant RYF Enterprises, LLC. Defendant filed an answer and counterclaim for declaratory judgment. Thereafter, plaintiff amended its complaint, which was filed on 3 February 2010. The complaint, as amended, alleged the following: By deed dated 14 December 2000, defendant became the owner of real property ("Property") identified as Lot 11, Block D and an adjoining strip of land located within the residential subdivision development known as Lake Toxaway Estates ("the Estates") in Transylvania County. In the 1960's, Lake Toxaway Company (LTC) developed the Estates, which now includes 9,000 acres containing over 1,200 lots as well as the entirety of the lake bed comprising Lake Toxaway and surrounding property,

including defendant's Property. Lake Toxaway is a man-made lake, which lake bed covers approximately 640 acres and 14 miles of shoreline. LTC has permitted property owners within the Estates, including defendant, to use Lake Toxaway for recreational purposes such as boating, fishing, and swimming. Although lake privileges were specifically granted by deed to some of the purchasers of lots within the Estates, LTC alleges it did not specifically grant lake privileges appurtenant to defendant's Property.

Plaintiff is an association whose members consist of property owners within the Estates. On 31 December 2003, pursuant to a transition agreement between LTC and the Association, plaintiff became the owner of and responsible for the maintenance, repair, and improvement of certain common areas within the Estates. The common areas included Lake Toxaway and the rights of way of the private road that provided access to lots, including defendant's Property. Plaintiff alleged that since defendant's acquisition of the Property in 2000, defendant had used Lake Toxaway with the permission of plaintiff and plaintiff's predecessor-in-title, LTC.

On 15 October 2008, plaintiff delivered an invoice to defendant. The invoice for services rendered, totaling $1,767.40, represented defendant's *pro rata* share of the annual expenses incurred to maintain, repair, and/or improve the private roads and Lake Toxaway during the 2008-2009 fiscal year. Although the due date for payment of the invoice was 17 November 2008, defendant did not pay this invoice.

Plaintiff's claims for relief included: a request for declaratory judgment to determine the rights and obligations of the parties regarding the use and maintenance of plaintiff's private roads and Lake Toxaway; breach of contract implied in fact; breach of contract implied in law/unjust enrichment; and breach of contribution obligations.

On 5 May 2010, defendant filed an answer to the amended complaint and reasserted its counterclaim for declaratory judgment asserting that defendant had "no obligations to plaintiff regarding the maintenance, repair, and improvement of Lake Toxaway and of the roads located within Toxaway Estates." On 19 July 2010, plaintiff filed a reply to defendant's counterclaim.

Following a bench trial, on 30 September 2011, the trial court entered judgment as follows: that defendant pay plaintiff $1,767.40 plus interest at the legal rate from and after 14 April 2009 when the complaint was filed and $3,949.81 plus interest from and after the date of the judgment; that defendant has an easement right to use the private roads within the

Estates that are owned and maintained by plaintiff; that defendant did not have an easement right to operate boats on Lake Toxaway in a manner that conflicted with plaintiff's rules and regulations; that plaintiff be awarded $12,002.50 as costs pursuant to G.S. 6-20, 7A-305, and 7A-314; and, that plaintiff has the right to exercise any rights of collection pursuant to its attachment of defendant's property, which would remain in full force and effect pending payment of the judgment or as otherwise provided by law.

An order amending judgment was entered on 20 October 2011, modifying a finding of fact but not otherwise disturbing the judgment of the trial court. From the 30 September 2011 judgment and 20 October 2011 order amending judgment, defendant appeals. Plaintiff also cross appeals from both judgments.

Standard of Review

"[W]hen 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." *Willen v. Hewson*, 174 N.C. App. 714, 718, 622 S.E.2d 187, 190 (2005) (citation omitted).

> Upon a finding of such competent evidence, this Court is bound by the trial court's findings of fact even if there is also other evidence in the record that would sustain findings to the contrary. Competent evidence is evidence "that a reasonable mind might accept as adequate to support the finding. The trial court's conclusions of law, by contrast, are reviewable *de novo*.

Eley v. Mid/East Acceptance Corp. of N.C., Inc., 171 N.C. App. 368, 369-70, 614 S.E.2d 555, 558 (2005) (citations omitted).

Defendant's Appeal

Defendant presents the following issues on appeal: whether the trial court erred (I) by concluding that there was an implied contract in fact between plaintiff and defendant; (II) by concluding that it would be inequitable and unjust for defendant to retain benefits provided by plaintiff without payment of the reasonable value of said benefits; (III) by concluding that the amounts charged by plaintiff were "a reasonable value of services[;]" (IV) by disregarding lots that were combined by owners to avoid multiple assessments; (V) by concluding that plaintiff can require

defendant to pay maintenance fees as a condition of defendant's right to place a boat on Lake Toxaway; and (VI) by the taxing of expert witness fees against defendant.

I

[1] First, defendant argues the trial court erred in reaching conclusion of law #1 which reads as follows:

> There is an implied contract in fact between the Plaintiff and the Defendant in which the Defendant impliedly agreed to pay for the upkeep, repair and maintenance of the private roads and roadsides within [the Estates] and Lake Toxaway, including its water body, dam and spillway due to the defendant having elected to use the roads and lake and accepting the benefits of such use, notwithstanding a lack of a meeting of the minds.

Defendant contends that a contract implied in fact requires a "meeting of the minds" and because the trial court specifically concluded there was a lack of the meeting of the minds, the trial court's conclusion constitutes reversible error. This argument is without merit.

It is well established that "[t]he essence of any contract is the mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds." *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980) (citations omitted). However,

> [a] contract implied in fact, . . . arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation is implied or presumed from their acts[.] With regard to contracts implied in fact, . . . one looks not to some express agreement, but to the actions of the parties showing an implied offer and acceptance.

Revels v. Miss Am. Org., 182 N.C. App. 334, 337, 641 S.E.2d 721, 724 (2007) (citations and quotation marks omitted).

> An implied contract is valid and enforceable as if it were express or written. [A]part from the mode of proving the fact of mutual assent, there is no difference at all in legal effect between express [contracts] and contracts implied in fact. Whether mutual assent is established and whether a contract was intended between parties are questions for the trier of fact.

Snyder, 300 N.C. at 217, 266 S.E.2d at 602 (citations and quotation marks omitted).

We note that because defendant has failed to challenge any specific findings of fact, we presume them to be supported by competent evidence and therefore deem them to be binding on appeal. *See Cohen v. McLawhorn*, 208 N.C. App. 492, 498, 704 S.E.2d 519, 524 (2010) (stating that "[u]nchallenged findings of fact are presumed to be supported by competent evidence, and are binding on appeal."). In our review, we look to the record to determine whether the findings of fact support the trial court's conclusion of law that an implied contract in fact existed between the parties.

In 2003, LTC and plaintiff entered into a Transition Agreement whereby ownership and responsibility for managing the dam, lake, roads, and common areas were conveyed to plaintiff. Since January 2004, plaintiff has managed the upkeep, repair, and maintenance of the private roads, dam, lake, and common areas by cleaning roadside ditches and drainage ways, removing roadside trees, repaving roads and dredging Lake Toxaway. Plaintiff also performed the administrative work necessary to determine the *pro rata* share of expenses to be paid by the property owners for the expense of upkeep, repair and maintenance. For its *pro rata* share of the expenses related to upkeep, repair, and maintenance, defendant was billed a total of $1,767.40 for fiscal year 2008 – 2009.

Since August 1965, when Lot 11, Block D was first deeded by LTC, subsequent owners of the Property, including defendant, have used Lake Toxaway continuously for boating and other recreational purposes. *See Snyder*, 300 N.C. at 218, 266 S.E.2d at 602 (stating that "[a]cceptance by conduct is a valid acceptance"). Defendant has also used the private roads, containing multiple points of access, within Lake Toxaway Estates. Defendant benefits from having the availability of well-maintained and secured private roads to and from the Property and for travel within Lake Toxaway Estates, in addition to a well-maintained and secure Lake Toxaway and dam.

We agree with the trial court that:

> [w]ith knowledge of the services provided by the Plaintiff in maintaining and managing the operations and care of the private roads, roadsides, and Lake Toxaway, Defendant agreed by its conduct . . . in using or claiming the right to use the private roads and lake so maintained and managed

> by the Plaintiff to pay for the maintenance, repair and upkeep of the roads, roadsides, and lake.

See Miles v. Carolina Forest Ass'n, 167 N.C. App. 28, 37, 604 S.E.2d 327, 333-34 (2004) (holding that the plaintiffs, who were lot owners within the defendant's subdivision association, had a contract implied in fact with the defendant where the plaintiffs received benefits to their properties and the plaintiffs were on clear notice that these benefits were being incurred).

Because the uncontested findings of fact support the trial court's conclusion that implicit in defendant's acceptance of the benefits of using the roads and the lake, was an agreement to pay for the upkeep, maintenance and repair of the roads and lake. Therefore, based on the record before us, we hold that a contract implied in fact existed between the parties. Defendant's argument is overruled.

II

[2] Next, defendant argues the trial court erred by reaching conclusion of law #7:

> By using or claiming the right to use the private roads within [the Estates] and Lake Toxaway, the Defendant has accepted the benefits provided by the Plaintiff in its efforts to preserve and protect access to, and the function and safety of, said private roads, roadsides and Lake Toxaway and it would be inequitable and unjust for Defendant to retain said benefits, the costs of which are supported by more than ninety percent (90%) of those who contribute into the Association, without paying for the reasonable value of same.

"Under a claim for unjust enrichment, a plaintiff must establish certain essential elements: (1) a measurable benefit was conferred on the defendant, (2) the defendant consciously accepted that benefit, and (3) the benefit was not conferred officiously or gratuitously." *Primerica Life Ins. Co. v. James Massengill & Sons Constr. Co.*, __ N.C. App. __, __, 712 S.E.2d 670, 677 (2011) (citation omitted).

Defendant contends that plaintiff "failed to show how the expense associated with building, maintaining and enhancing an additional 30 miles of roads and in collecting assessments from all of the owners of 1,224 lots in any way benefited RYF or was done at its request." As noted in Issue *I*, defendant has failed to challenge any specific findings of fact. After careful review, we determine that the trial court's unchallenged

findings of fact support its conclusion of law #7. It is uncontested that plaintiff's upkeep, repair, and maintenance of the dam, Lake Toxaway, roads, and common areas have conferred a measurable benefit on defendant. Plaintiff conferred this benefit by cleaning out ditches and drainage ways, removing trees, repaving roads, etc. It is also unchallenged that plaintiff spends "substantial sums of money every year protecting access to and from public roads to lots, including [the Property], which is located in the middle of the development." Plaintiff then assigned to the property owners an annual, proportionate share of the costs of maintaining, repairing, and improving the private roads and roadsides within Lake Toxaway Estates and Lake Toxaway. The total of plaintiff's maintenance billing invoices to defendant since August 2008 amounted to $5,717.21, less credits.

Although defendant argues that it did not request plaintiff's services, evidence that defendant consciously accepted the benefit conferred upon it from those services plaintiff rendered is illustrated by the following uncontested finding of fact:

> [w]ith knowledge of the services provided by [plaintiff] in maintaining and managing the operations and care of the private roads, roadsides, and Lake Toxaway, [defendant] agreed by its conduct . . . in using or claiming the right to use [the aforementioned areas] to pay for the maintenance, repair and upkeep of the roads, roadsides and lake.

Therefore, the trial court did not err by finding and concluding that defendant accepted a measurable benefit from plaintiff and as a result was unjustly enriched. Defendant's argument is overruled.

III

[3] In its third argument, defendant challenges conclusion of law #8:

> The amount of $5,717.21, which reflects the invoiced amounts less credits reflected in the Plaintiff's fiscal year 2008-2009, 2009-2010 and 2010-2011 invoices, constitutes a reasonable value of the services rendered by Plaintiff to Defendant related to the private roads, roadsides and Lake Toxaway for said fiscal years.

Defendant asserts that that the trial court erred by concluding that the amounts charged by plaintiff were "reasonable." Defendant contends that its obligation to pay maintenance fees "extends only to those amenities used by RYF in an amount proportional to its use of those amenities." We disagree.

Defendant relies almost solely on the holding from the Arizona Court of Appeals in *Freeman v. Sorchych*, 226 Ariz. 242, 245 P.3d 927 (2011), to support its argument that the fees imposed should be calculated according to defendant's actual use of the roads and lake. We note that we are in no way bound by a case from the Arizona Court of Appeals, nor are we persuaded by defendant's contentions.

Our North Carolina courts have held that the general rule, "in the absence of contract stipulation or prescriptive right to the contrary, [is that] the owner of an easement is liable for costs of maintenance and repairs where it exists and is used and enjoyed for the benefit of the dominant estate alone[.]" *Lamb v. Lamb*, 177 N.C. 150, 152, 98 S.E. 307, 309 (1919). Further, once there is a determination that an implied in fact contract exists, the reasonable value of services is used to determine damages. *See Turner v. Marsh Furniture Co.*, 217 N.C. 695, 697, 9 S.E.2d 379, 380 (1940).

In the instant case, it is uncontested that defendant had an easement right to use all of the private roads within Lake Toxaway Estates. Other unchallenged findings of fact made by the trial court also establish that defendant has used the private roads with its multiple points of access within Lake Toxaway Estates and has used Lake Toxaway for boating and other recreational purposes. "Since 2007, [defendant], in several correspondences with [plaintiff,] has claimed a right to use *all* the roads maintained by the Association and Lake Toxaway." (emphasis added).

Unchallenged findings of fact further support the conclusion of law that the invoices from plaintiff to defendant constitute a reasonable value of services rendered: finding of fact 51 and 52 state that defendant's bills to plaintiff for the fiscal years 2008 through 2011 were based on a *pro rata* share of the annual expenses of the Association. The trial court also found that the fees charged by plaintiff were directly related to the services and benefits performed by plaintiff and that the expenditures budgeted for and actually spent by plaintiff were reasonable. Finding of fact 65 provides that plaintiff's maintenance billing methodology, including expenses allocated, and classifications of property within Lake Toxaway Estates whose deeds are silent as to membership in the association, are "reasonable in determining the proportionate allocations for the costs related to the upkeep, repair and maintenance of the private roads, roadsides and Lake Toxaway among the users and/or beneficiaries of such properties, including the Defendant."

Accordingly, the pertinent findings of fact support the conclusion that the amounts invoiced to defendant represented a reasonable value of the services rendered by plaintiff to defendant. Defendant's argument is overruled.

IV

[4] In its fourth argument, defendant contends that plaintiff adopted an illegal policy – Resolution No. 090501 – which gave plaintiff the right to allow multiple, contiguous lots under single ownership to be combined as one for the purpose of assessments. We do not review this contention.

Because plaintiff did not obtain a ruling by the trial court on this issue, it is not properly preserved for appeal. N.C. R. App. P. 10(a)(1) (2013) ("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[.] . . . It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.").

V

[5] Defendant argues that the trial court erred by finding that plaintiff can require defendant to pay lake maintenance fees as a condition to defendant's right to place a boat on Lake Toxaway. We disagree.

As discussed in Issue *I*, we affirmed the trial court's conclusion of law that the parties had a contract implied in fact. Plaintiff's implied offer to defendant consisted of managing the upkeep, repair, and maintenance of Lake Toxaway. Defendant's implied acceptance of plaintiff's implied offer was the recreational use of Lake Toxaway for purposes such as boating since defendant acquired the property. Based on the conduct of the parties, the trial court's finding that plaintiff could require defendant to pay lake maintenance fees as a condition of defendant's recreational use of Lake Toxaway was supported by competent evidence. Defendant's argument is overruled.

VI

[6] In its last argument, defendant contends the trial court erred by allowing expert witness fees for three of plaintiff's witnesses based on the substance of their testimonies. We disagree.

"[T]rial courts are afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citation and quotation marks omitted). Pursuant to section 7A-305(d)(11) of the North Carolina General Statutes, the trial court is required to allow expert witness fees solely for the time the witness spent testifying at trial. N.C. Gen. Stat. § 7A-305(d)(11) (2011). However, pursuant to section 7A-314(b) and (d), respectively, the trial court has discretion to

award travel expenses, and fees for time the witness spent at trial when not testifying. N.C. Gen. Stat. § 7A-314(b) and (d) (2011); *Springs v. City of Charlotte*, 209 N.C. App. 271, 704 S.E.2d 319 (2011).

Defendant does not challenge the award of expert witness fees for Lamar Sprinkle, a registered land surveyor. However, he does challenge the award of expert witness fees for the other three expert witnesses, contending their testimony was neither reasonable nor necessary. We will address each of the three witnesses separately.

First, defendant argues that the content of testimony provided by Everette A. Schafer failed to support any theory advanced by plaintiff and was irrelevant to any legal question. "[I]n judging relevancy, it should be noted that expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified than the jury to draw such inferences." *Howerton*, 358 N.C. at 462, 597 S.E.2d at 688-89 (citation omitted).

At trial, Schafer was tendered and accepted without objection as an expert in the field of real property appraisal. Schafer testified to the market value added to defendant's Property based on having the following features provided by plaintiff: well-maintained and improved roads; maintenance of common areas such as walkways, landscaping, etc.; the excellent condition of Lake Toxaway based on plaintiff's maintenance of Lake Toxaway and its proximity to defendant's Property; and the multiple points of road access within Lake Toxaway Estates. Based on the content of the foregoing testimony, Schafer's expert testimony was relevant to assist the trier of fact, here the trial judge, in determining the benefit received by defendant.

Next, defendant argues that Susan Barbour's testimony was duplicative of previous testimony tendered by plaintiff and that Barbour's testimony was "factual testimony" that "could have been provided by either a lay person or a paralegal."

> It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed or even engaged in a specific profession. It is enough that the expert witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.

Id. at 461, 597 S.E.2d at 688 (citations and quotation marks omitted).

We note that Barbour was tendered and accepted without objection as an expert in real estate. An experienced real estate attorney, Barbour had conducted thousands of title examinations and rendered

title examination reports which included examinations for easements. At trial Barbour explained what constituted a special warranty deed and how an easement was created. Barbour also testified regarding her interpretation of several deeds within Lake Toxaway Estates. Specifically, she provided testimony regarding whether certain deeds utilized by LTC "actually expressed grants within the document, or other references to underlying restrictions that might have references to the lake rights." This record amply supports a determination that Barbour's expertise placed her in a better position to assist the trial court judge. Indeed the trial judge determined Barbour's testimony to be "reasonable and necessary."

Defendant also argues that the substance of Barbour's testimony was duplicative in nature to the testimony of defendant corporation's sole member, Rebecca Young Fraser. The record reveals that Barbour, plaintiff's expert witness, was called to testify *prior* to defendant's witness, Fraser. We reject defendant's contention that there was error in the admission of similar testimony that preceded defendant's testimony. Further, our Court has previously held that it is not an abuse of discretion to assess expert witness fees for testimony, "even though they all were used to prove identical facts in issue." *Lewis v. Setty*, 140 N.C. App. 536, 539, 537 S.E.2d 505, 507 (2000) (citation omitted).

In challenging the fee award for the third expert witness, Russell Bendel, defendant argues that his testimony did not constitute "expert testimony" and that it was duplicative of testimony already offered by plaintiff. Bendel was tendered and accepted without objection as an expert witness in civil engineering, particularly relating to dams. Bendel testified regarding the annual inspection reports for the Lake Toxaway dam. Bendel had prepared annual inspection reports for at least 200 different dams. Bendel testified that it was necessary and reasonable for plaintiff to perform repairs and maintenance on the Lake Toxaway dam in order "to prevent a larger problem from developing, which would potentially cause a failure of those dams." Clearly, Bendel's expertise and testimony regarding the necessity for repairs and maintenance on the Lake Toxaway dam assisted the trial court judge. Accordingly, we overrule defendant's arguments challenging expert fees awarded for Schafer, Barbour and Bendel.

Plaintiff's Cross-Appeal

Plaintiff presents the following issues on cross-appeal: whether the trial court erred by (VII) concluding that defendant possessed an easement appurtenant to use Lake Toxaway; (VIII) finding that the common

law doctrine of *lex neminem cogit ad vana seu inutilia peragenda* applied to prevent plaintiff's enforcement against swimming, wading or fishing activities associated with lot owners abutting Lake Toxaway.

VII

[7] Plaintiff challenges a portion of the trial court's conclusion of law #3: "The Court hereby declares that the defendant, its successors and assigns, has an appurtenant easement to use Lake Toxaway and the private roads owned by the plaintiff without having to be a member of the Association."

"An appurtenant easement is 'an easement created for the purpose of benefiting particular land. This easement attaches to, passes with and is incident of ownership of the particular land." *Nelms v. Davis*, 179 N.C. App. 206, 209, 632 S.E.2d 823, 825-26 (2006) (citations omitted).

In *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 418 S.E.2d 841 (1992), the parties argued that the trial court erred in declaring that purchasers of lots within a residential subdivision had an appurtenant easement to a lake within that subdivision. The *Shear* Court stated that "[i]t is well settled in this jurisdiction that an easement may be created by dedication. This dedication may be either a formal or informal transfer and may be either implied or express." *Id.* at 161-62, 418 S.E.2d at 846 (citation omitted). "[I]mplied dedication is also one arising by operation of law from the acts of the owner . . . . The intent which the law means, however, is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner." *Id.* at 163, 418 S.E.2d at 846-47. Our Court held that the contents of a recorded map – which depicted a lake, playground, and streets – alone created an easement to the lake and surrounding property. *Id.* at 163, 418 S.E.2d at 846. However, our Court also noted that

> oral representations and actions by defendants' predecessors concerning the lake . . . necessarily include the undeveloped areas around the lake in the scope of the easement. These representations and actions, along with the use of the plat map and its depiction of the lake and property, decidedly show an intent to create an easement to the lake and surrounding undeveloped property.

Id.

In the instant case, the trial court made the following unchallenged findings of fact relevant to its determination that an easement [appurtenant] to the lake was created:

6. In 1961, [LTC] commenced the development of lots near and around Lake Toxaway and advertised them for sale pursuant to published materials and a General Development Plan of the property of [LTC]. One of the advertising brochures shows completed streets and lots sold and platted as of January, 1969.

7. The advertising materials utilized by [LTC] included photographs of the facilities and statements that were designed to induce the purchase of lots at Lake Toxaway as follows:

- Lake Toxaway, North Carolina, . . . has been restored for the pleasure of families who are establishing vacation or year-around homes along its 14-mile shoreline. Once again Lake Toxaway is offering a multitude of opportunity for fun along with its matchless climate and beauty
- The enchantment of leisure at lovely Lake Toxaway begins with its beauty, the lake's clear 640 acre expanse shining beneath its coronet of high mountains.

  . . .

- Water level is maintained at a constant 3,012 feet above sea level, an advantage not enjoyed by residents of many other mountain lakes, many of which have hydro-electric installations demanding constant water level changes. Toxaway is a purely recreational lake, and has no such power installation.

. . .

9. At the time [LTC] commenced selling lots, the area was very remote and Lake Toxaway and its use by lot owners was the primary focus to induce purchasers to buy lots.

. . .

11. In July of 1970, [LTC] commenced the use of printed form deeds that included a specific provision for lake privileges as follows:

> The owner of the lot hereinabove described shall have the same privileges in and to the use of Lake Toxaway

> as other persons to whom Lake Toxaway Co. has sold lots and granted lake privileges.

Based on the trial court's unchallenged findings of fact which are binding on appeal, plaintiff's practice of advertising Lake Toxaway as having "been restored for the pleasure of families who are establishing vacation or year-around homes along its 14-mile shoreline" and focusing primarily on Lake Toxaway and its use to induce purchasers to buy lots supports the trial court's conclusion that "defendant, its successors and assigns, ha[ve] an appurtenant easement to use Lake Toxaway[.]" Plaintiff's argument is overruled.

VIII

[8] Next, plaintiff challenges the trial court's finding of fact #40:

> Due to the size of Lake Toxaway, it would be practically impossible for [plaintiff] to restrict those owners of property abutting Lake Tox[a]way, including the Defendant, from using the Lake from their respective shorelines for swimming, wading or fishing and the Court is not inclined under the common law doctrine of *lex neminem cogit ad vana seu inutilia peragenda* to prevent what would otherwise be a vain and useless act.

Plaintiff argues that this doctrine was misapplied because the trial court had the option of imposing criminal and civil penalties for trespassing.

