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REPORTS

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CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS
OF
NORTH CAROLINA
AT
RALEIGH

KERRY BIGELOW & CLYDE CLARK, PLAINTIFFS-APPELLANTS
v.
TOWN OF CHAPEL HILL & ROGER STANCIL, IN HIS OFFICIAL CAPACITY AS
MANAGER OF THE TOWN OF CHAPEL HILL AND IN HIS PERSONAL CAPACITY, INSOFAR AS
HE WAS OPERATING OUTSIDE OF HIS JOB DESCRIPTION, DEFENDANTS-APPELLEES

No. COA12-1105

Filed 7 May 2013

Public Officers and Employees—sanitation workers—wrongful discharge

Although the trial court did not err in a wrongful discharge case by granting defendants' N.C.G.S. § 1A-1, Rule 12(c) motion for judgment on the pleadings for defendant town manager Stancil in his individual capacity, the remainder of the trial court's 29 May 2012 order was vacated and remanded. Plaintiff sanitation workers sufficiently pled a claim for wrongful discharge.

Appeal by Plaintiffs from order entered 29 May 2012 by Judge R. Allen Baddour, Jr., in Superior Court, Orange County. Heard in the Court of Appeals 12 March 2013.

Alan McSurely for Plaintiffs-Appellants.

Cranfill Sumner & Hartzog LLP, by Dan M. Hartzog and Dan M. Hartzog, Jr., for Defendants-Appellees.

McGEE, Judge.

BIGELOW v. TOWN OF CHAPEL HILL

[227 N.C. App. 1 (2013)]

Kerry Bigelow (Bigelow) and Clyde Clark (Clark) (together, Plaintiffs) were fired from their employment as sanitation workers for the Town of Chapel Hill (Chapel Hill) on 29 October 2010. Roger Stancil (Stancil) was Chapel Hill's town manager at that time. During their employment with Chapel Hill, Plaintiffs rode on town garbage trucks and collected refuse from roll-out canisters, as well as yard waste. The firings were based upon findings that Plaintiffs had engaged in insubordination, threatening and intimidating behavior, and had been unsatisfactory in their job performances. Plaintiffs requested a hearing before Chapel Hill's Personnel Appeals Committee (the Committee) to review the decision to terminate Plaintiffs' employment. Hearings were conducted on 3 and 9 February 2011. By split votes, the Committee recommended that Stancil uphold the decision to fire Plaintiffs.

Plaintiffs filed this action on 4 December 2011. In their complaint, Plaintiffs alleged that Chapel Hill and Stancil, in both his official capacity and his personal capacity, (together, Defendants), wrongfully discharged Plaintiffs from their jobs and violated certain of Plaintiffs' rights protected under the North Carolina Constitution.

Defendants answered Plaintiffs' complaint on 5 December 2011. Defendants moved for judgment on the pleadings on 20 April 2012. Defendants' motion was heard on 14 May 2012 and, by order entered 29 May 2012, the trial court granted Defendants' motion on the pleadings. Plaintiffs appeal. Additional facts and allegations relevant to this opinion are included below.

I.

The sole issue on appeal is whether the trial court erred in granting Defendants' Rule 12(c) motion for judgment on the pleadings. We affirm as to Stancil in his individual capacity, but vacate and remand the remainder of the trial court's 29 May 2012 order for further action.

II.

Plaintiffs present the following question on appeal: "Did the superior court err when it dismissed Plaintiffs' four claims based on the pleadings, pursuant to N.C. Rules of Civil Procedure 12(c)?"

"This Court reviews a trial court's grant of a motion for judgment on the pleadings *de novo*." *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, 764-65 (2008) (citation 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

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[227 N.C. App. 1 (2013)]

is entitled to judgment as a matter of law.” *Id.* at 761, 659 S.E.2d at 767 (citation omitted).

[Rule 12(c)’s] function is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit. . . . Judgment on the pleadings is a summary procedure and the judgment is final. Therefore, each motion under Rule 12(c) must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits. The movant is held to a strict standard and must show that no material issue of facts exists and that he is clearly entitled to judgment. The 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) (citations omitted). “ ‘Judgments on the pleadings are disfavored in law[.]’ ” *Carpenter*, 189 N.C. App. at 757, 659 S.E.2d at 764-65 (citations omitted).

“ ‘A motion for judgment on the pleadings is allowable only where the pleading of the opposite party is so fatally deficient in substance as to present no material issue of fact[.] A complaint is fatally deficient in substance, and subject to a motion by the defendant for judgment on the pleadings if it fails to state a good cause of action for plaintiff and against defendant[.]’ ”

George Shinn Sports, Inc. v. Bahakel Sports, Inc., 99 N.C. App. 481, 486, 393 S.E.2d 580, 583 (1990) (citations omitted).

Under the “notice theory” of pleading contemplated by Rule 8(a)(1), detailed fact-pleading is no longer required. A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and – by using the rules provided for obtaining pretrial discovery

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[227 N.C. App. 1 (2013)]

– to get any additional information he may need to prepare for trial.

Sutton v. Duke, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970). A motion to dismiss is appropriately granted when a complaint states “a defective cause of action,” but not when a complaint states “a defective statement of a good cause of action.” *Id.* at 105-06, 176 S.E.2d at 168 (citations omitted). “[O]ther provisions of Rule 12, the rules governing discovery, and the motion for summary judgment provide procedures adequate to supply information not furnished by the complaint.” *Id.* “[A] document attached to the moving party’s pleading may not be considered in connection with a Rule 12(c) motion unless the non-moving party has made admissions regarding the document.” *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 205, 652 S.E.2d 701, 708 (2007).

III. *Consideration of Alleged Facts for a Motion for Judgment on the Pleadings*

We wish to make clear that what follows is not a statement of facts, but a recitation of Plaintiffs’ allegations as pleaded, and some additional information from the pleadings favorable to Plaintiffs. Defendants’ alleged facts are not included below unless favorable to Plaintiffs. *Kennedy*, 286 N.C. at 137, 209 S.E.2d at 499. We are in no manner endorsing Plaintiffs’ factual allegations. Plaintiffs’ complaint, along with Defendants’ answer and documents attached to the pleadings, when considered in the light most favorable to Plaintiffs, and taking Plaintiffs’ allegations as true, show the following: Plaintiffs, both African Americans, worked together as employees of Chapel Hill, beginning in the summer of 2009. Plaintiffs rode on the rear of collection trucks and emptied garbage bins into the trucks. Clark was hired as a sanitation worker by Chapel Hill in 1998. Bigelow drove large garbage trucks for the City of Burlington for eighteen years before being hired as a sanitation worker by Chapel Hill in 2007, where his “municipal sanitation driving experience placed him at the highest salary range for sanitation workers.” Bigelow received a performance evaluation of “outstanding” in 2008, and also received an “exceeds expectations” evaluation in 2009.

According to Plaintiffs, Chapel Hill posted a job opening for a driving position in December 2009. Bigelow applied for the position. Darrell Town (Town), a white male hired shortly before Chapel Hill hired Bigelow, also applied. Town did not have experience driving garbage collection trucks. Prior to being hired by Chapel Hill, he had worked for less than four and a half years at a private recycling company. Town was hired at the low end of the salary range for sanitation workers.

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[227 N.C. App. 1 (2013)]

Plaintiffs alleged that both Bigelow and Town were found qualified and both were interviewed. Bigelow's supervisor, an African American man, indicated that Bigelow would be a good choice for the job due to his prior heavy truck driving experience, his many years of working in sanitation, and because he was "a good person[.]" However, the Superintendent of Solid Waste, Harv Howard (Howard), a white male, selected Town, the less-qualified candidate, over the more experienced Bigelow. Bigelow filed a grievance through normal procedures on 12 February 2010. He alleged race discrimination in the hiring of Town, the less-experienced person, for the driving position. Racial discrimination in hiring is prohibited by [a Chapel Hill] town ordinance and written policies "promulgated by Defendant Stancil," a white male.

Plaintiffs alleged Bigelow had received no response from Chapel Hill by early June 2010, even though he had filed multiple grievances in February, March, and April. Bigelow retained an attorney who, in June 2010, wrote a "courtesy letter" to Chapel Hill, indicating that Bigelow was going to file a charge with the Equal Employment Opportunity Commission (EEOC) against Defendants. Bigelow filed an EEOC charge against Defendants on 9 June 2010.

The following day, Valerie Meicher (Meicher) sent a memorandum on behalf of Chapel Hill thanking Bigelow "for participating in the recent selection interviews[.]" and indicated that, "in response to a complaint[.]" Chapel Hill had "determined there were inconsistencies in the administration of the interview process." The "complaint" was in actuality the multiple grievances filed by Bigelow. Bigelow was invited to speak with a Chapel Hill official "about the date, time, and place of another interview." Chapel Hill had three different versions of this memorandum circulating "within . . . Stancil's management team" after Chapel Hill became aware of the EEOC charge. Chapel Hill also sent Bigelow's attorney a letter stating that it had finally completed its investigation into Bigelow's grievances. Defendants had placed Bigelow in the pool of applicants qualified for the driving position, and had interviewed him, but stated to the EEOC that they had hired the lesser-qualified Town because Bigelow was *unqualified* for the position.

Plaintiffs alleged that "Defendants engaged in heated arguments about whether to admit that Superintendent Howard's selection of the less qualified white applicant over . . . Bigelow was race discrimination." Plaintiffs alleged such an admission would jeopardize certain federal funding Chapel Hill received, and would give a boost to "Union organizing efforts." Plaintiffs alleged Chapel Hill knew the hiring of Town over Bigelow was discriminatory and that responding "in an honest, accurate,

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[227 N.C. App. 1 (2013)]

and timely manner” to Bigelow’s “challenge” would create “a crisis within the Public Works Department.” Plaintiffs also alleged that Stancil personally endorsed delay tactics that violated his own policies and the policies of Chapel Hill. Meicher reported directly to Stancil concerning the Bigelow issue. Meicher and Howard both resigned their “good jobs with [Chapel Hill] in the fall of 2010, as Defendants carried out the decision to discharge Plaintiffs.”

According to Plaintiffs’ complaint, they were penalized for other actions they took that affected Chapel Hill. In mid-March 2010, Clark complained to Howard concerning dangerous activities undertaken by the driver of the truck on which Clark and Bigelow worked. In early March, the driver, James Jones (Jones) was parking in the center (turn) lane of the five-lane Martin Luther King Boulevard in Chapel Hill, causing Clark to have to run across two lanes of traffic to collect garbage bins. Clark then had to drag the bins back across the two lanes of traffic to empty them into the truck. Bigelow took photographs of this practice, and when Jones saw Bigelow taking photographs, Jones “sped up the hill, leaving both of his collectors with no protection in the middle of the Boulevard.” When Clark complained to Howard, he showed Howard some of those photographs.

Plaintiffs alleged that Howard responded to Clark’s concerns by stating that he “was not interested in the complaints about unsafe working conditions, and that [] Clark should ‘not let [] Bigelow put you into something you can’t get out of.’ ” Jones was never “counseled or disciplined” for his unsafe driving practices, and drivers for Chapel Hill continued to engage in unsafe driving practices. Because drivers and collectors were not paid hourly, they received the same amount no matter how long it took to complete a route. Drivers rushed to complete routes as quickly as possible so they could take on second jobs “to supplement the low pay of [Chapel Hill].” Chapel Hill and Stancil were aware of these “incentive[s] for the workers to cut safety corners[.]”

According to Plaintiffs’ complaint, Chapel Hill had a policy, promulgated by Stancil on 9 November 2007, which required Stancil to expediently and thoroughly investigate complaints of safety violations and discrimination, resolve issues, and “ ‘learn from the incident[s] and revise expectations and Policy as appropriate.’ ” Stancil did not follow this policy in response to Plaintiffs’ complaints.

Plaintiffs further alleged that Howard responded to Plaintiffs’ complaints by requiring a meeting on 18 March 2010, and by directing Larry Stroud (Stroud), the Solid Waste Supervisor, to tell Plaintiffs’ co-workers

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that Plaintiffs “ ‘were messing up everything for the guys, and . . . that the guys would probably end up working 10 hours a day.’ ” Howard and Stroud “engaged in a campaign against Plaintiffs, saying [Plaintiffs] were trying to take away” the system whereby collectors could leave as soon as they finished their routes. Plaintiffs were at the meeting, and were singled out by Howard and Stroud, which resulted in co-workers “glaring” at Plaintiffs and telling them to stop filing grievances. Chapel Hill retaliated against Bigelow by informing Public Works employees that Bigelow had caused Jones to lose his driving job.

Plaintiffs began posting Union notices and articles on the employee bulletin board in early March 2010, and began talking with other employees about the N.C. Public Service Workers Union, which had made several earlier attempts to organize workers in Chapel Hill. On 23 March 2010, Defendants engaged Capital Associated Industries (CAI), “a right-wing consulting company that advertises it helps municipalities prevent unions from gaining a foothold in their workplaces[,]” to “ ‘uncover’ and ‘understand’ the ‘recent allegations in the Public Works Department[.]’ ” CAI was to investigate the issues surrounding Bigelow and Clark, and then give a “ ‘summary report and recommendations to the [Chapel Hill] Town Attorney.’ ” Plaintiffs alleged, “on information and belief,” that the purpose of having CAI provide a report to the Chapel Hill town attorney was to protect its contents through attorney-client privilege.

Plaintiffs claim that they continued to “associate and to speak out about matters of important public policy,” including discrimination and workplace safety. They also joined the N.C. Public Service Workers Union, UE-150, in April 2010. Chapel Hill was aware of Plaintiffs’ union status. Plaintiffs and the union “helped other workers file grievances in the spring and summer of 2010.” Plaintiffs asked the mayor and town council of Chapel Hill to insure that deadlines on responding to grievances were followed and that workers’ rights to “ ‘meet and confer’ ” were upheld. Defendants were upset that Plaintiffs had contacted the mayor. Stancil’s strategy was to “dig up some dirt” on Plaintiffs and “discharge them, in the hopes this would avert a crisis” in the Public Works Department.

Plaintiffs alleged that, in mid-July 2010, a Chapel Hill resident called and left a complaint related to Bigelow and Clark. At a later Committee hearing, this resident was referred to by the pseudonym, “Ms. Johnson” (Johnson) because she wished to remain anonymous. Johnson said a political fundraiser was to be held in her neighborhood, that it was to be attended by Vice President Biden, and that she had asked Plaintiffs to take more yard waste so her yard “would look nice for the Vice

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President.” Johnson stated that the “guys on the back of the truck said something like ‘who the h*** is paying for a \$500 room at the Carolina Inn,’ and ‘he’s not here to see the common man.’ ” Johnson said this response upset her, and that she “ ‘felt threatened’ and was afraid to report the interaction” lest she be “ ‘retaliated against.’ ”

That same day, Richard Terrell (Terrell), a member of the Public Works management team, visited Johnson’s neighborhood to investigate. Terrell determined that the brush had been collected and that the only remaining issue was whether Bigelow and/or Clark had made inappropriate remarks to Johnson. Terrell “concluded that if the remarks were deemed inappropriate, ‘counseling, oral or written warning’ would be available” for Plaintiffs.

According to Plaintiffs, Johnson emailed photographs to Chapel Hill on 9 September 2010. The photographs showed “ ‘what was left on Sandy Creek [Rd.]’ in front of her house,” and Johnson stated she was tired of having to rake the street after the crew had collected the yard debris. Johnson refused to be interviewed by CAI.

Following the departure of Howard and Meicher from employment by Chapel Hill, Plaintiffs were placed on administrative leave and instructed to stay off Chapel Hill property. Plaintiffs “were given no specific charges, written or oral, when they were ejected from [Chapel Hill] property or at any time after that before they were fired.” Chapel Hill’s policy is to

afford its employees certain due process rights[,] . . . [including] provid[ing] “specific” performance problems with the employee in a counseling session, and then two more written warnings, before termination. Here, where the initial complaints involved poor performance (not picking up yard waste), these warnings were required. In this case, no counseling[] or any disciplinary meetings were ever provided [to Plaintiffs] before they were summarily discharged.

Chapel Hill fired Plaintiffs in late October 2010.

Subsequent to Plaintiffs’ firings, the Committee held hearings to address the issues surrounding the firings. Plaintiffs alleged that during the hearings, the voices of two unidentified women were “piped in to the [Chapel Hill] Library conference room.” There was no way for Plaintiffs to identify to whom the voices belonged. The two women read prepared statements and would not answer any questions. “It is not known who

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wrote the statements for them, or when they were written.” The women stated they were told all they would have to do was read the written statements, and that they would not have to answer any questions.

Defendants attached the Committee findings and reports to their answer. We therefore consider these reports only to the extent they support Plaintiffs’ claims. The Committee consisted of a five-person panel. The Committee voted three to two in favor of upholding Bigelow’s termination by Chapel Hill, and voted four to one in favor of upholding Clark’s termination.

The following information was included in Committee documents attached to Defendants’ answer. Committee members expressed concern that, though Bigelow’s conduct was confrontational, the situation should have been handled with progressive disciplinary action, and that Chapel Hill failed to substantiate that Bigelow’s behavior “rose to the level of threatening and intimidating behavior or detrimental personal conduct.” Members were “unconvinced” that the anonymous “testimony” of one of the female witnesses “corroborated the allegation of threatening and intimidating behavior,” especially because that witness stated that, though she found Bigelow’s behavior “‘rude’” and felt he had not done a satisfactory job, she did not want him fired. “She just wanted her old crew back, a crew which included [] Bigelow.” Members were concerned that they were not allowed to question the anonymous witnesses and therefore “could not get the information necessary to come to a determination.” They were further “troubled by the lack of a clear response from [Chapel Hill] regarding exactly which public complaints had been independently verified by a member of [Chapel Hill] management, and how many different incidents the complaints actually referenced.” Members believed that Bigelow’s conduct towards co-workers was “behavior . . . tolerated as part of the culture of the department.” Members found that Chapel Hill did not follow its own policies before it terminated Bigelow. There was no direct evidence that Bigelow had been informed that his behavior was inappropriate, or warned that failure to amend his behavior could lead to termination. Two members cited Chapel Hill policy: “ ‘Normally employees receive counseling and several warnings and are given adequate time and assistance such as training or coaching before disciplinary actions result from unsatisfactory job performance.’ ” These members felt that Chapel Hill’s failure to comply with its own policy “contributed to the escalation of a problem that might have been resolved with appropriate warnings and counseling[.]” These members were particularly concerned that Chapel Hill knew of the complaints “early on” but did not inform Bigelow, nor provide

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the counseling or warnings dictated by policy that could have allowed Bigelow to address the offending behavior.

With respect to Clark, different members believed either that Clark was being unfairly held responsible for some of Bigelow's actions, that Clark's conduct was merely "discourteous" and should have been handled through "the progressive disciplinary procedures outlined in [Chapel Hill's] personnel manual," or that Chapel Hill had failed to prove the alleged behavior. One member was troubled that previous disciplinary actions related to Clark that were presented by Chapel Hill occurred before 2006, and that the only recent written warning concerned Clark's attendance, not inappropriate behavior.

We reiterate that none of the above allegations constitute established facts. They are alleged facts, and reasonable inferences therefrom, included in this opinion solely for our Rule 12(c) analysis.

We note that Defendants seem to misconstrue how documents attached to Defendants' pleadings are to be considered when ruling on Defendants' Rule 12(c) motion. Defendants cite heavily to certain findings made by the Committee and portions of the CAI report that support Defendants' argument that Plaintiffs were discharged for legitimate, not wrongful, reasons. For instance, Defendants state in their brief: "As established above, the CAI report found that Plaintiffs had directly contributed to low morale in the department, created fear among residents to the point where citizens were afraid to interact with [Chapel Hill] employees, [and] were consistently insubordinate and disrespectful to their supervisor[.]" Alleged facts in documents attached to Defendants' pleadings, just as alleged facts in Defendants' pleadings, are not considered in Defendants' motion for judgment on the pleadings unless Plaintiffs have admitted the alleged facts, or the alleged facts support Plaintiffs' claims. *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499; *see also Weaver*, 187 N.C. App. at 205, 652 S.E.2d at 708. The fact that findings in the documents might support a conclusion that Plaintiffs were discharged for lawful and legitimate reasons cannot factor in our review of the trial court's decision to grant Defendants' motion on the pleadings.

IV. *Wrongful Discharge*

Plaintiffs' fourth claim is for wrongful discharge. We limit this portion of the opinion to the wrongful discharge claim against Chapel Hill.

An employer wrongfully discharges an at-will employee if the termination is done for "an *unlawful reason or purpose* that contravenes public policy." As stated in

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Amos, the public-policy exception was “designed to vindicate the rights of employees fired for *reasons* offensive to the public policy of this State.” This language contemplates a degree of intent or wilfulness on the part of the employer. In order to support a claim for wrongful discharge of an at-will employee, the termination itself must be motivated by an unlawful reason or purpose that is against public policy.

Garner v. Rentenbach Constructors Inc., 350 N.C. 567, 571-72, 515 S.E.2d 438, 441 (1999) (citations omitted).

Although the definition of “public policy” approved by this Court does not include a laundry list of what is or is not “injurious to the public or against the public good,” at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes.

Amos v. Oakdale Knitting Co., 331 N.C. 348, 353, 416 S.E.2d 166, 169 (1992) (footnote omitted). However, “[u]nder the rationale of [Supreme Court precedent] something more than a mere statutory violation is required to sustain a claim of wrongful discharge under the public-policy exception.” *Garner*, 350 N.C. at 571, 515 S.E.2d at 441. “[A] degree of intent or wilfulness on the part of the employer [is required].” *Id.* at 572, 515 S.E.2d at 441. “[T]he termination itself must be motivated by an unlawful reason or purpose that is against public policy.” *Id.*

Although Plaintiffs’ complaint is not a model of clarity, Plaintiffs need only to allege facts sufficient to support a claim that their firing was “motivated by an unlawful reason or purpose that is against public policy.” *Id.* Plaintiffs alleged they were fired in retaliation for actions in which they were legally permitted to engage, and that this constituted a violation of public policy. If these allegations are supported by alleged facts in the pleadings, Plaintiffs have pled a valid claim. *Kennedy*, 286 N.C. at 137, 209 S.E.2d at 499.

First, Plaintiffs’ complaint alleged that Bigelow took photographs of unsafe driving conditions, and that Clark used those photos and lodged a complaint with Howard. Howard’s alleged response was that he was not interested, and that Clark should not let Bigelow “ ‘put you into something you can’t get out of.’ ”

Chapter 95, Article 21 of the North Carolina General Statutes is the

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Retaliatory Employment Discrimination Act (REDA). N.C. Gen. Stat. § 95-241 of REDA states:

(a) No person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do any of the following:

(1) File a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to any of the following:

....

b. []Article 16 of this Chapter.

N.C. Gen. Stat. § 95-241(a)(1)b. (2011). Article 16 is the Occupational Safety and Health Act of North Carolina (OSHANC). OSHANC states its legislative purpose in part as follows:

(2) The General Assembly of North Carolina declares it to be its purpose and policy through the exercise of its powers to ensure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions and to preserve our human resources:

a. By encouraging employers and employees in their effort to reduce the number of occupational safety and health hazards at the place of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

b. By providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

....

d. By building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

....

h. By providing for appropriate reporting procedures with respect to occupational safety and health

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which procedures will help achieve the objectives of this Article and accurately describe the nature of the occupational safety and health problem;

i. By encouraging joint employer-employee efforts to reduce injuries and diseases arising out of employment;

N.C. Gen. Stat. § 95-126(2) (2011). “The primary purpose of both the federal and state provisions prohibiting retaliatory discrimination is to ensure that employees are not discouraged from reporting violations of [OSHANC].” *Brooks v. Stroh Brewery Co.*, 95 N.C. App. 226, 229, 382 S.E.2d 874, 877 (1989).

Second, Plaintiffs alleged they were fired for engaging in union activities, including recruiting and using union attorneys to assist Plaintiffs in helping other employees file grievances. N.C. Gen. Stat. § 95-81 states: “No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.” N.C. Gen. Stat. § 95-81 (2011).

Third, Plaintiffs alleged that Chapel Hill retaliated against Bigelow for filing discrimination grievances, including Bigelow’s grievance filed in response to the hiring of Town for the driving position. N.C. Gen. Stat. § 95-151 states: “No employer, employee, or any other person related to the administration of this Article shall be discriminated against in any work, procedure, or employment by reason of sex, race, ethnic origin, or by reason of religious affiliation.” N.C. Gen. Stat. § 95-151 (2011). A retaliatory firing based upon an employee’s filing of a claim of discrimination in the workplace clearly violates public policy and could support a wrongful discharge claim. Furthermore, Bigelow initiated an EEOC charge against Chapel Hill based upon his perceived lack of response to his discrimination grievance. Retaliation against an employee for filing an EEOC charge is also a violation of public policy. *Brewer v. Cabarrus Plastics, Inc.*, 130 N.C. App. 680-81, 691, 504 S.E.2d 580, 586-87 (1998).

Fourth, Plaintiffs alleged that Chapel Hill violated their rights under the North Carolina Constitution by firing them for protected acts. Specifically, Plaintiffs alleged they were fired for acts protected by Article I, Section 14: “Freedom of speech . . . shall never be restrained[.]” N.C. Const. art. I, § 14. Plaintiffs alleged that they were fired for pro-union activities such as posting union notices and articles on the employee bulletin board and talking about the N.C. Public Service Workers Union with co-workers, speaking about dangerous workplace practices, and for political speech directed at a resident. Plaintiffs further alleged they

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were fired for acts protected by Article I, Section 19: “No person shall be . . . disseized of his . . . privileges . . . or in any manner deprived of his . . . property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.” N.C. Const. art. I, § 19. Plaintiffs alleged that they were deprived of property and privileges – their jobs – in a manner inconsistent with the “law of the land.” Specifically, they alleged that they were fired on the pretext of a report produced by an anti-union organization, when the actual reasons for their firings were those outlined in their complaint. Plaintiffs also alleged they were retaliated against, and fired, based in part on race. They alleged a continuing pattern of discrimination against Bigelow in promotion practices and handling of his discrimination grievances, and that discrimination played a significant part in the handling of the complaints of white residents. Violations of a plaintiff’s rights under the North Carolina Constitution violate public policy and will support a claim of wrongful discharge from public employment. *Whitings v. Wolfson Casing Corp.*, 173 N.C. App. 218, 222, 618 S.E.2d 750, 753 (2005); *Johnson v. Mayo Yarns, Inc.*, 126 N.C. App. 292, 295-97, 484 S.E.2d 840, 843 (1997); *Lenzer v. Flaherty*, 106 N.C. App. 496, 514-15, 418 S.E.2d 276, 287 (1992).

While we make no determinations on the merits of Plaintiffs’ wrongful discharge claim, we hold that Plaintiffs have sufficiently pled a claim for wrongful discharge. We vacate the trial court’s dismissal of this claim against Chapel Hill and remand for further action.

V. North Carolina Constitutional Claims

Plaintiffs’ remaining claims are all based in the North Carolina Constitution.

In *Corum v. University of North Carolina*, our Supreme Court held that one whose state constitutional rights have been abridged has a direct claim under the appropriate constitutional provision. 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). A claim is available, however, only in the absence of an adequate state remedy. As plaintiff’s rights are adequately protected by a wrongful discharge claim, a direct constitutional claim is not warranted. The trial court did not err when granting defendants’ motion to dismiss based on plaintiff’s free speech claim.

Phillips v. Gray, 163 N.C. App. 52, 58, 592 S.E.2d 229, 233 (2004) (some citations omitted). “[A]n adequate remedy must provide the possibility of

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relief under the circumstances.” *Craig v. New Hanover Cty Bd. of Educ.*, 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009) (holding that when sovereign immunity bars a claim, no adequate state remedy exists, and the plaintiff may proceed directly under the North Carolina Constitution).

Plaintiffs’ complaint alleged that Chapel Hill “purchased liability insurance which waives any claim to immunity it or its employees may have.” Defendants’ answer admitted Chapel Hill had insurance “which provides certain coverage to [Chapel Hill] with respect to Plaintiffs’ claims” but denied that Chapel Hill had waived any claim to immunity. Defendants’ second defense is a plea of “sovereign and governmental immunity as a defense to all applicable claims asserted herein and to the extent not waived by the purchase of insurance[.]”

As long as Defendants’ sovereign immunity defense remains potentially viable for any or all of Plaintiffs’ wrongful discharge-related claims, our Supreme Court’s decision in *Craig*, 363 N.C. at 340, 678 S.E.2d at 355, dictates that Plaintiffs’ associated North Carolina constitutional claims are not supplanted by those claims. “This holding does not predetermine the likelihood that plaintiff will win other pretrial motions, defeat affirmative defenses, or ultimately succeed on the merits of his case. Rather, it simply ensures that an adequate remedy must provide the possibility of relief under the circumstances.” *Id.*

[T]he notice theory of pleading does not necessarily mean that there must be a full-blown trial. Utilizing the “facility of pretrial discovery, the real facts can be ascertained and by motion for summary judgment (or other suitable device) the trial court can determine whether as a matter of law there is any right of recovery on those facts.”

Sutton, 277 N.C. at 104, 176 S.E.2d at 167 (citation omitted).

We note that the reasoning in *Craig* may be applicable to situations other than loss of the ability to pursue an adequate state remedy because of sovereign immunity. The reasoning in *Craig* clearly does not extend to situations where a plaintiff has lost the right to pursue an adequate state remedy due to his own action.

[T]he facts presented here are distinguishable from a case in which a plaintiff has lost his ability to pursue a common law claim due to expiration of the statute of limitations, for example. Sovereign immunity entirely precludes this plaintiff from moving forward with his common law claim; without being permitted to pursue his direct colorable

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constitutional claims, he will be left with no remedy for his alleged constitutional injuries.

Craig, 363 N.C. at 340, 678 S.E.2d at 355-56.

We vacate that portion of the order dismissing the constitutional claims against Chapel Hill, and remand for further action consistent with this opinion.

VI. *Claims Against Stancil*

Stancil was sued in both his official and individual capacities for his alleged actions in this matter. First, North Carolina does not recognize direct North Carolina constitutional claims against public officials acting in their individual capacities. *Corum v. University of North Carolina*, 330 N.C. 761, 789, 413 S.E.2d 276, 293 (1992). To the extent, if any, that Plaintiffs' constitutional claims were also against Stancil in his individual capacity, dismissal of those claims is affirmed. As for Plaintiffs' individual wrongful discharge claim against Stancil, our *de novo* review of the pleadings finds no factual allegations supporting Plaintiffs' conclusory allegation that "Stancil was acting outside the scope of his official duties in hiring" CAI. Plaintiffs' complaint "fails to state a good cause of action" against Stancil in his individual capacity. *George Shinn Sports*, 99 N.C. App. at 486, 393 S.E.2d at 583 (citations omitted). We affirm the dismissal of all claims against Stancil acting in his individual capacity.

Concerning Plaintiffs' claims against Stancil in his official capacity:

An official capacity suit, such as the one here, is "merely another way of pleading an action against the governmental entity." *See also Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (1997) (official capacity claim under 42 U.S.C. § 1983 is only another way of pleading a claim against the governmental entity of which officer is an agent and "[t]hus, where the governmental entity may be held liable for damages resulting from its official policy, a suit naming public officers in their official capacity is redundant"). As a result, Oakwood's claims against Womack in his official capacity as Johnston County's Tax Collector are identical to its claims against Johnston County and our analysis of the viability of the Johnston County claims applies equally to Womack.

Oakwood Acceptance Corp. v. Massengill, 162 N.C. App. 199, 211-12, 590 S.E.2d 412, 421-22 (2004) (some citations omitted); *see also White*

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v. Trew, __ N.C. __, __, 736 S.E.2d 166, 168 (2013); *Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 725 (1998). Plaintiffs' claims against Stancil in his official capacity are identical to Plaintiffs' claims against Chapel Hill. *Oakwood*, 162 N.C. App. at 211-12, 590 S.E.2d at 422. Our above analysis of Plaintiffs' claims against Chapel Hill applies equally to the claims against Stancil in his official capacity. *Id.*

Affirmed in part, vacated and remanded in part.

Judges GEER and DAVIS concur.

AMY DIAMOND, PETITIONER

v.

CHARLOTTE-MECKLENBURG COUNTY BOARD OF EDUCATION, ERIC DAVIS,
TIMOTHY S. MORGAN, TOM TATE, JOYCE DAVIS, & ALLEN MCELRATH, IN THEIR
INDIVIDUAL AND OFFICIAL CAPACITIES, RESPONDENTS

No. COA12-690

Filed 7 May 2013

1. Schools and Education—dismissed teacher—use of force against student—findings supported by evidence

The trial court correctly dismissed a teacher's petition for judicial review of a school board decision to terminate her employment after she used physical force on a misbehaving student. The school board's decision was supported by substantial evidence; findings indicating that the events of the day were chaotic and confusing did not negate the evidence supporting the school board's decision.

2. Schools and Education—dismissed teacher—use of force against student—statutory exception—not applicable

The trial court correctly dismissed the petition of a terminated teacher for judicial review where the trial court did not err in concluding that the school board properly applied N.C.G.S. § 115C-391 in determining that the statutory exception to the use of physical force against a student did not apply. The school board's findings indicated that the behavior of the unruly student, while annoying and extremely disruptive, did not pose a threat to the safety or well-being of teachers or students, nor did his actions threaten to damage property.

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Appeal by petitioner from an order entered 28 February 2012 by Judge A. Robinson Hassell in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 December 2012.

Tin Fulton Walker & Owen, PLLC, by John W. Gresham, for petitioner-appellant.

Parker Poe Adams & Bernstein, LLP, by Mary H. Crosby and Stacy K. Wood, for respondents-appellees.

BRYANT, Judge.

Where the trial court dismissed petitioner's petition for judicial review of a Charlotte-Mecklenburg County Board of Education (School Board) decision to terminate her position after she used physical force on a misbehaving student, we affirm the order of the trial court.

On 2 February 2011, the students of Bailey Middle School, where petitioner worked as an academic facilitator, were evacuated due to a bomb threat. During the evacuation, after students had been removed to the school's track and field area, one seventh grade student repeatedly disregarded teacher instructions. He refused to put away his soda, refused to sit down and responded to teacher requests to behave with various inappropriate verbal assaults, causing continuing disruption.

After unsuccessful attempts to change the student's behavior, the student's teacher approached petitioner for assistance. Petitioner first advised the teacher to try to ignore the student and to instruct the other students to do the same. After this approach proved unsuccessful, petitioner approached the student, told him he needed to cooperate, and provided him with the option of either sitting down or relocating to a nearby fence, where he would be removed from the other students.

The student used offensive language in responding to petitioner, stating that he would not do "any f---g thing she f---g told him to do." Petitioner led the student to the fence by his arm, but the student continued to behave disruptively. Petitioner then slapped the student across his face.

The next day, 3 February 2011, petitioner was suspended with pay pending an investigation into the incident. After an investigation, in a letter dated 2 September 2011, the Superintendent recommended petitioner's dismissal to the School Board based on: (1) failure to abide by the North Carolina Code of Professional Practice and Conduct for North

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Carolina Educators, as required by the Charlotte-Mecklenburg Board of Education, by committing an “abusive act” against a student, (2) failure to fulfill the duties and responsibilities imposed on teachers by the North Carolina statutes by failing to maintain order and discipline, and (3) insubordination.

Petitioner met with the Superintendent to respond to the recommendation of dismissal, at which time they discussed the charges and petitioner informed the Superintendent that she believed her actions fell under an exception to the prohibition on the use of physical force, articulated in N.C.G.S. § 115C-391(a) (repealed 2011). The exception permits an educator to bypass the standard procedure for using physical force on a student, in limited circumstances. N.C. Gen. Stat. § 115C-391 (repealed 2011).

After the meeting, the Superintendent issued a letter notifying petitioner of his intent to recommend her dismissal to the Board of Education. Petitioner then requested review of her dismissal by an independent case manager, pursuant to N.C.G.S. § 115C-325(j2).

At the hearing, the case manager concluded that the termination was justified because, although N.C.G.S. § 115C-391 might apply to an evacuation such as the one here, petitioner’s actions were not reasonably calculated to maintain order and thus the exception did not apply. The case manager emphasized that there was no threatened harm to the student himself or to another person, and that his outbursts did not create a safety concern.

Petitioner requested a hearing before the School Board to further challenge the Superintendent’s dismissal recommendation. After the presentation of oral and written testimony, the School Board unanimously upheld the dismissal recommendation on 15 September, 2011.

Petitioner then filed a Petition for Judicial Review pursuant to N.C.G.S. § 115C-325(n). In response, respondents, the School Board and the individually named School Board members, filed a Motion to Dismiss on 28 November 2011. Judge A. Robinson Hassell heard the Petition for Judicial Review on 9 February 2011 and granted respondents’ motion to dismiss in an order dated 24 February 2012. In the order, he concluded that the termination decision was not based on an error of law and that evidence existed to support the School Board’s decision under either a de novo or a whole record standard of review.