The common law doctrine of *lex neminem cogit ad vana seu inutilia peragenda* states that "the law compels no one to do vain or useless things." *Bailey v. State*, 330 N.C. 227, 249, 412 S.E.2d 295, 308 (1991). Here, the record shows that Lake Toxaway covers approximately 640 acres of lake bed and 14 miles of shoreline. The evidence supports the trial court's finding that it would be practically impossible to restrict property owners, including defendant, from using Lake Toxaway. Plaintiff's cite to *Adams Creek Assocs. v. Davis*, 186 N.C. App. 512, 652 S.E.2d 677 (2007), for the contention that the trial court could enforce civil and criminal penalties for trespass is not persuasive, and plaintiff cites no authority that would require the trial court to consider such penalties. Because we hold that there is competent evidence to support the trial court's finding of fact #40, plaintiff's argument is overruled.

Affirmed.

Judges HUNTER, Robert C., and STEELMAN concur.

LITTLE v. LITTLE

[226 N.C. App. 499 (2013)]

DEBORAH J. LITTLE, PLAINTIFF
v.
CHARLIE J. LITTLE, DEFENDANT

No. COA12-414-2

Filed 16 April 2013

1. Evidence—plaintiff's testimony—medical diagnosis—hearsay

In a domestic violence protection order proceeding, plaintiff's testimony that she had been diagnosed with a neck injury was hearsay that did not fall within an exception and was prejudicial.

2. Evidence—judicial notice—uncertified criminal file

In a domestic violence protection order proceeding, the trial court erred by taking judicial notice of an uncertified criminal file showing that defendant was convicted in the separate criminal case arising out of the alleged assault. Since the trial court specifically relied upon defendant's having been found guilty in the criminal action, it cannot be concluded that taking judicial notice of the criminal file was harmless error.

3. Domestic Violence—protective order—remanded—renewal

Where it was unclear whether a domestic violence protective order had been renewed, the trial court was ordered on remand to vacate the order if it had not been renewed. Defendant was entitled to a new trial if the domestic violence protective order was properly renewed.

Appeal by defendant from order entered 27 October 2011 by Judge Robert M. Wilkins in Randolph County District Court. Heard in the Court of Appeals 11 September 2012. Opinion filed 15 January 2013. Petition for rehearing granted 21 February 2013. The following opinion supersedes and replaces the opinion filed 15 January 2013.

No brief filed on behalf of plaintiff-appellee.

Bell and Browne, P.A., by Charles T. Browne, for defendant-appellant.

GEER, Judge.

Defendant Charlie J. Little appeals the trial court's entry of a domestic violence protective order in favor of plaintiff Deborah J. Little. He

primarily contends on appeal that the trial court erred in allowing Ms. Little to testify that she had been diagnosed with a cervical neck strain as a result of domestic violence. Because the testimony was inadmissible hearsay and the trial court relied upon that testimony in its order, we reverse.

Facts

On 6 September 2011, Ms. Little filed a complaint seeking a domestic violence protective order. She alleged that defendant assaulted her on 3 September 2011 in the driveway of their residence in Trinity, North Carolina, injuring her neck. The trial court entered an ex parte domestic violence protective order on 6 September 2011 finding that Mr. Little had committed an act of domestic violence against Ms. Little and ordering, among other things, that Mr. Little remain at least 1,000 feet away from Ms. Little at all times. The trial court issued a notice of hearing on the domestic violence protective order for 15 September 2011. Mr. Little filed an answer denying the allegations of domestic violence.

After multiple continuances, the trial court held a hearing on 27 October 2011. At the hearing, the court heard testimony from Ms. Little, Mr. Little, and Deputy Eric Wilson of the Randolph County Sheriff's Department, the officer who had responded to Ms. Little's call regarding the events of 3 September 2011. During the hearing, the trial court took judicial notice of the criminal file related to the 3 September 2011 events.

At the close of the hearing, the trial court entered a domestic violence protective order (1) noting that the court had taken judicial notice of the criminal file in which "[d]efendant was found guilty on 10/10/11 of assault on female," (2) finding that defendant used his hand to attempt to choke Ms. Little resulting in neck strain, and (3) ordering, among other things, that defendant should have no contact with Ms. Little and remain at least 1,000 feet away from her at all times. The order was effective through 27 October 2012. Mr. Little timely appealed to this Court.

Discussion

" '[W]hen 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.' " *Burress v. Burress*, 195 N.C. App. 447, 449, 672 S.E.2d 732, 734 (2009) (quoting *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). When there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal. *Id.* at 449-50, 672 S.E.2d at 734.

[1] Defendant first contends on appeal that the trial court committed reversible error in admitting Ms. Little's testimony that she had been diagnosed with a cervical neck injury. Defendant contends the statement was hearsay not subject to any exception under the North Carolina Rules of Evidence.

Ms. Little testified that at some point after defendant assaulted her, she "noticed that [her] neck was stiff and [she] was having a hard time swallowing." She continued:

> MRS. LITTLE: . . . so I went to the hospital in Greensboro, and they diagnosed me --
>
> [DEFENSE COUNSEL]: Well, objection.
>
> MRS. LITTLE: -- with having a cervical --
>
> THE COURT: Hang on. . . . If you're up here, you're testifying today, and somebody makes an objection like [defense counsel] just did, okay, if you'll please just stop talking until I can figure out what's going on, all right? If you are the person or the attorney that makes the objection, I'll just remind you that you need to make sure you let me know what the legal basis is for your objection and then I'll -- I'll rule.
>
> Okay, so, yes, sir, [defense counsel], what's the objection?
>
> [DEFENSE COUNSEL]: Hearsay, Your Honor.
>
> THE COURT: Overruled. Go ahead.
>
> MRS. LITTLE: Yes. I was di- --
>
> THE COURT: I'm saying -- ma'am, you were saying something about the diagnosis. What was it?
>
> MRS. LITTLE: Cervical strain, and I do have a documentation from the hospital that notes that, and also they prescribed me some pain pills 'cause it -- and muscle relaxer 'cause the doctor told me that I --
>
> [DEFENSE COUNSEL]: Objection.
>
> MRS. LITTLE: -- was going to --
>
> [DEFENSE COUNSEL]: Hearsay.

> THE COURT: Okay. Sustained. Okay. Go ahead, ma'am. What -- okay. Okay. I don't -- you've already told me what the diagnosis is.
>
> MRS. LITTLE: Yes.
>
> THE COURT: That's okay. All right. What else?

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.R. Evid. 801(c). Hearsay evidence is generally inadmissible unless it falls within one of the exceptions recognized in the North Carolina Rules of Evidence or another statute. N.C.R. Evid. 802 ("Hearsay is not admissible except as provided by statute or by these rules.").

There is no question that the complained-of testimony was an out-of-court statement offered for the truth of the matter asserted. Ms. Little was testifying to what the doctor told her in order to prove to the court that her neck had suffered a cervical strain. The statement was, therefore, inadmissible unless it fell within one of the recognized exceptions to the hearsay rule.

Because there is no evidence that the doctor in this case was unavailable, the testimony, in order to be admissible, must fall within one of the exceptions in Rule 803 of the Rules of Evidence, which sets out the exceptions to the hearsay rule that apply regardless of the availability of the person making the statement. We have been unable to identify any specific exception in Rule 803 that might apply. Since the trial court provided no explanation for why it was overruling the hearsay objection, the court could not have admitted the statement under the catch-all exception of Rule 803(24). *See State v. Smith*, 315 N.C. 76, 96, 337 S.E.2d 833, 847 (1985) (finding reversible error where the trial court did not "set[] out in the record his analysis of the admissibility of hearsay testimony pursuant to the requirements of Rule 803(24)").

Because the admission of Ms. Little's statement regarding what a doctor said about her diagnosis does not fall within any hearsay exception, it was inadmissible evidence. Even so, "[i]t is well established that even when the trial court commits error in allowing the admission of hearsay statements, one must show that such error was prejudicial in order to warrant reversal." *In re F.G.J., M.G.J.*, 200 N.C. App. 681, 687-88, 684 S.E.2d 745, 750 (2009) (internal quotation marks omitted).

When a trial court sits without a jury, this Court generally "presume[s] that the [trial] court disregard[ed] the incompetent evidence" and

sustains the trial court's findings if they are supported by competent evidence. *Munchak Corp. v. Caldwell*, 301 N.C. 689, 694, 273 S.E.2d 281, 285 (1981). Here, however, the trial court specifically found that plaintiff had suffered "neck strain," and the only evidence submitted of that diagnosis was Ms. Little's inadmissible testimony. Consequently, it is apparent that the trial court did, in fact, rely upon the inadmissible hearsay. Given the trial court's finding of fact, we cannot conclude that admission of the evidence was harmless error.

[2] Defendant next asserts that the trial court erred in admitting evidence that defendant was convicted in the separate criminal case arising out of the alleged assault. During the hearing in this case, Ms. Little testified that she had filed assault charges against Mr. Little. When asked by the trial court whether she had any further testimony, she said: "I did -- as far as the assault charge, Mr. Little was found guilty of it."

Ms. Little also presented an apparently uncertified document from the criminal file in support of her testimony. After Mr. Little's attorney objected that the document was uncertified, the trial court asked for the document and ruled that he was taking "judicial notice of the contents of the official file, 11 CR 055306." The trial court explained that he was finding the criminal file "relevant to the case here."

After noting Mr. Little's attorney's objection to its taking judicial notice of Mr. Little's criminal file, the court ruled: "This Court -- the Court still takes judicial notice of it." The trial court then indicated it would grant the domestic violence protective order, but took a recess for the purpose of going to get the file regarding defendant's criminal conviction:

> I want to just get that file that I took judicial notice of. I'm gonna go ahead and enter the Order. If you want to be here, that's fine. If not, otherwise, let's go ahead and enter it. If you want to be here, that'll be fine, but I'll -- I haven't signed it yet.

After a 15-minute recess, the trial court returned and said the following:

> In this case, although I had rendered my decision prior to actually seeing the criminal file, which I noted I would take judicial notice during the trial itself, Madam Clerk has now produced that. I see that on October 10th, 2011, the defendant appeared in front of Judge Sabiston and entered a plea of not guilty to one count of assault on a female, and contrary

> to his pleas, was found guilty of assault on a female; again, on October 10th of 2011, for this same incident.

The court then included the following finding of fact in the order:

> Criminal charges filed in 11 CR 055306. Court takes judicial notice of contents of that file. Defendant was found guilty on 10/10/11 of assault on female by presiding Judge Sabiston.

We first note that defendant does not cite any authority for his contention that the trial court's going to get Mr. Little's criminal file and thereby "procuring evidence for" Ms. Little was improper. Indeed, a "[t]rial court[] may properly take judicial notice of 'its own records in any prior or contemporary case when the matter noticed has relevance.' " *Stocum v. Oakley*, 185 N.C. App. 56, 61, 648 S.E.2d 227, 232 (2007) (quoting Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 26 (5th ed. 1998)); *see also Mason v. Town of Fletcher*, 149 N.C. App. 636, 640, 561 S.E.2d 524, 527 (2002) (holding finding of fact that right of way was 39.37 feet was proper where finding was supported by trial court's having taken judicial notice of separate case in same county).

The trial court did not specify the basis for its determination that the file was relevant, and the only possible basis we have been able to identify is the doctrine of collateral estoppel. Res judicata cannot apply because Ms. Little was not a party to the criminal proceeding. *See Moore v. Young*, 260 N.C. 654, 658, 133 S.E.2d 510, 513 (1963) (holding res judicata did not apply in wrongful death claim where defendant had been convicted of involuntary manslaughter because plaintiff was not party to criminal action).

Collateral estoppel applies " 'when there has been a final judgment or decree, necessarily determining [the] fact, question or right in issue, rendered by a court of record and of competent jurisdiction, and there is a later suit involving an issue as to the identical fact, question or right theretofore determined, and involving identical parties or parties in privity with a party or parties to the prior suit.' " *King v. Grindstaff*, 284 N.C. 348, 355, 200 S.E.2d 799, 805 (1973) (quoting *Masters v. Dunstan*, 256 N.C. 520, 524, 124 S.E.2d 574, 576 (1962)). Our Courts have, however, approved the use of offensive collateral estoppel to bar re-litigation of issues without consideration of privity under certain circumstances. *See Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 268-69, 488 S.E.2d 838, 840 (1997).

We need not decide whether offensive collateral estoppel would apply in this case, however, because the record does not indicate that

any final judgment exists in the criminal proceeding. The disposition in the underlying assault action was a prayer for judgment continued ("PJC") that only imposed as conditions payment of costs and obedience to the preexisting temporary restraining order. Such a PJC does not constitute a final judgment. *See State v. Cheek*, 31 N.C. App. 379, 381-82, 229 S.E.2d 227, 228 (1976) (" 'When the prayer for judgment is continued there is no judgment -- only a motion or prayer by the prosecuting officer for judgment. And when the court enters an order continuing the prayer for judgment and at the same time imposes conditions amounting to punishment (fine or imprisonment) the order is in the nature of a final judgment, from which the defendant may appeal. Punishment having been once inflicted, the court has exhausted its power and cannot thereafter impose additional punishment.' " (quoting *State v. Griffin*, 246 N.C. 680, 683, 100 S.E.2d 49, 51 (1957))).

We, therefore, have not been able to identify any basis for admitting the result of the criminal proceeding in this case. Since the trial court specifically relied upon defendant's having been found guilty in the criminal action, we cannot conclude that the court's taking judicial notice of the criminal file was harmless error.

Consequently, the trial court committed prejudicial error in admitting the hearsay testimony and in taking judicial notice of the criminal file. We, therefore, reverse the trial court's order.

[3] N.C. Gen. Stat. § 50B-3(b) (2011) provides that "[p]rotective orders entered pursuant to this Chapter shall be for a fixed period of time not to exceed one year." The trial court may, however, renew a protective order "upon a motion by the aggrieved party filed before the expiration of the current order . . . ." *Id.* While defendant represents to the Court that the order in this case was not renewed, the record before the Court is silent on that question. On remand, in the event the domestic violence protective order was not renewed, the trial court shall enter an order vacating the domestic violence protective order. If the domestic violence protective order was properly renewed, then defendant is entitled to a new trial.

Reversed and remanded.

Chief Judge MARTIN and Judge STROUD concur.

PHELPS STAFFING, LLC, PLAINTIFF
v.
C. T. PHELPS, INC. AND CHARLES T. PHELPS, DEFENDANTS

No. COA12-886

Filed 16 April 2013

1. Employer and Employee—noncompetition agreement—not enforceable

The trial court correctly concluded that a noncompetition agreement was not enforceable and granted summary judgment for defendants on a tortious interference claim where plaintiff's noncompetition agreement served only to hamper lawful competition while placing an unreasonable burden on the ability of plaintiff's former employees to make a living.

2. Unfair Trade Practices—hiring competitor's employees—billing—conduct not egregious

The trial court did not err by granting summary judgment for defendants on a claim for unfair and deceptive practices or acts arising from the hiring of a competitor's employees and the subsequent billing for their work. Plaintiff did not allege before the trial court any circumstances independent of an unenforceable noncompetition agreement that would support a conclusion that the billing by CTP, Inc. amounted to egregious or aggravating circumstances.

Appeal by plaintiff from order entered 3 April 2012 by Judge Howard E. Manning, Jr. in Franklin County Superior Court. Heard in the Court of Appeals 29 January 2013.

Harris & Hilton, P.A., by Nelson G. Harris, for plaintiff-appellant.

Edmundson & Burnette, L.L.P., by J. Thomas Burnette and James T. Duckworth, III, for defendants-appellees.

North Carolina Justice Center, by Carol Brooke, amicus curiae.

HUNTER, Robert C., Judge.

Plaintiff-appellant Phelps Staffing, LLC ("plaintiff") appeals from the trial court's order granting summary judgment in favor of defendants-appellees C. T. Phelps, Inc. ("CTP, Inc.") and Charles T. Phelps (collectively

"defendants") on three causes of action: (1) tortious interference with contract; (2) conversion; and (3) unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1.[1] Plaintiff's arguments on appeal address only the first and third claims. After careful review, we affirm the trial court's order.

Background

The history of the parties and their prior litigation need not be recounted here as it has been well documented by this Court in *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, __ N.C. App. __, 720 S.E.2d 785 (2011). The facts pertinent to this appeal may be summarized as follows. Plaintiff and CTP, Inc. are both North Carolina corporations engaged in the business of providing temporary labor to clients. In December 2008, CTP, Inc. began competing with plaintiff for plaintiff's existing clients. CTP, Inc. was successful in acquiring several of plaintiff's clients and convinced these clients to fulfill their temporary labor needs through CTP, Inc. rather than through plaintiff. To meet the needs of its new clients, CTP, Inc. recruited some of plaintiff's employees and allowed them to keep the same or similar contract labor positions with the clients; a process plaintiff describes as "flipping" employees.

In 2009, in an attempt to thwart CTP, Inc.'s competition, plaintiff began requiring employees to sign a noncompetition agreement effectively prohibiting plaintiff's employees from leaving plaintiff's employment to work directly for plaintiff's clients as an employee of that corporation or to work indirectly for plaintiff's clients through another temporary staffing business. The agreement plaintiff required its employees to sign reads as follows:

> In consideration of [Phelps Staffing] utilizing and placing Employee with a company customer, during the term of Employee's employment with [Phelps Staffing] and for a period of twelve (12) months from the voluntary or involuntary termination of Employee's employment with [Phelps Staffing] for any reason whatsoever, with respect to any Company customer whom Employee provided services for or was placed as a temporary worker with ("Company Customer"), Employee will not[:]

1. Plaintiff cites N.C. Gen. Stat. § 75-1.1 in its complaint to allege "unfair and deceptive trade practices" by defendants. While references to the acts proscribed by this statute as "trade practices" persist in our caselaw, the word "trade" was removed from the statute in 1977. *See* 1977 N.C. Sess. Laws ch. 747, § 1.

> (a) discuss or accept employment similar to the services or work Employee performed for such Company customer;
>
> (b) accept employment from, or contract with, any individual, partnership or company for placement (as a temporary work or permanent hire) of Employee with a Company Customer for the provision of services similar to the services or work performed for such Company Customer; or
>
> (c) enter into any contract with a Company Customer for performance of services similar to the services performed by Employee for such Company Customer while employed by [Phelps Staffing].

In summary, the agreement provides that during an employee's employment by plaintiff, and for a period of one year after the voluntary or involuntary termination of employment with plaintiff, the employee will not discuss or accept employment at plaintiff's clients where the employee had been placed for work by plaintiff. Plaintiff admits that its primary purpose in requiring job applicants to execute the noncompetition agreement was to prevent its employees from working for CTP, Inc. or for other competitors at plaintiff's clients.

Plaintiff alleges that sometime between 2 October 2010 and 12 October 2010, CTP, Inc. "flipped" a number of plaintiff's employees that had been placed by plaintiff at facilities in North Carolina, Georgia, and Virginia that were operated by plaintiff's clients, including Hoover Treated Wood Products, Inc. ("Hoover"). Each employee that was flipped completed an application for employment with CTP, Inc., and plaintiff's clients acquiesced to the change in employment by their temporary workers. Some of the applications for employment with CTP, Inc. submitted by employees in Virginia are dated 4 October 2010. Plaintiff contends, however, that these applications were received by CTP, Inc. on 11 October 2010 and were altered to appear as though they were completed on 4 October 2010. Plaintiff further alleges that CTP, Inc. then improperly billed Hoover and another client for work performed and completed by temporary workers while the temporary workers were still plaintiff's employees. The billing covered the week of 4 October 2010 through 10 October 2010. Hoover paid CTP, Inc. for this work. Plaintiff alleges its damages resulting from the improper billing totaled $5,267.12.

On 16 November 2010, plaintiff filed the underlying action against defendants. Plaintiff alleged tortious interference with contract against defendants for inducing plaintiff's former employees to violate the noncompetition agreement. Plaintiff alleged that defendants' billing of

Hoover for work performed by plaintiff's employees amounted to conversion. Plaintiff also alleged that defendants' conduct amounted to unfair and deceptive practices and acts in violation of N.C. Gen. Stat. § 75-1.1.

The trial court granted summary judgment in favor of defendants concluding that the noncompetition agreement signed by plaintiff's employees was "unconscionable, void and unenforceable as a matter of law and public policy[.]" The trial court also granted summary judgment on plaintiff's claim for conversion concluding that the alleged improper billing did not amount to conversion. Lastly, the trial court concluded that plaintiff's unfair and deceptive practices claim necessarily failed because the claim was based on the claims for tortious interference with contract and conversion, on which the trial court granted summary judgment in favor of defendants. As for plaintiff's claim for $5,267.12 in damages resulting from CTP, Inc.'s billing, the trial court "recommend[ed]" that defendants either pay the amount to plaintiff or that plaintiff institute a separate civil action to recover the damages. Plaintiff appeals.

Arguments

We review *de novo* the trial court's ruling on a motion for summary judgment. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment "is appropriate only when the record shows 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.' " *Id.* (quoting *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007)). "All facts asserted by the [nonmoving] party are taken as true . . . and their inferences must be viewed in the light most favorable to that party[.]" *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted).

A. Noncompetition Agreement

[1] "[R]estrictive covenants between an employer and employee are valid and enforceable if they are (1) in writing; (2) made part of a contract of employment; (3) based on valuable consideration; (4) reasonable both as to time and territory; and (5) not against public policy." *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 649-50, 370 S.E.2d 375, 380 (1988). It is the last of these elements that is at issue in this case: whether the noncompetition agreement Phelps Staffing required its employees to sign is unenforceable as a matter of public policy.

As defendants contend, our caselaw disfavors noncompetition agreements which hamper an individual's right to earn a livelihood unless the restriction protects a sufficient countervailing interest of the employer. *See Starkings Court Reporting Services v. Collins*, 67 N.C.

App. 540, 541-42, 313 S.E.2d 614, 615 (1984). The right of an employer to protect itself from competition must be balanced against "undue hardship" on the employee:

> [E]ven where there is an otherwise permissible covenant not to compete: [T]he restraint is unreasonable and void if it *is greater than is required for the protection of the promisee or if it imposes an undue hardship upon the person who is restricted.* Owing to the possibility that a person may be deprived of his livelihood, the courts are less disposed to uphold restraints in contracts of employment than to uphold them in contracts of sale.

Id. (quoting *Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 75, 185 S.E.2d 278, 281 (1971)) (emphasis added) (second alteration in original).

In *Electrical South, Inc. v. Lewis*, 96 N.C. App. 160, 165, 385 S.E.2d 352, 355 (1989), this Court noted that determining whether a noncompetition agreement offends public policy requires us to consider " 'the right of the employer to protect, by reasonable contract with [its] employee, the unique assets of [its] business, a knowledge of which is acquired during the employment and by reason of it[.]' " *Id.* (quoting *Kadis v. Britt*, 224 N.C. 154, 159, 29 S.E.2d 543, 546 (1944)). We have recognized such unique assets to include customer contacts and confidential information. *Id.* However, when such proprietary interests of the employer are absent and "the effect of a contract 'is merely to stifle normal competition, it is . . . offensive to public policy . . . in promoting monopoly at the public expense and is bad.' " *Starkings*, 67 N.C. App. at 542, 313 S.E.2d at 616 (quoting *Kadis*, 224 N.C. at 159, 29 S.E.2d at 546).

In *Starkings*, we concluded that the noncompetition agreement at issue was unenforceable as a matter of public policy. The defendant in *Starkings*, against whom the plaintiff sought to enforce the noncompetition agreement, "had no access to trade secrets or unique information as a result of her business association with [the] plaintiff." *Id.* at 542, 313 S.E.2d at 616. It was clear to the Court that the agreement "was designed for one purpose: to restrain and inhibit normal competition." *Id.* at 542, 313 S.E.2d at 616. Accordingly, we held the noncompetition agreement was against public policy and imposed greater restraint on the defendant's ability to earn a living than was necessary to protect the plaintiff's business interests. *Id.*

Here, plaintiff admits that his primary purpose in requiring employees to sign the noncompetition agreement was to prevent competition from other temporary labor providers, particularly CTP, Inc. In oral

arguments before this Court, plaintiff conceded that its employees do not have access to trade secrets or proprietary information as a result of their employment with plaintiff. Indeed, plaintiff describes its employees as "general laborer[s]." Plaintiff contends that the noncompetition agreement is not unconscionable because it "is not so oppressive that no honest and fair person, particularly a general laborer seeking employment, would accept the same."

As defendants note, however, the trial court did not conclude that the noncompetition agreement was unenforceable solely on the grounds that it was unconscionable. Rather, the trial court concluded the agreement was unconscionable and unenforceable as a matter of public policy. The record supports the trial court's conclusion that the agreement is merely an attempt to stifle lawful competition between businesses and that it unfairly hinders the ability of plaintiff's former employees to earn a living.