Petitioner appeals.

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On appeal, petitioner raises the following issues: whether the trial court erred in concluding that the School Board's decision was (I) supported by substantial evidence and thus was not arbitrary and capricious and (II) not based on an error of law regarding the School Board's application of N.C.G.S. § 115C-391 to petitioner's use of physical force.

I

[1] Petitioner first argues that the trial court incorrectly concluded that the School Board's decision was supported by substantial evidence. We disagree.

North Carolina General Statutes, section 150B-51 governs judicial review of a school board's actions. It permits reversal or modification of a school board decision when the substantial rights of a petitioner "may have been prejudiced because the findings, inferences, conclusions, or decisions are . . . [u]nsupported by substantial evidence . . . in view of the entire record as submitted[.]" N.C. Gen. Stat. § 150B-51(b)(5) (2011).

A court reviews the final decision of the School Board for lack of evidence under N.C.G.S. § 150B-51 pursuant to a whole record standard of review, basing its findings on the final decision of the School Board and the official record. N.C.G.S. § 150B-51(c). "The 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). Rather, the whole record test requires that the court consider both the evidence justifying the School Board's decision and any contradictory evidence to determine whether the School Board's decision was supported by substantial evidence. *Id.* In other words, "review is limited to determining whether the superior court correctly decided that the Board's decision to dismiss plaintiff . . . was supported by substantial evidence in light of the whole record." *Crumpp v. Bd. of Educ.*, 79 N.C. App. 372, 373, 339 S.E.2d 483, 484 (1986) (citation omitted). Substantial evidence exists when "a reasonable mind might accept [the evidence] as adequate to support a conclusion." *Thompson*, 292 N.C. at 414, 233 S.E.2d at 544 (citations omitted).

This court need not determine that substantial evidence existed for each of the three stated reasons for petitioner's dismissal; it is sufficient that any one of the reasons for her dismissal is supported by substantial

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evidence, provided that she was notified of the reason. *Crump*, 79 N.C. App. at 374, 339 S.E.2d at 485 (citation omitted).

In reaching its decision to recommend dismissal, the School Board accepted the case manager's findings of fact. Using those factual findings, we will first consider whether petitioner's termination on the basis of "failure to fulfill the duties and responsibilities imposed upon teachers by the general statutes of this State" is supported by substantial evidence. *See* N.C. Gen. Stat. § 115C-325(e)(1)(i) (2011) ("System of Employment of Public School Teachers").

North Carolina law instructs that teachers have a duty, "when given authority over some part of the school program by the principal or supervising teacher, to maintain good order and discipline . . ." N.C. Gen. Stat. § 115C-307(a) (2011). The School Board found that petitioner was given authority by the school's principal to oversee and implement the school evacuation. It was thus her duty as an educator to maintain order and discipline during that process. *See* N.C.G.S. § 115C-307(a).

Based on the Case Manager's factual findings, the School Board's determination that petitioner failed to maintain good order and discipline as a result of her use of physical force is supported by substantial evidence. The School Board found that petitioner's actions failed to improve the situation with the misbehaving student, and even possibly made it worse. It also found that petitioner's handling of the situation required an assistant principal and a security officer to step in and deal with the repercussions of her actions, separating her and the student and calming the student down. That two other school employees had to promptly act to deescalate the situation between petitioner and the student supports the conclusion that petitioner failed to maintain order during the school evacuation, in violation of N.C.G.S. § 115C-307(a).

While certain factual findings also indicate that the events of the day were somewhat chaotic and uncertain — an entire middle school had been relocated to a track and field area for two to three hours and students and staff understandably became restless — the confusion or chaos does not negate the evidence supporting the School Board's finding. Despite the additional stress created by the surrounding environment, sufficient evidence exists to support the conclusion that petitioner's actions failed to maintain good order and discipline in the situation.

Therefore, the School Board's decision to terminate plaintiff for her failure to fulfill the duties imposed by the N.C.G.S. § 155C-307 is supported by substantial evidence. Petitioner's argument that the decision of the School Board was arbitrary and capricious is therefore overruled.

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In light of the fact that we uphold petitioner's termination based on her failure to fulfill the duties imposed by the North Carolina General Statutes, we need not determine whether the Superintendent's other stated reasons were supported by substantial evidence based on the whole record. *Crump*, 79 N.C. App. at 374, 339 S.E.2d at 485.

II

[2] Petitioner next argues that the trial court erred in concluding that the School Board's decision was not based on an error of law. This argument is based on petitioner's contention that the School Board failed to correctly apply N.C.G.S. § 115C-391.

The standard of review for this argument is likewise governed by N.C.G.S. § 150B-51, which permits reversal or modification of a school board decision when the substantial rights of a petitioner "may have been prejudiced because the findings, inferences, conclusions, or decisions are . . . [a]ffected by other error of law[.]" N.C.G.S. § 150B-51(b) (4). The court shall review the matter, using the official record, under a *de novo* standard of review. N.C.G.S. § 150B-51(c). However, the School Board's decision "is presumed to be made in good faith and in accordance with governing law." *Richardson v. N.C. Dept. of Pub. Instruction Licensure Section*, 199 N.C. App. 219, 223-24, 681 S.E.2d 479, 483 (2009). It is therefore the burden of the party asserting error to overcome this presumption with competent evidence. *Id.*

Petitioner asserts that her actions were permissible under N.C.G.S. § 115C-391, which, prior to its repeal, stated:

school personnel may use reasonable force, including corporal punishment, to control behavior or to remove a person from the scene in those situations when necessary:

- (1) To quell a disturbance threatening injury to others;
- (2) To obtain possession of weapons or other dangerous objects on the person, or within the control, of a student;
- (3) For self-defense;
- (4) For the protection of persons or property; or
- (5) To maintain order on school property, in the classroom, or at a school-related activity on or off school property.

N.C. Gen. Stat § 115C-391(a) (repealed 2011). Petitioner argues that she slapped the student to maintain order during the evacuation; therefore

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her action falls under the last articulated exception and the trial court committed an error of law by failing to apply it to her case. We disagree.

N.C.G.S. § 115C-391 lists five particular circumstances in which the use of unregulated physical force against a student may be permitted: preventing injury to others, obtaining weapons or dangerous objects, self-defense, protecting people or property, and maintaining order. *Id.* The last exception, and the one under which petitioner claims to fall, using physical force to maintain order, is the broadest. However, this broad exception must be read in the context of the entire statute, which sets forth particular requirements for the use of physical force, and then articulates narrow exceptions to those requirements. *See id.*

The first four exceptions listed imply a level of emergency. *See id.* In each case there is some imminent danger to person or property, which is sufficient to override the typical protections for the use of force against students. However, to permit an interpretation of the last exception, maintaining order, as petitioner contends, would effectively eliminate an exigency requirement. Such interpretation would serve to undermine the statute as a whole, which is intended to establish clear limits for the use of physical force against students.

In the case of petitioner, while there is some dispute as to the environment created by the bomb threat and the evacuation, the School Board's factual findings indicate that the behavior of the unruly student, while annoying and extremely disruptive, did not pose a threat to the safety or well-being of teachers or students, nor did his actions threaten to damage school or private property. Although the bomb threat and evacuation created a difficult situation that potentially threatened student safety, the unruly student's statements and refusal to comply with teacher instructions to sit down and put away his soda did not appear to create a situation of imminent danger simply because they occurred outside the normal school day. The School Board found that, at the time of the altercation, students had been relocated away from the school and were in no immediate danger; further, its findings indicated that the unruly student's actions did not create or magnify any safety threat. The pertinent findings of the Case Manager, as adopted by the School Board, support the School Board's dismissal of petitioner. The presumption that the School Board's decision was made in good faith and in accordance with the applicable law remains. *See Richardson*, 199 N.C. App. at 223-24, 681 S.E.2d at 483.

Therefore, we hold that the trial court did not err in concluding that the School Board properly applied N.C.G.S. § 115C-391 in determining

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that the statutory exception did not apply to petitioner's use of physical force. Accordingly, we affirm the trial court order dismissing the petitioner's petition for judicial review.

Affirmed.

Judges CALABRIA and GEER concur.

ESTATE OF DONNA S. RAY, BY THOMAS D. RAY AND ROBERT A. WILSON, IV,
ADMINISTRATORS OF THE ESTATE OF DONNA S. RAY, AND THOMAS D. RAY, INDIVIDUALLY, PLAINTIFFS

v.

KEITH FORGY, M.D., P.A., INDIVIDUALLY AND AS AGENT/APPEARANT AGENT OF
GRACE HOSPITAL, INC. [sic], AND/OR GRACE HEALTHCARE
SYSTEM, INC. [sic], AND/OR BLUE RIDGE HEALTHCARE
SYSTEMS, INC. [sic] AND/OR CAROLINAS HEALTHCARE SYSTEM,
INC. [sic] AND AS AN AGENT/APPEARANT AGENT, EMPLOYEE AND SHAREHOLDER OF MOUNTAIN
VIEW SURGICAL ASSOCIATES, [sic] AND GRACE HOSPITAL, INC., AND/OR GRACE
HEALTHCARE SYSTEM, INC., AND/OR BLUE RIDGE HEALTHCARE SYSTEM, INC.
[sic], AND/OR CAROLINAS HEALTHCARE SYSTEM, INC. [sic], DEFENDANTS

No. COA12-1071

Filed 7 May 2013

1. Medical Malpractice—apparent agency—summary judgment proper—release form

The trial court did not err in a medical malpractice case by granting summary judgment in favor of hospital defendants on the issue of whether Dr. Forgy was the hospital defendants' apparent agent. It would not be reasonable for a patient presented with the pertinent release form to assume that Dr. Forgy was a hospital employee.

2. Medical Malpractice—corporate negligence—summary judgment improper

The trial court's order in a medical malpractice case granting hospital defendants' motion for summary judgment on the theory of corporate negligence based on the hospital granting Dr. Forgy privileges was reversed and remanded for further proceedings. The evidence permitted at least an inference that the hospital defendants were not reasonably diligent in reviewing Dr. Forgy's qualifications when renewing his surgical privileges.

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3. Medical Malpractice—corporate negligence—Rule 9(j) certification not required

The trial court did not err in a medical malpractice case by denying defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 9(j). Where corporate negligence claims arise out of policy, management or administrative decisions, the claim is rooted in ordinary negligence principles and the reasonably prudent person standard should be applied. Rule 9(j) certification is not required for these types of corporate negligence claims.

Appeal by plaintiffs from judgment entered 21 December 2007 by Judge Robert C. Ervin in Burke County Superior Court. Heard in the Court of Appeals 25 March 2013.

Poyner Spruill LLP, by E. Fitzgerald Parnell, III and Cynthia L. Van Horne; Crowe & Davis, P.A., by H. Kent Crowe; Hill, Peterson, Carper, Bee & Deitzler, P.L.L.C, by C. Michael Bee; and C. Sue Holvey, PLLC, by C. Sue Holvey, for plaintiffs—appellants.

Roberts & Stevens, P.A., by Phillip T. Jackson and Ann-Patton Hornthal, for defendants—appellees Grace Hospital, Inc. and Blue Ridge HealthCare System, Inc.

Patterson Harkavy LLP, by Burton Craige, amicus curiae for the North Carolina Advocates for Justice.

Bennett & Guthrie, PLLC, by Richard V. Bennett and Joshua H. Bennett, amicus curiae for the North Carolina Association of Defense Attorneys.

Linwood L. Jones, amicus curiae for the North Carolina Hospital Association.

MARTIN, Chief Judge.

The Estate of Donna S. Ray and Thomas D. Ray, individually, (together, “plaintiffs”) filed suit on 25 August 2004 against Dr. Keith Forgy, M.D. (“Dr. Forgy”), Grace Hospital, Inc., Blue Ridge HealthCare System, Inc., Carolinas HealthCare System, Inc., and Grace HealthCare System, Inc., (together, “hospital defendants”) alleging negligence by Dr. Forgy and by defendants under the theories of apparent agency and corporate negligence. After initially denying the hospital defendants’

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motion to dismiss the case pursuant to N.C.G.S. § 1A-1, Rule 9(j), the trial court later granted hospital defendants' motion for summary judgment on 21 December 2007. The trial court certified the case for immediate appeal to this Court, which dismissed the appeal as interlocutory in an opinion filed 25 March 2009. Plaintiffs and Dr. Forgy participated in a binding arbitration in 2012, which ultimately resulted in judgment for the plaintiffs. Plaintiffs now appeal the 21 December 2007 grant of hospital defendants' summary judgment motion, as the claims against Dr. Forgy have been resolved and the case is now ripe for appeal. After careful consideration, we reverse and remand for further proceedings.

On 7 August 2003, 43-year-old Donna Ray visited her primary care physician's office, Burke Primary Care, complaining of abdominal pain, nausea, and vomiting. The doctor who evaluated Ray admitted her to Grace Hospital that day. After various tests over a period of five days, a Burke Primary Care physician requested Dr. Forgy provide a surgical consult for Ray. Dr. Forgy evaluated Ray and recommended she undergo a gastroscopy and colonoscopy. Prior to the tests, Ray signed a consent form which designated Dr. Forgy as "my physician," and separately, "Grace Hospital Personnel" as an additional healthcare provider. After the tests, Dr. Forgy recommended Ray undergo a laparoscopic cholecystectomy to surgically remove her gallbladder based on suspected gallbladder disease. Ray signed another consent form and the laparoscopic cholecystectomy was performed on 14 August 2003. The post-operative pathology report was negative for gallbladder disease. Ray was discharged from Grace Hospital two days later.

Shortly thereafter, Ray visited Dr. Forgy at his private medical office on 22 August 2003 reporting difficulty urinating and abdominal pain. Dr. Forgy inserted a catheter, which relieved the abdominal pain. Ray saw Dr. Forgy at his office two more times; he removed the catheter on 25 August and followed up with Ray the following day, before ultimately discharging her from his care with instructions to return if she had any questions or problems that she suspected were related to her cholecystectomy.

On 9 September 2003, Ray was taken to the Grace Hospital Emergency Department complaining of abdominal pain, nausea, vomiting, and difficulty urinating, where various tests were performed. A few days later, a Burke Primary Care physician requested that Dr. Forgy evaluate Ray again. After performing several tests, Dr. Forgy suspected that Ray was suffering from a biliary leak, a complication of the gallbladder removal procedure. Ray's husband, Thomas Ray, signed a consent form on her behalf authorizing Dr. Forgy to perform a laparotomy, an

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exploratory abdominal surgery. Dr. Forgy's post-operative report concluded that there was "no biliary leak." Ray's condition quickly worsened after the laparotomy and she was transferred to the Intensive Care Unit at Frye Regional Medical Center on 16 September 2003. Insertion of a drain at Frye suggested that Ray did in fact have a biliary leak or an injury to the liver. On 30 October 2003, Ray was transferred to the Intensive Care Unit at UNC-Chapel Hill, where she remained until her death on 11 July 2004.

On appeal, plaintiffs contend the trial court erred in granting summary judgment for the hospital defendants because a genuine issue of material fact exists with regard to two theories of liability: apparent agency and corporate negligence.

"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)). On appeal, this Court "is restricted to assessing the record before it. Only those pleadings and other materials that have been considered by the trial court for purposes of summary judgment and that appear in the record on appeal are subject to appellate review." *Rentenbach Constructors, Inc. v. CM P'ship*, 181 N.C. App. 268, 277, 639 S.E.2d 16, 22 (2007) (quoting *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 690, 340 S.E.2d 374, 377 (1986)) (internal quotation marks omitted).

I.

[1] Plaintiffs contend there is a genuine issue of material fact as to whether Dr. Forgy was the hospital defendants' apparent agent, thereby rendering such defendants vicariously liable for his acts through agency by estoppel. Specifically, plaintiffs argue there was no notice that Dr. Forgy was an independent contractor because his picture, name, and telephone number were advertised in defendants' brochure, and Dr. Forgy never told Ray or her husband that he was not an employee of the hospital. We disagree.

"Under the doctrine of *respondeat superior*, a hospital is liable for the negligence of a physician or surgeon acting as its agent." *Hylton v. Koontz*, 138 N.C. App. 629, 635, 532 S.E.2d 252, 257 (2000), *disc. review denied and appeal dismissed*, 353 N.C. 373, 546 S.E.2d 603–04

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(2001). To hold a hospital liable for the negligence of a doctor under the theory of apparent agency,

a plaintiff must prove that (1) the hospital has held itself out as providing medical services, (2) the plaintiff looked to the hospital rather than the individual medical provider to perform those services, and (3) the patient accepted those services in the reasonable belief that the services were being rendered by the hospital or by its employees.

Diggs v. Novant Health, Inc., 177 N.C. App. 290, 307, 628 S.E.2d 851, 862 (2006), *disc. review and supersedeas denied*, 361 N.C. 426, 648 S.E.2d 209 (2007).

Here, evidence before the trial court at the time of defendants' motion for summary judgment suggests there is no issue of material fact whether Ray looked to the hospital rather than to the individual medical provider, Dr. Forgy, to perform her surgeries. Before the gastroscopy and colonoscopy, and the laparoscopic cholecystectomy, Ray signed request for treatment forms. In a section labeled "Designation(s)," she checked the box labeled "Physician" and wrote in "Dr. Forgy." Additionally, Ray separately checked a box labeled "Grace Hospital Personnel." Thomas Ray also signed nearly identical consent forms before allowing a catheter to be placed and allowing a drain to be put in his wife's abdomen. This suggests that Ray looked to Dr. Forgy separate and distinct from Grace Hospital and its personnel to receive medical treatment. *See Diggs*, 177 N.C. App. at 308–09, 628 S.E.2d at 863 ("[G]iven the distinction made between plaintiff's personal physician and the unnamed anesthesiologist [a jury could find] plaintiff was accepting [anesthesia] in the reasonable belief that [anesthesia] would be provided by the hospital and its employees."). Furthermore, Ray visited Dr. Forgy at his private medical office separate from Grace Hospital on three occasions. In doing so, Ray signed a different form specific to Dr. Forgy's practice and provided him with her health insurance information. This, again, suggests Ray and Ray's husband looked to Dr. Forgy specifically and separately from Grace Hospital to perform procedures and administer medical care.

Moreover, page two of the release form, in large print just above the signature line, provides explicit notice regarding the employment status of Grace Hospital physicians:

I understand that many of the physicians on the staff of Grace Hospital are not employees or agents of the hospital, but rather, are independent contractors who have been

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granted the privilege of using its facilities for the care and treatment of patients. . . . My signature below indicates that I have read and understand the above information.

Therefore, it would not be reasonable for a patient presented with this form to assume that Dr. Forgy was a hospital employee. *Cf. Diggs*, 177 N.C. App. at 309, 628 S.E.2d at 863 (citing *Jennison v. Providence St. Vincent Med. Ctr.*, 174 Or. App. 219, 234, 25 P.3d 358, 367 (2001)). Thus, the trial court did not err in finding no genuine issue of material fact and granting summary judgment to the hospital defendants with regard to this theory of liability.

II.

[2] Plaintiffs next contend there is a genuine issue of material fact as to whether the hospital defendants breached a duty to Ray when they re-credentialed Dr. Forgy as a member of the medical staff in 2001, did not adequately monitor or supervise him, and failed to investigate his history of medical negligence claims.

“[T]here are fundamentally two kinds of [corporate negligence] claims: (1) those relating to negligence in clinical care provided by the hospital directly to the patient, and (2) those relating to negligence in the administration or management of the hospital.” *Estate of Waters v. Jarman*, 144 N.C. App. 98, 101, 547 S.E.2d 142, 144, *disc. review denied*, 354 N.C. 68, 553 S.E.2d 213 (2001). Cases alleging a failure by the hospital to adequately monitor and oversee a physician or which contend the hospital was negligent in granting privileges to unqualified physicians are examples of the latter, and require the court to apply the reasonably prudent person standard of care in assessing negligence. *Id.* at 102–03, 547 S.E.2d at 145 (discussing *Blanton v. Moses H. Cone Hosp., Inc.*, 319 N.C. 372, 375, 354 S.E.2d 455, 457 (1987)).

A failure to inquire further into a matter listed on an application for renewal of surgical privileges has been deemed sufficient to raise a genuine issue of material fact as to whether a hospital was negligent in re-credentialing a doctor. *See Carter v. Hucks-Folliss*, 131 N.C. App. 145, 147–48, 505 S.E.2d 177, 178–79 (holding there was a genuine issue of material fact that the hospital was negligent in renewing a doctor’s surgical privileges when his application for renewal said he was not board certified and the record revealed no further inquiry by the hospital into the doctor’s certification status), *disc. review denied*, 349 N.C. 528, 526 S.E.2d 173 (1998). Here, Dr. Forgy filled out an “Application for Reappointment Form” on 10 August 2001 to renew his staff privileges at

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Grace Hospital. The form asked if professional liability suits had been filed against him since his last application and if so, how many. The form also specified that “if YES, please provide full explanation on a separate sheet, and attach.” Dr. Forgy checked “YES” and listed the number “1” twice, indicating that one professional liability suit had been filed against him since his last application and that there was one “presently pending.” Dr. Forgy attached information related to his professional liability insurance, as the form instructed, but did not attach an explanation or any documentation related to the pending professional liability suit. Dr. Forgy acknowledged in his deposition that several liability cases had been filed against him in the past, and that some of those cases went to judgment. When asked whether anyone at the hospital had ever discussed the care of those patients with him, he said “not to my recollection,” and “not that I remember.” Considered in the light most favorable to plaintiffs, this evidence permits at least an inference that the hospital defendants were not reasonably diligent in reviewing Dr. Forgy’s qualifications, raising a genuine issue of material fact with respect to their negligence in renewing Dr. Forgy’s surgical privileges. Accordingly, we hold the court erred in granting defendants’ motion for summary judgment.

[3] As an alternative basis for upholding the dismissal of plaintiffs’ complaint, the hospital defendants assert that the trial court erred by denying their motion to dismiss the complaint prior to the motion for summary judgment because plaintiffs failed to comply with the special pleading rules for medical malpractice cases contained in N.C.G.S. § 1A-1, Rule 9(j). We disagree.

When alleging medical malpractice, a complaint must

specifically assert[] that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is *reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence* and who is willing to testify that the medical care did not comply with the applicable standard of care

N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2011) (emphasis added). Defendants contend that plaintiffs could not have reasonably expected their proffered expert witness, Dr. Daly, to qualify as an expert because he does not meet the same or similar specialty test under North Carolina Rule of Evidence 702(b)(1) or the majority of professional time requirement under Rule 702(b)(2).

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This Court held in *Estate of Waters*, 144 N.C. App. at 102–03, 547 S.E.2d at 145, that where corporate negligence claims “arise[] out of policy, management or administrative decisions, such as granting or continuing hospital privileges, failing to monitor or oversee performance of the physicians, credentialing, and failing to follow hospital policies,” the claim is rooted in ordinary negligence principles and the “reasonably prudent person” standard should be applied. Accordingly, Rule 9(j) certification is not required for these types of corporate negligence claims. *See id.* at 103, 547 S.E.2d at 145. Thus, the trial court was correct in denying defendants’ motion to dismiss based on Rule 9(j).

The trial court’s order granting summary judgment to the hospital defendants on the theory that Dr. Forgy was acting as such defendants’ agent is affirmed, as is its order denying defendants’ motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 9(j). The trial court’s order granting the hospital defendants’ motion for summary judgment on the theory that they were negligent in granting Dr. Forgy privileges is reversed and the case is remanded to the trial court for such proceedings as may be required.

Affirmed in part, reversed in part and remanded.

Judges HUNTER and STEPHENS concur.

MARY E. FULMORE, ADMINISTRATOR OF THE ESTATE OF
PRISCILLA ANN MAULTSBY, PLAINTIFF

v.

GREGORY HOWELL AND PFS DISTRIBUTION COMPANY, INC., DEFENDANTS

No. COA12-1384

Filed 7 May 2013

Negligence—sudden emergency—vehicular accident

The trial court did not err in a negligence case arising out of a vehicular accident by granting defendants’ motion for summary judgment based upon the doctrine of sudden emergency. Plaintiff failed to demonstrate that defendant driver’s alleged violation of various safety regulations proximately caused the accident; the exact details of the accident as argued by plaintiff were not genuine issues of material fact; and while defendant driver could have had other reactions to the sudden emergency which may have resulted in a different outcome, this did not create a genuine issue of material fact.

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[227 N.C. App. 31 (2013)]

Appeal by plaintiff from order entered on or about 11 June 2012 by Judge W. Allen Cobb, Jr. in Superior Court, Wayne County. Heard in the Court of Appeals 28 March 2013.

Joretta Durant, P.C., by Joretta Durant, for plaintiff-appellant.

Wharton, Aldhizer & Weaver, PLC, by Charles F. Hilton, Esq., for defendants-appellees.

STROUD, Judge.

Plaintiff appeals summary judgment order granting defendants' motion for summary judgment based upon the doctrine of sudden emergency. For the following reasons, we affirm.

I. Background

Plaintiff, the administrator of the estate of Priscilla Maultsby, filed a complaint alleging defendants were liable for Ms. Maultsby's death. Plaintiff alleged that defendant Gregory "Howell was an agent or employee" of defendant PFS Distribution Company, Inc., ("PFS") when he was driving a tractor trailer truck "owned, rented or leased" by defendant PFS which collided with Ms. Maultsby's vehicle. As a result of the collision, Ms. Maultsby died.

Plaintiff made claims against both defendants for ordinary negligence and against defendant PFS for negligent entrustment, supervision and training. Defendants answered plaintiff's complaint and raised the defense of sudden emergency in that "the actions of Gregory Howell alleged in the Complaint were in response to a sudden emergency, not of his own making. Therefore, the Defendants are not liable for the damages alleged by the Plaintiff." In March of 2012, defendants filed for summary judgment.

Defendant Howell was driving the truck westbound on North Carolina Highway 55 when he saw another vehicle, driven by Ina Harper, approaching his truck in the wrong lane. In an attempt to avoid a head-on collision with Ms. Harper's vehicle, defendant Howell stated that he "jerked" the wheel of his truck and hit his brakes "hard[.]" Unfortunately, defendant Howell's truck and Ms. Harper's vehicle collided, and defendant Howell's truck ended up in the opposite lane where it collided with Ms. Maultsby's vehicle. Defendant Howell described the time between when he first saw Ms. Harper's vehicle traveling in the opposite direction in his lane until his collision with Ms. Maultsby as "instantaneous[.]"

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On or about 11 June 2012, the trial court granted defendants' motion for summary judgment "based on the doctrine of sudden emergency[.]" Plaintiff appeals.

II. Summary Judgment

Plaintiff contends that the trial court erred in granting summary judgment on the basis of sudden emergency in favor of defendants for three reasons.

On appeal from summary judgment, the applicable standard of review is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. 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 judgment as a matter of law. If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. We review the record in a light most favorable to the party against whom the order has been entered to determine whether there exists a genuine issue as to any material fact.

Smith v. Harris, 181 N.C. App. 585, 587, 640 S.E.2d 436, 438 (2007) (citations, quotation marks, and brackets omitted).

"The doctrine of sudden emergency creates a less stringent standard of care for one who, through no fault of his own, is suddenly and unexpectedly confronted with imminent danger to himself or others." *Marshall v. Williams*, 153 N.C. App. 128, 131, 574 S.E.2d 1, 3 (2002) (citation and quotation marks omitted).

The sudden emergency doctrine provides that one confronted with an emergency is not liable for an injury resulting from his acting as a reasonable man might act in such an emergency. Two elements must be satisfied before the sudden emergency doctrine applies: (1) an emergency situation must exist requiring immediate action to avoid injury, and (2) the emergency must not have been created by the negligence of the party seeking the protection of the doctrine.

Sobczak v. Vorholt, 181 N.C. App. 629, 638, 640 S.E.2d 805, 812 (2007) (citation and quotation marks omitted).

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A. Safety Regulations

Citing the Federal Motor Carrier Safety Regulations, the Code of Federal Regulations, defendant PFS's "company policy[.]" and the North Carolina Commercial Driver's Manual, plaintiff contends that there was a genuine issue of material fact that defendant Howell violated various regulations by driving beyond the hours set by them and thus was negligent. Plaintiff hints at the fact that violation of the various cited regulations would result in negligence *per se*, arguing that driving more hours than is allowed pursuant to certain safety regulations shows defendant was fatigued and thus his "judgment was impaired[.]" However, even assuming all the cited regulations by plaintiff are applicable to defendant Howell, plaintiff has not forecast any evidence establishing that defendant was in fact fatigued. Taking it a step further, even assuming *arguendo* that violation of any of the cited regulations is *per se* negligence and even evidence of fatigue, plaintiff is still missing the element of causation as plaintiff has failed to demonstrate that defendant Howell's "fatigue" in any way caused the accident. *See Mabrey v. Smith*, 144 N.C. App. 119, 122, 548 S.E.2d 183, 186 ("The elements of negligence are: 1) legal duty; 2) breach of that duty; 3) actual and proximate causation; and 4) injury."), *disc. review denied*, 354 N.C. 219, 554 S.E.2d 340 (2001); *see also Lord v. Beerman*, 191 N.C. App. 290, 294, 664 S.E.2d 331, 334 (2008) ("Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred." (citation, quotation marks, and brackets omitted)); *see generally State v. Lane*, 115 N.C. App. 25, 28, 444 S.E.2d 233, 235 ("The State must prove that defendant's action was both the cause-in-fact (actual cause) and the proximate cause (legal cause) of the victim's death to satisfy the causation element."), *disc. review denied*, 337 N.C. 804, 449 S.E.2d 753 (1994). Whether or not defendant Howell had been driving longer than he should have, plaintiff has not shown how this violation was a proximate cause of the accident in question, and this argument is overruled. *See Mabrey*, 144 N.C. App. at 122, 548 S.E.2d at 186.

B. Defendant Howell's Description of the Accident

Plaintiff next contends that there was a genuine issue of material fact because defendant Howell gave four different accounts of the accident in his statement to State troopers at the scene of the accident, in his statement to State troopers at the hospital, at his deposition, and in his affidavit. We have reviewed defendant Howell's statements and plaintiff's contentions and see no material difference between defendant's accounts. The fact that defendant Howell did not use the exact same

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words each time he described the details of the accident does not mean that “[d]efendant Howell gave four different versions of how the collision occurred.” Even if there are minor differences in the accounts, all would still support a finding of sudden emergency as none of defendant Howell’s accounts differ in the material facts: defendant Howell’s truck had a collision with Ms. Harper’s vehicle which was driving the wrong way in his lane which resulted in defendant Howell’s truck colliding with Ms. Maultsby’s vehicle. *See generally Sobczak*, 181 N.C. App. at 638, 640 S.E.2d at 812. The exact details of the accident as argued by plaintiff are not “genuine issue[s] of material fact.” *Smith*, 181 N.C. App. at 587, 640 S.E.2d at 438. This argument is overruled.

C. Sudden Emergency Doctrine

Lastly, plaintiff seems to argue that though the sudden emergency doctrine was applicable and appropriately applied in this case, there was evidence that defendant Howell could have reacted in another way and avoided the collision. Plaintiff argues, *inter alia*, that there is evidence that defendant Howell should have veered right instead of left and that he should have stopped more quickly. This may be true, but it is exactly the sort of hindsight which the doctrine of sudden emergency precludes. *See Forgy v. Schwartz*, 262 N.C. 185, 190, 136 S.E.2d 668, 672 (1964). Plaintiff’s arguments are based upon expert analysis after the fact; defendant Howell had to react “instantaneously.” *See id.* “In the face of an emergency, a person is not held to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence would have made in similar circumstances.” *Tharpe v. Brewer*, 7 N.C. App. 432, 438, 172 S.E.2d 919, 924 (1970). Furthermore,

[t]he cases reveal that motorists who have been confronted by an automobile approaching in the wrong lane have, on occasions, (1) continued straight ahead, (2) turned to the right, (3) turned to the left, and (4) stopped. . . . In applying the doctrine of sudden emergency, the courts have not been inclined to weigh in “golden scales” the conduct of the motorist who has acted under the excited impulse of sudden panic induced by the negligence of the other motorist.

Forgy, 262 N.C. at 199, 190, 136 S.E.2d at 672 (citation omitted). Accordingly, while defendant Howell could have had other reactions to the sudden emergency which may have resulted in a different outcome, this does not create a “genuine issue of material fact[.]” *Smith*, 181 N.C. App. at 587, 640 S.E.2d at 438. This argument is overruled.

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III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges ELMORE and STEELMAN concur.

HIGHLAND PAVING CO., LLC, PLAINTIFF

v.

FIRST BANK AND SOUTHEAST DEVELOPMENT OF CUMBERLAND, LLC, DEFENDANTS

No. COA12-1297

Filed 7 May 2013

1. Appeal and Error—interlocutory orders and appeals—certification—immediately appealable

The trial court's interlocutory order dismissing all claims against defendant First Bank was immediately appealable as the order resolved all claims against that defendant and the trial court certified under N.C.G.S. § 1A-1, Rule 54(b) that there was no just reason to delay the appeal.

2. Contracts—breach of contract—exhibits contradicted allegations—no breach

The trial court did not err by dismissing plaintiff's breach of contract claim. Even assuming an enforceable contract between plaintiff and defendant First Bank existed, plaintiff's exhibits contradicted its allegations that defendant First Bank breached its agreement to hold proceeds from the sale of certain property at issue in escrow.

3. Fiduciary Relationship—failure to allege—breach of fiduciary duty—constructive fraud

The trial court did not err by dismissing plaintiff's claims for breach of fiduciary duty and constructive fraud. Plaintiff failed to allege a relationship between it and defendant First Bank that could constitute a fiduciary relationship.

4. Quantum Meruit—no unjust enrichment—claim properly dismissed

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The trial court did not err by dismissing plaintiff's claim in *quantum meruit* where defendant was not enriched, much less unjustly enriched, from the transaction at issue.

5. Unfair Trade Practices—no sales proceeds—no conversion—no deceit

The trial court did not err by granting defendant First Bank's motion to dismiss plaintiff's claim for unfair and deceptive trade practices. As there were no sales proceeds to escrow from the transaction at issue, defendant First Bank could not have converted those funds to its own use by deceiving plaintiff about the existence of those funds.

Appeal by plaintiff from order entered on or about 25 June 2012 and 23 July 2012 by Judge Gregory A. Weeks in Superior Court, Harnett County. Heard in the Court of Appeals 28 March 2013.

Ryan McKaig Attorney at Law, PLLC, by Ryan McKaig, for plaintiff-appellant.

Nexsen Pruet, PLLC, by M. Jay DeVaney and Brian T. Pearce, for defendant-appellee First Bank.

STROUD, Judge.

Highland Paving Co., Ltd., ("plaintiff") appeals from the order granting First Bank's motion to dismiss all claims against it. Plaintiff argues that it properly pled all claims against First Bank and that therefore the trial court erred in granting its motion to dismiss. For the following reasons, we affirm the trial court's order in full.

I. Background

During the summer of 2008, plaintiff was hired by Southeast Development of Cumberland, LLC ("Southeast") to install utilities and perform grading and road construction for Southeast's development known as Green Valley. To finance the development, Southeast took out a loan from First Bank secured by a deed of trust on the Green Valley property, which was recorded in the Cumberland County Registry.

At some point after development began, Southeast was unable to pay for plaintiff's improvements to the land and plaintiff was unwilling to proceed with further construction until paid. To save the project, First Bank drafted an agreement wherein plaintiff agreed to forgo

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payment until “the first 12 to 16 lots” were sold and all of plaintiff’s work on the project was complete to the satisfaction of First Bank. Defendant Southeast agreed to forgo any proceeds from the “first takedown of [the] lots” and to provide all proceeds from that sale to First Bank to escrow until plaintiff completed its work and the first lots were sold. First Bank, in turn, agreed to “release the first takedown of lots” at a reduced fee “upon the condition that [First Bank] escrows and disburses all proceeds from the sale” to the contractors, including plaintiff.

The first eight lots were sold and plaintiff received its portion of the proceeds without incident. Plaintiff has alleged that defendants sold the remainder of Green Valley on 26 October 2011 without consulting plaintiff, but refused to compensate it for the outstanding amount on its construction costs, valued at \$153,651.54. Plaintiff claims that First Bank “fail[ed] to escrow the funds and pay Plaintiff as agreed.”

On 26 January 2012, plaintiff filed a complaint in Superior Court, Harnett County, alleging that defendants breached their contracts with plaintiff, that First Bank had engaged in constructive fraud, that it was entitled to compensation under a *quantum meruit* theory, and that both defendants had engaged in unfair and deceptive trade practices. Plaintiff attached several exhibits to its complaint, including: its initial project proposal for Green Valley; the original deed of trust securing First Bank’s loan; the subsequent agreement between plaintiff and defendants; plaintiff’s invoice for work completed on the project; the check for plaintiff’s portion of the proceeds from the first eight lots; a general warranty deed transferring ownership of the rest of Green Valley to East West Alliance Northridge Park, Ltd. (“East West”); and a certificate of satisfaction recorded by East West cancelling the debt secured by the deed of trust originally recorded by First Bank.