Plaintiff argues that the noncompetition agreement is not so broad as to prevent its former employees from working for any of plaintiff's clients but prohibits its former employees from working only for those clients with whom the employee was placed for temporary work. Plaintiff argues that the scope of the noncompetition agreement is further limited such that it only prohibits former employees from working at the specific location of the client where the former employee was placed for work by plaintiff, e.g. a specific Hoover plant where an employee worked. Plaintiff's interpretation of the scope of the noncompetition agreement is not supported by the record. We agree that the terms of the agreement do not prohibit an employee from accepting employment from one of plaintiff's customers with whom an employee was not placed for work. But, as to those customers with whom the employee was placed for work, the agreement does not contain any terms restricting its scope to only the specific location where that employee was placed for work. Thus, a former employee would be prohibited from working for a client, such as Hoover, whether the client had a second location in the same city or in a different state. Moreover, as the agreement provides that its terms apply after termination of the employee "for any reason whatsoever," if Phelps Staffing were to decide to no longer provide staffing to a client and terminated its contract with the client, plaintiff's noncompetition agreement would prevent the former employees from accepting employment from plaintiff's former client for a period of twelve months.

"The line of demarcation . . . between freedom to contract on the one hand and public policy on the other must be left to the circumstances of the individual case. Just where this line shall be in any given situation is

to be determined by the rule of reason." *Beam v. Rutledge*, 217 N.C. 670, 674, 9 S.E.2d 476, 478 (1940). Public policy favors the enforcement of contracts that protect legitimate business interests but must also guard against unreasonable restrictions. *Id.* at 673, 9 S.E.2d at 478. Under the facts of this case, we conclude plaintiff's noncompetition agreement serves only to hamper lawful competition while placing an unreasonable burden on the ability of plaintiff's former employees to make a living. As such, we hold that the noncompetition agreement at issue in this case is unenforceable as a matter of public policy. Because the noncompetition agreement is unenforceable, the contract cannot support plaintiff's claim for tortious interference with contract, and the trial court did not err in granting summary judgment in favor of defendants on that claim.

B. Unfair or Deceptive Acts or Practices

[2] Plaintiff next contends that the trial court erred in granting summary judgment in favor of defendants on plaintiff's claim for unfair and deceptive practices and acts. We disagree.

To establish a *prima facie* claim under N.C. Gen. Stat. § 75-1.1(a), a plaintiff must show: "(1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). "A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Id.* While the scope of "commerce" under N.C. Gen. Stat. § 75.1-1(a) is broad, "it is not intended to apply to all wrongs in a business setting." *Id.* at 657, 548 S.E.2d at 711. "Moreover, '[s]ome type of *egregious or aggravating* circumstances must be alleged and proved before [section 75-1.1(a)'s] provisions may [take effect].' " *Id.* (quoting *Allied Distribs., Inc. v. Latrobe Brewing Co.*, 847 F. Supp. 376, 379 (E.D.N.C. 1993)) (first and third alterations in original).

Plaintiff contends that CTP, Inc. billed and collected money from Hoover for work performed by individuals that were plaintiff's employees and that the billing constituted acts in violation of N.C. Gen. Stat. § 75-1.1(a). The trial court concluded that plaintiff's claim for unfair and deceptive practices and acts ("UDPA") was founded on plaintiff's claims for tortious interference with contract and conversion[2] on which summary judgment was granted in favor of defendants. Concluding there was

2. On appeal, plaintiff raises no argument regarding the trial court's ruling on plaintiff's claim for conversion. Accordingly, we deem the issue abandoned. N.C. R. App. P. 28(b)(6) (2012).

nothing separate to support the UDPA claim, the trial court granted summary judgment in favor of defendants on the UDPA claim as well.

In its brief on appeal, plaintiff alleges that when CTP, Inc. flipped some of its employees, CTP, Inc. altered the dates on some of the job applications submitted to CTP, Inc. by plaintiff's employees. As a result of these alterations, it appears as if the flipped employees began working for CTP, Inc. before they left plaintiff's employment. Plaintiff contends that CTP, Inc. then billed, and collected money from, Hoover for the work performed by the temporary workers while they were plaintiff's employees. Although copies of work applications appear in the record on which plaintiff alleges the application date has been altered, the record does not establish that plaintiff alleged any conduct by CTP, Inc. that amounted to anything other than a billing error. Thus, despite plaintiff's arguments on appeal, we conclude that plaintiff did not allege before the trial court any circumstances independent of the noncompetition agreement that would support a conclusion that the billing by CTP, Inc. amounted to egregious or aggravating circumstances. Accordingly, the trial court did not err in granting summary judgment in favor of defendants on this claim. *See Ace Chemical Corp. v. DSI Transports, Inc.*, 115 N.C. App. 237, 248, 446 S.E.2d 100, 106 (1994) (affirming grant of summary judgment in favor of the defendant on the plaintiff's UDPA claim where the plaintiff failed to allege or present evidence of substantial aggravating circumstances for UDPA claim in complaint or at hearing before the trial court). Plaintiff's argument is overruled.

Conclusion

Because we conclude the noncompetition agreement signed by plaintiff's employees is unenforceable as a matter of public policy, the trial court did not err in granting summary judgment in favor of defendants on plaintiff's claim for tortious interference with contract. Plaintiff abandoned its appeal from the trial court's ruling on its claim for conversion. Plaintiff failed to allege any egregious or aggravating circumstances to support its claim that CPT, Inc.'s billing for work performed by plaintiff's employees was an unfair and deceptive practice or act. Accordingly, the trial court's order is affirmed.

AFFIRMED.

Judges McCULLOUGH and DAVIS concur.

SAMOST v. DUKE UNIV.

[226 N.C. App. 514 (2013)]

ALBERT H. SAMOST AND TIMOTHY E. SHAUGHNESSY, PLAINTIFFS
v.
DUKE UNIVERSITY, DEFENDANT

No. COA12-635

Filed 16 April 2013

Contracts—breach—judgment on the pleadings

The trial court did not err by entering judgment on the pleadings in favor of defendant on the grounds that plaintiff's complaint did not adequately assert a breach of contract claim.

Judge Hunter, Robert C. dissenting.

Appeal by plaintiffs from order entered 12 January 2012 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 10 December 2012.

Ekstrand & Ekstrand LLP, by Robert C. Ekstrand and Stefanie A. Smith, for plaintiffs.

Ellis & Winters LLP, by Paul K. Sun, Jr. and Nora F. Warren, for defendant.

ERVIN, Judge.

Plaintiffs Albert H. Samost and Timothy E. Shaughnessy appeal from an order granting Defendant Duke University's motion for judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c), and dismissing their complaint with prejudice. On appeal, Plaintiffs argue that the trial court erred by entering judgment on the pleadings in favor of Defendant on the grounds that their complaint, when considered in light of the applicable standard of review, adequately asserted a breach of contract claim. After careful consideration of Plaintiffs' 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 affirmed.

I. Factual Background

A. Substantive Facts[1]

Plaintiffs, who were seniors at Duke University in the spring of 2011 and had completed all prerequisites for graduation, lived in off-campus housing. Although each Plaintiff lived in his own house, their houses, along with three additional houses associated with a fraternity to which Plaintiffs belonged, shared a one-acre backyard.

On 2 April 2011, Plaintiffs hosted a party. At approximately 4:45 p.m. on that date, a neighbor requested that Plaintiffs turn down their music. Although Plaintiffs honored this request, the neighbor's husband made a complaint to Dr. Phail Wynn, Defendant's Vice President of Durham and Regional Affairs, in which he asserted that the noise continued even though the music had been turned off.

Based on the neighbor's complaint concerning the noise level at the 2 April 2011 party, Assistant Dean of Students Christine Pesetski notified Plaintiffs that she would be investigating their conduct in accordance with Defendant's disciplinary system, which is set forth in the "Bulletin of Duke University, The Duke Community Standard in Practice: A Guide for Undergraduates." This document, which the parties refer to as the Bulletin, is published each academic year, "expresses a standard for behavior – a set of expectations of students who claim membership in Duke's learning community," and includes provisions governing the undergraduate disciplinary process. All incoming undergraduates are required to sign a pledge to adhere to the provisions of and values reflected in the Bulletin.

On 8 April 2011, Plaintiffs hosted another party in their backyard. During this party, two officers of the Durham Police Department appeared. After conversing with Plaintiff Shaughnessy, the officers cited him for violating the City of Durham's noise ordinance. Assistant Dean Pesetski learned about the 8 April 2011 incident and notified Plaintiffs that she would be investigating the events which occurred on that occasion as well.

Although the Bulletin provides that an accused student will have an initial Administrative Hearing and receive an informal resolution offer in lieu of a referral to the Undergraduate Conduct Board, Plaintiff Samost was not extended such an informal resolution offer. Instead,

1. Consistent with the applicable standard of review, the factual statement set out in the body of this opinion is drawn from the allegations contained in Plaintiffs' complaint and documents referenced in that complaint that were attached to the parties' pleadings.

Assistant Dean Pesetski simply referred the accusations against him to the Undergraduate Conduct Board. Although Plaintiff Shaughnessy was offered a suspension in lieu of further discipline, he declined to accept that proposal. As a result, both Plaintiffs were charged with "Disorderly Conduct, Guests, and Other – Violating Ordinances and/or Laws."

A disciplinary hearing was held before a five-member Undergraduate Conduct Board panel on 4 May 2011. At the conclusion of the hearing, the panel found that neither Plaintiff had played an active role in creating the allegedly excessive noise and were not, for that reason, responsible for engaging in disorderly conduct. However, the panel found both Plaintiffs responsible for violating Defendant's "Guest" rule and found Plaintiff Shaughnessy responsible for violating Defendant's "Other - Violating Ordinances and/or Laws" rule. As a result, the panel suspended Plaintiffs for two semesters and ordered them to perform 50 hours of community service.

On or about 10 May 2011, Plaintiffs appealed the panel's decision to the Appellate Board. In their challenge to the panel's decision, Plaintiffs pointed out the absence of any evidence indicating that they had personally engaged in any culpable conduct, argued that they had impermissibly been disciplined based upon the conduct of others, and contended that their chances for a more favorable outcome at the hearing had been harmed by numerous procedural irregularities, including the fact that the only evidence heard by the panel took the form of statements made by individuals who were not present at the hearing, the fact that their conduct had been evaluated by an individual whose previous statements established that she was biased against them, the fact that they did not receive adequate notice of the hearing or the evidence that would be presented against them, and the fact that the hearing had been scheduled at a time when their advisors could not attend. On 12 May 2011, the Appellate Board vacated the panel's decision and remanded the matter for a new hearing before a different panel. The Appellate Board made this decision on the grounds that there was "relevant new information" presented in support of Plaintiffs' appeal and because of its "concerns about some of the procedural issues" that Plaintiffs had raised. Although the Appellate Board agreed to allow Plaintiffs to participate in the upcoming commencement exercises, it also decided that Plaintiffs' diplomas and transcripts would be "held back until such time as all charges have been resolved through the conduct system." Instead of proceeding with the new hearings ordered by the Appellate Board, however, Plaintiffs instituted this civil action against Defendant.

B. Procedural History

On 13 May 2011, Plaintiffs filed a complaint and a request for the issuance of a temporary restraining order and a preliminary injunction in which they alleged that Defendant had breached a contract with Plaintiffs and requested an award of compensatory and punitive damages and temporary, preliminary, and permanent injunctive relief barring Defendant from involuntarily withdrawing Plaintiffs from the University, re-trying Plaintiffs for conduct which had already been found not to have occurred, and continuing to subject Plaintiffs to disciplinary proceedings. After a hearing held on the same afternoon with respect to Plaintiffs' request for the entry of a temporary restraining order, Defendant agreed to allow Plaintiffs to graduate and receive their diplomas, as well as to terminate the disciplinary proceedings without further consequences to Plaintiffs.

On 12 August 2011, Defendant filed an answer in which it admitted certain allegations set out in Plaintiffs' complaint, denied other allegations set out in Plaintiffs' complaint, and asserted various affirmative defenses. On the same date, Defendant filed a motion for judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c). After a hearing held on 9 January 2012, the trial court entered an order granting Defendant's motion and dismissing Plaintiffs' complaint with prejudice on 12 January 2012. Plaintiffs noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

A trial court's ruling on a motion for judgment on the pleadings is subject to *de novo* review on appeal. *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335, *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). In determining whether to grant a motion for judgment on the pleadings,

> [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 and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (internal citations omitted). "A motion for judgment on the pleadings . . . should not be granted unless 'the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.' " *American Bank & Trust Co. v. Elzey*, 26 N.C. App. 29, 32, 214 S.E.2d 800, 802 (quoting 5 C. Wright and A. Miller, Federal Practice & Procedure § 1368 (1969)), *cert. denied*, 288 N.C. 252, 217 S.E.2d 662 (1975). For that reason, "[t]he [motion's] function is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit," with "[a] motion for judgment on the pleadings [being] the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499. We will now utilize this standard of review to determine whether the trial court correctly granted Defendant's motion.[2]

B. Sufficiency of Plaintiffs' Complaint

"The elements of a claim for breach of contract are (1) [the] existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). "In the obligations assumed by a party to a contract is found his duty, and his failure to comply with the duty constitutes the breach." *Sale v. Highway Comm'n*, 242 N.C. 612, 619, 89 S.E.2d 290, 296 (1955). "In the absence of a supplemental agreement, the parties are bound by the terms of the contract and recovery, if any, is controlled by its provisions." *Thompson-Arthur Paving Co. v. N.C. Dep't of Transp.*, 97 N.C. App. 92, 95, 387 S.E.2d 72, 74, *disc. review denied*, 327 N.C. 145, 394 S.E.2d 186 (1990); *see also Kinston v. Suddreth*, 266 N.C. 618, 621, 146 S.E.2d 660, 662-63 (1966) (discussing a party's ability to limit damages based on a contract provision). In construing a contract, the courts are to give full effect to each unambiguous contractual provision. *Singleton v. Haywood Elec. Membership. Corp.*, 357 N.C. 623, 629, 588 S.E.2d 871, 875 (2003) (stating that "various terms of the [contract] are to be harmoniously construed,

---

2. An examination of Plaintiffs' complaint reveals the presence of many references to the Bulletin. According to well-established North Carolina law, this document (which is attached to Defendant's answer) is properly before the Court for purposes of considering the validity of Plaintiff's challenge to the trial court's order. *N.C. Concrete Finishers, Inc. v. N.C. Farm Bureau Mut. Ins. Co.*, 202 N.C. App. 334, 336, 688 S.E.2d 534, 535 (2010) (noting that the trial court, in considering a motion for judgment on the pleadings lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c), is only entitled to "'consider facts properly pleaded and documents referred to or attached to the pleadings'") (quoting *Reese v. Mecklenburg County*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009), *disc. rev. denied*, 364 N.C. 242, 698 S.E.2d 653 (2010)).

and if possible, every word and every provision is to be given effect") (alteration in original); *see also Cone Mills Corp. v. Allstate Ins. Co.*, 114 N.C. App. 684, 687, 443 S.E.2d 357, 359 (1994) (stating that, "[w]here the policy language is clear and unambiguous, the court's only duty is to determine the legal effect of the language used and to enforce the agreement as written"), *disc. review improvidently granted*, 340 N.C. 353, 457 S.E.2d 300 (1995). As a result, determining whether Plaintiffs have adequately alleged a "breach of the terms of that contract" requires us to examine the clear and unambiguous procedural provisions set out in the Bulletin in light of the factual allegations set out in the pleadings. *Poor*, 138 N.C. App. at, 26, 530 S.E.2d at 843.

In their complaint, Plaintiffs allege that the Bulletin constituted an enforceable contract between Defendant and themselves and that numerous provisions set out in the Bulletin were violated during the proceedings leading up to the making of the initial disciplinary decision and in connection with Plaintiffs' appeal from that initial disciplinary decision. More specifically, Plaintiffs alleged that Defendant violated the contract between the parties set out in the Bulletin in a number of ways, including violations of:

> a. [Defendant's] written promised procedure that no student may be punished for the conduct of others;
>
> b. [Defendant's] written promised procedure that a student is provided with a trained advisor . . . to seek advice from;
>
> c. [Defendant's] written promised procedure that no student may be punished for failing to prevent others from violating [Defendant's] policies;
>
> d. [Defendant's] written promised procedure that no student may be found responsible and punished except where the evidence meets a "clear and convincing" burden of proof that a policy violation occurred and the accused committed it (at both the Administrative Hearing and the UCB Hearing);
>
> e. [Defendant's] written promised procedure that no student may be disciplined except upon a fair and impartial hearing;
>
> f. [Defendant's] written promised procedure to disclose to an accused student the written evidence and

charges being presented against him to the hearing panel for his knowledge and review at least 120 hours before his disciplinary hearing;

g. [Defendant's] written promised procedure that an accused student be provided the opportunity to rebut any witness testimony presented against him and the promised procedure that material witnesses may only present testimony that is deemed to be directly related to the accused student's case and must avoid relaying hearsay;

h. [Defendant's] written promise[d] procedure that an accused student be notified of a hearing at least 120 hours [in] advance (notification includes the time, date and location of the hearing, evidence against them, as well as names of hearing panel members and witnesses);

i. [Defendant's] written promised procedure that no student may be disciplined by a hearing panel without an opportunity to challenge any panel member if there is a significant conflict of interest, and the implied right to be informed of facts giving rise to such a conflict;

j. [Defendant's] written promised procedure of the right for a student to be accompanied by an advisor to the hearing and to seek advice from anyone;

k. [Defendant's] written promised procedure that a student found responsible by the hearing panel can appeal based on clearly stated grounds and the implied right that the appeals process must be carried out in line with the student's reasonable expectations.

Assuming, without in any way deciding, that the Bulletin created a valid contract between Plaintiffs and Defendant, we do not believe that these allegations adequately allege a breach of the parties' contract.

As we have already noted, the alleged contract between the parties must be viewed in its entirety, with Plaintiffs' right to recover for breach of contract being governed by the relevant contractual provisions. More specifically, Plaintiffs allege that Defendant breached the parties' contract because Plaintiffs were not afforded certain substantive rights and procedural protections afforded by the Bulletin during their initial disciplinary hearing or on appeal. However, the disciplinary procedures

established in the Bulletin recognize the risk that the initial hearing panel may make either substantive or procedural errors and provides a remedy for such errors in the form of further review by the Appellate Board. Put another way, we believe that the alleged contract between the parties creates a unified disciplinary system which cannot provide any basis for a breach of contract action until all relevant procedures have been completed. As a result, given the necessity for Plaintiffs to comply with all of the provisions of the alleged contract between the parties before asserting a claim for breach of contract and the existence of an internal appellate review process in the contract upon which Plaintiffs rely, no breach of contract could have occurred until Defendant had made a disciplinary decision which had been upheld throughout all stages of the contractually established review procedure.

In their complaint, Plaintiffs clearly allege that the Appellate Board overturned the initial disciplinary decision made by the hearing panel and granted them a new disciplinary hearing as the result of both the discovery of new evidence and procedural defects in the manner in which the initial disciplinary hearing was conducted and remanded the matter for further consideration. Given that the initial disciplinary decision upon which Plaintiffs rely has been reversed on appeal in accordance with procedures described in the Bulletin and that no final decision has been made with respect to the issue of whether Plaintiffs violated the applicable disciplinary rules, the pleadings clearly indicate that the disciplinary process contemplated in the Bulletin had not been completed as of the date upon which Plaintiffs filed their complaint. As a result, since no final disciplinary decision has been made, Plaintiffs are not entitled to seek an award of damages or other relief based upon Defendant's alleged failure to comply with the disciplinary procedures set out in the Bulletin.

A decision to reverse the trial court's order granting judgment on the pleadings in favor of Defendant would be tantamount to a holding that, since Plaintiffs have alleged that they were harmed by various deficiencies in the manner in which the disciplinary process had been conducted to date, they have adequately pled a breach of contract on the part of Defendant. Such a decision would, in essence, allow a student who is dissatisfied with the outcome of an initial disciplinary hearing and the appellate review of that decision to initiate civil litigation without the necessity for complying with and awaiting the outcome of all of the procedures enumerated in the Bulletin. In the event that one were to take such a position to its logical conclusion, students subject to discipline on the basis of allegedly defective procedures would be allowed

to bypass the appeal process entirely, effectively rendering the appellate review provisions contained in the Bulletin meaningless. Such an outcome would be inconsistent with the fundamental legal principles that "every provision [in a contract] is to be given effect," *Singleton*, 357 N.C. at 629, 588 S.E.2d at 875, and that any recovery for breach of contract must be "controlled by [the applicable contractual] provisions." *Thompson-Arthur Paving Co.*, 97 N.C. App. at 95, 387 S.E.2d at 74. As a result, any such decision would be inconsistent with fundamental principles of North Carolina contract law.

Although Plaintiffs note that the Appellate Board withheld their transcripts and diplomas "until such time as all charges have been resolved through the conduct system," this assertion is not sufficient to preclude the entry of an order granting judgment on the pleadings in favor of Defendant. As an initial matter, the fact that the Appellate Board withheld Plaintiffs' transcripts and diplomas has no bearing on the extent, if any, to which the disciplinary procedures set out in the Bulletin have been concluded. Secondly, and perhaps more importantly, the Bulletin itself provides that:

> At any time after the filing of a complaint, the conduct officer or designee, after consulting with a student's academic dean, may place a "disciplinary hold" on the academic and/or financial records of any student pending the outcome of proceedings or to enforce a disciplinary sanction. A "disciplinary hold" may prevent, among other things, registration, enrollment, matriculation, the release of transcripts, and the awarding of a degree.

Thus, given that the procedures prescribed in the Bulletin authorize the withholding of Plaintiffs' transcripts and diplomas during the pendency of their disciplinary proceeding and given that the disciplinary proceedings involving Plaintiffs had not been completed, the fact that the Appellate Board withheld Plaintiffs' transcripts and diplomas does not support a showing that Defendant acted in a manner which was contrary to the disciplinary procedures enumerated in the Bulletin. As a result, given that the pleadings, when construed in the light most favorable to Plaintiffs, do not suffice to support a determination that any breach of contract occurred, we conclude that the trial court did not err by granting Defendant's request for the entry judgment on the pleadings in its favor.[3]

---

3. The fact that Plaintiffs might have been unable to obtain injunctive relief at a

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court correctly granted judgment on the pleadings in favor of Defendant. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Chief Judge MARTIN concurs.

Judge ROBERT C. Hunter dissents by separate opinion.

HUNTER, Robert C., Judge, dissenting.

Because I believe the Student Bulletin created an enforceable contract and plaintiffs specifically pled a breach of that contract in their complaint, I conclude that the trial court erred in granting defendant's motion for judgment on the pleadings. Therefore, I respectfully dissent.

Background

Plaintiffs Albert Samost ("Samost") and Timothy Shaughnessy ("Shaughnessy") (collectively "plaintiffs") were seniors at Duke University ("defendant") in the spring of 2011. They lived in off-campus housing. Although each plaintiff lived in his own house, their houses, along with three additional houses, all shared a one-acre backyard.

On 2 April 2011, plaintiffs hosted a party. At approximately 4:45 p.m., a neighbor requested plaintiffs turn the music down. Plaintiffs alleged they did, but the neighbor's husband made a complaint to Dr. Phail Wynn, Duke University's Vice President of Durham and Regional Affairs, reporting that the noise continued even though the music had been turned off. Defendant was also informed that plaintiffs hosted a similar party on 6 April 2011 that resulted in trash in their yard and on the street.

---

time satisfactory to them because of the nature of the disciplinary process set out in the Bulletin does not, in our opinion, tend to show that Defendant breached any contract stemming from the Bulletin. Moreover, while both Defendant's counsel and other agents of Defendant did state that Defendant did not intend to conduct any further disciplinary proceedings involving Plaintiffs, those statements do not justify the denial of Defendant's motion. In essence, these statements indicate that Defendant, after allowing Plaintiffs to graduate, to receive their diplomas, and to have access to their transcripts, had concluded the disciplinary process in Plaintiffs' favor. We are unable to see how such a result supports a determination that Defendant violated any contract arising from the Bulletin.

Based on these complaints, Duke University Assistant Dean of Students Christine Pesetski ("Assistant Dean Pesetski") notified plaintiffs she would be "launching a formal inquiry into this matter in order to determine whether to proceed with possible university disciplinary action." The university policies at issue were disorderly conduct, guests, and "other - violating ordinances and/or laws." For an explanation of Duke's disciplinary system, including policies and procedures, Assistant Dean Pesetski pointed plaintiffs to the online publication "The Duke Community Standard in Practice: A Guide for Undergraduates" (the "Bulletin").

The Bulletin is published each academic year and "expresses a standard for behavior—a set of expectations of students who claim membership in Duke's learning community." All incoming undergraduates, upon admittance, are required to sign a pledge to adhere to the values reflected in the Bulletin. Among other things, the Bulletin includes sections that describe undergraduate policies and the undergraduate disciplinary process.

On 8 April 2011, plaintiffs again hosted a party in their backyard. Two police officers responded and issued Shaughnessy a citation for a noise ordinance violation. Assistant Dean Pesetski notified plaintiffs that she knew about the 8 April 2011 party and citation. She requested plaintiffs meet with her immediately to discuss this issue. Plaintiffs' allege that instead of meeting to discuss an informal resolution in lieu of a formal hearing, Assistant Dean Pesetski referred the matter for formal university hearings.

A disciplinary hearing was held on 4 May 2011 with a five-member Undergraduate Conduct Board panel (the "UCB panel"). After a two-hour long hearing, the UCB panel voted unanimously to hold plaintiffs responsible for violating Duke's "Guest" rule and to hold Shaughnessy responsible for violating Duke's "Other - Violating Ordinances and/or Laws" rule. The UCB panel suspended plaintiffs for two semesters and ordered them to perform 50 hours of community service.

On or about 11 May 2011, plaintiffs appealed the UCB panel's decision. On 12 May, the Appellate Board vacated the UCB's decision and remanded the matter for a new hearing. The Appellate Board agreed to allow plaintiffs to participate in the upcoming commencement exercises but informed them that they would not receive their diplomas until the disciplinary charges were resolved. Graduation ceremonies and the conferment of plaintiffs' diplomas and degrees were scheduled to take place on 14 and 15 May, a Saturday and Sunday. After learning of the Appellate

Board's decision on 12 May, plaintiffs requested that the Chair of the Appellate Board reconsider its decision to remand the matter for a new hearing and its decision to withhold their diplomas.

By Friday afternoon, 13 May 2011, the Chair of the Appellate Board had not responded to plaintiffs' request for reconsideration. However, plaintiffs were contacted to schedule their rehearing before the UCB panel. That same day, plaintiffs filed a complaint in Durham County Superior Court alleging a breach of contract claim and requesting both injunctive relief and damages. With regard to the injunctive relief, plaintiffs requested defendant be enjoined from "interfering with [p]laintiffs' participation in commencement and related events, such as receiving their diplomas or placing a hold on any request for the issuance of [p]laintiffs' transcripts" and subjecting them to further disciplinary proceedings. On that same day, plaintiffs filed a motion for a temporary restraining order and preliminary injunction ("TRO"). A hearing was held that same afternoon with regard to plaintiffs' TRO. At the hearing, Duke agreed to allow plaintiffs to graduate and receive their diplomas. No TRO was filed.

Defendant sent plaintiffs letters dated 20 May 2011, after graduation exercises, informing them that defendant would not place any administrative holds on their transcripts and that their cases were considered "closed" and would not be referred to a new panel for reconsideration. It is not clear from the record whether plaintiffs were aware that their cases were "closed" or that there would be no administrative hold on their transcripts prior to the 20 May letter. On 12 August 2011, defendant filed an Answer reiterating that it would conduct no further disciplinary hearings and that the disciplinary action against plaintiffs was "close[d]." That same day, defendant filed a motion for judgment on the pleadings pursuant to Rule 12(c). The matter came on for hearing on 9 January 2012. The trial court granted defendant's motion and dismissed plaintiffs' complaint with prejudice on 12 January 2012. Plaintiffs appealed on 18 January 2012.

Arguments

Plaintiffs' sole argument on appeal is that the trial court erred in granting defendant's motion for judgment on the pleadings. Specifically, relying on *Ryan v. University of N.C. Hosps.*, 128 N.C. App 300, 494 S.E.2d 789, *disc. review improvidently allowed*, 349 N.C. 349, 507 S.E.2d 39 (1998), and persuasive authority from other jurisdictions, plaintiffs contend that the relationship between a university and a student is contractual in nature. The Bulletin's specific, express promises

regarding the procedural guarantees governing disciplinary matters constitute the terms of their contract. By failing to comply with those promises, defendant breached its contract with plaintiffs. I agree with plaintiffs and recognize the relationship between plaintiffs and defendant as contractual in nature. Thus, the terms of that contract include the express, nonacademic promises defendant made in the Bulletin regarding the disciplinary process, specifically the "procedural rights" afforded to "accused students." Accordingly, I believe plaintiffs' complaint sufficiently pled facts to warrant further proceedings, and the trial court erred in granting defendant's motion for judgment on the pleadings.

We review the trial court's ruling on a motion for judgment on the pleadings *de novo*. *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005). "The [motion's] function is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit. A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). When determining whether to grant a motion for judgment on the pleadings, "[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party." *Id.* (internal citations omitted). "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Griffith v. Glen Wood Co., Inc.*, 184 N.C. App. 206, 210, 646 S.E.2d 550, 554 (2007).

The first issue the trial court was required to determine was whether the Bulletin constituted an enforceable contract. Although the majority assumes, without deciding, that the Bulletin created an enforceable contract, I must decide this issue since my ultimate conclusion requires a showing of both elements of a breach of contract claim—existence of a valid contract and breach. In support of their argument that the Bulletin's terms were enforceable, plaintiffs rely on *Ryan*. In *Ryan*, 128 N.C. App. at 301, 494 S.E.2d at 790, the plaintiff was a medical resident who was matched as a resident with the defendant University of North Carolina Hospitals. The parties entered into a one-year written contract that was renewable for each of the three years of the residency. Id. During the second year of his residency, the plaintiff alleged that the defendant planned to terminate the residency. *Id.* Plaintiff filed an action against the defendant alleging breach of contract and various other claims. *Id.*

The trial court granted the defendant's motion to dismiss on all claims. *Id.* Plaintiff appealed the dismissal of his breach of contract

claim contending that he had an "employment contract whereby [he] worked for a 'substandard wage' in 'partial consideration' for a 'training program in full compliance with the Accreditation Council for Graduate Medical Education Residency Review Committee.' " *Id.* This Court reversed noting that one of the plaintiff's claims did not involve an "inquiry into the nuances of educational processes and theories"—specifically, plaintiff alleged that the defendant breached the "Essentials of Accredited Residencies" that required a one-month rotation in gynecology. *Id.* at 302-03, 494 S.E.2d at 791. Thus, the Court held that the plaintiff alleged facts sufficient to support his breach of contract claim based on the defendant's failure to provide him a one-month rotation in gynecology. *Id.* at 303, 494 S.E.2d at 791. In support of its conclusion, the *Ryan* court cites *Ross v. Creighton Univ.*, 957 F.2d 410, 417 (7th Cir. 1992), where the Seventh Circuit concluded that a student may allege a breach of contract claim against his university if he "point[s] to an identifiable contractual promise that [the University] failed to honor." *Id.* at 302, 494 S.E.2d at 791.

Plaintiffs contend that the "identifiable contractual promise," *Ross*, 957 F.2d at 417, defendant made was to adhere to the terms and conditions regarding disciplinary proceedings stated in the Bulletin. In contrast, defendant asserts that "*Ryan* does not hold that all educational handbooks are enforceable contracts." Instead, defendant argues that this case is controlled by our caselaw holding that policies and procedures included in employment handbooks or manuals do not become enforceable unless they are expressly included in an employment contract. *See Walker v. Westinghouse Elec. Corp.*, 77 N.C. App. 253, 259, 335 S.E.2d 79, 83-84 (1985) (noting that "employment manuals or policies do not become part of the employment contract unless expressly included in it"); *Black v. Western Carolina Univ.*, 109 N.C. App. 209, 213-14, 426 S.E.2d 733, 736, *writ denied*, 334 N.C. 433, 433 S.E.2d 173 (1993) (holding that because "neither of the plaintiff's employment contracts expressly incorporated the provisions of the UNC Code[,]" the Code was not an enforceable contract). Thus, pursuant to defendant's arguments, if the policies and promises in an educational handbook or manual are not specifically incorporated into a written contract between the student and the university, they are not enforceable.

In reviewing the relevant caselaw in our federal courts, the issue of whether a student handbook, which would include the Bulletin, can create a valid and enforceable contract is unsettled. For example, in *Love v. Duke Univ.*, 776 F. Supp. 1070, 1075 (M.D.N.C.1991), *aff'd*, 959 F.2d 231 (4th Cir. 1992), the court held that the academic bulletin was

not a binding contract between a student and the university. Similarly, in *Guiliani v. Duke Univ.*, No. 1:08CV502, 2010 WL 1292321, *7–8 (M.D.N.C. 2010), the court dismissed the plaintiff's breach of contract claim where the student did not allege the existence of a contract that specifically incorporated the university's handbooks and policy manuals into a contract.

However, in *McFadyen v. Duke Univ.*, 786 F. Supp. 2d 887, 983 (M.D.N.C. 2011), *reversed in part, affirmed in part, and dismissed in part on other grounds in Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012), the court allowed the plaintiff's breach of contract claim to proceed with regard to his allegations that the defendant failed to follow promised disciplinary procedures outlined in the Student Bulletin and Student Code of Conduct. Citing *Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 34-35 (1st Cir. 2007), the court held that

> a breach of contract claim would not allow for review of the substance of the disciplinary proceedings, since that is a matter left to educational discretion, a breach of contract claim could potentially reach the limited inquiry of whether Duke failed to follow promised procedures for imposing discipline (particularly suspension) under the Code of Conduct.

McFadyen, 786 F. Supp. 2d at 983.

As in *McFadyen*, other federal courts have construed student handbooks and manuals as binding contracts. In *Havlik*, 509 F.3d at 34, the First Circuit noted that the relationship between a student and the university is contractual and the "relevant terms of the contractual relationship between a student and a university typically include language found in the university's student handbook." In *Mangla v. Brown Univ.*, 135 F.3d 80, 83 (1st Cir. 1998), the court stated that "[t]he student-college relationship is essentially contractual in nature. The terms of the contract may include statements provided in student manuals and registration materials."

In *Ross*, 957 F.2d at 416, the Seventh Circuit, in reviewing other states' treatment of the relationship between a student and a private university or college, found that "[i]t is held generally in the United States that the basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract." However, the *Ross* Court emphasized that not

all breach of contract claims against a private university or college are proper: "To state a claim for breach of contract, the plaintiff must do more than simply allege that the education was not good enough. Instead, he must point to an identifiable contractual promise that the defendant failed to honor." *Ross*, 957 F.2d at 416-17.

I find the reasoning of *McFayden* and the Seventh and First Circuits persuasive and would adopt their reasoning.[1] Accordingly, I conclude that the procedural rights afforded to students involved in the disciplinary process that are specifically stated in the Bulletin are judicially enforceable. Here, I believe that plaintiffs' complaint sufficiently pled a breach of contract claim by asserting that defendant failed to comply with those procedural rights. Plaintiffs' complaint did not challenge academic matters or attack the quality of their education, *see Ross*, 957 F.2d at 416; assert a breach of contract claim based on general policies contained in a student manual, *see McFadyen*, 86 F. Supp. 2d at 982-83; or challenge the substance of the procedural mechanism, *see id.* at 983. Plaintiffs' complaint only alleged that defendant failed to abide by the specific promises set forth in the Bulletin regarding their procedural rights in the undergraduate disciplinary system. Accordingly, I believe plaintiffs' breach of contract claim should be allowed to proceed with regard to defendant's alleged failure to comply with promised rights in their disciplinary procedures.

I note that in their brief, defendant contends that even if the Court concludes that the Bulletin constitutes an enforceable contract, plaintiffs cannot prevail on their breach of contract claim because the complaint fails to show that defendant breached the contractual provisions of the Bulletin. However, I disagree. Here, plaintiffs have alleged facts that, when treated as true, support an inference that defendant violated specific provisions of its academic disciplinary procedure, as stated in the Bulletin. While I do not express an opinion as to whether plaintiffs would ultimately prevail in their claims, I do believe that this aspect of defendant's argument is more appropriate in a summary judgment motion.

---

1. It is important to note that while students facing suspension or expulsion from *public* schools are entitled to procedural due process pursuant to the 14th Amendment to the United States Constitution, *see Goss v. Lopez*, 419 U.S. 565, 576, 42 L. Ed. 2d 725, 739 (1975), and Article I, Section 19 of the North Carolina Constitution, *see Sneed v. Greensboro City Bd. of Ed.*, 299 N.C. 609, 618, 264 S.E.2d 106, 113 (1980), students at *private* universities and colleges are not afforded this same constitutional protection since there is no state action, *see N.C. Nat. Bank v. Burnette*, 297 N.C. 524, 535, 256 S.E.2d 388, 394 (1979) (noting that the constitutional due process protects individuals only where there has been state action).

The majority holds that there has been no breach until defendant made a decision which was upheld in all stages of the review procedure. Thus, since the disciplinary process had not been completed on the date at which plaintiffs filed their complaint, there has been no breach. Therefore, plaintiffs are not entitled to seek an award of damages or other relief according to the majority. In other words, the majority holds that plaintiffs would not be entitled to seek an award of damages or other relief for breach of contract until the UCB panel reheard the case, made a decision, plaintiffs had a chance to appeal that decision, and the Appellate Board made a final decision.

However, I disagree with the majority's conclusion that plaintiffs were required to wait to file their complaint until all disciplinary proceedings were completed for two primary reasons. First, the majority's conclusion ignores the nature of one of plaintiffs' requested forms of relief, injunctive relief. Plaintiffs requested the trial court enjoin defendant from interfering with their participation in graduation exercises, including receiving their diplomas or placing a hold on their academic transcripts. While the Appellate Board had agreed to let plaintiffs participate in commencement exercises, it had informed them that they would not receive their diplomas and their transcripts would be placed on hold. All of the disciplinary proceedings necessary to render a final decision would have occurred after graduation. Thus, since graduation activities were to occur that Saturday and Sunday, plaintiffs had to file for injunctive relief that Friday afternoon or else they would lose their opportunity to obtain this relief prior to graduation. Because plaintiffs' request for damages also stemmed from the breach of contract claim, plaintiffs properly included their request for damages in their complaint.

Second, for all intents and purposes, defendant's decision to not pursue further disciplinary action against plaintiffs constituted a final decision. In addition, this decision to "close" the proceedings was reflected in the parties' pleadings. Defendant sent plaintiffs letters on 20 May specifically stating that it considered the disciplinary matters against them "closed" and informing them that it would not be referring their case to a new UCB panel. In its Answer, defendant noted this and attached a copy of the 20 May 2011 correspondence. At the hearing on defendant's motion for judgment on the pleadings, defendant emphasized this point on at least two occasions. Thus, these statements were included in the parties' pleadings and made known to the trial court at the time it ruled on the motion for judgment on the pleadings.

Based on these reasons, I respectfully disagree with the majority's conclusion that granting defendant's motion for judgment on the

pleadings was proper because the disciplinary proceedings had not been "completed." I believe that the majority's holding, which concludes otherwise, would put plaintiffs in a position where they were unable to obtain appropriate relief from either defendant or the courts.

Conclusion

Because I believe that plaintiffs have successfully pled a breach of contract claim, I would hold that the trial court erred in granting defendant's motion for judgment on the pleadings. Accordingly, I would reverse and remand the matter to the trial court for further proceedings.

STATE OF NORTH CAROLINA
v.
JULIE ANN NOBLE

No. COA12-734

Filed 16 April 2013

1. Homicide—involuntary manslaughter—providing alcohol to a minor—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence a charge of involuntary manslaughter that arose from underage drinking in defendant's home. The State presented substantial evidence that defendant knowingly provided and allowed the consumption of alcohol as part of a plan, scheme, system, or design that created an environment in which the victim could possess and consume alcohol.

2. Evidence—prior crimes or bad acts—providing alcohol to minors

The trial court did not err in an involuntary manslaughter prosecution that arose from underage drinking in defendant's home by allowing the State to present evidence of defendant's alleged prior bad acts. The testimony in question was probative of a plan by defendant to create an environment where the victim felt comfortable possessing and consuming alcohol. Any error from testimony that defendant's husband had once encouraged the victim to consume alcohol in their home was harmless considering the other substantial evidence of defendant's guilt.

3. Evidence—prior crimes or bad acts—limiting instruction—not prejudicial

In an involuntary manslaughter prosecution that arose from providing alcohol to minors, the trial court did not err by allowing evidence of defendant's prior bad acts. The evidence was probative of whether defendant possessed knowledge of the victim's age and had a plan to make an environment that encouraged the victim to possess and consume alcohol. Furthermore, the trial court properly instructed the jury that the evidence was admitted for the limited purpose of showing that defendant had knowledge of the victim's age and a plan to create an environment that encouraged his consumption of alcohol.

Appeal by defendant from judgment entered 18 November 2011 by Judge Gary M. Gavenus in Transylvania County Superior Court. Heard in the Court of Appeals 29 January 2013.

Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders Jon H. Hunt and Benjamin Dowling-Sendor, for defendant-appellant.

HUNTER, Robert C., Judge.

Julie Ann Noble ("defendant") appeals from the judgment entered after a jury found her guilty of involuntary manslaughter for her involvement in the death of Joseph Daniel Furr ("Daniel") who died from alcohol poisoning at defendant's home. On appeal, defendant argues that the trial court erred by: (1) denying her motion to dismiss the charge of involuntary manslaughter for insufficient evidence; and (2) allowing the State to present evidence of defendant's alleged prior bad acts in violation of Rule 403 and Rule 404(b) of the North Carolina Rules of Evidence. After careful review, we find no error.

Background

Before trial, defendant sought to exclude the State's evidence of defendant's alleged prior bad acts relating to underage persons possessing and consuming alcohol at defendant's home. After the trial court conducted a *voir dire* hearing to listen to the State's evidence, it denied

defendant's motion. The evidence presented at trial tended to establish the following.

In 2008, defendant resided in Brevard, North Carolina with her husband, Allen Noble, and two sons, Zachary ("Zach") and Cody. Defendant often hosted parties at her home for Zach, Cody, and their friends during which guests under the age of 21 would consume alcohol. The alcohol at some of these gatherings was provided by defendant and her husband. As attendance at these parties increased, however, underage guests would bring their own alcohol.

Trek Parker, a friend of Daniel, often visited defendant's home and saw defendant drinking with underage guests. At one of these parties, Trek saw Daniel drinking alcohol in the presence of defendant. Because the alcohol was set out in coolers around the house, Trek believed that the alcohol Daniel was drinking was provided by defendant and her husband. Adam Parker also testified that he attended parties at defendant's home which were often held in the basement of the house and attended mostly by individuals under 21 years old. Adam testified that he would consume alcohol and play drinking games at these parties in the presence of defendant and that defendant knew he was under 21. According to Adam, defendant was conscientious about not allowing anyone who had been drinking to drive home; defendant would collect the car keys of the guests at these parties and insisted that they use designated drivers when leaving.

In October or November of 2008, defendant was seen at the grocery store with Daniel who was pushing a grocery cart containing nine cases of beer. Defendant paid for the beer and left the store with Daniel. Brittany Reece testified that she accompanied Daniel to a 2008 Halloween party at defendant's home during which defendant offered shots of alcohol to Daniel and other underage persons.

Early on the morning of 20 December 2008, the Transylvania Sheriff's Office responded to a complaint of a loud party and underage drinking at defendant's home. When two detectives arrived at defendant's home they found defendant outside with a number of intoxicated underage individuals. The detectives asked to conduct a safety sweep of the house. The detectives explained to defendant that they were concerned there were additional underage people drinking alcohol in the home and that they "needed to check to make sure they're all right because you can die from alcohol poisoning." Although initially uncooperative, defendant allowed the detectives into her home. In the basement level of the house, the detectives noticed empty beer cans and liquor bottles lying around and

they found several underage persons who had been drinking alcohol, including Daniel. The officers smelled alcohol on Daniel's breath, determined he was 19 years old, and cited him for underage possession of alcohol. Defendant was cited for resisting, obstructing, and delaying an officer as well as aiding and abetting a person less than 21 years of age to possess or consume alcohol.

On 26 December 2008, defendant purchased two bottles of Kentucky Supreme bourbon at the ABC store in Brevard. That night, defendant ate dinner with her husband, her sons, and three guests, Daniel, Rinski Brouwer, and James McDaniel. At approximately 11:30 p.m., Zack, Cody, Daniel, Rinski, and James went to the basement of the house to play pool and watch television. Zach testified that Daniel retrieved an unopened bottle of Kentucky Supreme bourbon from his backpack and that Zach, James, and Daniel drank mixed drinks made from the bottle of bourbon. When defendant came down to the basement after dinner, Daniel put the bottle of bourbon away but resumed drinking after she left. By the time Zack went to bed at approximately 2:30 a.m., Daniel was "pretty drunk." Later that morning, when Cody was getting ready to go to work he discovered Daniel sitting at a table in the basement slumped over and unresponsive. James attempted to revive Daniel by performing CPR, but was unsuccessful. Rinski testified that defendant and her husband came down to the basement and began cleaning up by throwing away the bottles of alcohol before calling 911. Daniel's autopsy revealed that he died of alcohol poisoning.

Defendant was charged with involuntary manslaughter based on the unlawful act of aiding and abetting a person under the age of 21 to possess or consume alcohol in violation of N.C. Gen. Stat. § 18B-302. At the conclusion of all of the evidence, defendant moved to dismiss the charge for insufficient evidence. The motion was denied. The jury found defendant guilty of involuntary manslaughter, and the trial court sentenced defendant to a term of 16 to 20 months imprisonment. Defendant appeals.

Discussion

I. Motion to Dismiss

[1] Defendant argues that the trial court erred by denying her motion to dismiss the charge of involuntary manslaughter for insufficient evidence. We disagree.

When a defendant makes a motion to dismiss for insufficient evidence "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a

lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). When presented with circumstantial evidence, " 'the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances.' " *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 919 (1993)). If so, it is the jury's duty to determine if the defendant is actually guilty. *Id.*

"The elements of involuntary manslaughter are: (1) an unintentional killing; (2) proximately caused by either (a) an unlawful act not amounting to a felony and not ordinarily dangerous to human life, or (b) culpable negligence." *State v. Hudson*, 345 N.C. 729, 733, 483 S.E.2d 436, 439 (1997). A proximate cause is an act which "caused or directly contributed to the death." *State v. Cummings*, 301 N.C. 374, 377, 271 S.E.2d 277, 279 (1980). There may be more than one proximate cause of death, and criminal responsibility attaches so long as one of the proximate causes is attributable to a criminal act of the defendant. *See id.* "[T]he question of whether [a] defendant's conduct was the proximate cause of death is a question for the jury." *State v. Bailey*, 184 N.C. App. 746, 749, 646 S.E.2d 837, 839 (2007).

The alleged unlawful act that the State argued supported the charge of involuntary manslaughter was that defendant aided and abetted a person under the age of 21 with the possession or consumption of an alcoholic beverage in violation or N.C. Gen. Stat. § 18B-302.

> A person is guilty of a crime by aiding and abetting if (i) the crime was committed by some other person; (ii) the defendant knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime; and (iii) the defendant's actions or statements caused or contributed to the commission of the crime by that other person.

State v. Goode, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999). "An aider or abettor is a person who is actually or constructively present at the scene of the crime and who aids, advises, counsels, instigates or encourages another to commit the offense." *State v. Barnette*, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981). Aiding and abetting is not founded upon the defendant's mere presence at the scene of the crime. *See Goode*, 350 N.C. at 260, 512 S.E.2d at 422. Rather, "to be guilty [the defendant] must aid or actively encourage the person committing the crime or in some way communicate to this person his intention to assist in its commission." *Id.*

Defendant argues that the State was required to prove that defendant provided Daniel with the alcohol he drank the morning of his death, specifically a bottle of Kentucky Supreme bourbon. Because, defendant contends, the State's evidence created no more than mere suspicion as to whether defendant gave Daniel the bottle of bourbon from which he was drinking the morning of his death, the trial court erred in failing to dismiss the charge against her. Contrary to defendant's argument, the State was not required to prove that defendant provided Daniel with the alcohol that he consumed and which caused his death. Rather, the State had to prove: (1) that Daniel was under the age of 21 and possessed malt beverage, spirituous liquor, or mixed beverage or consumed any alcoholic beverage; (2) that defendant aided or encouraged Daniel to possess or consume that alcohol; (3) that defendant knew or had reason to know that Daniel was under the age of 21 at the time of the crime; and (4) that defendant was over the age of 21. *See* N.C. Gen. Stat. § 18B-302(b), (c)(2) (2011).