First Bank moved to dismiss all claims against it on or about 28 February 2012. The Superior Court held a hearing and granted First Bank’s motion by order entered 25 June 2012. The trial court also entered a supplemental order certifying that the order dismissing the claims against First Bank was a final order and that there is no just reason to delay an appeal. Plaintiff filed written notice of appeal to this Court on 24 July 2012.¹

1. Plaintiff also noted the 23 July Rule 54(b) “supplemental order” in its notice of appeal, but makes no argument concerning that order.

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II. Interlocutory Order

[1] The order plaintiff appeals from resolves only the claims against First Bank. Plaintiff's claims against Southeast are still pending. Therefore, this order is an interlocutory order. *See Stinchcomb v. Presbyterian Medical Care Corp.*, ___ N.C. App. ___, ___, 710 S.E.2d 320, 323, *disc. rev. denied*, 365 N.C. 338, 717 S.E.2d 376 (2011). Normally, interlocutory orders are not immediately appealable. *Id.*

Here, however, the trial court certified that there is no just reason for delay under N.C. Gen. Stat. § 1A-1, Rule 54(b) (2011). It is uncontested that the order on appeal resolves all claims against First Bank.

When an appeal is from an order that is final as to one party, but not all, and the trial court has certified the matter under Rule 54(b), this Court must review the issue. . . . As this appeal is from an order which is final as to some of the parties, and the trial court has properly certified the appeal pursuant to Rule 54(b), we must review the issue.

Id. at ___, 710 S.E.2d at 323 (citations and quotation marks omitted). We will therefore review the order based upon the Rule 54(b) certification.

III. Motion to Dismiss

Plaintiff argues on appeal only that the trial court erred in dismissing all of its claims against First Bank because each claim was properly pled. First Bank argues that the trial court correctly dismissed all claims because the exhibits attached to and incorporated into plaintiff's complaint contradict its material allegations.

A. Standard of Review

On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Block v. County of Person, 141 N.C. App. 273, 277–78, 540 S.E.2d 415, 419 (2000) (citations and quotation marks omitted).

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As a general proposition . . . matters outside the complaint are not germane to a Rule 12(b)(6) motion. . . . If, however, documents are attached to and incorporated within a complaint, they become part of the complaint. They may, therefore, be considered in connection with a Rule 12(b)(6) or 12(c) motion without converting it into a motion for summary judgment.

Weaver v. Saint Joseph of the Pines, Inc., 187 N.C. App. 198, 203-04, 652 S.E.2d 701, 707 (2007) (citation omitted). “The terms of such exhibit control other allegations of the pleading attempting to paraphrase or construe the exhibit, insofar as these are inconsistent with its terms.” *Wilson v. Crab Orchard Development Co.*, 276 N.C. 198, 206, 171 S.E.2d 873, 879 (1970); see *Hall v. Sinclair Refining Co.*, 242 N.C. 707, 711, 89 S.E.2d 396, 399 (1955) (“The contracts, incorporated in the complaint by amendment, have neutralized the allegations of the original complaint and put to naught the cause of action asserted therein. Such variance or defect may be raised by demurrer.” (citations omitted)).

B. Breach of Contract

[2] Plaintiff first contends that it properly pled a breach of contract.

The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of the contract. This Court has held that where the complaint alleges each of these elements, it is error to dismiss a breach of contract claim under N.C. Gen.Stat. § 1A-1, Rule 12(b)(6).

McLamb v. T.P. Inc., 173 N.C. App. 586, 588, 619 S.E.2d 577, 580 (2005) (citation, quotation marks, and brackets omitted), *disc. rev. denied*, 360 N.C. 290, 627 S.E.2d 621 (2006). We will first examine what plaintiff alleged, and then what the documents attached to the complaint show.

In its complaint, plaintiff alleged that there was a contract between it and defendants wherein it agreed to forgo payment until the first twelve to sixteen lots were sold and First Bank agreed to receive the funds from the sales, hold those proceeds in escrow, and distribute them to plaintiff once the lots were sold. Plaintiff alleged that defendant Southeast has sold several lots without notifying plaintiff and that First Bank has breached its agreement to hold those proceeds in escrow.

First Bank argues that we should affirm the trial court’s order as to the breach of contract claim for two reasons. First, the alleged contract attached to plaintiff’s complaint was never signed by any representative

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of First Bank. Next, even if the unsigned contract is valid, the other documents attached to the complaint show that First Bank did not breach the contract. We hold that, even assuming the agreement between plaintiff and First Bank was an enforceable contract, plaintiff's exhibits contradict its allegations as to breach.

Plaintiff alleged that Southeast sold the subject property on 26 October 2011, that the bank received the proceeds from the sale, and then failed to disburse the funds as required under the contract. Plaintiff attached to its complaint the original deed of trust in which defendant Southeast was the grantor and First Bank was the beneficiary and holder of the debt.

On 26 October 2011, defendant Southeast deeded the remainder of the subject property to East West for \$10.00 in exchange for cancellation of the debt secured by the deed of trust. East West recorded a certificate of satisfaction on 7 November 2011 certifying that it owned the debt and cancelling the deed of trust. There is no allegation that East West is a subsidiary of First Bank or otherwise affiliated with it. Thus, it appears that at some later date, First Bank sold or otherwise transferred its interest in the debt and the property to East West, who is not a party to the present action.

Although plaintiff described this transaction as a "sale," the documents attached to the complaint indicate that there were no "proceeds" from this transaction, as the plain language of the exhibits show that property was transferred in satisfaction of a debt obligation, not in exchange for money. If there were no "proceeds," First Bank could not be under any contractual obligation to ensure that they were escrowed for plaintiff's benefit and could not have breached the contract as alleged. The obvious risk inherent in plaintiff's agreement to accept future "sales proceeds" from the lots in payment of Southeast's debt was that there might ultimately be no sales proceeds; unfortunately for plaintiff, that is exactly what happened.

Plaintiff relies solely on this transaction in its allegation that First Bank breached the contract. The exhibits attached to plaintiff's complaint contradict its material allegations as to First Bank's breach of the contract because they show that there would not have been proceeds for First Bank to escrow and convert for its own use in breach of the contract. The exhibits attached to the complaint "reveal[] the absence of facts sufficient to make a good claim." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 429 (2007) (citation and quotation marks

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omitted). Therefore, we hold that the trial court did not err in granting First Bank's motion to dismiss the breach of contract claim.

C. Breach of Fiduciary Duty and Constructive Fraud

[3] Plaintiff next argues that the trial court erred in dismissing its claim that First Bank breached its fiduciary duty and that it engaged in constructive fraud. These allegations arise out of the same contract and transaction discussed above. Plaintiff alleged that it placed trust and confidence in First Bank.

To establish constructive fraud, a plaintiff must show that defendant (1) owes plaintiff a fiduciary duty; (2) breached this fiduciary duty; and (3) sought to benefit himself in the transaction. A confidential or fiduciary relation can exist under a variety of circumstances and is not limited to those persons who also stand in some recognized legal relationship to each other. It extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other. Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the “special circumstance” of a fiduciary relationship has arisen. Determining whether a fiduciary relationship exists requires looking at the particular facts and circumstances of a given case.

Crumley & Associates, P.C. v. Charles Peed & Associates, P.A., ___ N.C. App. ___, ___, 730 S.E.2d 763, 767 (2012) (citations, quotation marks, brackets, and ellipses omitted).

Plaintiff alleged that it “placed special trust and confidence in First Bank due to the written agreement, their priority lien position, the parties’ previous dealings and due to the fact that the Bank is a professional fiduciary.” It further alleged that the bank “promised payment to Plaintiff for work performed given the priority lien position.” Plaintiff argues that First Bank owed it a fiduciary duty in part because “[t]he parties . . . in essence formed a partnership to complete the project[.]” Plaintiff did not allege, however, that the parties ever formed a formal partnership. *Cf.* N.C. Gen. Stat. §§ 59-101, *et seq.* (2011) (codifying the Revised Uniform Limited Partnership Act). It never alleged that First Bank ever agreed to represent its interests in the transaction or that some other special relationship existed between it and First Bank. The only relationship between plaintiff and the bank was that created by the contract wherein

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the bank agreed to hold any proceeds from defendant Southeast's land sales in escrow and then distribute the proceeds to plaintiff upon inspection of the completed work.

"[P]arties to a contract do not thereby become each others' fiduciaries; they generally owe no special duty to one another beyond the terms of the contract . . ." *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699, *disc. rev. denied*, 332 N.C. 482, 421 S.E.2d 350 (1992). "North Carolina courts generally find that parties who interact at arms-length do not have a fiduciary relationship with each other, even if they are mutually interdependent businesses." *Crumley & Associates, P.C.*, ___ N.C. App. at ___, 730 S.E.2d at 767 (citation omitted).

Our review of reported North Carolina cases has failed to reveal any case [and plaintiff cites none] where mutually interdependent businesses, situated as the parties were here, were found to be in a fiduciary relationship with one another.

Tin Originals, Inc. v. Colonial Tin Works, Inc., 98 N.C. App. 663, 666, 391 S.E.2d 831, 833 (1990). As in *Tin Originals*, "[w]e decline to extend the concept of a fiduciary relation to the facts of this case." *Id.*

Because plaintiff has failed to allege a relationship between it and First Bank that could constitute a fiduciary relationship, it cannot maintain its constructive fraud claim. *See Crumley & Associates, P.C.*, ___ N.C. App. at ___, 730 S.E.2d at 767. Therefore, the trial court did not err in granting First Bank's motion as to the constructive fraud claim. *See Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 429.

D. *Quantum Meruit*

[4] Plaintiff next argues that it properly pled a claim in *quantum meruit* and that the trial court erred in dismissing this claim. First Bank counters that the trial court correctly dismissed the claim because plaintiff did not plead *quantum meruit* in the alternative to its breach of contract claim and that it failed to properly allege what "valuable service" First Bank received.

To recover in *quantum meruit*, a plaintiff must show that (1) services were rendered to the defendant; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously. In addition, *quantum meruit* claims require a showing that both

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parties understood that services were rendered with the expectation of payment.

Wing v. Town of Landis, 165 N.C. App. 691, 693, 599 S.E.2d 431, 433 (2004) (quotation marks, citations, and brackets omitted).

The claims of breach of contract and *quantum meruit* are normally pled in the alternative, since some of the allegations required for one claim are contrary to those required for the other; if there is a valid and enforceable contract, *quantum meruit* is not appropriate, and vice versa. See *Catoe v. Helms Const. & Concrete Co.*, 91 N.C. App. 492, 498, 372 S.E.2d 331, 335-36 (1988) (observing that recovery on an express contract theory precludes recovery in *quantum meruit* where both claims are based on the same subject matter). Yet we will construe the allegations of the complaint liberally and treat them as alternatively pled instead of as a contradiction within the allegations. See *Block*, 141 N.C. App. at 277, 540 S.E.2d at 419 (“The complaint must be liberally construed . . .”); N.C. Gen. Stat. § 1A-1, Rule 8(e)(1) (2011) (“No technical forms of pleading or motions are required.”). “While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim or it may be dismissed under Rule 12(b)(6).” *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988) (citation omitted).

Plaintiff alleged that First Bank received the benefit of its services by receiving the proceeds from the sale of the properties, as evidenced by the certificate of satisfaction. Although plaintiff did allege generally that it provided a valuable service to First Bank, it did not allege that First Bank profited from its services in any way other than from the 26 October transaction. “Where both general and specific allegations are made respecting the same matter, the latter control.” *Burns v. Burns*, 4 N.C. App. 426, 430, 167 S.E.2d 82, 85 (1969) (citation omitted).

As discussed above, the certificate of satisfaction was not recorded by First Bank. The allegations do not even acknowledge that First Bank was not mentioned in any of the documents connected to the 26 October transaction. The allegations also do not reveal how First Bank could have profited or benefitted from the cancellation of the deed of trust by the new owner of defendant Southeast’s debt.

Plaintiff’s only theory of enrichment is premised on the allegation that First Bank received funds from a sale of property on 26 October 2011. As explained above, the exhibits attached to plaintiff’s complaint contradict this allegation. “Without enrichment, there can be no ‘unjust

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enrichment' and therefore no recovery on an implied contract." *Wing*, 165 N.C. App. at 695, 599 S.E.2d at 434 (citation and quotation marks omitted). Thus, the complaint and the exhibits attached thereto "reveal[] the absence of facts sufficient to make a good claim." *Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 429 (citation and quotation marks omitted). Accordingly, we hold that the trial court did not err in granting First Bank's motion to dismiss plaintiff's *quantum meruit* claim.

E. Unfair and Deceptive Trade Practices

[5] Plaintiff finally argues that the trial court erred in granting First Bank's motion to dismiss its claim for Unfair and Deceptive Trade Practices (UDTP).

In order to establish a violation of N.C.G.S. § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs. The determination of whether an act or practice is an unfair or deceptive practice that violates N.C.G.S. § 75-1.1 is a question of law for the court.

Gray v. North Carolina Ins. Underwriting Ass'n, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000) (citations omitted).

Plaintiff bases its UDTP claim on "a secret transaction involving the land that was the subject of the original contract, and that First Bank converted escrowed funds for its own use while failing to pay Highland Paving for its work." It alleged that this act was an unfair or deceptive act or practice. Like all of plaintiff's other claims, this claim is based on the 26 October transaction.

Although plaintiff argues generally that First Bank "converted escrowed funds for its own use," it specifically conceded in its complaint that all funds due to it prior to 26 October were paid by First Bank. Thus, as with the other claims, this claim rests entirely on the allegation that First Bank received proceeds from the "sale" of the properties on 26 October.

As discussed above, this allegation is directly contradicted by the exhibits plaintiff attached to its complaint. If there were no sales proceeds from the 26 October transaction to escrow, First Bank cannot have converted those funds to its own use by deceiving plaintiff about the existence of those funds. Thus, the exhibits directly contradict plaintiff's allegation of an unfair or deceptive act. Perhaps, as plaintiff argues, there was some other "secret transaction" by which First Bank benefited, but we cannot assume that First Bank engaged in some nefarious

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plot when the complaint fails to identify it. Because the terms of an attached exhibit control over contrary allegations in the complaint, *Wilson*, 276 N.C. at 206, 171 S.E.2d at 879, we hold that plaintiff has failed to state a claim for unfair or deceptive trade practices. *See Gray*, 352 N.C. at 68, 529 S.E.2d at 681.

IV. Conclusion

The exhibits attached to plaintiff's complaint contradict its material factual allegations such that plaintiff cannot maintain any of its claims against First Bank. Therefore, we hold that the trial court did not err in granting First Bank's motion to dismiss for failure to state a claim and affirm the 25 June 2011 order dismissing plaintiff's claims against First Bank.

AFFIRMED.

Judge ELMORE concurs.

Judge STEELMAN concurs in a separate opinion.

STEELMAN, Judge, concurring.

Based on the allegations contained in plaintiff's complaint, I am compelled to concur with the opinion in this case. It is not the duty of this Court to construct arguments for the parties on appeal. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

SADIE HOWARD, PLAINTIFF
v.
COUNTY OF DURHAM, DEFENDANT

No. COA12-1484

Filed 7 May 2013

1. Contracts—breach of contract—failure to plead valid contract—pre-audit statement required

The trial court did not err by granting defendant's motion to dismiss a claim of breach of contract. Plaintiff failed to plead a valid

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contract based upon the absence of a pre-audit statement mandated by N.C.G.S. § 159-28(a).

2. Fraud—negligent misrepresentation—motion to dismiss—failure to allege pecuniary loss

The trial court did not err by granting defendant's motion to dismiss a claim of negligent misrepresentation. Plaintiff failed to allege any pecuniary loss.

Appeal by plaintiff from Order entered 17 October 2012 by Judge Orlando F. Hudson, Jr. in Superior Court, Durham County. Heard in the Court of Appeals 28 March 2013.

Hairston Lane Brannon, PA by Jeremy R. Leonard and James E. Hairston, Jr., for plaintiff-appellant.

Durham County Attorney's Office by Assistant County Attorney Kathy R. Everett-Perry, for defendant-appellee.

STROUD, Judge.

Sadie Howard ("plaintiff") appeals from the order entered 17 October 2012 dismissing both of her claims against Durham County ("defendant"). She argues on appeal that the trial court erred in granting defendant's motion to dismiss because it had jurisdiction over defendant and she properly pled each claim. For the following reasons, we affirm.

I. Background

On 26 July 2012, plaintiff filed a complaint against defendant in Superior Court, Durham County, for breach of contract and negligent misrepresentation. Plaintiff's complaint alleged that in April 2010, she had filed a complaint in Superior Court, Wake County, for violation of her civil rights under 42 U.S.C. § 1983 and wrongful termination. Defendant removed the action to the United States District Court for the Eastern District of North Carolina. The parties participated in a mediated settlement conference on 2 May 2011. Defendant was represented at the settlement conference by Kim Simpson, the Durham County Tax Administrator, and Kathy Everett-Perry, an Assistant Durham County Attorney.¹

1. The record before this court does not include any pleadings or other information from the federal lawsuit. The facts noted in this opinion are based solely upon the allegations of plaintiff's complaint.

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The parties exchanged settlement offers and, according to plaintiff's complaint, they reached an oral agreement to settle for \$50,000. The mediator prepared a "Memorandum of Settlement" reflecting the terms of the settlement. Plaintiff signed the memorandum, but Ms. Simpson refused to sign for defendant as she said she did not have authority to settle for that amount. On 4 May 2011, Ms. Simpson informed the mediator that she had decided not to recommend the settlement offer to the Durham County Board of Commissioners.

Instead of filing an answer, defendant moved to dismiss plaintiff's complaint on 11 September 2012 under N.C. Gen. Stat. § 1A-1, Rule 12(b) (1), (2), and (6), alleging that the trial court lacked subject matter and personal jurisdiction due to sovereign immunity and that plaintiff's complaint failed to state a claim. Along with its motion to dismiss, defendant filed an affidavit from Catherine Whisenhunt, the Risk Manager for Durham County, stating that the county has not purchased any insurance policies that would cover plaintiff's claims. The Superior Court granted defendant's motion by order entered 17 October 2012 both on jurisdictional grounds and on the grounds that plaintiff failed to state a cause of action. Plaintiff filed written notice of appeal to this Court on 25 October 2012.

II. Motion to Dismiss

Defendant moved to dismiss plaintiff's action both on the grounds of sovereign immunity under N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and (2) and failure to state a claim under Rule 12(b)(6). The Superior Court granted defendant's motion to dismiss on both grounds. For the following reasons, we affirm the trial court's order.