The evidence established that at the time of Daniel's death defendant was over the age of 21 and that Daniel was 19 years old. The State also presented evidence that defendant knew that Daniel was under the age of 21 at the time of his death. On 8 December 2008, a few weeks before Daniel's death, defendant assisted Daniel with an employment application for a job at defendant's place of employment. Defendant testified that she completed the application form for Daniel and wrote his date of birth on the form, 16 February 1989. Furthermore, the State presented substantial evidence that Daniel consumed alcohol and that this led to his death as defendant's son testified that Daniel was drinking bourbon on the morning he died from alcohol poisoning.

The State also produced substantial evidence that defendant "knowingly advised, instigated, encouraged, procured, or aided[,]" *Goode*, 350 N.C. at 260, 512 S.E.2d at 422, Daniel in possessing or consuming the alcohol that caused his death. The evidence established that defendant

frequently hosted parties at her home during which defendant was aware that underage people, including Daniel, consumed alcohol. On at least one occasion, defendant was seen offering alcohol to Daniel, and defendant knew the Daniel was under the age of 21. The State presented substantial evidence that defendant's actions of allowing Daniel to consume, and providing Daniel with, alcohol were part of a plan, scheme, system, or design that created an environment in which Daniel could possess and consume alcohol and that her actions were done knowingly and were not a result of mistake or accident. Viewed in the light most favorable to the State, we conclude the evidence was sufficient to allow a reasonable juror to conclude that defendant assisted and encouraged Daniel to possess and consume the alcohol that caused his death. Therefore, the trial court did not err in denying defendant's motion to dismiss the charge of involuntary manslaughter.

II. Rule 404(b) Evidence

[2] Defendant also contends that the trial court erred in allowing the State to present evidence of defendant's alleged prior bad acts in violation of Rule 403 and 404(b) of the North Carolina Rules of Evidence in that the only relevance of the evidence was to establish defendant's propensity to commit the crime, was unfairly prejudicial, and was confusing to the jury. We disagree.

The Supreme Court of North Carolina has recently clarified the standard of review for evidentiary rulings under Rules 403 and 404(b) in *State v. Beckelheimer*, __ N.C. __, 726 S.E.2d 156 (2012).

> When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, as it did here, we look to whether the evidence supports the findings and whether the findings support the conclusions. We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

Id. at __, 726 S.E.2d at 159.

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2011). The rule, however, provides for the admission of such evidence if offered "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* Rule 404(b) is 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.
>
> > Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also "is relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried."

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (quoting *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987) (citation omitted), *cert. denied*, 108 S. Ct. 1598, 99 L. Ed. 2d 912 (1988)). Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2011).

When determining whether evidence of a defendant's other acts is admissible under Rule 404(b), the trial court must also consider the similarity between, and temporal proximity of, the crime charged and the act of which evidence is being offered. *Beckelheimer*, __ N.C. at __, 726 S.E.2d at 159. "Prior acts are sufficiently similar 'if there are some unusual facts present in both crimes' that would indicate that the same person committed them," *id.* (quoting *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890-91 (1991)), and "go to a purpose other than propensity," *id.* __ N.C. at __, 726 S.E.2d at 160. Finally, even if the trial court concludes the evidence is relevant to something other than the defendant's propensity to commit the crime, as well as sufficiently similar and temporally related to the crime charged, the evidence may be excluded under Rule 403 if the trial court determines that admission of the evidence would result in unfair prejudice, confusion of the issues, or would mislead the jury. N.C. Gen. Stat. § 8C-1, Rule 403.

Defendant contends the trial court erred in allowing the State to present evidence: that defendant provided her home as a place for individuals under the legal drinking age, including Daniel, to possess and consume alcohol; that defendant offered Daniel and other underage persons alcohol at these parties; that defendant purchased alcohol at a

grocery store while accompanied by Daniel; and the defendant was cited for aiding and abetting Daniel and other persons less than 21 years old to possess or consume alcohol one week before Daniel's death.

In response to defendant's motion to exclude this evidence, the trial court conducted a *voir dire* hearing after which it concluded that the evidence was admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, the absence of mistake, and the absence of accident. The trial court found that in the events testified to by the witnesses defendant was present when alcohol was purchased in the presence of an underage person or was present and aware that underage persons were offered and/or consumed alcoholic beverages on defendant's property. These findings are supported by the record as detailed above, and the findings support the trial court's conclusion that the testimony was admissible as evidence of a plan, knowledge, and absence of mistake or accident in aiding and abetting possession and consumption of alcohol by persons under 21 years old.

The evidence of parties at defendant's home at which defendant provided alcohol to Daniel and other underage persons, and those parties at which the underage persons brought their own alcohol is probative of defendant's plan to create an environment at her home where Daniel felt comfortable possessing and consuming alcohol. The evidence of defendant purchasing beer while Daniel was pushing defendant's grocery cart was admissible for this same reason. The evidence of the prior charge of aiding and abetting was probative of defendant's knowledge that in the parties often held in her basement underage persons possessed and consumed alcohol, and that her actions of permitting such conduct in her home could result in their deaths.

Defendant contends that the testimony of Trek Parker and Adam Perkins that defendant held parties at her home at which underage persons, including Daniel, consumed alcohol concerned events that occurred two to three years before Daniel's death and were too remote to be admissible. Because this testimony by Parker and Perkins was probative of a plan by defendant to create an environment where Daniel felt comfortable possessing and consuming alcohol, we conclude the events these witnesses described were not too remote in time from the crime charged to be inadmissible. *See State v. Patterson*, 149 N.C. App. 354, 364, 561 S.E.2d 321, 327 (2002) (concluding that evidence of the defendant's prior bad acts of providing alcohol to minors and inviting them to his home for parties where he sexually abused them were not too remote to be relevant evidence of a common scheme or plan even though they occurred ten and fifteen years earlier).

Defendant also argues that testimony that her husband had once encouraged Daniel to consume alcohol in their home was inadmissible and prejudicial. Assuming without deciding that this testimony was inadmissible under Rule 404(b), we conclude that the error was harmless; considering the other substantial evidence of defendant's guilt, there is no reasonable possibility that the jury would have reached a different verdict had this testimony about defendant's husband not been admitted. *State v. Willis*, 332 N.C. 151, 168, 420 S.E.2d 158, 165 (1992) (concluding that although the trial court erred in admitting evidence of prior acts under Rule 404(b) the error was harmless as it is was not likely that the jury would have reached a different conclusion in light of the other evidence of the defendant's guilt); N.C. Gen. Stat. § 15A-1443 (2011).

[3] Lastly defendant contends that even if this evidence was admissible under Rule 404(b), the trial court erred by not excluding the evidence under Rule 403 as it was unfairly prejudicial and confused the jury. Defendant argues these prior acts were not relevant to the charge of involuntary manslaughter and led the jury to believe the prior acts evidence could serve as evidence of the unlawful act that was the basis of the involuntary manslaughter of Daniel. In support of her argument, defendant points to the jury's request for clarification of the trial court's instructions on proximate cause during its deliberations.

As discussed above, we conclude the evidence of defendant's prior acts was relevant to the charge of involuntary manslaughter as it was probative of whether defendant possessed knowledge of Daniel's age, and a plan to make an environment that encouraged Daniel to possess and consume alcohol. The trial court was aware of the potential of prejudice and properly instructed the jury that the evidence was admitted for the limited purpose of showing that defendant had "the knowledge, which is a necessary element of the crime charged in this case and there existed in the mind of the defendant a plan, scheme, system or design involving the crime charged in this case, absence of mistake and the absence of accident." *See State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998) (rejecting argument that the trial court abused its discretion in admitting evidence of prior bad acts where the "court was aware of the potential danger of unfair prejudice to defendant . . . was careful to give a proper limiting instruction to the jury" and the evidence was "highly probative" of the defendant's knowledge that his actions would likely kill the victim). That the jury requested clarification of the meaning of proximate cause and that the trial court provided additional explanation of the term is not sufficient to establish that the trial court abused its discretion in admitting the evidence.

Conclusion

For the reasons stated above, we conclude the trial court did not err in denying defendant's motion to dismiss or in admitting the evidence of defendant's prior bad acts.

NO ERROR.

Judges McCULLOUGH and DAVIS concur.

STATE OF NORTH CAROLINA
v.
ISHMAEL LAMAR QUICK

No. COA12-1111

Filed 16 April 2013

Constitutional Law—right to counsel violation—right against self-incrimination violation—motion to suppress statements

The trial court did not err by suppressing defendant's statements based on violations of his right to counsel and right against self-incrimination. Defendant asserted his right to counsel and did not initiate communication with the police. Even if defendant had initiated communications, the State did not prove that any waiver therefrom was knowing and intelligent. Finally, the issue of whether defendant was in custody was not preserved for appellate review because it was not argued at trial.

Appeal by the State from order entered 14 May 2012 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 27 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

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

HUNTER, JR., Robert N., Judge.

The State appeals from an order entered 14 May 2012 suppressing statements made by Ishmael Lamar Quick ("Defendant") based on violations of his right to counsel and right against self-incrimination. We affirm the trial court's order.

I. Factual & Procedural Background

On 27 April 2010, Defendant was in custody at the Harnett County Detention Center. Detective Rodney Jackson of the Harnett County Sherriff's Office had secured warrants for additional charges against Defendant and led him from the jail to the interrogation room of the Sherriff's Department. After Detective Jackson read Defendant his *Miranda* rights at 12:32 p.m., Defendant said that he wanted his attorney present and asked to contact his attorney.

Detective Jackson and Defendant left the interrogation room and went to another room, where Defendant tried to use the phone to contact his lawyer. When he was unable to contact his attorney, Defendant left a message. Detective Jackson returned Defendant to the interrogation room and asked if he "still wanted his lawyer present." Defendant again said that he wanted his attorney.

While walking from the interrogation room back to the jail, Detective Jackson told Defendant that he would be serving him with more warrants. He told Defendant that an attorney did not need to be present, that an attorney would not help with the warrants, and that the warrants would be served regardless of whether the attorney was there. At that point, Defendant said, "We need to talk."

Detective Jackson returned Defendant to the interrogation room and re-read him his *Miranda* rights at 12:39 p.m. At 12:48 p.m., a waiver form was filled out, and Defendant signed the form indicating that he wanted to talk without his attorney. The form was witnessed by another detective at 12:59 p.m.

Defendant was indicted on charges of felonious breaking or entering, felonious larceny pursuant to a breaking or entering, felonious possession of stolen goods, and felonious conspiracy to commit breaking or entering. On 8 May 2012, Defendant filed a motion to suppress based on violations of his Sixth Amendment rights. A hearing was held before Judge Mary Ann Tally in Cumberland County Superior Court on 10 May 2012. On 14 May 2012, the trial court granted the motion to suppress. The State filed timely notice of appeal.

II. Jurisdiction & Standard of Review

This Court has jurisdiction pursuant to N.C. Gen. Stat. §§ 15A-979(c) and 15A-1445(b) (2011). 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).

III. Analysis

The State argues that the trial court erred in granting Defendant's motion to suppress because: (1) Defendant was not in custody; (2) Defendant initiated a communication with police; and (3) Defendant's waiver was knowing and intelligent. We disagree and thus affirm the order of the trial court.

Miranda v. Arizona, 384 U.S. 436, 444 (1966), established that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda* established a right to counsel if the defendant "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking." *Id.* at 444-45. "[D]uring custodial interrogation, once a suspect invokes his right to counsel, all questioning must cease until an attorney is present or the suspect initiates further communication with the police." *State v. Dix*, 194 N.C. App. 151, 155, 669 S.E.2d 25, 28 (2008) (citing *Edwards v. Arizona*, 451 U.S. 477, 485 (1981)).

The State first contends that Defendant was not in custody for purposes of *Miranda*. However, we do not need to address this argument, as it was not raised at the trial court hearing. The State argued at the hearing that Defendant initiated his communication with the police. The State never argued or mentioned Defendant not being in custody. "[A] contention not raised and argued in the trial court may not be raised and argued for the first time on appeal." *In re Hutchinson*, ___ N.C. App. ___, ___, 723 S.E.2d 131, 133 (2012); *see also Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("[T]he law does not permit parties to swap horses between courts in order to get a better mount. . . ."). We therefore will not consider the State's argument that Defendant was not in custody.

The State next argues that Defendant initiated contact with the police following his initial request for counsel and thus waived his right to counsel. "A valid waiver can only occur if the defendant reinitiates the conversation and the waiver was knowing and intelligent." *State v. Tucker*, 331 N.C. 12, 35-36, 414 S.E.2d 548, 561 (1992).

The trial court in the present case found both that Defendant did not reinitiate and that Defendant's waiver was not "knowing and intelligent." The State does not contest the trial court's finding of fact that, after Defendant had attempted to contact his attorney, Detective Jackson returned Defendant to the interrogation room and asked him again if he wanted an attorney. Defendant answered in the affirmative. The State also does not contest the trial court's finding of fact that

> On the way back from the interrogation room, Detective Jackson told the defendant that he [had] more warrants to serve on him, that an attorney would not be able to help with the warrants, and that defendant would be served with the warrants regardless of whether the attorney was there or not. Defendant thereafter agreed to talk.

The State argues that the trial court was incorrect in concluding from these facts that Defendant did not initiate the communication.

"Interrogation" under *Miranda* encompasses "not only . . . express questioning, but also . . . any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). The test is whether the police "should have known" their comments were likely to elicit an incriminating response. *Id.* at 302.

In the present case, after Defendant asserted his right to counsel once, the police returned him to the interrogation room and again asked if wanted counsel, to which he said yes. Then, on the way from the interrogation room back to the jail, Detective Jackson told Defendant that an attorney would not able to help him and that he would be served with the warrants regardless of whether an attorney was there. This communication went beyond the statements normally attendant to arrest and custody. The police knew or should have known that telling Defendant that an attorney could not help him with the warrants would be reasonably likely to elicit an incriminating response. It was only after this statement by police that Defendant agreed to talk. Defendant did not initiate the communication.

This case is distinguishable from holdings in *State v. Allen*, 200 N.C. App. 709, 684 S.E.2d 526 (2009), and *State v. Thomas*, 310 N.C. 369, 312 S.E.2d 458 (1984). In *Allen*, the detective merely stated that the defendant was being charged with second-degree murder and then proceeded to serve the defendant with the warrants. 200 N.C. App. at 718-19, 684 S.E.2d at 533. Our Court found that this did not constitute interrogation, as the detective merely stated the charges brought against the defendant, statements "normally attendant to arrest and custody." *Id.* at 719, 684 S.E.2d at 533 (quotation marks and citation omitted). The statements in the present case, however, go beyond those "normally attendant to arrest and custody." Detective Jackson went further in stating that "an attorney would not be able to help [Defendant] with the warrants," making comments he knew or should have known were reasonably likely to elicit an incriminating response.

In *Thomas*, the detective remarked to the defendant that "he should be sure and tell his attorney [that] he had a chance to help himself and did not do so." 310 N.C. at 377, 312 S.E.2d at 463. Five minutes later, the defendant asked the officers whether they still wanted a statement. *Id.* The officers told the defendant it was up to him, and the defendant stated he would like to give a statement. *Id.* Our Supreme Court found that the officer's " 'off-hand' remark" was not interrogation because the officer should not have known that it was reasonably likely to provoke the defendant into making an incriminating statement. *Id.* at 377-78, 312 S.E.2d at 463. Our Supreme Court found that the defendant's statement was not in response to any question asked by officers and was thus admissible. *Id.* at 377-79, 312 S.E.2d at 463-64. In the present case, however, Defendant's statement was in direct response to Detective Jackson's comments that an attorney would not be able to help him. While the detective in *Thomas* made an off-hand comment about the defendant telling his attorney he had the opportunity to help himself and didn't, Detective Jackson in the present case told Defendant that an attorney would not be able to help him. This is more than an off-hand remark. In addition, unlike *Thomas*, Defendant was willing to talk immediately after Detective Jackson's comments. There was no gap in time between the comments and Defendant's response. The facts of this case are distinguishable from *Thomas* and Defendant did not initiate communications with police.

Assuming, *arguendo*, that Defendant had initiated communication with police, the trial court also found that Defendant's waiver was not knowing and intelligent. "A defendant may waive his Miranda rights, but the State bears the burden of proving that the defendant made a

knowing and intelligent waiver." *State v. Brown*, 112 N.C. App. 390, 396, 436 S.E.2d 163, 167 (1993). "Whether a waiver is knowingly and intelligently made depends on the specific facts of each case, including the defendant's background, experience, and conduct." *Id.* Age, although not determinative, can be one of the factors considered as part of the totality of the circumstances. *In re J.D.B.*, 196 N.C. App. 234, 240-41, 674 S.E.2d 795, 800 (2009).

In the present case, the trial court found that the prosecution failed to meet its burden of showing that Defendant made a knowing and intelligent waiver under the totality of the circumstances. It included in those circumstances the facts that: (1) Defendant was 18 years old and had limited experience with the criminal justice system; (2) there was a period of time between 12:39 p.m. and 12:54 p.m. where there is no evidence as to what occurred; and (3) there was no audio or video recording.

After initially asserting his right to counsel at 12:32 p.m. and trying to contact his attorney, Defendant was taken back into the interrogation room, where Detective Jackson told him to let him know once he had an attorney if he wanted to talk. Defendant reaffirmed that he still wanted his lawyer present. Then, on the way back from the interrogation room, Detective Jackson told Defendant that he was being served with more warrants and that an attorney would not be able to help. Defendant was then returned again to the interrogation room for a third time and readvised of his *Miranda* rights at 12:39 p.m. Only seven minutes elapsed between Defendant's initial assertion of his right to counsel and his supposed waiver of that right, during which time Defendant tried to contact his attorney and reasserted his right to counsel at least once. A waiver form was filled out at 12:48 p.m. and witnessed at 12:59 p.m. There is no evidence as to what transpired in the interrogation room between 12:39 p.m. and 12:59 p.m. The timeline, along with the statements by police that an attorney would not be able to help with the warrants, suggest that any waiver by Defendant was not knowing and intelligent.

Defendant's age and inexperience, when combined with the circumstances of his interrogation, support the trial court's conclusion that the State failed to prove Defendant's waiver was knowing and intelligent.

IV. Conclusion

Because Defendant asserted his right to counsel and did not initiate communication with the police, the trial court did not err in granting Defendant's motion to suppress. In addition, even if Defendant had initiated communications, the State did not prove that any waiver therefrom

was knowing and intelligent. For the foregoing reasons, the trial court's order granting Defendant's motion to suppress is

Affirmed

Judge CALABRIA concurs.

Judge STEELMAN concurs with a separate opinion.

STEELMAN, Judge, concurring.

I concur with the result reached by the majority in that the State fails to challenge the facts found by the trial court, and those facts support the conclusions of law reached by the trial court.

STATE OF NORTH CAROLINA
v.
JOSEPH RAGLAND, DEFENDANT

No. COA12-699

Filed 16 April 2013

1. Appeal and Error—notice of appeal—pro se—no service on State—court to which appeal taken not identified

A *pro se* notice of appeal that was not served on the State and that did not identify the court to which appeal was taken was not dismissed where the State did not raise the lack of service and participated in the appeal, and the Court of Appeals was the only court with jurisdiction to hear the appeal.

2. Evidence—objection—subsequent evidence without objection

There was no error in a rape and sexual offense prosecution where the State was allowed to introduce the victim's underwear over defendant's chain-of-custody objection and defendant did not object to subsequent testimony regarding cuttings from the underwear that were tested by a forensic scientist and a laboratory report from those tests.

3. Witnesses—expert—properly qualified—sexually abused children

There was a proper foundation for expert witness testimony in a rape and sexual offense prosecution where defendant did not dispute that the witness was properly qualified to testify regarding the characteristics of sexually abused children. Nothing in *State v. Streater*, 197 N.C. App. 632, suggests that any particular type of examination is necessary before an expert may testify about the profiles of sexually abused children.

4. Appeal and Error—preservation of issues—not argued on appeal—no objection to subsequent testimony—plain error not argued

An issue regarding the testimony of an expert, behavioral theories, and the victim's behavior in a rape and sexual offense prosecution was not properly before the Court of Appeals where defendant did not argue on appeal that the trial court erred in allowing the initial testimony regarding behavioral histories, did not object to subsequent testimony, and did not argue plain error.

5. Appeal and Error—preservation of issues—failure to object at trial—plain error not argued

The Court of Appeals did not address a challenge to testimony where defendant did not object at trial or argue plain error on appeal.

6. Evidence—DNA—prosecutor's fallacy

Testimony in a rape and sexual offense prosecution erroneously assumed that the random match probability of DNA was the same as the probability that the defendant was not the source of the DNA sample, which is known as the prosecutor's fallacy.

7. Evidence—DNA—prosecutor's fallacy—other evidence

There was no prejudicial error from use of "the prosecutor's fallacy" regarding DNA evidence in a rape and sexual offense trial, given the other evidence.

Appeal by defendant from judgments entered 23 September 2011 by Judge William R. Pittman in Johnston County Superior Court. Heard in the Court of Appeals 15 November 2012.

Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.

Kimberly P. Hoppin for defendant-appellant.

GEER, Judge.

Defendant Joseph Ragland appeals from his conviction of second degree rape, two counts of second degree forcible sex offense, and sexual servitude. On appeal, defendant primarily contends that the trial court committed plain error when it allowed the State's expert witness to testify that certain DNA evidence could have come from no one else in the world other than defendant. We agree that this testimony constituted the "prosecutor's fallacy" that the United States Supreme Court found improper in *McDaniel v. Brown*, 558 U.S. 120, 175 L. Ed. 2d 582, 130 S. Ct. 665 (2010) (per curiam). Nonetheless, given the State's overwhelming evidence, we hold defendant has failed to establish that the admission of this testimony was plain error.

Facts

The State's evidence tended to show the following facts. Defendant was the pastor of The Books of Acts, Church of God and Christ Jesus in Angier, North Carolina. "Sarah" and her family began attending defendant's church three times a week when Sarah was seven years old.[1] Sarah worked in the church's daycare and performed "praise type" dance at the church on Sundays. Sarah believed defendant could heal and protect people and also withdraw his protection from them. Sarah's father, Mr. Mills, was head deacon in the church and her mother, Ms. Mills, was an evangelist in the church. Ms. Mills was having an affair with defendant prior to 11 April 2009.

In April 2009, Ms. Mills and Mr. Mills left the country for a vacation. Sarah was 16 years old at the time. While they were gone, Sarah stayed first with a family friend, Darlene Gilchrist, and then with her grandmother. It was arranged that Sarah would stay with defendant if, for some reason, she needed another place to stay.

Sarah got into a confrontation with her grandmother on Saturday, 11 April 2009. Sarah's parents were scheduled to return from vacation the following day, Easter Sunday. Ms. Mills spoke with Sarah's grandmother, learned of the confrontation, and later spoke with defendant. Ms. Mills and defendant decided Sarah could stay with defendant and his wife for the night. Defendant picked up Sarah from her grandmother's house and drove Sarah to his house. Sarah believed she was going to go shopping with defendant's wife.

---

1. The pseudonyms "Sarah," "Mr. Mills," and "Ms. Mills" are used throughout this opinion to protect the child's privacy and for ease of reading.

When they arrived at defendant's house, nobody else was home, and defendant instructed Sarah to put her bags in his son's room. Sarah asked if she could take a shower before leaving to shop with defendant's wife. After she had showered, Sarah went back to the son's room. Defendant knocked and, when Sarah answered the door, forced his way into the bedroom. Defendant handed Sarah a cup of beer and told her to drink it. He then asked Sarah to fix a computer in another room. When Sarah moved the mouse of the computer, a video appeared on the monitor of two people having sex. Sarah then returned to the son's bedroom where defendant remained.

Defendant attempted to persuade Sarah to let him give her a massage, but Sarah repeatedly told him "no." Defendant then forced Sarah down on the bed and rubbed lotion all over her body while she screamed "no" and asked to be taken home. Defendant told Sarah, "I'm going to tell you what to do and you're going to do exactly what I say." Defendant then told Sarah, "I'm going to make you nut [sic] today" and penetrated her vagina with his fingers. Defendant next performed cunnilingus on Sarah against her will. Sarah was "moving and screaming and yelling" for defendant to stop. Defendant also penetrated Sarah's anus with his fingers. Finally, defendant forcefully engaged in vaginal intercourse with Sarah while she physically resisted. When defendant finished, he released Sarah and left the room momentarily.

Before Sarah could completely dress, defendant returned to the room and threatened her: "[I]f you tell anybody, I'm going to smack you so hard you'll have to wear a wig on your head." For the next 15 minutes, while Sarah stood in a corner of the room, defendant told Sarah about how he was "God's gift to women." Defendant forced Sarah to bend over, and he engaged in anal intercourse with her.

After defendant finished, he left the room and barred Sarah's path to the door of the house. He told Sarah they were going to eat pizza, he called to order a pizza, and he told Sarah to sit in the living room with him while he watched television. After the pizza was delivered, defendant told Sarah to eat -- he threatened that if she did not, she "was going to get in trouble."

After eating, defendant told Sarah that they were "going to do this one more time." He took her to his son's room again, stripped off her clothes, and again engaged in vaginal intercourse with her. Defendant then told Sarah to go to sleep and left the room. Sarah could hear defendant walking about the house and was scared to move.

The next morning, Easter Sunday, defendant entered his son's bedroom and asked Sarah where he should take her. Sarah asked to be driven to the house of Ms. Gilchrist, the family friend. On the drive over, defendant told Sarah that she should forgive him because God already had. He also instructed her to shower and douche when she got home. As Sarah exited defendant's truck, defendant said, "[D]on't ever tell anybody because I'm going to turn you into a frog."

Once inside, Sarah used Ms. Gilchrest's phone to call her mother and told her mother that defendant raped her. Sarah told nobody else at that time. Once back at her own house, Sarah told her uncle that she did not want to attend defendant's church and instead went to church with her grandmother. Sarah called a member of defendant's church and said she was sick and could not dance for the Easter services. Sarah never changed the clothes she was wearing while at defendant's house. She attended church wearing a large coat over the clothes. Sarah's uncle noted that Sarah did not dress as she regularly did for church, did not dress appropriately for the weather, was ill-tempered, and was not her usual self that day.

Sarah's parents returned from their trip close to midnight and took Sarah to WakeMed Hospital. At WakeMed, a physician's assistant, Katherine Hardy, and a nurse, Leslie Duran, took statements from Sarah, examined Sarah, and collected a rape kit. Ms. Hardy noted that Sarah had a "friable cervix . . . at the 6:00 position." Deputy Dwayne Medlin with the Johnston County Sheriff's Office also interviewed Sarah and then took the completed rape kit and a bag of Sarah's clothing from Nurse Duran.

Laboratory tests on vaginal swabs collected with the rape kit revealed sperm with a DNA profile that matched defendant's DNA. Tests on the rectal swabs revealed sperm with a mixture of DNA -- defendant's and Sarah's DNA profiles could not be excluded as contributors to the mixture. In addition, sperm with DNA matching defendant's DNA was found in cuttings from Sarah's panties, along with a reaction consistent with the presence of human saliva.

On 2 November 2009, defendant was indicted for second degree rape, rape by a custodian, two counts of second degree forcible sex offense, two counts of sex offense by a custodian, and two counts of crime against nature. On 1 August 2011, defendant was additionally indicted for first degree kidnapping and three counts of sexual servitude. On 23 September 2011, the State dismissed two counts of sex offense by a custodian, two counts of crime against nature, two counts

of sexual servitude, and the first degree kidnapping charge. According to the transcript, the charge of rape by a custodian was also dismissed, although the dismissal was omitted from the record.

Defendant testified in his own defense at trial. He denied engaging in any sexual activity with Sarah and stated that Sarah's mother wanted defendant destroyed because he had ended their affair. He testified that on the Friday before Ms. Mills left for her week-long trip, she called him to come over, and they had sexual intercourse using a condom. Ms. Mills then removed the condom from defendant using a dry bath cloth, and defendant left. Later that day, when Ms. Mills called asking defendant to return, defendant told Ms. Mills that their affair was over.

Defendant also testified that Sarah stayed at his house on the night of 11 April 2009. Defendant spent much of the evening preparing a barbeque hog for Easter Sunday and only periodically checked on Sarah. He ordered a pizza for them at some point.

The jury found defendant guilty of second degree rape, two counts of second degree forcible sex offense, and sexual servitude. The trial court sentenced defendant to three consecutive, presumptive-range terms of 72 to 96 months imprisonment. Defendant filed a timely written pro se notice of appeal. His appellate counsel has filed a petition for writ of certiorari because of possible defects in that notice of appeal. The State, in response to the petition, has asserted that it "takes no legal position regarding the disposition of this petition."

Discussion

[1] We first address defendant's notice of appeal. While defendant's written notice of appeal was timely, the record contains no indication that defendant served the notice of appeal on the State. However, "a party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal." *Hale v. Afro-Am. Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993). Here, the State has not raised the issue of lack of service of the notice of appeal by motion or otherwise and has participated without objection in the appeal by filing its brief. Accordingly, under *Hale*, any objection to the lack of service has been waived.

In addition, in violation of Rule 4(b) of the Rules of Appellate Procedure, defendant's written notice of appeal does not designate the court to which appeal was taken. This Court has held, however, "that

[an appellant's] failure to designate this Court in its notice of appeal is not fatal to the appeal where the [appellant's] intent to appeal can be fairly inferred and the [appellees] are not mislead [sic] by the [appellant's] mistake." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011). Here, defendant's intent to appeal is plain, and since this Court is the only court with jurisdiction to hear defendant's appeal, it can be fairly inferred defendant intended to appeal to this Court. The State does not suggest that it was in any way misled by the notice of appeal.

Accordingly, defendant's failure to serve the notice of appeal and his mistake in failing to name this Court in his notice of appeal do not warrant dismissal. We, therefore, dismiss the petition for writ of certiorari.

I

[2] Defendant first contends that the trial court erred in admitting evidence regarding Sarah's panties because the State did not lay a proper foundation for admission of the evidence. Defendant argues that although Deputy Medlin testified that the examining nurse gave him "a bag of clothes that [Sarah] was wearing when the event occurred" and he assumed the panties were in the bag, there was no testimony from the examining nurse as to whether the panties came from Sarah or how or by whom the panties were collected. Defendant has not, however, preserved this argument for appellate review.

Deputy Medlin testified that he placed the clothes, including the panties, in a paper bag that was in turn sealed in a container stored in the evidence room. The panties were ultimately identified as State's Exhibit 10. Defendant objected to the admission of State's Exhibit 10 on the grounds that the State failed to lay a proper foundation. Defense counsel argued that the nurse who gave the deputy the clothes had not testified and, therefore, the State had not proven that the clothes, including the panties, in fact came from Sarah. The trial court overruled defendant's objection and admitted State's Exhibit 10.

Subsequently, however, defendant did not object during the direct examination of forensic scientist Jessica Posto to the admission of State's Exhibit 43E, which included cuttings from the panties that were contained in State's Exhibit 10. Those cuttings, admitted without objection, were tested and revealed the presence of sperm and reactions consistent with the presence of human saliva. Further, the State introduced, without objection, Ms. Posto's report of her laboratory analysis of the panties contained in State's Exhibit 10.

It is well established that " '[w]here evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.' " *State v. Perry*, 159 N.C. App. 30, 36, 582 S.E.2d 708, 713 (2003) (quoting *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995)). In *Perry*, the State admitted through one witness, over the defendant's objection, a copy of a document called a "nutriscription." *Id.* At some other point during the trial, however, when the State introduced the original "nutriscription" and medical records pertaining to it through a different witness, the defendant did not object. *Id.* Accordingly, the Court held: "By failing to object to the later admission of the same evidence, defendant has waived any benefit of the original objection and failed to preserve the issue for appeal." *Id.* at 37, 582 S.E.2d at 713.

Here, while defendant did object to the admission of the panties, he did not object to the admission of cuttings from those panties or the report describing the testing of the panties. As a result, he waived his initial objection. Since defendant does not specifically argue plain error on appeal, we do not address this issue further. *See State v. Wright*, 210 N.C. App. 697, 703, 709 S.E.2d 471, 475 ("Defendant failed to 'specifically and distinctly' contend that the trial court's jury instructions on first-degree burglary amounted to plain error. Therefore, this issue has been waived on appeal and is dismissed."), *disc. review denied*, 365 N.C. 332, 717 S.E.2d 394 (2011).

II

[3] Defendant next argues that the trial court erred in admitting portions of the expert testimony of Dr. Sharon Cooper. First, defendant argues that the trial court erred in permitting Dr. Cooper to give the following expert opinion:

> Based upon my fundamental knowledge in this area, my experience in treating patients, and my evaluation of this particular patient and her family as well as my review of all of the investigative records and the medical records in this particular case, it is my medical opinion to the degree of reasonable certainty that the history provided in this case, the behaviors that were described about this child and the DSM-IV diagnoses that she had as well as the laboratory findings and the physical exam findings of this patient *were consistent with those types of findings seen in victims in child sexual abuse and sexual assault.*

(Emphasis added.)

Our Supreme Court has held that "[i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility. However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (per curiam) (internal citations omitted). Defendant argues that the State did not lay the "proper foundation" required by *Stancil* because Dr. Cooper conducted only a single, one hour and 20 minute interview with Sarah and did not personally conduct a physical examination of Sarah.

We believe that defendant has misconstrued *Stancil*'s reference to a "proper foundation." In support of its holding that experts could testify upon a proper foundation as to whether a complainant had characteristics consistent with those of sexually-abused children, the *Stancil* Court cited *State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992), and *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987). Both of those cases held that a witness may give an opinion that a child's profile is consistent with that of a sexually-abused child if the witness is a properly qualified expert. *See Hall*, 330 N.C. at 818, 412 S.E.2d at 888 (explaining that "[o]nly an expert in the field may testify on the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent with this profile"); *Kennedy*, 320 N.C. at 32, 357 S.E.2d at 366 (upholding admissibility of witnesses' testimony because, "[w]here scientific, technical, or other specialized knowledge will assist the fact finder in determining a fact in issue or in understanding the evidence, an expert witness may testify in the form of an opinion, N.C.R. Evid. 702[;] . . . the expert may testify as to the facts or data forming the basis of her opinion, N.C.R. Evid. 703"; and the challenged testimony of the experts in that case, "if believed, could help the jury understand the behavior patterns of sexually abused children and assist it in assessing the credibility of the victim").[2]

We, therefore, believe, and hold, that the Supreme Court's requirement of a proper foundation addresses the question whether the expert

---

2. The *Stancil* Court additionally cited *State v. Aguallo*, 322 N.C. 818, 823, 370 S.E.2d 676, 678 (1988), which held that an expert was properly permitted to give an opinion that a physical examination of the victim revealed findings consistent with the presence of vaginal trauma because that "opinion did not comment on the truthfulness of the victim or the guilt or innocence of defendant."

witness possesses the necessary educational and experiential qualifications to testify regarding the characteristics of sexually-abused children and whether the complaining witness possessed those characteristics. *See also State v. Ware*, 188 N.C. App. 790, 798, 656 S.E.2d 662, 667 (2008) (holding that expert was qualified to testify regarding sexually-abused children based on witness' education, professional license, and experience). Here, defendant does not dispute that Dr. Cooper was properly qualified to testify as an expert regarding the characteristics of sexually-abused children. The State, therefore, laid a proper foundation for Dr. Cooper's opinion under *Stancil*.

Defendant, however, quotes *State v. Streater*, 197 N.C. App. 632, 641, 678 S.E.2d 367, 373 (2009) (emphasis added), in which this Court explained that "[t]he proper foundation is a predicate to the admission of expert opinion" and, "[i]n a sex abuse case, a physical examination and an interview with the victim *can* lay the proper foundation for expert testimony." *Streater* did not, however, address the foundation required for testimony that a victim has symptoms or characteristics consistent with profiles of sexually-abused children. Instead, the Court found impermissible the State's leading questions to the expert that assumed a fact not in evidence: that the victim had specifically told the expert that the defendant was the man who had sexually abused her. *Id.* at 641-42, 678 S.E.2d at 374. The Court's reference to the lack of "proper foundation" for the leading questions related only to the lack of testimony by the expert that the victim had specifically identified the defendant. *Id.* Nothing in *Streater* suggests that any particular type of examination is necessary before an expert may testify about the profiles of sexually-abused children.

[4] Defendant next argues that Dr. Cooper impermissibly vouched for Sarah's credibility. Dr. Cooper initially testified to the following:

> We use behavioral histories in order to help us to get a feel for false allegations. For example, if a victim is making a false allegation, they usually will not be able to tell us they're having intrusive thoughts almost every day about what has happened to them, that their grades declined significantly and that they would go from an A student to an F student. They would not know that -- they would have nightmares regarding fearfulness. It's specific to this particular event. A victim who is making a false allegation would not be able to demonstrate what we would refer to

> as an acute stress reaction or psychological shock as other people would notice[.]

At that point, defendant objected and, outside the presence of the jury, defense counsel argued, "Your Honor, I think during the voir dire of the witness, counsel was not going to ask her whether her examination of the witness would be on the issue of whether or not she was raped. Yet the questions he's asking her and her answers are the same thing." Defense counsel additionally asserted: "The child wouldn't do this unless this happens. This is how she's phrasing it." The trial court ruled that Dr. Cooper was permitted to testify that Sarah's behaviors were consistent with sexual abuse, but cautioned the State to "[s]tay away from the part whether she thinks she's telling the truth."

Subsequently, defendant did not object when Dr. Cooper testified that (1) Sarah's curling up in a fetal position next to a heater was characteristic of a person with acute stress reaction; (2) Sarah's transition from being a "straight A student" to "making F's" indicated that Sarah "was so psychological [sic] dysfunctional that she couldn't deal with" school; and (3) as of the time of trial, Sarah still exhibited some post-traumatic stress symptoms and "still does have intrusive thoughts of what has happened to her." Defendant contends that "[t]hese subsequent statements, after her recent prior comments regarding false allegations, inferred [sic] Dr. Cooper's opinion that Sarah was not making a false allegation because she exhibited the behaviors Dr. Cooper had just described as being evidence that one was not making false allegations."

Defendant does not make any argument on appeal that the trial court erred in allowing the initial testimony regarding behavioral histories. Although he points to the combined effect of that initial testimony and the subsequent description of Sarah's behaviors as resulting in an impermissible expert opinion on Sarah's credibility, he did not object to that subsequent testimony and does not argue plain error on appeal. That issue is not, therefore, properly before this Court. *See Wright*, 210 N.C. App. at 703, 709 S.E.2d at 475 (dismissing unpreserved argument where defendant did not specifically argue plain error on appeal).

[5] We likewise do not address defendant's final challenge to Dr. Cooper's testimony that Sarah had "the ability to actually say exactly what time each of those sexual events occurred, the oral sex, the anal sex, the vaginal sex. They occurred at three different times overnight for that child." While defendant argues that "[t]his was an affirmative statement that the assaults happened, and that they happened in the way Sarah had

reported," defendant again did not object at trial and does not argue on appeal that admission of this statement was plain error.

III

[6] Defendant next argues that the trial court committed plain error in admitting certain expert testimony regarding DNA evidence because that testimony amounted to a "prosecutor's fallacy."

> 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 affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

The United States Supreme Court described the "prosecutor's fallacy" in *McDaniel*, 558 U.S. at 128, 175 L. Ed. 2d at 588, 130 S. Ct. at 670. The fallacy involves the use of DNA evidence to show "random match probability." *Id.* Random match probability evidence is the probability that another person in the general population would share the same DNA profile as the person whose DNA profile matched the evidence. *Id.* at 124, 175 L. Ed. 2d at 585, 130 S. Ct. at 668. For example, in *McDaniel*, the State's expert tested semen from the victim's underwear and from a rape kit and determined that the DNA obtained from those tests matched the defendant's DNA "and that the probability another person from the general population would share the same DNA (the 'random match probability') was only 1 in 3,000,000." *Id.*

Regarding the fallacy, the Court in *McDaniel* explained, "[t]he prosecutor's fallacy is the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample." *Id.* at 128, 175 L. Ed. 2d at 588, 130 S. Ct. at 670. "In other words, if a juror is told the probability a member of the general population would share the same DNA is 1 in 10,000 (random match probability), and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA found

at the crime scene (source probability), then he has succumbed to the prosecutor's fallacy." *Id.*

In *McDaniel*, the defendant did not challenge the State's expert's random match probability opinion "that only 1 in 3,000,000 people would have the same DNA profile as the rapist." *Id.*, 130 S. Ct. at 671. However, the Court explained that the State's expert failed to properly dispel the prosecutor's fallacy "when the prosecutor asked [the State's expert], in a classic example of erroneously equating source probability with random match probability, whether 'it [would] be fair to say . . . that the chances that the DNA found in the panties -- the semen in the panties -- and the blood sample, the likelihood that it is not [the defendant] would be .000033,' " and the State's expert "ultimately agreed that it was 'not inaccurate' to state it that way." *Id.* at 128-29, 175 L. Ed. 2d at 588, 130 S. Ct. at 671.

Here, defendant correctly asserts that the testimony of one of the State's experts, Agent Sharon Hinton from the State Crime Lab, improperly relied upon the prosecutor's fallacy. Agent Hinton testified that the State Crime Lab has a population database for North Carolina residents which is used to determine how common a particular DNA profile is in the general population of North Carolina. She further testified that analysts at the lab use certain characteristics of a DNA sample "to determine a person's . . . frequency in the general population." Agent Hinton then testified as follows:

> Q. And how do you use this particular database in your case work?
>
> A. Like I said, if you have a match between a case, we need to know how popular or how common that profile is. With a straight match means [sic] that there's no mixture. There's only one profile in -- on a piece of evidence. You calculate to see how common that profile is to that known standard. *And if it's over the world's population, then you know that there could be no one else other than that person in the world.*

(Emphasis added.)

Regarding her statistical conclusions in the present case, Agent Hinton testified to the following:

> The DNA profile obtained from the sperm fractions from the vaginal swabs and sperm fractions from the cutting

> of the panties *matched the DNA profile obtained from Joseph Ragland* and did not match the profile obtained from [Sarah].
>
> . . . .
>
> . . . The probability of randomly selecting an unrelated individual with the DNA profile that matches the DNA profile obtained from the sperm fractions of the vaginal swabs and the sperm fractions from the cutting from the panties is greater than 1 trillion, which is more than the world's population for North Carolina Caucasian, Black, Lumbee Indian and Hispanic populations. *Meaning that anything over the world's population, like I said earlier, can be no one other than that person.*

(Emphasis added.)

Thus, the agent effectively testified that defendant's DNA profile matched the DNA profile obtained from the vaginal swabs and the panties and that the probability that a different, unrelated person in the general population was the source of that DNA was zero. The testimony therefore erroneously assumed "that the random match probability is the same as the probability that the defendant was not the source of the DNA sample." *Id.* at 128, 175 L. Ed. 2d at 588, 130 S. Ct. at 670.

[7] Having concluded that this testimony was inadmissible, we must additionally determine whether that inaccurate testimony had a probable impact on the jury's verdicts. Defendant argues that admission of the evidence was plain error as to the second-degree rape charge, the sexual servitude charge, and the charge for second-degree sex offense that required the State to prove that defendant engaged in anal intercourse with Sarah. We disagree.

The State presented substantial physical evidence showing that defendant engaged in vaginal and anal intercourse with Sarah. With respect to vaginal intercourse, Ms. Hardy testified that, upon examination at the hospital, Sarah had "a friable cervix," meaning there was "an abrasion" on Sarah's cervix and that it looked like "if you touched it, it would bleed very easily." Dr. Cooper similarly testified that Sarah had a friable cervix, such that the tissue would bleed easily, and that a friable cervix "can be seen when there has been trauma to the cervix." Dr. Cooper further explained that the friable cervix was consistent with "really forcible vaginal intercourse." Finally, Dr. Cooper testified that the fact that Sarah's cervix was friable at the "6:00 position" indicated that

Sarah had had forcible intercourse with her legs high up over her shoulders. Sarah testified that, when defendant raped her vaginally, she was positioned with her legs high over defendant's shoulders.

Moreover, the State's evidence also showed that fully-intact sperm were found in Sarah's vagina, anus, and panties. Dr. Cooper testified that sperm in those situations would begin to break down in about 24 hours, indicating that the sperm found in Sarah's vagina, anus, and panties had been there for less than a day.

In addition, defendant does not dispute that the DNA evidence obtained from the vaginal swabs and the panties matched defendant and that Agent Hinton *properly* testified that "[t]he probability of randomly selecting an unrelated individual with the DNA profile that matches the DNA profile obtained from the sperm fractions of the vaginal swabs and the sperm fractions from the cutting from the panties is greater than 1 trillion, which is more than the world's population for North Carolina Caucasian, Black, Lumbee Indian and Hispanic populations." This powerful DNA evidence was not rendered inadmissible because of the subsequent inaccurate statement based upon the prosecutor's fallacy. *See id.* at 132, 175 L. Ed. 2d at 590, 130 S. Ct. at 672-73 (explaining that defendant's expert's contention that State's expert erroneously failed to dispel the prosecutor's fallacy "provided no warrant for entirely excluding the DNA evidence or [the State's expert's] testimony" because the defendant's expert "did not contest that the DNA evidence matched [the defendant]" and "[t]hat DNA evidence remains powerful inculpatory evidence even though the State concedes [the State's expert] overstated its probative value by failing to dispel the prosecutor's fallacy").

The State also presented powerful, unchallenged DNA evidence obtained from the rectal swabs. Agent Hinton testified that defendant "could not be excluded as a contributor" to the mixture of DNA found on the rectal swabs and that the probability that a random, unrelated person chosen from the general population of North Carolina could not be excluded as a contributor was as follows:

> [F]or the North Carolina Caucasian population, 1 in 3.55 million; North Carolina Black population, 1 in 11.6 million; North Carolina Lumbee Indian population is . . . 1 in 5.22 million; and the North Carolina Hispanic population is 1 in 9.07 million.

Also regarding anal intercourse, Dr. Cooper testified that the most common symptoms that victims of anal rape describe are pain and trouble

having a bowel movement and that Sarah's medical records show that Sarah described abdominal pain and difficulty having bowel movements when she reported to the hospital.

In addition to the physical evidence, the State presented the testimony of Sarah describing in detail two incidents of vaginal intercourse and one incident of anal intercourse. Sarah's testimony was corroborated by her prior consistent statements.

Thus, given the properly-admitted forensic evidence, the expert testimony, Sarah's testimony, and the corroborating testimony, we cannot conclude that the jury would probably have reached a different verdict in the absence of the prosecutor's fallacy evidence. Defendant has, therefore, failed to show plain error.

No error.

Judges STEPHENS and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
JONTE ROUSON

No. COA12-382

Filed 16 April 2013

1. Search and Seizure—traffic stop—show of force—argument without merit

The trial court did not err by denying defendant's motion to suppress evidence seized in a traffic stop where defendant pled guilty to firearms and drugs charges. Although defendant argued that the show of force by law enforcement during a traffic stop amounted to an arrest and that a search of his person occurred without probable cause, the trial court's findings fully supported its conclusion and defendant's argument to the contrary did not establish merit or reveal an error warranting the issuance of a writ of *certiorari*.

2. Appeal and Error—motion for writ of certiorari—no meritorious claim

A defendant who contended that there was insufficient evidence to support his guilty pleas to drugs and firearms charges did

not present good cause for the issuance of a writ of *certiorari* where he failed to present a meritorious claim or reveal error in the proceeding below. The appeal was dismissed.

Appeal by defendant from judgment entered 12 September 2011 by Judge Wayland J. Sermons, Jr. in Martin County Superior Court. Heard in the Court of Appeals 12 September 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt and Assistant Appellate Defender Benjamin Dowling Sendor, for defendant-appellant.

BRYANT, Judge.

Where defendant has failed to bring forth a meritorious argument or reveal error in the trial court's denial of his motion to suppress and in the acceptance of his guilty pleas on the charges of possession with intent to sell or deliver cocaine and possession of a stolen firearm, we deny defendant's petition for writ of certiorari.

In Martin County Superior Court, on 5 August 2008, defendant was indicted on two counts of possession with intent to sell and deliver a controlled substance and possession of a stolen firearm. Defendant filed two motions to suppress: the first, on 8 January 2009, to suppress all evidence obtained as a result of a vehicle stop; and the second, on 28 January 2009, to suppress the evidence obtained as a result of a search of the passengers of the vehicle. The trial court denied both motions.