A. Standard of Review

With respect to a motion to dismiss based on sovereign immunity, the question is whether the complaint specifically alleges a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action. . . . [Further,] precise language alleging that the State has waived the defense of sovereign immunity is not necessary, but, rather, the complaint need only contain sufficient allegations to provide a reasonable forecast of waiver.

Sanders v. State Personnel Com'n, 183 N.C. App. 15, 19, 644 S.E.2d 10, 13 (citations, quotation marks, and brackets omitted), *disc. rev. denied*, 361 N.C. 696, 652 S.E.2d 653, and *app. dismissed*, 361 N.C. 696, 652 S.E.2d 654 (2007).

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On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Block v. County of Person, 141 N.C. App. 273, 277–78, 540 S.E.2d 415, 419 (2000) (citations and quotation marks omitted).

B. Breach of Contract

[1] We first address plaintiff’s breach of contract claim. Plaintiff argues that the trial court erred in dismissing her claim for lack of jurisdiction and failure to state a claim because she alleged a valid contract between her and defendant. Defendant counters that it is protected by sovereign immunity because there was evidence before the trial court that it had not waived immunity through the purchase of “insurance which would provide coverage for the Causes of Action stated in plaintiff’s complaint.” Defendant further asserts that that “there was never a meeting of the minds between the parties and, thus, no agreement” and that plaintiff failed to properly plead a valid contract based upon the lack of a pre-audit statement required by N.C. Gen. Stat. § 159-28(a).

First, we note that defendant is not protected by sovereign immunity as to a claim for breach of contract, if there was a valid contract between it and plaintiff.

[W]henver the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract. Thus, in this case, and in causes of action on contract . . . the doctrine of sovereign immunity will not be a defense to the State. The State will occupy the same position as any other litigant.

Smith v. State, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976) (citation omitted). This rule applies to contracts entered into by the counties of this state. *Archer v. Rockingham County*, 144 N.C. App. 550, 558, 548 S.E.2d 788, 793 (2001), *disc. rev. denied*, 355 N.C. 210, 559 S.E.2d 796 (2002). Although plaintiff’s underlying claims in federal court were for

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“willful violation of civil rights pursuant to 42 U.S.C. § 1983” and wrongful termination, the claim which is the subject of this action arises only from the failure to settle that claim in federal court and does not involve the merits of plaintiff’s federal claim.

Thus, if plaintiff properly pled a valid contract between her and defendant, defendant would not be protected by sovereign immunity as to a claim for breach of the contract. *See Archer*, 144 N.C. App. at 558, 548 S.E.2d at 793. If, however, plaintiff did not properly plead a valid contract, her action would be subject to dismissal for failure to state a claim for breach of contract. *Id.*; *see McLamb v. T.P. Inc.*, 173 N.C. App. 586, 588, 619 S.E.2d 577, 579-80 (2005), *disc. rev. denied*, 360 N.C. 290, 627 S.E.2d 621 (2006). So we must first consider whether plaintiff has pled a valid contract.

Lest this case create bad law which we believe would be quite detrimental to mediation and apparently contrary to our state law and public policy regarding mediation, we note that this case presents a unique situation. This case falls into an unusual gap between the statutes and rules governing mediation in the state court and the federal court. Had the mediated settlement conference taken place in our state’s superior court, there would clearly be no enforceable agreement because mediated settlement agreements must be in writing under N.C. Gen. Stat. § 7A-38.1(1)(2011). The mediation rules governing mediation in the Eastern District of North Carolina also provide that mediated settlement agreements “shall” be in writing, E.D.N.C. Local Rule 101.1d(d)(3), but we can find no Fourth Circuit cases which hold that this rule precludes enforcement of an oral agreement reached at mediation, and we will not presume to interpret the federal rules, particularly as defendant has not raised this argument. *See* N.C.R. App. P. Rule 28(a); *Ashley Furniture Industries, Inc. v. SanGiacomo N.A. Ltd.*, 187 F.3d 363, 378 (4th Cir. 1999) (noting that the local rules in the Middle District of North Carolina require mediated settlement agreements to be reduced to writing, but declining to address whether that requirement makes an oral settlement agreement unenforceable, reasoning that “[t]he district court is certainly in a better position than we to interpret its rules.”).

Taking the allegations of the complaint as true, as we must, plaintiff has alleged an oral contract and defendant has raised no defense that this particular agreement must be in writing to be enforceable. Thus, this case is governed by neither the state nor federal statutes regarding mediation. By its plain language, N.C. Gen. Stat. § 7A-38.1 only applies to superior court civil actions and does not purport to govern mediated settlement conferences in the federal courts within North

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Carolina. Therefore, we must apply the general common law of contract formation.

Defendant also fails to raise any argument regarding Ms. Simpson's authority, or lack thereof, to settle plaintiff's claim on defendant's behalf without approval by the county commissioners. Under N.C. Gen. Stat. § 153A-12, a county may act only upon approval by the county commissioners. "[P]owers [vested in a county] can only be exercised by the board of commissioners, or in pursuance of a resolution adopted by the board." *Jefferson Standard Life Ins. Co. v. Guilford County*, 225 N.C. 293, 301, 34 S.E.2d 430, 435 (1945). Plaintiff has not alleged any particular action by defendant's county commissioners assenting to the proposed settlement or even authorizing defendant's counsel to settle the case for any particular amount, but she has alleged that defendant's counsel had authority, or at least apparent authority, to settle. Defendant has not challenged plaintiff's failure to allege that the County took any action to approve the \$50,000 settlement alleged by plaintiff, so we will not address this issue. We note the absence of any argument regarding authority only to caution against use of this opinion to support any future argument regarding how a county may or may not authorize a settlement.

Now we will address the sole argument which defendant did raise, which is based upon plaintiff's failure to plead a valid contract based upon the absence of a pre-audit statement mandated by N.C. Gen. Stat. § 159-28(a)(2011). This argument is based upon the assumptions that the parties did enter into an agreement to settle for \$50,000 and that Ms. Simpson either had authority to enter this agreement or that she had apparent authority to do so. Thus, defendant seeks to avoid its obligation to plaintiff based only upon the absence of a pre-audit statement.

N.C. Gen.Stat. § 159–28(a) sets forth the requirements and obligations that must be met before a county may incur contractual obligations. . . . *Where a plaintiff fails to show that the requirements of N.C. Gen. Stat. § 159–28(a) have been met, there is no valid contract, and any claim by plaintiff based upon such contract must fail.*

Data General Corp., 143 N.C. App. 97, 102-03, 545 S.E.2d at 243, 247 (2001) (citations and quotation marks omitted) (emphasis added). N.C. Stat. § 159-28(a) states:

If an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, the contract, agreement, or purchase order shall include on its face a certificate stating

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that the instrument has been preaudited to assure compliance with this subsection. The certificate, which shall be signed by the finance officer or any deputy finance officer approved for this purpose by the governing board, shall take substantially the following form:

This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.

(Signature of finance officer).

A settlement agreement requiring a county to pay money is subject to the requirements of N.C. Gen. Stat. § 159-28(a). *Cabarrus County v. Systel Business Equipment Co., Inc.*, 171 N.C. App. 423, 427, 614 S.E.2d 596, 599, *disc. rev. denied*, 360 N.C. 61, 621 S.E.2d 177 (2005).²

Plaintiff argues that under *Lee v. Wake County*, a preaudit certificate is not required. In *Lee*, the plaintiff brought a workers' compensation claim and the parties entered into a written settlement agreement at a mediated settlement conference held under the rules of the Industrial Commission. *Lee v. Wake County*, 165 N.C. App. 154, 155-57, 598 S.E.2d 427, 429-30, *disc. rev. denied*, 359 N.C. 190, 607 S.E.2d 275 (2004). In *Lee*,

[t]he memorandum of agreement provided in pertinent part that defendants would pay plaintiff a lump sum of \$750,000 and would pay certain medical and disability benefits, and that defendants would prepare a formal clincher agreement incorporating the terms of the settlement agreement and releasing defendants from all workers' compensation liability. The memorandum of agreement contained no contingencies or provisional terms such as the approval of its terms by the Wake County Board of County Commissioners. Thereafter, defendants withdrew their consent to the memorandum of agreement and refused to prepare a formal settlement agreement for presentation to the Commission for approval.

Id. at 156, 598 S.E.2d at 429.

2. N.C. Gen. Stat. § 159-28(a) was amended in 2012 to add a provision whereby an obligation under this subsection does not need a preaudit certificate if it has been approved by the Local Government Commission. This amendment became effective 12 July 2012. 2012 N.C. Sess. Laws 156.

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In seeking to avoid their obligation under the agreement, the defendant in *Lee* argued that “the entire agreement was invalid because their representative at the settlement conference had not been given authority to negotiate a settlement agreement for more than \$100,000.” *Id.* Before the Industrial Commission and on appeal to this Court, the defendants also claimed that “the absence of a preaudit certificate pursuant to G.S. § 159–28 defeats the Commission’s authority to direct defendants to prepare a formal Compromise Settlement Agreement for approval.” *Id.* at 161, 598 S.E.2d at 432. In the context of the Industrial Commission mediation, this Court rejected that argument and held that “given the current posture of this matter, the Commission could properly enforce the memorandum of agreement and order defendants to do so.” *Id.* But this holding was based specifically upon the Industrial Commission mediation process:

The development of a formalized workers’ compensation compromise settlement agreement takes place within the structure imposed by the Industrial Commission Rules and the Industrial Commission Rules for Mediated Settlement Conferences. These rules provide for a three-stage process. First, the parties attend a mediated settlement conference. “If an agreement is reached in the mediation conference, the parties shall reduce the agreement to writing, specifying all the terms of their agreement bearing on the resolution of the dispute before the Industrial Commission, and sign it along with their counsel.” RMSC Rule 4(d). Secondly, “agreements for payment of compensation shall be submitted in proper form for Industrial Commission approval, and shall be filed with the Commission within 20 days of the conclusion of the mediation conference.” RMSC Rule 4(d). To be “in proper form,” a compromise settlement agreement must be accompanied by, *e.g.*, copies of all pertinent medical and vocational rehabilitation records, a signed release of liability, and documents pertinent to the claimant’s future earning capacity. Finally, upon submission to the Commission, “[o]nly those agreements deemed fair and just and in the best interest of all parties will be approved.” Industrial Commission Rule 502(1). In this sequence of events the pre-audit certificate will naturally be executed, if at all, after the settlement conference, when the amount of the county’s liability is known, and as part of the general formalizing of the documents for submission to the Industrial Commission.

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We conclude that an otherwise valid memorandum of agreement is not rendered void by the fact it does not bear the requisite pre-audit certificate. In this case, the subject memorandum of agreement is an agreement to prepare a formalized settlement compromise agreement for the Commission's consideration. The current appeal therefore involves an action for specific performance, not for the payment of money. We conclude that G.S. § 159-28 does not require that a memorandum of agreement be accompanied by a county finance manager's pre-audit certificate to enable the Commission to direct the submission of a formalized compromise settlement agreement.

Id. at 162-63, 598 S.E.2d at 432-33.

Thus, *Lee* is distinguishable from this case for several reasons. First, in *Lee* there was "an otherwise valid memorandum of agreement" which was actually executed by a representative of the defendants. *Id.* at 156, 162, 598 S.E.2d at 429, 433. In addition, the agreement in *Lee* was reached in the context of a "three-stage process" before the Industrial Commission in which "the pre-audit certificate will naturally be executed, if at all, after the settlement conference, when the amount of the county's liability is known, and as part of the general formalizing of the documents for submission to the Industrial Commission." *Id.* at 162, 598 S.E.2d at 432-33. No such process applies to the case before us. Actually, as noted above, although this agreement arose in mediation, the rules which would normally govern mediated settlement agreements in our courts do not apply.

Plaintiff's only theory of a contract is one formed by oral agreement of the parties, as defendant never signed the written agreement. Indeed, plaintiff specifically alleged that the agreement was a "verbal agreement," and that defendant's representative specifically stated that "she had no authority to settle the claim for the sum she had offered to Plaintiff."

An oral contract, by its very nature, cannot contain the written certification required by N.C. Gen. Stat. § 159-28(a). See *Cincinnati Thermal Spray, Inc. v. Pender County*, 101 N.C. App. 405, 407-08, 399 S.E.2d 758, 759 (1991) (affirming dismissal of a contract action for failure to conform to N.C. Gen. Stat. § 159-28(a) where the plaintiff alleged an oral contract between it and the defendant county). Thus, plaintiff has failed to allege that the settlement agreement met the requirements of N.C.

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Gen. Stat. § 159-28(a). “An obligation incurred in violation of this subsection is invalid and may not be enforced.” N.C. Gen. Stat. § 159-28(a).

Because plaintiff has failed to allege a contract conforming to the dictates of § 159-28(a), she has failed to allege a valid contract and cannot state a claim for breach of contract. *See Systel*, 171 N.C. App. at 427, 614 S.E.2d at 599; *McLamb*, 173 N.C. App. at 588, 619 S.E.2d at 580. Accordingly, we affirm the trial court’s order dismissing this claim.

C. Negligent Misrepresentation

[2] Plaintiff next argues that the trial court erred in dismissing her claim for negligent misrepresentation. Defendant argues that this claim is precluded by sovereign immunity and that plaintiff failed to state a claim. Because we conclude that plaintiff has failed to state a claim, we do not address the immunity issues raised by the parties.

Plaintiff alleged that she “justifiably relied, to her detriment, on information prepared by defendant without reasonable care.” She alleged that she suffered pecuniary loss “from the defendant’s action of supplying false information during the course of a mediated settlement conference.” The “false information” as alleged was defendant’s counsel’s initial representation that she had authority to settle the case, while she later in the mediation informed plaintiff that she did not have authority to settle for \$50,000.

“The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care.” *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988) (citations omitted). “In this State, we have adopted the Restatement 2d definition of negligent misrepresentation and have held that the action lies where *pecuniary loss* results from the supplying of false information to others for the purpose of guiding them in their business transactions.” *Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519, 525, 430 S.E.2d 476, 480 (1993) (citations omitted). A claim for negligent misrepresentation must allege pecuniary loss. In other words, the complaint must allege that the plaintiff’s reliance was actually detrimental. *See Raritan River Steel Co.*, 322 N.C. at 206, 367 S.E.2d at 612.

Here, plaintiff’s complaint fails to allege any pecuniary loss. Plaintiff alleged that Ms. Simpson misrepresented her authority to settle the case for Durham County and that she signed the Memorandum of Settlement in reliance on Ms. Simpson’s misrepresentation. She does not allege that her position in the federal litigation was prejudiced by the lack of a

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settlement.³ Plaintiff has not alleged that the Memorandum of Settlement was used against her in any way. This case is not one where the plaintiff had already taken some action, such as taking a dismissal or executing a release, that would preclude her recovery in the underlying federal action in reliance on defendant's representations.

The only loss plaintiff claims is the loss associated with not having settled the case. Specifically, plaintiff asserts that "she suffered pecuniary loss as a result of [defendant] supplying false information, which induced her into making an acceptance of the offer." As explained above, even taking all allegations in the complaint as true, no valid settlement agreement was formed due to the lack of a pre-audit certificate. Plaintiff cites no case recognizing a failure to settle a case as a compensable "pecuniary loss" and we decline to extend the definition of negligent misrepresentation to cover such a situation.

It is well recognized that not all mediated settlement conferences will result in a settlement agreement. *See* N.C. Gen. Stat. § 7A-38.1(f) ("Nothing in this section shall require any party or other participant in the conference to make a settlement offer or demand which it deems is contrary to its best interests."); E.D.N.C. Local Rule 101.1d(f)(10) ("It is the duty of the mediator to determine if an impasse has been reached or mediation should for any reason be terminated. The mediator shall then inform the parties that mediation is terminated."). Even if plaintiff believed for a few hours, or at the most two days, that they had reached a settlement, when in fact no settlement had been reached, this is simply not a pecuniary loss, even if her belief was reasonable based on the representations of the other party. Plaintiff has not alleged any other facts that could constitute pecuniary loss.

"In ruling on a Rule 12(b)(6) motion to dismiss, the trial court regards all factual allegations of the complaint as true. Legal conclusions, however, are not entitled to a presumption of truth." *Miller v. Rose*, 138 N.C. App. 582, 592, 532 S.E.2d 228, 235 (2000) (citations omitted). Thus, although plaintiff has alleged each element of negligent misrepresentation, including pecuniary loss, we hold that "the complaint on its face reveals the absence of facts sufficient to make a good claim." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 429 (citation and

3. Although plaintiff's brief discusses some aspects of the federal case, the record before us includes absolutely nothing from the federal action other than the allegations of plaintiff's complaint as noted above. "Matters discussed in the brief but outside the record will not be considered." *Hudson v. Game World, Inc.*, 126 N.C. App. 139, 142, 484 S.E.2d 435, 437-38 (1997) (citation omitted).

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quotation marks omitted), *app. dismissed*, 361 N.C. 425, 647 S.E.2d 98, *disc. rev. denied*, 361 N.C. 690, 652 S.E.2d 257 (2007). Therefore, we affirm the trial court's order dismissing plaintiff's negligent misrepresentation claim. Because we affirm the trial court's order on 12(b)(6) grounds, we need not reach the immunity issues presented as to this claim.⁴

III. Conclusion

Plaintiff failed to allege a valid contract between her and defendant as the complaint itself demonstrates that there was no pre-audit certificate. Plaintiff's claim of negligent misrepresentation was properly dismissed because plaintiff failed to allege any pecuniary loss. Therefore, we affirm the trial court's order granting defendant's motion to dismiss.

AFFIRMED.

Judges ELMORE and STEELMAN concur.

4. Defendant also argued that it was immune from suit because when a governmental entity engages in settlement mediation it is undertaking a governmental function in that it is "protecting the coffers of the citizens of Durham County." Although we do not reach this issue, we are highly skeptical that settlement negotiations could qualify as a governmental function when any person, group of people, or corporate entity could, and do, in fact, engage in that activity. *See Town of Sandy Creek v. East Coast Contracting, Inc.*, ___ N.C. App. ___, ___, 736 S.E.2d 793, 796-97 ("Generally speaking, the distinction [between governmental and proprietary functions] is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and 'private' when any corporation, individual, or group of individuals could do the same thing." (citation, quotation marks, and brackets omitted)). Every party, whether an individual, company, or municipality, that engages in settlement negotiations aims to reach an agreement that best protects their coffers or wallets. Such an objective, though it may well be appreciated by the citizens of Durham County, is hardly a uniquely governmental one. Taken to its logical extreme, defendant's argument is that all governmental entities are immune from any enforcement of any mediated settlement agreement simply because the governmental entity was a party to the mediation.

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IN THE MATTER OF A.K.D. AND O.R.D.

No. COA12-1355

Filed 7 May 2013

**Termination of Parental Rights—grounds for termination—
improper reliance on stipulation**

The trial court erred in a termination of parental rights case by terminating respondent's rights to his two children. The trial court improperly relied on the parties' stipulation that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(7).

Appeal by respondent-father from orders entered 13 August 2012 by Judge Robert Trivette in Dare County District Court. Heard in the Court of Appeals 17 April 2013.

Laura F. Meads for petitioner-appellee mother.

Mary McCullers Reece for respondent-appellant father.

HUNTER, JR., Robert N., Judge.

The juveniles' father ("Respondent") appeals from orders terminating his parental rights to his minor children A.K.D. and O.R.D. ("the juveniles"). Because the trial court erred by relying on an improper stipulation to the sole ground for termination of parental rights, we reverse and remand for new hearing.

I. Facts & Procedural History

On 28 October 2011, the juveniles' mother ("Petitioner") petitioned to terminate Respondent's parental rights to the juveniles. Petitioner alleged Respondent: (i) failed to pay court-ordered child support; (ii) neglected the juveniles; and (iii) abandoned the juveniles. On 28 November 2011, Respondent filed a *pro se* response denying the allegations.

The trial court held hearings on 18 April, 18 June and 3 July 2012. On 13 August 2012, the trial court entered orders terminating Respondent's parental rights to the juveniles. In its orders, the trial court made the following factual finding:

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The parties stipulated that the Court could find by clear, cogent, and convincing evidence that [Respondent] willfully abandoned the juvenile[s] for at least six months immediately preceding the filing of the petition and that grounds exist to terminate [Respondent's] parental rights under NCGS § 7B-1111(7).

Based on this stipulation, the trial court concluded as a matter of law that grounds existed to terminate Respondent's parental rights. The trial court then concluded it was in the juveniles' best interests to terminate Respondent's parental rights. On 29 August 2012, Respondent filed timely notice of appeal.

II. Jurisdiction & Standard of Review

This Court has jurisdiction to hear the instant case pursuant to N.C. Gen. Stat. § 7B-1001(a)(6) (2011) (stating that "appeal of a final order of the court in a juvenile matter shall be made directly to the Court of Appeals" when the order "terminates parental rights").

There is a two-step process in a termination of parental rights proceeding. In the adjudicatory stage, the trial court must establish that at least one ground for the termination of parental rights listed in [N.C. Gen. Stat. § 7B-1111] exists. . . . Once one or more of the grounds for termination are established, the trial court must proceed to the dispositional stage where the best interests of the child are considered. There, the court shall issue an order terminating the parental rights unless it further determines that the best interests of the child require otherwise.

In re Blackburn, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001) (internal citations omitted).

For the trial court's adjudicatory determination, "[t]he standard for appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings of fact support its conclusions of law."¹ *In re C.C.*, 173 N.C. App. 375, 380, 618 S.E.2d 813, 817 (2005). Clear, cogent and convincing evidence requires more proof than the "preponderance of the evidence"

1. The "clear, cogent and convincing" standard is synonymous with the "clear and convincing" standard used in some cases. *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908.

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standard but less than the “beyond a reasonable doubt” standard. *Bost v. Van Nortwick*, 117 N.C. App. 1, 13–14, 449 S.E.2d 911, 918 (1994).

We review adjudicatory conclusions of law *de novo*. *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006). “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) (quotation marks and citation omitted).

We review the trial court’s dispositional “best interests of the child” determination for abuse of discretion. *See In re S.F.*, 198 N.C. App. 611, 614, 682 S.E.2d 712, 715–16 (2009); *In re A.R.H.B.*, 186 N.C. App. 211, 218, 651 S.E.2d 247, 253 (2007). “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).

III. Analysis

On appeal, Respondent argues the trial court erred by relying on the parties’ stipulation that grounds existed to terminate Respondent’s parental rights under N.C. Gen. Stat. § 7B-1111(a)(7). We agree.

In North Carolina, “stipulations are judicial admissions and are therefore binding in every sense, preventing the party who agreed to the stipulation from introducing evidence to dispute it and relieving the other party of the necessity of producing evidence to establish an admitted fact.” *Thomas v. Poole*, 54 N.C. App. 239, 241, 282 S.E.2d 515, 517 (1981).

“When construing a stipulation a court must attempt to effectuate the intention of the party making the stipulation as to what facts were to be stipulated without making a construction giving the stipulation the effect of admitting a fact the party intended to contest.” *In re I.S.*, 170 N.C. App. 78, 87, 611 S.E.2d 467, 473 (2005). However, “[s]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.” *State v. Prush*, 185 N.C. App. 472, 480, 648 S.E.2d 556, 561 (2007) (quotation marks and citation omitted).

Under N.C. Gen. Stat. § 7B-1111(a)(7), grounds for terminating parental rights exist where the parent has “willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion.” N.C. Gen. Stat. § 7B-1111(a)(7) (2011). “Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.” *In re Adoption of Searle*, 82

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N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986). “In this context, the word ‘willful’ encompasses more than an intention to do a thing; there must also be purpose and deliberation. *Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence.*” *In re T.C.B.*, 166 N.C. App. 482, 485, 602 S.E.2d 17, 19 (2004) (emphasis added)(quotation marks and internal citations omitted).

In the present case, Respondent argues the trial court erred by relying on the parties’ stipulation that grounds for terminating his parental rights exist. We agree.

At the 18 April 2012 adjudication hearing, the following discussion occurred between Respondent’s counsel, Petitioner’s counsel, and the trial court:

[Respondent’s counsel]: [W]hat I have discussed with my client is, for the adjudicatory phase only, to stipulate the grounds exist for the adjudication only, not for the dispositional portion of the hearing, and he’s agreed to do that. . . .

. . . .

THE COURT: . . . What do we need to do as far as this adjudication— stipulation on the adjudication? What exactly are we stipulating to?

[Petitioner’s counsel]: I believe it’s that grounds have been met, specifically that abandonment.

[Respondent’s counsel]: The only ground that is time here— that is timely alleged is the abandonment.

[Petitioner’s counsel]: Which is 7B-1111 subsection 7.

THE COURT: All right. Do you agree with that, [Petitioner’s counsel], both the ground that’s alleged, and that’s the ground under which the stipulation is?

[Petitioner’s counsel]: Yes.

[Respondent’s counsel]: I do.

. . . .

THE COURT: So do we need to stipulate as to any specific findings or just that— that there are findings— there are facts that support that stipulation?

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[Respondent's counsel]: Yes, by the presumptive— I'm trying to figure—

[Petitioner's counsel]: By clear, cogent, and convincing evidence [*Inaudible*] there are facts— the parties have stipulated that the facts at issue here will show that [Respondent] willfully abandoned the juvenile for at least six months immediately preceding the filing of this petition, and we just need specifically that ground.

THE COURT: All right.

[Petitioner's counsel]: And then we would have to make—

THE COURT: I don't want to have to come back later and get in an argument about what facts support that finding.

[Respondent's counsel]: No. On disposition— I mean, on disposition, it's— there is no dispute of fact that he has not seen the children for over a six month period of time. At the dispositional phase, we'll be presenting evidence as to why that occurred, but there's no dispute that he has not—

THE COURT: But it did occur.

[Respondent's counsel]: Yes, sir.

THE COURT: All right. And that doesn't preclude him in any way at the disposition hearing to explain why that occurred.

[Respondent's counsel]: Yes, sir.

In this discussion, Respondent's attorney twice stipulated that the ground of willful abandonment existed. However, this stipulation is an invalid stipulation to a conclusion of law.

In the relevant exchange, the trial court recognized it needed factual stipulations to support its conclusion that willful abandonment existed. Although Petitioner's counsel stipulated these facts existed, Respondent's counsel only stipulated there was "no dispute of fact that he has not seen the children for over a six month period of time." Respondent's stipulation only eliminated Petitioner's need to prove Respondent abandoned the juveniles for at least six consecutive months immediately preceding the termination petitions. *See Thomas*, 54 N.C.

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App. at 241, 282 S.E.2d at 517. Respondent never stipulated his abandonment was willful.² Since Petitioner presented no evidence during the hearing's adjudicatory phase, no facts support the trial court's conclusion that the abandonment was willful. Accordingly, the trial court's adjudication under N.C. Gen. Stat. § 7B-1111(a)(7) is not supported by its findings of fact.

IV. Conclusion

Because the parties' stipulation failed to establish the sole ground found for termination, we reverse the trial court's orders terminating Respondent's parental rights and remand for a new hearing. Since we remand for new hearing, we do not address Respondent's challenge to the trial court's conclusion that terminating his parental rights in is the juveniles' best interests.

REVERSED and REMANDED.

Judges STROUD and DILLON concur.

IN THE MATTER OF C.W.N., JR.

No. COA12-485

Filed 7 May 2013

Constitutional Law—ineffective assistance of counsel—not *per se* ineffective—no prejudice

A juvenile defendant charged with misdemeanor assault could not sustain a claim for ineffective assistance of counsel. Counsel's failure to make any closing argument was not ineffective assistance of counsel *per se*. Furthermore, the juvenile failed to establish a reasonable probability that had counsel asserted on closing argument that the incident in the boys' bathroom was an accident occurring as a result of horseplay, the result of the proceeding would have been different.

2. Additionally, Respondent's counsel repeatedly stated she intended to explain "why" Respondent abandoned the juveniles during the disposition phase of the trial. We believe this statement further indicates Respondent denied the abandonment was willful.

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[227 N.C. App. 63 (2013)]

Appeal by juvenile from adjudication order and disposition order entered 29 November 2011 by Judge Herbert L. Richardson in Robeson County District Court. Heard in the Court of Appeals 13 November 2012.

Attorney General Roy Cooper, by Assistant Attorney General Tiffany Y. Lucas, for the State.

Michelle FormyDuval Lynch for defendant-appellant.

BRYANT, Judge.

Where juvenile fails to establish that counsel's performance was deficient or prejudiced, juvenile cannot sustain a claim for ineffective assistance of counsel.

On 8 November 2011, a juvenile petition for misdemeanor assault was filed in the Robeson County District Court. The petition alleged that C.W.N., Jr. (juvenile) "[wound] his arm up like a softball player and hit[] [the victim] in the groin [] area[.]"

An adjudicatory hearing commenced in Robeson County during the Lumberton Juvenile District Court Session on 29 November 2011, the Honorable Herbert L. Richardson, Judge presiding. During the hearing, evidence was admitted which tended to show that juvenile, then fifteen years old, and three other boys were engaging in horseplay while in a boys' bathroom at their school. The victim, then thirteen years old, was not engaged in horseplay but entered the bathroom and then a bathroom stall. When the victim exited the bathroom stall, juvenile said, "watch this," swung his arm, and stuck the victim in the groin area. The victim fell to the ground. Thereafter, a juvenile petition alleging misdemeanor assault was filed against juvenile.

Following the presentation of evidence, Judge Richardson requested closing arguments first from juvenile, then the prosecution. Juvenile counsel stated, "Your Honor, I don't have anything to add to what the Court has heard." The prosecution made a closing argument. Judge Richardson then adjudicated juvenile as delinquent on the charge of misdemeanor assault. Juvenile appeals.

On appeal, juvenile raises the following issues: whether juvenile received ineffective assistance of counsel (I) when his counsel failed to make any closing argument; or alternatively, (II) when his counsel

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failed to argue that the incident was not an assault but occurred during horseplay.

Right to counsel in a juvenile proceeding

Pursuant to the Sixth Amendment of the United States Constitution, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.” U.S. Const. amend. VI.

“Juvenile proceedings, however, stand in a different light. Whatever may be their proper classification, they certainly are not ‘criminal prosecutions.’ Nor is a finding of delinquency in a juvenile proceeding synonymous with ‘conviction of a crime.’” *In re Burrus*, 275 N.C. 517, 529, 169 S.E.2d 879, 886-87 (1969). In *Application of Gault*, 387 U.S. 1, 18 L. Ed. 2d 527 (1967), the Supreme Court of the United States, states that

[w]e do not mean to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment. We reiterate this view, here in connection with a juvenile court adjudication of delinquency, as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution.

Id. at 30-31, 18 L. Ed. 2d at 548 (quotations omitted).

We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child’s right to be represented by counsel

Id. at 41, 18 L. Ed. 2d 527 at 554.

The right to counsel in any proceeding in which a juvenile is alleged to be delinquent has been codified in North Carolina General Statutes, section 7B-2000. *See* N.C. Gen. Stat. § 7B-2000(a) (2011) (“A juvenile alleged to be within the jurisdiction of the court has the right to be represented by counsel in all proceedings. Counsel for the juvenile shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services, unless counsel is retained . . . in any proceeding in which the juvenile is alleged to be (i) delinquent . . .”).

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Ineffective Assistance of Counsel

“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) (citations omitted). “[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” *State v. Fair*; 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted).

“When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel’s conduct fell below an objective standard of reasonableness.” *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citation omitted).

I

Juvenile first argues that his counsel’s failure to make a closing argument before the District Court was a per se violation of the Sixth Amendment right to assistance of counsel. We disagree.

“There are [] circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” *United States v. Cronin*, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 667 (1984) (citations omitted). “*Powell* [*v. Alabama*, 287 U.S. 45, 77 L. Ed. 158 (1932),] was [] a case in which the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial.” *Id.* at 661, 80 L. Ed. 2d at 669. However, “only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel’s actual performance at trial.” *Id.* at 662, 80 L. Ed. 2d at 670; see *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985) (holding “ineffective assistance of counsel, *per se* in violation of the Sixth Amendment, has been established in every criminal case in which the defendant’s counsel admits the defendant’s guilt to the jury without the defendant’s consent.”).

Juvenile cites *Cronin*, 466 U.S. 648, 80 L. Ed. 2d 657, and *Herring v. New York*, 422 U.S. 853, 45 L. Ed. 2d 593 (1975), in support of his argument that defense counsel’s failure to make a closing argument amounted to a failure to satisfy the assistance of counsel guaranteed by the Sixth Amendment. We note that in both cases, the circumstances giving rise to the allegations of ineffective assistance of counsel were the result of restrictions placed upon the performance of counsel by the

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trial court. *See, e.g., Cronic*, 466 U.S. at 662, 80 L. Ed. 2d 670 n. 31 (holding that appointment of a real estate lawyer who had never conducted a jury trial, to represent defendant on mail fraud charges and allowing only twenty-five days for pretrial preparation did not justify a presumption that the defendant was denied the effective assistance of counsel guaranteed by the Sixth Amendment, and that the defendant's ineffective assistance of counsel claim could only be made by pointing to specific errors made by trial counsel), and *compare, Herring*, 422 U.S. 853, 45 L. Ed. 2d 593 (holding that where a New York statute allowed a trial judge to deny the defendant the opportunity to present a closing argument, such was a violation of the right to counsel guaranteed by the Sixth Amendment).

Here, the question of whether juvenile's Sixth Amendment rights were violated stems from lead counsel's own voluntary actions, not an external constraint.

The right to the effective assistance of counsel is [] the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred.

Cronic, 466 U.S. at 656, 80 L. Ed. 2d at 666. As stated in *Herring*, closing arguments present each party with an opportunity to point out weaknesses in the positions of their adversary and draw inferences from the evidence. *Herring*, 422 U.S. at 862, 45 L. Ed. 2d at 600. In a criminal case, closing arguments allow a party to clarify the issues for resolution “[a]nd for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.” *Id.* at 862, 45 L. Ed. 2d at 600 (citation omitted). However, a counsel's failure to present a closing argument in the context of a nonjury juvenile delinquency hearing is not, standing alone, a circumstance so likely to prejudice the accused that a violation of a juvenile's Sixth Amendment right to assistance of counsel is to be presumed. *See generally, Cronic*, 466 U.S. 648, 80 L. Ed. 2d 657.

To hold that counsel's failure to speak during closing arguments in a nonjury juvenile delinquency hearing is per se ineffective assistance of counsel presumes that, while perhaps not advocacy, silence is always prejudicial. This we cannot say. *Compare State v. Taylor*, 79 N.C. App. 635, 637, 339 S.E.2d 859, 861 (1986) (Where defense counsel “refrained

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from speaking or presenting evidence at the sentencing hearing,” this Court reasoned that “[w]hile we find the absence of positive advocacy at the sentencing hearing troublesome, we do not believe we can hold, on this record, that it constituted deficient performance prejudicial to the defendant.”); *State v. Davidson*, 77 N.C. App. 540, 546, 335 S.E.2d 518, 522 (1985) (“If resourceful preparation reveals nothing positive to be said for a criminal defendant, at the very least effective representation demands that counsel refrain from making negative declamations.”). In light of the federal and state case law discussed herein as applied to the facts of this case, we can find no ineffective assistance of counsel per se. Accordingly, we overrule juvenile’s argument.

II

Alternatively, juvenile argues that he received ineffective assistance of counsel when defense counsel failed to make the argument that the incident in the boys’ bathroom was an accident occurring as a result of horseplay. We disagree.

To establish ineffective assistance of counsel, “[juvenile] must show that his counsel’s conduct fell below an objective standard of reasonableness. In order to meet this burden [juvenile] must satisfy a two part test.” *Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248 (citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984) (describing a two-part test to assess an objective standard of reasonableness for assistance of counsel)).

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.

State v. Paige, 202 N.C. App. 516, 523, 689 S.E.2d 193, 197 (2010) (citation omitted).

Here, prior to the examination of the first witness, juvenile counsel made a motion to sequester the remaining witnesses, which the trial

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court granted. Three witnesses testified for the prosecution: the victim and two other boys who were present in the bathroom at the time of the assault. Juvenile testified on his own behalf. All witnesses testified consistently that the victim was not involved in horseplay while in the bathroom and was struck by juvenile once when he exited the bathroom stall. Two boys who witnessed the assault testified that when the victim exited the bathroom stall, juvenile said, “watch this,” and then swung his arm “like he was throwing a softball” hitting the victim in his groin area. The victim fell to the ground. Juvenile’s counsel cross-examined the victim and the other two witnesses called by the prosecution, specifically questioning what each person was doing. Counsel’s examination revealed that a fourth boy, who was not present at the hearing, entered the bathroom prior to the assault and engaged juvenile in horseplay. Counsel’s cross-examination clarified that while the victim testified on direct examination that “they” threw water on him while he was in the bathroom stall, he believed only one boy, whom he could not identify, was throwing water on him. Counsel tested inconsistencies between trial testimony and a witness’s statement to an investigating officer made within two days of the incident. Counsel also elicited testimony regarding what words juvenile said to the victim after hitting him: “was he all right.” On direct-examination of juvenile, counsel elicited testimony regarding juvenile’s perception of events. Juvenile testified that after he used the sink to wash his hands another boy was blocking the paper towel dispenser; so, to dry his hands, juvenile swung his hands around. Everyone was laughing and joking around. The victim was accidentally hit when he exited the bathroom stall.