On 12 September 2011, defendant pled guilty to possession with intent to sell or deliver cocaine and possession of a stolen firearm. While the trial court noted that defendant "reserved his right to appeal the determination of his Motion to Suppress," defendant failed to enter a timely notice of appeal from the entry of judgment. On 4 June 2012, defendant filed with this Court a petition for writ of certiorari.

"The writ of certiorari may be issued in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C. R. App. P. 21 (2012). "A petition for the writ must show

merit or that error was probably committed below. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citations omitted).

To establish the merit of his petition for writ of certiorari and reveal the error he asserts was committed by the trial court, defendant incorporates the arguments from his brief filed earlier with this Court.

In his brief, defendant contends that the trial court erred by (I) denying his motion to suppress; (II) accepting his guilty plea to possession of a stolen firearm; and (III) accepting his guilty plea to possession with intent to sell or deliver cocaine.

[1] Defendant's initial contention (I) rests on the argument that the show of force by law enforcement during a traffic stop amounted to an arrest and that a search of his person occurred without probable cause in violation of the Fourth Amendment to the United States Constitution, section 19 and 20 of Article I of the North Carolina Constitution, and North Carolina General Statutes, section 15A-401(b).

For support, defendant cites the Ninth Circuit Court of Appeals' holding in *United States v. Beck*, 598 F.2d 497 (9th Cir. 1979), where nine custom patrol officers in four cars stopped a taxi, escorted three passengers from the vehicle, and discovered heroin and cocaine in the boots of two of the men. *Id.* at 499-500. The taxi had been stopped, not for any traffic violation, but on a hunch that the occupants were transporting drugs. Reversing the trial court's denial of the defendants' motion to suppress the evidence, the Court of Appeals held that given the circumstances, the degree of force used by the patrol officers, as shown by their overwhelming show of authority, amounted to an arrest for which there was no probable cause. *Id.* at 502.

Here, defendant was a passenger in a vehicle carrying five men stopped for running a red light. In its order denying defendant's motion to suppress, the trial court made the following unchallenged findings of fact:

> 9. [A law enforcement officer] approached the driver's window and [a second officer on the scene] gave instructions to the four passengers to place their hands where their hands could be seen.
>
> 10. [The second officer] testified that the back seat passengers kept taking their hands off of the back of the front seat and were moving around and passengers

had to be told several times to place hands back where they could be seen.

11. [The initial officer on the scene] was talking to the driver of the [vehicle] outside of the car when the driver attempted to flee and was subsequently arrested . . . .

12. [The second officer] testified he did not know what was in the car and why passengers kept taking their hands off the seat and kept moving around, and based upon those actions plus . . . the evasive actions of the vehicle's driver the officers asked passengers [to step] out of the vehicle one by one.

13. [] [D]efendant who was seated in the back seat on the right was asked [to step] out and told by [the second officer] that he was going to do a weapons frisk at which point defendant said he had a gun.

14. [The second officer] then removed a pistol which was concealed in the defendant's waistband beneath defendant's tee shirt and [the officer] then conducted a search incident to arrest and found suspected cocaine in the defendant's pants pocket.

The trial court concluded that

> [the officer had] sufficient concern for his safety and that of other officers to remove the defendant from the vehicle for the purpose of conducting a weapons frisk . . . . [And,] [t]hat based upon defendant admitting that he was in possession of a firearm which was found to be concealed upon his person, [the officer] had probable cause to search defendant pursuant to arrest . . . .

The trial court's findings of fact fully support its conclusion of law. Defendant's argument to the contrary does not establish merit or reveal an error warranting the issuance of a writ of certiorari. *See Grundler*, 251 N.C. at 189, 111 S.E.2d at 9.

[2] Defendant further argues that the trial court erred by accepting his guilty pleas on the charges of (II) possession of a stolen weapon and (III) possession with intent to sell or deliver cocaine, as the record failed to provide a sufficient factual basis for either plea. As to each charge, defendant argues that the factual basis given by the prosecutor failed

to establish an element of the crime. On the charge of possession of a stolen weapon, defendant contends that there was no basis for a finding that he knew the firearm was stolen. On the charge of possession with intent to sell or deliver cocaine, defendant contends that there was no basis to establish he intended to sell or deliver the cocaine.

"A plea of guilty involves the waiver of several fundamental rights, including freedom from self-incrimination and the right to a trial by jury. It is therefore imperative that guilty pleas represent a voluntary, informed choice." *State v. Santos*, 210 N.C. App. 448, 450-51, 708 S.E.2d 208, 210 (2011) (citation omitted).

> [A] superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:
>
> . . .
>
> (2) Determining that he understands the nature of the charge;
>
> (3) Informing him that he has a right to plead not guilty;
>
> (4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
>
> (5) Determining that the defendant, if represented by counsel, is satisfied with his representation . . . .

N.C. Gen. Stat. § 15A-1022(a) (2011). We note that defendant does not contest the trial court's adherence to the requirements of section 15A-1022(a). "A judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea." N.C.G.S. § 15A-1022(c). Section 15A-1022(c) provides a nonexclusive list of five sources for the factual basis: 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; and a statement of facts by the defense counsel. *Id.* "[I]n enumerating these five sources, the statute contemplates that some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty." *State v. Agnew*, 361 N.C. 333, 336, 643 S.E.2d 581, 583 (2007) (citation, quotations, and brackets omitted).

In support of his argument regarding insufficient factual basis for the plea for possession of a stolen weapon, defendant cites *State v. Allen*, 79 N.C. App. 280, 339 S.E.2d 76 (1986). In *Allen*, the defendant's conviction

for possession of stolen goods was reversed based on the prosecution's failure to establish an essential element of the offense. This Court noted "[t]here [was] no direct evidence that [the] defendant knew the property in his car trunk was stolen." *Id.* at 282, 339 S.E.2d at 77-78. The Court went on to observe that "[o]ther cases upholding convictions when knowledge was at issue have contained some evidence of incriminating behavior on the part of the accused." *Id.* at 285, 339 S.E.2d at 79.

We note a significant distinction between *Allen* and the instant case: *Allen* addressed the appeal from the trial court's denial of the defendant's motion for nonsuit following the close of evidence during a jury trial. For such an issue, an appellate court "must view all evidence in the light most favorable to the State, in an effort to determine whether the State met its burden of presenting substantial evidence of each element of the offense charged[.]" *Id.* at 282, 339 S.E.2d at 77 (citations omitted). Assuming the *Allen* standard *requires* that the factual basis necessary for a trial court's acceptance of a plea meet the same standard required in a motion to dismiss, the record before this Court indicates that standard has been met. The trial court had before it evidence that the gun defendant possessed was stolen and that defendant knew or had reasonable grounds to know the gun was stolen. There was also evidence before the trial court that defendant possessed 2.5 grams of cocaine with the intent to sell and deliver it. The fact that the record shows defendant "purchased" the firearm in exchange for cocaine can be considered other incriminating evidence of knowledge and intent. This incriminating evidence of knowledge and intent separates these facts from Allen and is applicable to both charges.

After review of the record proper and presentation of the factual basis for the plea, defendant agreed there was a factual basis for the plea, plead guilty to possession of a stolen firearm and possession with intent to sell and deliver a controlled substance, and was sentenced accordingly.

Failing to present a meritorious claim or reveal error in the proceeding below, defendant has failed to present good cause for the issuance of a writ of certiorari. *See Grundler*, 251 N.C. at 189, 111 S.E.2d at 9. Accordingly, in our discretion, defendant's petition for a writ of certiorari is denied, and his appeal dismissed.

Dismissed.

Judges HUNTER, Robert C., and STEELMAN concur.

STATE OF NORTH CAROLINA
v.
GEORGE MICHAEL STEEN, DEFENDANT

No. COA12-1069

Filed 16 April 2013

1. Sexual Offenses—child victim—motions to dismiss—sufficiency of evidence—credibility

The trial court did not err by denying defendant's motions to dismiss the charges of first-degree sexual offense and sexual offense with a child. Although defendant argued the minor child victim was not credible, our courts have long recognized, and defendant conceded, that the credibility of witnesses and the proper weight to be given their testimony must be decided by the jury.

2. Appeal and Error—preservation of issues—failure to argue at trial

Although defendant contended the minor victim was incompetent to testify in accordance with N.C.G.S. § 8C 1, Rule 601(b) in a sexual offenses case, defendant failed to preserve this issue under N.C. R. App. P. 10(a)(1) because he did not challenge the victim's competence at trial.

3. Evidence—testimony—polygraph examinations—no limiting instruction required

The trial court did not err in a sexual offenses case by failing to issue a limiting instruction on its own motion for the jury to disregard any reference to a special agent's role as a polygraph examiner with the State Bureau of Investigation. The special agent's testimony contained no statements or suggestions that she administered a polygraph examination to defendant.

4. Appeal and Error—preservation of issues—waiver—admission of similar testimony—failure to cite authority

The trial court did not commit plain error in a sexual offenses case by admitting the challenged testimony from a special agent. Defendant waived his right to appellate review of any error that may have resulted from the admission of this challenged testimony because defendant offered similar testimony. Further, defendant's challenges to other portions of the special agent's testimony to which defendant failed to present argument supported by persuasive or binding legal authority were deemed abandoned.

STATE v. STEEN

[226 N.C. App. 568 (2013)]

Appeal by defendant from judgment entered 28 March 2012 by Judge Robert C. Ervin in Lincoln County Superior Court. Heard in the Court of Appeals 11 February 2013.

Roy Cooper, Attorney General, by Laura E. Crumpler, Assistant Attorney General, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for defendant–appellant.

MARTIN, Chief Judge.

Defendant George Michael Steen appeals from a judgment entered upon jury verdicts finding him guilty of two counts of first-degree sexual offense with a child in violation of N.C.G.S. § 14-27.4(a)(1), and one count of sexual offense with a child in violation of N.C.G.S. § 14-27.4A(a). We find no error.

The evidence presented at trial tended to show that M.S. was placed into the custody of the Lincoln County Department of Social Services ("DSS") on 2 November 2004, after he and his sisters were removed from his mother's home upon allegations that the children were neglected; M.S. was four years old. Immediately following his removal from his mother's home, M.S. was placed in the home of then-foster parents defendant and his wife, Jennifer Steen, for twenty-one days. Then, in an effort to reunite M.S. with his sisters, M.S. was removed from defendant's home and placed in another foster care home with his sisters, where M.S. remained for less than three months before the family determined that it could not "handle" all three children. M.S. was then returned to defendant's home for about two-and-a-half years until M.S. was removed again and returned to his biological mother for two months in an attempt at reunification. M.S. underwent a series of placements for the next two months, and was then placed for a third time in defendant's home in December 2007, where M.S. lived until he left for the last time in February 2009, when M.S. was eight years old.

According to April Gullatte, who was M.S.'s DSS foster care social worker from 2004 through September 2009, M.S.'s third placement with defendant ended when M.S. "was accused of acting out sexually at school, going up under the bathroom stall and trying to touch a child." After that incident, M.S. was placed in the home of Debra and Mickey Ledford, who were "level two therapeutic foster parents," "specially trained . . . to handle certain behavioral issues that children have that are in care."

Mr. Ledford testified that on one occasion when he was getting the bath water ready for M.S., M.S. asked Mr. Ledford if he could take a shower with him, and Mr. Ledford told M.S. that "big boys do not do this," "[w]e don't shower together." Then, after M.S. had been living in the Ledford home for some time, Mrs. Ledford testified that she and M.S. were "in the living room watching a Lifetime movie" when M.S. said, "[D]id I ever tell you about the time that [defendant] stuck his penis in my butt[?]" Mrs. Ledford testified that she said "no," and turned off the television. According to Mrs. Ledford, M.S. told her that "it happened in the shower," that "he done it [sic] quite frequently," and that "[defendant] would stop" if defendant's wife would walk into the bathroom, "[b]ut he would start again after she left the room."

At trial, then-eleven-year-old M.S. testified that, while he lived in defendant's house, defendant would take showers with him once or twice a week, which defendant himself admitted occurred at that frequency. Although defendant testified that the "only time" he took showers with M.S. was "when [they] were going somewhere and [they] had to hurry up and get ready so [they] could get going," M.S. testified that, when defendant took showers with him, defendant did "sexual things" to him.

According to M.S., while defendant was in the shower with him, defendant would have M.S. "get down on [his] knees" and defendant would move back and forth and "mak[e] [M.S.] suck his penis," which M.S. said felt "[w]eird and gooey" and "[l]ike soft" in M.S.'s mouth. M.S. also testified that defendant put his mouth on M.S.'s penis, and that "it just didn't feel right." M.S. further testified that defendant "sticked [sic] his penis in [M.S.'s] butt," and described that defendant would put his penis "in between [M.S.'s] butt crack," so that defendant's penis touched the part of M.S.'s bottom where the food comes out. M.S. also said that when defendant would stand behind him and put his penis in M.S.'s bottom, M.S. would stand on the sides of the tub and hold onto both the wall and the rod that holds up the shower curtain so that he would not slip and fall in the shower. While defendant was showering with M.S., M.S. said that defendant's wife would be out of the house or "somewhere in the house," and said that "she would open the blinds to see what we were doing but we would always stop then. He would tell me to stop." Finally, M.S. testified that defendant told M.S. that he would "do something to [M.S.] if [he] told" about what happened in the shower, "said he would hurt [M.S.] or get [M.S.] in trouble," and that M.S. "thought really [defendant] was going to hurt [him]." Additionally, M.S. said that defendant "told [M.S.] he would tell [defendant's wife] or someone else that [M.S.] was lying about what [M.S.] said and who believes little kids?"

M.S. said he did not tell defendant's wife because, "I don't want her to not think I'm telling the truth, which I was telling the truth. They are married, so I don't want to break them apart and he go to jail . . . ." M.S. said he reported the abuse to the Ledfords after he lived with them and got to know them because, he said, "I could trust them and they—and I trusted what they said because they said the truth."

In early 2010, Donna Corriher, the DSS social worker who took over M.S.'s case after he began living with the Ledfords, received an e mail from the Ledfords which described the allegations that M.S. reported to them. Upon receiving the e mail, Ms. Corriher filed a report with DSS, which initiated an investigation. Amy Cloninger, a family assessor investigator for Child Protective Services for DSS, was assigned to conduct the investigation into M.S.'s allegations.

On 2 February 2010, when M.S. was nine years old, M.S. was interviewed at the Child Advocacy Center, which interview was simultaneously observed through closed-circuit television by Ms. Cloninger, Ms. Corriher, and Detective Dennis Harris from the Lincolnton Police Department. During the interview, M.S. said, "I had sex with that man, [defendant] George Steen," and when asked what he meant by "sex," M.S. said that defendant "stuck his penis up [his] butt." M.S. also reiterated his allegations, including that "he did oral sex to [defendant] and [defendant] did it to him more than once," that defendant would make M.S. "stand on the rails" or sides of the tub and "they would have sex," and that "[i]t happened in the shower" and "didn't happen anywhere else." M.S. also repeated his allegation that, when defendant's wife would enter the bathroom, "they would stop because she might pull back the curtains."

Colden Quick, a therapist and licensed clinical social worker with Piedmont Family Services, testified that M.S. was referred to his practice for an evaluation after M.S. was involved in an inappropriate sexual contact with another student at school. Mr. Quick was admitted, without objection, as an expert in the field of clinical social work with a specialty in sexual abuse, and testified that M.S. exhibited behaviors that are consistent with children who have experienced sexual abuse. Mr. Quick further opined that it is not normal for a child of M.S.'s age to know about anal stimulation or penetration, or to have opinions about what anal stimulation feels like without having been exposed to it or having experienced it.

Kelly Holland, a therapist and clinical manager at Thompson Child Family Focus, a residential treatment facility for children who have

suffered trauma in their past, testified that, about a month into her therapy sessions with M.S., when they were talking about "good touch, bad touch, secret touch," M.S. mentioned that "someone had given him a secret touch and he didn't want to talk about it." A couple of sessions later, M.S. told Ms. Holland that defendant "had hurt him" and "had performed oral and anal sex on him and asked [M.S.] to do the same to him," and that, when defendant's wife walked in the bathroom that defendant "stopped the sexual abuse and she did whatever she needed to do in the bathroom and left and then it resumed." Ms. Holland said that the sexual abuse consisted of oral and anal sex and "fondling of [M.S.'s] bottom, chest and legs." Ms. Holland also testified that M.S. "expressed quite a bit of fear of [defendant]," and that M.S. said "on multiple occasions that he wanted [defendant] to be in jail and he wanted him to stay there" "[b]ecause [defendant] hurt him." Ms. Holland further testified that, while living in the residential facility beginning in August 2010, M.S. exhibited behaviors that included "[e]xcessive masturbation, poor boundaries with other people, touching of others, both accidental and on purpose—[in]appropriate ways—getting too close to other people," and "[s]ometimes using provocative language." Ms. Holland testified, without objection, that such behavior is not normal for a seven- to ten-year-old child who has not experienced sexual abuse, and that such behavior is "quite common" with children who have experienced sexual abuse.

Detective Harris testified that he received a report from DSS in February 2010 alleging that M.S. had been sexually abused by defendant, and recounted the acts constituting that abuse, which allegations were consistent with the testimony offered by each of the State's prior witnesses at trial. Detective Harris further testified that the report indicated that defendant told M.S. to say that, if anyone found out, that M.S. should say that it was defendant's brother who perpetrated the abuse.

With respect to M.S.'s truthfulness, the Ledfords both testified that M.S. lied or was untruthful on a number of occasions during the time he lived with them. Ms. Corriher, M.S.'s social worker, testified that lying was not an issue with M.S. "any more than other children lie like on an average," and said that M.S. "might tell a lie like if he thought he was going to get in trouble and once he was sat down [sic] and talked to about that, he might fess up to it." Ms. Cloninger, the DSS investigator, testified that, during M.S.'s interview, she observed that M.S. "showed that he knew the difference between the truth and a lie." Mr. Quick, M.S.'s therapist, testified that M.S. would tell him that "he didn't want to get anybody in trouble for things that he would say." Additionally, at trial, M.S. testified that he understood that it was important to tell the

truth "[b]ecause if you don't be honest [sic], then you——then you are not going to be trusted." When asked, "How do we know you're not lying now?," M.S. answered, "Because I changed. I know the truth. I tell the truth." "[T]his is serious right now." "That was a while back but now I am completely honest. I need to be honest . . . [o]r no one would trust me."

Defendant was indicted on two counts of first-degree sexual offense with a child and charged upon an information on one count of sexual offense with a child. At trial, defendant moved to dismiss the charges at the close of the State's evidence and at the close of all of the evidence, which motions were denied. Defendant was found guilty by a jury on each of the charged offenses, and was sentenced to a term of 300 months to 369 months imprisonment. Defendant appeals.

---

[1] Defendant first contends the trial court erred by denying his motions to dismiss because the State presented insufficient evidence of the charged offenses. After a careful review of defendant's argument, we find no error with respect to this issue.

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). "The trial court in considering such motions is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight." *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. "The trial court's function is to test whether a *reasonable inference* of the defendant's guilt of the crime charged may be drawn from the evidence." *Id.* "In so doing the trial court should only be concerned that the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982). "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom . . . ." *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. "[C]ontradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion." *Id.* "The defendant's

evidence, unless favorable to the State, is not to be taken into consideration." *Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 653.

In the present case, defendant does not dispute, and the record reflects, that the State presented "relevant evidence" that "a reasonable mind might accept as adequate to support [the] conclusion" that defendant was the perpetrator of the charged offenses and that he committed each essential element of those offenses. *See Smith*, 300 N.C. at 78–79, 265 S.E.2d at 169. "What defendant argues as the basis for insufficient evidence in fact goes to the issues of credibility and weight to be given to the evidence." *See State v. Jordan*, 321 N.C. 714, 717, 365 S.E.2d 617, 619 (1988). Specifically, defendant argues that the testimony presented by the accusing victim M.S. was not credible—and thus insufficient—based on purported contradictions in M.S.'s testimony and discrepancies between M.S.'s testimony and defendant's witnesses' testimony. Nevertheless, our courts have long recognized, and defendant himself concedes, that "[t]he credibility of witnesses and the proper weight to be given their testimony must be decided by the jury—not by the court." *See State v. Orr*, 260 N.C. 177, 179, 132 S.E.2d 334, 336 (1963). Since "contradictions and discrepancies are for the jury to resolve and do not warrant dismissal," *see Powell*, 299 N.C. at 99, 261 S.E.2d at 117, and "[t]he defendant's evidence, unless favorable to the State, is not to be taken into consideration," *see Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 653, we conclude that the trial court did not err when it denied defendant's motions to dismiss the charged offenses.

[2] We note that defendant asserts as a sub issue to his first issue on appeal that M.S. was incompetent to testify in accordance with N.C.G.S. § 8C-1, Rule 601(b). However, because defendant failed to challenge M.S.'s competence at trial and thus failed to preserve this argument on appeal, *see* N.C.R. App. P. 10(a)(1), and because any contradictions in M.S.'s testimony "may have been an appropriate subject for cross examination or a jury argument, [but] . . . in no way alter[] [M.S.'s] competence as a witness," *see State v. Carter*, 210 N.C. App. 156, 162, 707 S.E.2d 700, 705 (internal quotation marks omitted), *disc. review denied*, 365 N.C. 202, 710 S.E.2d 9 (2011), we decline to consider this assertion further.

Defendant next challenges testimony from North Carolina State Bureau of Investigation ("SBI") Special Agent Amanda Nosalek, who was called as the State's last rebuttal witness before the close of all of the evidence.

[3] Defendant first asserts that the trial court erred by failing to issue a limiting instruction on its own motion for the jury "to disregard any reference to [Special Agent Nosalek's] role as a polygraph examiner"

with the SBI. In support of his assertion, defendant directs this Court's attention to cases addressing the admissibility of testimony regarding polygraph examinations in North Carolina. However, our review of the entirety of Special Agent Nosalek's testimony, which occupies four pages of a two-volume, 366 page transcript, shows that her testimony contains no statements or suggestions that she administered a polygraph examination to defendant. When asked to describe her duties with the SBI, Special Agent Nosalek responded that she has worked "as a drug agent, worked drug investigations, criminal investigations, general investigations and in October of 2009, . . . took over as the District Polygraph Examiner." When asked whether, in addition to performing polygraph examinations, she "also assist[ed] other agencies in criminal investigations," Special Agent Nosalek replied, "Absolutely, as assigned by our District Supervisor." Finally, when asked whether she "conduct[ed] an interview as part of [her] duties with the SBI" with defendant in February 2010, Special Agent Nosalek testified that she conducted "a standard interview" with defendant. Thus, after reviewing the entire testimony offered by Special Agent Nosalek, we are not persuaded that the trial court's failure to instruct the jury *sua sponte* "to disregard any reference to [Special Agent Nosalek's] role as a polygraph examiner" would have caused the jury, as defendant urges, to "have been left with the impression" that defendant was questioned "as part of a polygraph examination." Accordingly, we find this argument is without merit.

[4] Defendant next challenges testimony elicited from Special Agent Nosalek that recounted defendant's opinions regarding "what [defendant] thought should happen to a person who had done something like this to a child" and whether "that person should get a second chance." Because defendant challenges this testimony for the first time on appeal, such challenges can only be reviewed for plain error. *See State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) ("Unpreserved error in criminal cases . . . is reviewed only for plain error.").

"It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979). Additionally, "[s]tatements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law," *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007), *aff'd per curiam*, 362 N.C. 342, 661 S.E.2d 732 (2008), and "a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416

(2001), *supersedeas denied and disc. reviews denied and dismissed as moot*, 355 N.C. 216, 560 S.E.2d 141–42 (2002); *see also* N.C. Gen. Stat. § 15A-1443(c) (2011) ("A defendant is not prejudiced by . . . error resulting from his own conduct.").

Our review of the transcript reveals that, during cross-examination, defendant testified about the opinions he expressed to Special Agent Nosalek regarding whether he would want the person who hurt M.S. to be punished, whether such a person should be given a second chance, and what he thought should happen to somebody who abused M.S. Because defendant himself offered testimony that is of a similar character to the testimony from Special Agent Nosalek which defendant now challenges by this argument on appeal, we conclude that defendant has waived his right to appellate review of any error that may have resulted from the admission of this challenged testimony from Special Agent Nosalek. Accordingly, we overrule this issue on appeal. Defendant's challenges to other portions of Special Agent Nosalek's testimony for which defendant has failed to present argument supported by persuasive or binding legal authority are deemed abandoned. *See* N.C.R. App. P. 28(a), (b)(6).

No error.

Judges McGEE and CALABRIA concur.

THE TOWN OF SANDY CREEK, PLAINTIFF
v.
EAST COAST CONTRACTING, INC., MICHAEL D. HOBBS, ENGINEERING SERVICES, PA, CHARLES DAVID DICKENSON, TODD S. STEELE AND RLI INSURANCE COMPANY, DEFENDANTS

AND

EAST COAST CONTRACTING, INC., THIRD-PARTY PLAINTIFF
v.
THE CITY OF NORTHWEST, THIRD-PARTY DEFENDANT

No. COA12-561-2

Filed 16 April 2013

Immunity—governmental—proprietary function—sewer construction

In an action involving roads damaged during sewer construction and a claim of governmental immunity, the trial court did not

err by denying a motion to dismiss by the City of Northwest, a third party defendant. A local governmental unit acts in a proprietary function when it contracts with engineering and construction companies, regardless of whether the project under construction will be a governmental function once it is completed.

Appeal by third-party defendant from order filed 13 February 2012, by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 11 October 2012. Petition for discretionary review for the third-party defendant was allowed on 11 March 2013 by the Supreme Court of North Carolina for reconsideration. This opinion supersedes the opinion filed on 18 December 2012.

Smith Parsons, by Steven L. Smith and Matthew E. Orso, for third-party plaintiff appellee.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Justin K. Humphries and Clay Allen Collier, for third-party defendant appellant.

McCULLOUGH, Judge.

The City of Northwest ("Northwest"), appeals from the trial court's denial of its motion to dismiss East Coast Contracting, Inc.'s ("ECC") third-party complaint. In the initial appeal (*Sandy Creek I*), we affirmed the denial of Northwest's motion on the limited basis of governmental immunity. Our Supreme Court entered an order on 11 March 2013, directing the Court of Appeals to reconsider our decision in light of the case of *Williams v. Pasquotank Co. Parks and Recreation Dep't*, ___ N.C. ___, 732 S.E.2d 137 (2012). Upon reconsideration, we again affirm the trial court's ruling.

I. Background

This case began 9 September 2010 when The Town of Sandy Creek ("Sandy Creek") filed suit against ECC, Engineering Services, PA ("ES"), and individuals seeking recovery for damages to Sandy Creek roads allegedly caused by ECC while ECC was constructing a sewer system for Northwest. The facts were fully set forth in *Sandy Creek I* and will not be repeated here unless necessary to understand the rationale for our decision.

With Sandy Creek's original suit pending, ECC filed a third-party complaint against Northwest on 12 November 2010 alleging breach of

contract, negligence, and indemnity and contribution. Northwest then filed a Rule 12(b)(6) motion to dismiss on 14 February 2011. The trial court on 13 February 2012, denied Northwest's motion to dismiss.

Northwest appealed that order upon the trial court's Rule 54(b) certification. In *Sandy Creek I*, we set forth the standard of review and we concluded that the lower court's denial of Northwest's motion was appealable.

Governmental Immunity

In *Sandy Creek I*, we noted: "In North Carolina the law on governmental immunity is clear. In the absence of some statute that subjects them to liability, the state and its governmental subsidiaries are immune from tort liability when discharging a duty imposed for the public benefit." *McIver v. Smith*, 134 N.C. App. 583, 585, 518 S.E.2d 522, 524 (1999).

In the initial appeal, Northwest first argued that it is entitled to governmental immunity because ECC failed to plead statutory authorization to sue the city and failed to plead waiver of immunity.

We held that waiver of governmental immunity need only be pled where a municipal corporation is acting in a governmental capacity; and where a municipal corporation is acting in a proprietary manner, waiver need not be pled. *See McIver*, 134 N.C. App. at 586, 518 S.E.2d at 525.

In *Sandy Creek I*, we recognized the difficulty in making the determination of whether an authority is entitled to governmental immunity stating: "Our courts have long noted that drawing the line between municipal operations which are proprietary and subject to tort liability versus operations which are governmental and immune from such liability is a difficult task." *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 751, 407 S.E.2d 567, 568 (1991).

Northwest contended that the construction of a sewer system is a governmental function and entitled to governmental immunity. Northwest relied on *McCombs v. City of Asheboro*, where the plaintiff's intestate crawled into a ditch excavated for the laying of a sewer line and was killed when the ditch partially collapsed on top of him. 6 N.C. App. 234, 235, 170 S.E.2d 169, 170 (1969). In *McCombs*, we addressed the issue of governmental immunity and noted "that the courts are sharply divided as to whether the construction of a sewerage system constitutes a governmental function or a proprietary function." *Id.* at 240, 170 S.E.2d at 173. Yet, we ultimately held "the construction of a sewerage system is a governmental function[.]" *Id.*

In *Sandy Creek I*, this Court felt the case of *City of Gastonia v. Balfour Beatty Constr. Corp.*, 222 F. Supp. 2d 771 (W.D.N.C. 2002), to be a better analogy. Although not controlling, in *Balfour*, the court considered whether the construction of a water treatment facility was a governmental or proprietary function. While attempting to apply the law as it anticipated the North Carolina Supreme Court would, the court stated:

> The law of North Carolina requires that the Court look with particularity at the specific function alleged to be governmental. It is not enough to say that "construction" of a water treatment plant is governmental. The Court must look at what part of the long process of construction is alleged to be governmental and which parts are alleged to be proprietary. The decision to construct a water treatment plant, the determination of where to locate it, as well as the setting of standards for its capacity and capability are all exercises of governmental function utilizing governmental discretion. How the City of Gastonia conducts its business relationships with contractors and subcontractors is not inherently governmental -- such a function requires no exercise of governmental discretion.

Id. at 774.

Reconsideration

We now must consider the guidance provided in our Supreme Court's case by *Estate of Williams*, ___ N.C. ___, 732 S.E.2d 137. In that case, the Court dealt with a drowning in a portion of a public park called the "Swimming Hole," an area rented to the public for a fee. The trial court and Court of Appeals had both denied Pasquotank County's attempt to dismiss under the doctrine of governmental immunity. There the Court of Appeals had set forth a four-factor test to assist in determining whether an activity was governmental or proprietary in nature. That test was articulated as follows:

> (1) whether an undertaking is one *traditionally* provided by the local governmental units[;] (2) [i]f the undertaking of the municipality is one in which *only* a governmental agency could engage, or if any corporation, individual, or group of individuals could do the same thing[;] (3) whether the county charged a substantial fee[;] and (4) if a fee was charged, whether a profit was made.

Estate of Williams v. Pasquotank Cnty. Parks & Rec. Dep't, ___ N.C. App. ___, ___, 711 S.E.2d 450, 453 (2011) (internal quotation marks and citations omitted).

The Court of Appeals held that the second factor, whether the undertaking was one in which only a governmental agency could engage, was the most important factor.

Our Supreme Court reversed, stating that our analysis should begin with determining what position, if any, the legislature has taken regarding this activity. This deference is warranted because the courts should not abrogate a doctrine when the legislature has expressed itself. In *Estate of Williams*, our Supreme Court stated:

> "We suggested in *Steelman v. City of New Bern*, 'It may well be that the logic of the doctrine of sovereign immunity is unsound and that the reasons which led to its adoption are not as forceful today as they were when it was adopted.' 279 N.C. at 595; 184 S.E.2d at 243. However, we declined to abrogate a municipality's governmental immunity from tort liability for the negligence of its agents acting in the scope of their authority. The rationale was that, albeit the doctrine was 'judge-made,' the General Assembly had recognized it as the public policy of the State by enacting legislation which permitted municipalities and other governmental bodies to purchase liability insurance and thereby waive their immunity to the extent of the amount of insurance so obtained. *Id.* at 594-96, 184 S.E.2d at 242-53."

___ N.C. ___, ___, 732 S.E.2d 137, 140-41 (2013) (quoting *Smith v. State*, 289 N.C. 303, 312, 222 S.E.2d 412, 418-19 (1976)).

Our Supreme Court recognized that governmental immunity does have limits and will not apply when the function is proprietary. *Town of Grimesland v. City of Washington*, 234 N.C. 117, 123, 66 S.E.2d 794, 798 (1951).

Even though the legislature had recognized that the operation of public parks are proper governmental functions, N.C. Gen. Stat. § 160A-351 (2011), our Supreme Court remanded the case for a determination as to the amount of revenues derived by Pasquotank County in its operation of the "Swimming Hole."

In the case at bar, however, we recognize that judicial precedent has previously held that construction of a sewer system is a governmental

function. *McCombs*, 6 N.C. App. 234, 170 S.E.2d 169. That is not the nature of the claim in this case, however. Here, this case began when the Town of Sandy Creek sued ECC and ES, both of whom contracted with Northwest. The City of Northwest was brought into the suit by a Third-Party Complaint based on Northwest's contractual relationship with the defendants.

In *Sandy Creek I*, we analyzed these pleadings as follow:

> In the present case, ECC claims "Northwest owed [it] a duty of reasonable care in the exercise of its responsibilities on the Project[]" and Northwest breached this duty by "failing to provide Contract Documents sufficient for construction of the Project[,]" "improperly certifying that ECC's work was complete and in conformance with the Contract Documents[,]" accepting "Engineering Services, P.A.'s improper certification that ECC's work was complete and in conformance with the Contract Documents[,]" "failing to direct ECC to correct the allegedly damaged Sandy Creek streets[,]" "failing to properly administer the Contract such that sufficient funds remained to pay for the work to correct the allegedly damaged Sandy Creek streets[,]" and "failing to retain a competent representative to administer the Contract in such a way so as to avoid harm to third parties."
>
> Northwest argues these are political decisions to which ECC attempts to attribute liability. We disagree. These allegations of breaches of the duty of reasonable care do not concern decisions of government discretion such as whether to construct a sewer system or where to locate the sewer system. Instead, the alleged breaches concern Northwest's handling of the contract and Northwest's business relationship with the contractor, acts that are not inherently governmental but are commonplace among private entities.
>
> Thus, even where "the focus is on the nature of the service itself, not the provider of the service[,]" *Wright v. Gaston County*, 205 N.C. App. 600, 606, 698 S.E.2d 83, 88 (2010), we find that Northwest was involved in a proprietary function while handling its business relationship with ECC and the trial court did not err in denying Northwest's motion to dismiss based on governmental immunity.

After reviewing the present case using the guidance set forth in *Estate of Williams*, we remain convinced that a local governmental unit acts in a proprietary function when it contracts with engineering and construction companies, regardless of whether the project under construction will be a governmental function once it is completed. This is ever more so when the party harmed is a neighboring municipality.

II. Conclusion

Accordingly, we once again affirm the trial court's order on the limited basis of governmental immunity.

Affirmed.

Judges GEER and STEPHENS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 APRIL 2013)

ADAMS v. KALMAR No. 12-749	Duplin (06CVS695)	Affirmed
CONGDON v. CONGDON No. 12-988	Pitt (10CVD2485)	Affirmed
GRIST v. SMITH No. 12-488	Buncombe (11CVD5211)	Affirmed
IN RE B.S.L.R. No. 12-1100	Gaston (09JT385)	Affirmed
IN RE D.W.L. No. 12-1251	Buncombe (12JA14)	Affirmed
IN RE H.J.C. No. 12-1432	Catawba (11JT52)	Affirmed
IN RE H.S.G. No. 12-1012	Wilkes (10JA9) (10JT9)	Affirmed
IN RE J.C. No. 12-1182	Wake (10JT297)	Affirmed
IN RE K.C.P. No. 12-1230	Gaston (12JT65)	Affirmed
IN RE N.A.R. No. 12-1240	Jackson (11JT56)	Affirmed
IN RE R.D. No. 12-1400	Mecklenburg (12JA150)	Reversed and Remanded
JACKSON v. TIM MAGUIRE, INC. No. 12-1098	New Hanover (11CVS2156)	Affirmed in part, Vacated in part and Remanded
MOORE v. MOORE No. 12-1058	Mecklenburg (06CVD5757)	Dismissed
MOORE v. SMITH No. 12-1118	Buncombe (10CVS4307)	No Error

QUALITY BUILT HOMES, INC. v. N.C. DEP'T OF ENV'T & NATURAL RES. No. 12-1020	Moore (11CVS52)	Affirmed
STATE v. BABER No. 12-1121	Brunswick (08CRS52858) (10CRS3751)	No error in Case No.08-CRS-52858; Judgment arrested in Case No. 10-CRS-3751
STATE v. BELLAMY No. 12-890	Iredell (05CRS4713-17)	No Error
STATE v. GREGORY No. 12-793	Pasquotank (10CRS2117-18) (10CRS51363) (10CRS51369)	No error in part; Remand in part for resentencing.
STATE v. HAITH No. 12-933	Guilford (09CRS101648) (09CRS102103) (09CRS102107-08) (10CRS24228)	No Error
STATE v. LEWIS No. 12-1056	Wayne (09CRS2564) (09CRS51066-67)	No Error in part; Vacated and Remanded in part
STATE v. LINDSAY No. 12-1319	Cabarrus (09CRS53391)	Dismissed in part; no plain error in part.
STATE v. MCLEOD No. 12-939	Wake (11CRS200609) (11CRS4054)	No Error
STATE v. MILLER No. 12-818	Mecklenburg (10CRS200935-36) (10CRS200940) (10CRS200942)	No Error
STATE v. THOMPSON No. 12-1274	Mecklenburg (09CRS239501) (09CRS76472)	No Error
STATE v. WICKS No. 12-912	Buncombe (11CRS327-31) (11CRS54869) (11CRS55094-95)	No Error

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

to address the issues raised by plaintiffs' appeal. A claim for attorney fees pursuant to N.C.G.S. § 6-21.5 is not part of a plaintiff's underlying substantive claim, and neither the dismissal of a case nor the filing of an appeal deprives the trial court of jurisdiction to hear Rule 11 motions. **Bissette v. Harrod, 1.**

Concession of error by State—not binding—Although the State conceded error by the trial court on a satellite-based monitoring issue, the Court of Appeals was not bound by that concession and reviewed the record to determine whether the trial court did, in fact, commit error. **State v. Hadden, 330.**

Insufficient record on appeal—ineffective assistance of counsel—dismissed without prejudice—The evidence in the record on appeal was insufficient to support defendant's claim that he received ineffective assistance of counsel when his trial counsel failed to procure the assistance of an expert psychologist. The claim was dismissed without prejudice to defendant's right to reassert it through a motion for appropriate relief. **State v. James, 120.**

Interlocutory orders and appeals—denial of motion to dismiss—Plaintiff mother's appeal from the trial court's order denying her motion to modify child custody was dismissed because it was an appeal from an interlocutory order. The reserved issue of attorney fees under N.C.G.S. § 50-13.6 precluded the finality of the child custody order. Plaintiff's conditional petition for writ of *certiorari* was denied. **Hausle v. Hausle, 241.**

Interlocutory orders and appeals—denial of summary judgment—collateral estoppel—substantial right—The trial court's order denying defendant's motion for summary judgment in a condemnation case on the ground of collateral estoppel affected a substantial right and was properly before the Court of Appeals. **Hillsboro Partners, LLC v. City of Fayetteville, 30.**

Interlocutory orders and appeals—lobbying enforcement—substantial right—Respondent's appeal was from an interlocutory order but immediately appealable because a substantial right was affected where respondent investigated petitioner's lobbying activities and issued fines, and the matter proceeded through administrative hearings to the superior court, where the fines were set aside. Petitioner's constitutional claim was still pending, but immediately appealable because respondent was charged with investigating violations of and enforcing the lobbying laws and respondent's ability to carry out its duties required that it be able to act timely on allegations it believed constituted violations. **Beason v. N.C. Dep't of Sec'y of State, 222.**

Interlocutory orders and appeals—substantial right—privileged information—Because the trial court's interlocutory order compelled production of files which may be privileged pursuant to N.C.G.S. § 160A-168, the trial court's order affected a substantial right and was immediately appealable. **Wind v. City of Gastonia, 180.**

Interlocutory orders and appeals—substantial right—violations and enforcement of lobbying laws—Although respondent's appeal from the trial court's order reversing and setting aside a civil fine assessment imposed against petitioner was from an interlocutory order, a substantial right was affected entitling respondent to immediate appellate review since respondent was charged with investigating violations of and enforcing Articles 2, 4, and 8 of the lobbying laws pursuant to N.C.G.S. § 120C-600 (a-b). **Beason v. N.C. Dep't of Sec'y of State, 210.**

APPEAL AND ERROR—Continued

Motion for writ of certiorari—no meritorious claim—A defendant who contended that there was insufficient evidence to support his guilty pleas to drugs and firearms charges did not present good cause for the issuance of a writ of *certiorari* where he failed to present a meritorious claim or reveal error in the proceeding below. The appeal was dismissed. **State v. Rouson, 562.**

Notice of appeal—pro se—no service on State—court to which appeal taken not identified—A *pro se* notice of appeal that was not served on the State and that did not identify the court to which appeal was taken was not dismissed where the State did not raise the lack of service and participated in the appeal, and the Court of Appeals was the only court with jurisdiction to hear the appeal. **State v. Ragland, 547.**

Preservation of issues—closing argument—not transcribed—An appellate argument concerning the closing argument in an automobile case was dismissed where the argument was not transcribed nor adequately set out in narrative form. **Joines v. Moffitt, 61.**

Preservation of issues—Constitutional Law—double jeopardy—Rule 2 not invoked—Defendant's argument the State violated his right to be free from double jeopardy for obtaining property by false pretenses was not preserved at trial where the record contained no indication that defense counsel specifically argued the double jeopardy issue to the trial court. The Court of Appeals declined to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to review the issue where the record on appeal did not contain all the materials necessary to determine defendant's double jeopardy claim. **State v. Seelig, 147.**

Preservation of issues—failure to argue—Since defendant City did not argue that it could satisfy the mandatory disclosure requirement of N.C.G.S. § 160A-168(c)(1) by allowing plaintiff to inspect "confidential" information from his own employee personnel file that had been subjectively redacted by defendant, and since questions as to public policy are for legislative determination, such a discussion was inapposite to the issues. **Wind v. City of Gastonia, 180.**

Preservation of issues—failure to argue at trial—Although defendant contended the minor victim was incompetent to testify in accordance with N.C.G.S. § 8C 1, Rule 601(b) in a sexual offenses case, defendant failed to preserve this issue under N.C. R. App. P. 10(a)(1) because he did not challenge the victim's competence at trial. **State v. Steen, 568.**

Preservation of issues—failure to object at trial—plain error not argued—The Court of Appeals did not address a challenge to testimony where defendant did not object at trial or argue plain error on appeal. **State v. Ragland, 547.**

Preservation of issues—failure to present issue at trial—Although plaintiff contended that the trial court erred by disregarding lots that were combined by owners to avoid multiple assessments, this assignment of error was not preserved under N.C. R. App. P. 10(a)(1) because plaintiff did not present this issue at trial. **Lake Toxaway Cmty. Ass'n, Inc. v. RYF Enters., LLC, 483.**

Preservation of issues—inadequate record on appeal—constitutional law—effective assistance of counsel—Defendant's argument that he did not receive effective assistance of counsel during the plea bargaining process in an obtaining property by false pretenses case was dismissed without prejudice to defendant's filing a motion for appropriate relief in the trial court. Defense counsel conceded that the record before the Court of Appeals was inadequate to address the issue, and the issue was raised on direct appeal for preservation purposes only. **State v. Seelig, 147.**

EVIDENCE—Continued

Expert testimony—sufficient notice—opportunity to cross-examine—right to discovery not violated—right to reasonable notice not violated—The trial court in a second-degree murder case did not violate defendant's statutory right to discovery or his constitutional right to reasonable notice of evidence by allowing the State to present the testimony of an expert toxicologist. Defendant had the toxicology report for four years, had the report reviewed by two independent experts, was afforded the opportunity to meet privately with the expert for an hour and twenty minutes prior to the *voir dire* hearing, and was afforded a full opportunity to cross-examine the witness on *voir dire*. **State v. Barnes, 318.**

Gang-related testimony—irrelevant—prejudicial—plain error—The trial court erred in an attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon with intent to kill case by allowing irrelevant gang-related testimony. Furthermore, in view of the entire record, the admission of the testimony had a probable impact on the jury's finding that defendant was guilty and thus constituted plain error. **State v. Hinton, 108.**

Hearsay—prior testimony—confrontation rights not violated—The trial court did not err in a first-degree murder, attempted robbery with a dangerous weapon, and felony breaking and entering case by admitting into evidence a witness's prior testimony from defendant's *Alford* plea hearing under N.C.G.S. § 8C-1, Rule 804(b)(1), and defendant's confrontation rights were not violated. **State v. Rollins, 129.**

Judicial notice—uncertified criminal file—In a domestic violence protection order proceeding, the trial court erred by taking judicial notice of an uncertified criminal file showing that defendant was convicted in the separate criminal case arising out of the alleged assault. Since the trial court specifically relied upon defendant's having been found guilty in the criminal action, it cannot be concluded that taking judicial notice of the criminal file was harmless error. **Little v. Little, 499.**

Objection—subsequent evidence without objection—There was no error in a rape and sexual offense prosecution where the State was allowed to introduce the victim's underwear over defendant's chain-of-custody objection and defendant did not object to subsequent testimony regarding cuttings from the underwear that were tested by a forensic scientist and a laboratory report from those tests. **State v. Ragland, 547.**

Officer's opinion—right of way—excluded—The trial court did not abuse its discretion in an action arising from an automobile accident by excluding an officer's testimony regarding his opinion as to which party had the right of way. The officer did not have the requisite personal knowledge to offer his opinion. **Joines v. Moffitt, 61.**

Opened door—remand on other grounds—argument not considered—An argument about whether the door was opened to evidence otherwise properly excluded was not considered where a new trial was granted on other grounds. The same testimony may not necessarily recur during the new trial. **Katy v. Capriola, 470.**

Plaintiff's testimony—medical diagnosis—hearsay—In a domestic violence protection order proceeding, plaintiff's testimony that she had been diagnosed with a neck injury was hearsay that did not fall within an exception and was prejudicial. **Little v. Little, 499.**

WORKERS' COMPENSATION

Causation—migraine headaches—The Industrial Commission did not err in a workers' compensation case by determining that plaintiff's migraine headaches were causally related to her work-related injury. The work-related injury need not be the sole cause of the problems to render an injury compensable as long as the work-related accident contributed in some reasonable degree to plaintiff's disability. **Williams v. Bank of Am., 412.**

Conclusion of law—mischaracterization of conclusion—The Industrial Commission did not err in a workers' compensation case by entering its conclusion of law number five. Plaintiff's argument was a mischaracterization of the Commission's conclusion. **Gray v. United Parcel Serv., Inc., 15.**

Contempt—failure to provide medical treatment—discovery sanction—not applicable—The Industrial Commission did not err in a workers' compensation case because it did not hold defendants in contempt under N.C.G.S. § 1A-1, Rule 37(b)(2) for allegedly failing to provide plaintiff with medical treatment pursuant to an order of the Commission. That rule is limited to remedying those instances in which a party fails to make discovery or comply with discovery orders during pretrial proceedings and was not applicable here. **Powe v. Centerpoint Human Servs., 256.**

Disability—effect of temporary payments—vocational rehab—refusal to cooperate—A workers' compensation case was remanded for a determination by the Commission as to whether plaintiff was disabled under *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762. The Commission improperly or accidentally converted defendants' payment of temporary total disability benefits into a wholly unsupported stipulation that plaintiff was totally disabled during the payment periods, and seemingly focused on the vocational rehabilitation issue to the exclusion of the disability issue. The impact of an employee's refusal to cooperate with vocational rehabilitation services on the employee's right to indemnity compensation arises only after she meets her burden of establishing disability. **Powe v. Centerpoint Human Servs., 256.**

Doctor's testimony—Commission the sole judge of credibility of witnesses—The Industrial Commission did not err in a workers' compensation case by concluding a doctor's testimony was speculative. Regardless of whether the Commission deemed it speculative, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. **Gray v. United Parcel Serv., Inc., 15.**

Findings—continued rehab beneficial—supporting evidence sufficient—In a case decided on other grounds, the Industrial Commission's finding in a workers' compensation case that plaintiff would benefit from continued rehabilitation was based on competent evidence. Though the evidence was, at best, minimal, it was competent to support the Commission's findings of fact under the applicable deferential standard. **Powe v. Centerpoint Human Servs., 256.**

Findings—supported by the evidence—An argument by the plaintiff in a workers' compensation case that the Industrial Commission's findings were not supported by the evidence was overruled where plaintiff based her argument on a trifling disagreement with how the Commission interpreted the evidence in the record, not a lack of true evidentiary support. **Powe v. Centerpoint Human Servs., 256.**