[Juvenile counsel:] So, you’re saying it was an accident that you hit him?

[Juvenile:] Yes, yes, Sir.

Counsel further questioned whether juvenile asked if the victim was all right: to which juvenile responded, “Yes, sir. . . . Multiple times.”

Following examination of juvenile, the trial court stated that it would hear first from juvenile’s counsel and then from the prosecution in closing. Juvenile’s counsel stated, “Your Honor, I don’t have anything to add to what the Court has heard.” The prosecution made a closing argument contending that the evidence showed that the boys were in a bathroom engaged in horseplay but once the victim exited the bathroom stall, he became “the butt of all the horse play[.]” The court sustained juvenile counsel’s objection to the prosecutor’s speculation as to what counsel believed. After closing argument, the court stated that the

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prosecution had met its burden on the charge of misdemeanor assault and that juvenile was delinquent on that charge. The juvenile proceeding, including the disposition phase, transpired over a period of approximately forty minutes.

It appears from the record, that the juvenile proceeding maintained the character of a confrontation between adversaries and that juvenile's counsel required the prosecution's case to survive a meaningful adversarial testing, *see Cronin*, 466 U.S. at 656-57, 80 L. Ed. 2d at 666; furthermore, juvenile fails to establish a reasonable probability that had counsel asserted on closing argument that the incident in the boys' bathroom was an accident occurring as a result of horseplay, the result of the proceeding would have been different, *see Paige*, 202 N.C. App. at 523, 689 S.E.2d at 197. Three witnesses, including the victim, testified to facts tending to indicate the assault on the victim was non-accidental. Therefore, juvenile has failed to establish he received ineffective assistance of counsel. Accordingly, juvenile's argument is overruled.

Affirmed.

Judges McGEE and ERVIN concur.

IN THE MATTER OF SUTTLES SURVEYING, P.A., LICENSE No. C-0648
(NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS
Case No. V2009-027)

IN THE MATTER OF KENNETH D. SUTTLES, PLS LICENSE No. L-2678
(NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS
Case No. V2009-064)

No. COA 12-1350

Filed 7 May 2013

1. Engineers and Surveyors—suspension of surveyor's license—dispute with client—authority of Board

Plaintiff Suttles contended that the Board of Examiners for Engineers and Surveyors (Board) exceeded its statutory authority when it suspended his surveyor's license and reprimanded his surveying company. Specifically, Suttles asserted that the Board lacked

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statutory authority to adjudicate a purely contractual dispute, but the Board's decision did not render judgment on whether Suttles breached any contract with Smith. The Board's decision focused on Suttles' actions throughout his business dealings with this client.

2. Engineers and Surveyors—suspension of surveyor's license—dispute with client — rules not unconstitutionally vague

The Court of Appeals rejected the contention of a surveyor (Suttles) that the decision of the Board of Examiners for Engineers and Surveyors (Board) to suspend his surveyor's license and reprimand his surveying company was based on unconstitutionally vague and overbroad rules. Any reasonably intelligent member of the profession must have understood that issuing a preliminary plat with knowledge that it would be improperly recorded violated the Board's rules. Also, the record reflected Suttles' personal knowledge that a confidentiality clause in a settlement agreement would necessarily subvert the Board's investigation.

Appeal from Order on Judicial Review entered 21 August 2012 by Judge Nathaniel J. Poovey in Burke County Superior Court affirming a Decision and Right of Appeal entered 10 May 2011 by the North Carolina Board of Examiners for Engineers and Surveyors. Heard in the Court of Appeals 27 March 2013.

Allen, Moore & Rogers L.L.P., by John C. Rogers, III, for petitioner-appellants.

Troutman Sanders, L.L.P., by Patricia P. Shields, for respondent-appellee.

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

Kenneth Suttles ("Appellant") and his surveying company, Suttles Surveying, P.A., appeal from an Order on Judicial Review affirming the decision of the North Carolina Board of Examiners for Engineers and Surveyors ("the Board") suspending Appellant's license for six months and reprimanding Suttles Surveying. Appellant contends that the trial court erred in affirming the decision of the Board because (1) the Board's decision exceeded the scope of its statutory authority and (2) the Board's decision violated constitutional provisions. For the following reasons, we uphold the trial court's affirmance of the Board's decision.

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I. Factual and Procedural Background

In the fall of 2008, John R. Smith (“Smith”) was involved in a property dispute with his neighbor Ruby Revis (“Revis”). Revis hired A&T Surveying, who determined that a mobile home Smith believed to be situated on his property was in fact on Revis’ property. In an effort to challenge Revis’ survey, Smith’s daughter, Angela Piercy (“Piercy”) contacted Suttles Surveying. Piercy met Appellant, the proprietor of Suttles Surveying, and paid him \$50.00 to view the disputed property and meet with Smith. Appellant met with Smith to discuss the surveying work that would be needed. Appellant agreed to establish the disputed boundary between the properties, and Smith paid Appellant a down payment of \$1,000.00 to begin the surveying work.

Appellant then began the process of surveying the lot. However, a payment dispute subsequently arose between Appellant and Smith. Smith claimed that Appellant had agreed to perform the work for a total dollar amount between \$3,000.00 and \$4,000.00, not to exceed \$4,000.00. Appellant claimed that he told Smith that the \$3,000.00-\$4,000.00 quote was merely a starting figure. Appellant also claimed that he informed Smith that he would be billed “periodically throughout the process,” i.e. on a time and materials basis.

On 20 November 2008 Smith received a \$6,206.15 bill from Appellant, noting the \$1,000.00 already paid, leaving a balance of \$5,206.15. Smith called Appellant and informed him that the bill was not in the amount that they had agreed upon. Appellant responded by reducing the disputed bill to \$4,125.60. However, the record reflects that Appellant did not inform Smith that there was additional work to be done or inform Smith of the anticipated cost of this additional work. At a 17 December 2008 meeting Appellant requested that Smith pay the outstanding November bill, but did not inform Smith that more than \$8,000.00 in additional fees had accrued.

On 31 December 2008, Appellant wrote Smith a letter requesting payment of the November invoice. This letter informed Smith that the surveying work would not be continued unless the invoice was paid, and noted that the invoice constituted only a “partial billing.” Smith responded on 2 January 2009 with a letter asking that the job be completed for the agreed upon amount, between \$3,000.00 and \$4,000.00. Smith had also obtained two written estimates to do the survey from other surveyors: one was for \$3,100.00 and the other was for \$2,500.00. On 5 January 2009 Appellant responded to Smith with another letter

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claiming that the surveying work was 99% complete and that the rest would be completed when the November “partial billing” was paid.

On 16 January 2009, in response to a request by Smith, Appellant prepared a letter claiming that the total amount due as of that date was \$15,109.87. Appellant offered to settle the account for the work already performed for a payment of \$11,961.68. On 26 January 2009 Smith sent Appellant a letter stating that he was willing to pay \$3,000.00 (what Smith believed to be the original agreement) if the work was completed. On 5 February 2009, Appellant’s attorney sent a letter to Smith including a bill for \$10,984.27 for work done between the date of the November invoice and the 17 December 2008 meeting. This letter also reiterated Appellant’s offer to settle the account for payment of \$11,961.68.

Smith filed a formal complaint with the Board, which was received on 19 February 2009. The Board initially replied that the matter “appears to be a contractual issue, which is outside the jurisdiction of the Board,” but that the matter would be presented to the Review Committee for its consideration. In the interim, Appellant sent a letter to Smith threatening to place a lien on Smith’s property if the account was not settled. Piercy contacted Appellant and negotiated a settlement for \$8,000.000 in addition to Smith’s previous \$1,000.00 deposit.

The terms of the settlement agreement reached between Smith and Appellant contained a confidentiality provision. This confidentiality clause required the parties to keep the terms of the dispute confidential, required that Smith and Piercy waive any right to file a complaint with the Board, and required that Smith and Piercy agree to dismiss within five days any complaints that had already been filed. The settlement agreement also provided that Appellant provide Smith with a map of the survey.

Appellant provided Piercy a map as well as a mylar copy for recording purposes. The map was marked “Preliminary Plat Only Not for Conveyance.” The map was incomplete because Appellant failed to place the northwest corner. Nevertheless, Appellant informed Piercy the map would “stand up in court.” Piercy recorded the map soon thereafter.

On 30 July 2009, the Board sent Smith a letter informing him that the Review Committee decided to investigate his complaint. In keeping with the terms of the settlement agreement, Piercy contacted the Board to attempt to withdraw the complaint. Additionally, Smith and Piercy initially refused to meet with Board investigator Cathy Kirk (“Kirk”) in light of the settlement agreement’s confidentiality clause. Smith and Piercy

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eventually agreed to speak to Kirk after Appellant's counsel sent a letter waiving the confidentiality portion of the settlement.

After a hearing, the Board found that by issuing a map marked "preliminary," Appellant had failed "to conduct his practice in order to protect the public health, safety and welfare." The Board found this harmful to the public because Smith and third parties cannot rely on the data recorded on the map. The Board also found that the terms of the confidentiality clause in the settlement agreement constituted a failure by Appellant to "conduct his practice in order to protect the public health, safety and welfare," was a failure by Appellant "to recognize the primary obligation to protect the public in the performance of his professional duties," and constituted the "performance of services in an unethical manner." The Board also concluded that Appellant's actions in failing to communicate the cost and services to be provided and already provided was a "failure to be objective and truthful in all professional reports and statements, a failure to include relevant and pertinent information in all professional statements and reports, and was the performance of services in an unethical manner, in violation of 21 NCAC 56.0701(d)(1) and 56.0701(g)."

On 10 May 2011 the Board suspended Appellant's surveyor's license for a period of six months and reprimanded Suttles Surveying. Appellant petitioned for judicial review, and on 21 August 2012 the trial court affirmed the decision of the Board. Appellant filed timely notice of appeal from the trial court's order.

II. Jurisdiction and Standard of Review

We have jurisdiction over this appeal. *See* N.C. Gen. Stat. § 7A-27(b) (2011) (stating that appeal of a final judgment entered upon a superior court's review of a decision of an administrative agency lies with this Court).

The standard of review on an appeal from the decision of an administrative agency is determined by the nature of the error asserted by the appellant. *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). If an appellant argues the agency's decision was affected by an error of law, the standard of review is *de novo*. *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993). This Court uses the "whole record" test to determine whether the agency's decision was supported by substantial evidence. *Id.*

Here, Appellant argues only that the Board's decision was affected by errors of law. As such, we review the decision of the Board *de novo*.

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Id. Because Appellant does not allege that the Board's findings were unsupported by competent evidence in the record, the Board's findings of fact are binding on Appeal. *See N.C. State Bar v. McLaurin*, 169 N.C. App. 144, 149, 609 S.E.2d 491, 495 (2005) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

III. Analysis

A. Board's Jurisdiction

[1] Appellant first contends that the Board exceeded its statutory authority when it suspended Appellant's license for six months and reprimanded Suttles Surveying. Specifically, Appellant asserts that the Board lacks statutory authority to adjudicate a purely contractual dispute. We disagree with Appellant's characterization of the Board's decision.

"The powers and authority of administrative officers and agencies are derived from, defined and limited by constitution, statute, or other legislative enactment." *State ex rel. Comm'nr of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (1980). Chapter 89C of the General Statutes delineates the Legislature's regulation of the practice of Engineering and Land Surveying. N.C. Gen. Stat. § 89C-2 (2011) provides that, "[i]n order to safeguard life, health, and property, and to promote the public welfare, the practice of engineering and the practice of land surveying in this State are hereby declared to be subject to regulation in the public interest."

The Legislature has granted the Board the power to adopt and enforce rules of professional conduct. N.C. Gen. Stat. § 89C-10 (2011). All individuals licensed by the Board must observe the rules of professional conduct which should be adopted "[i]n the interest of protecting the safety, health, and welfare of the public." N.C. Gen. Stat. § 89C-20 (2011). In cases where violations of the rules of professional conduct are alleged, the Board proceeds under N.C. Gen. Stat. § 89C-22 (2011). *See* N.C. Gen. Stat. § 89C-20.

N.C. Gen. Stat. § 89C-22 establishes the Board's procedure for disciplinary action. Charges of "fraud, deceit, gross negligence, incompetence, misconduct, or violations of this Chapter, the rules of professional conduct, or any rules adopted by the Board" may be levied against Board licensees, and must be sworn to in writing and filed with the Board. N.C. Gen. Stat. § 89C-22(a). "All charges, unless dismissed by the Board as unfounded or trivial or unless settled informally, shall be heard by the Board as provided under the requirements of Chapter 150B of the General Statutes." N.C. Gen. Stat. § 89C-22(b). In the event of charges, the

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licensee is granted a hearing. “If, after a hearing, a majority of the Board votes in favor of sustaining the charges, the Board shall reprimand, levy a civil penalty, suspend, refuse to renew, refuse to reinstate, or revoke the licensee’s certificate, require additional education or, as appropriate, require reexamination.” N.C. Gen. Stat. § 89C-22(c). The Board may levy said penalties if a licensee is found guilty of a “[v]iolation of any provisions of this Chapter, the Rules of Professional Conduct, or any rules as adopted by the Board.” N.C. Gen. Stat. § 89C-21(a)(4).

The Board’s rules of professional conduct require, *inter alia*, that a licensee be “objective and truthful in all professional reports, statements, or testimony. The licensee shall include all relevant and pertinent information in such reports, statements or testimony.” 21 NCAC 56.0701(d)(1). Moreover, a licensee is required to “perform services in an ethical . . . and . . . lawful manner.” 21 NCAC 56.0701(g).

Appellant contends that the Board’s decision impermissibly adjudicated a contractual fee dispute between Appellant and Smith. Appellant’s argument mischaracterizes the nature of the Board’s decision. It is indeed true that the Board does not have the statutory authority to resolve disputes between private parties regarding payments made for surveying work; such decisions are the province of the courts. However, here the Board’s decision does not render judgment on whether the Appellant breached any contract with Smith. The Board’s decision focuses on Appellant’s actions throughout his business dealings with Smith. The Board held that Appellant did not perform his services in an ethical manner and was not truthful in all of his interactions with Smith, thus falling short of the professional standards promulgated by the Board. *See* 21 NCAC 56.0701(d)(1); 21 NCAC 56.0701(g). Such questions of truthfulness and ethical behavior are the very issues for which the Legislature granted the Board power to promulgate professional rules protecting the “safety, health, and welfare of the public.” N.C. Gen. Stat. § 89C-20; *see also* N.C. Gen. Stat. § 89C-10; N.C. Gen. Stat. § 89C-2.

Appellant claims that the conduct at issue “in no way implicates the public health, safety, or welfare” and thus disciplining Appellant constitutes *ultra vires* action by the Board. This argument also fails because, as N.C. Gen. Stat. § 89C-2 makes clear, the Legislature intended its rules on the practice of surveying to protect property interests in North Carolina. The Board found that Appellant’s actions in issuing a “Preliminary Plat,” knowing that Piercy intended to record the map, did not appropriately protect the public because neither Smith nor third parties could rely on the data recorded on the map.

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Appellant cites *Blaylock Grading Co. v. Smith*, 189 N.C. App. 508, 658 S.E.2d 680 (2008) for the proposition that the Board lacks statutory authority over purely economic matters between private parties. The Court in *Blaylock* noted that “when a breach of contract between two parties involves only economic loss . . . the health and safety of the public are not implicated.” *Id.* at 512, 658 S.E.2d at 683. However, *Blaylock* merely involved a contractual dispute between private parties, one of whom happened to be a land surveyor. None of the factual circumstances found by the Board discussed above were an issue in *Blaylock*. As such, *Blaylock* is inapposite to the case at bar.

The Legislature has expressly endowed the Board with the authority to promulgate Rules of Professional Conduct and to discipline licensees that violate those rules. See N.C. Gen. Stat. §§ 89C-10, 89C-20, 89C-21, 89C-22. Here, the Board has merely resolved matters specifically related to Professional Conduct, which are squarely within the Board’s bailiwick. As such, Appellant’s claim that the Board lacked jurisdictional authority to make its ruling must fail.

B. Due Process

[2] Appellant’s second contention is that the Board’s decision violates the due process provided by both the state and federal constitutions, in that the rules of the Board are unconstitutionally vague and overbroad. Appellant asserts that he was not provided adequate notice that he would be in violation of Board rules (1) by entering into a settlement agreement that prevented Smith from filing or maintaining a disciplinary complaint against him and (2) by issuing a map marked “preliminary” that Appellant knew would be recorded. Accordingly, Appellant claims that the Board’s disciplinary actions violate the constitutional requirements of procedural due process.

“Procedural due process requires that an individual receive adequate notice and a meaningful opportunity to be heard before he is deprived of life, liberty, or property.” *In re Magee*, 87 N.C. App. 650, 654, 362 S.E.2d 564, 566 (1987). Moreover, a professional license, such as a surveyor’s license, is a property interest, and is thus protected by due process. *Id.* at 654, 362 S.E.2d at 567. However, Appellant makes no showing as to why the process afforded by the Board’s review falls short of either federal or state due process requirements.

Appellant correctly notes that the test for constitutional vagueness is “whether a reasonably intelligent member of the profession would understand that the conduct in question is forbidden.” *In re Wilkins*,

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294 N.C. 528, 548, 242 S.E.2d 829, 841 (1978); *see also White v. N.C. State Bd. of Examiners of Practicing Psychologists*, 97 N.C. App. 144, 150, 388 S.E.2d 148, 152 (1990). Appellant further contends that no statute, Board rule, or Board policy explicitly prohibited settlement agreements like the one entered into by Appellant, Smith, and Piercy.

However, N.C. Gen. Stat. § 89C-20 requires that all licensees “shall cooperate fully with the Board in the course of any investigation.” The record reflects that Appellant knew his settlement with Smith, which included a confidentiality clause and prohibited Smith from filing or continuing a claim with the Board, would necessarily prevent reporting to the Board. Thus, not only would a reasonably intelligent member of the profession understand that such conduct was forbidden, but the record reflects that the Appellant had personal knowledge that this confidentiality clause within the settlement agreement would necessarily subvert the Board’s investigation. We acknowledge that when the Board’s investigators contacted the attorney for Appellant, Appellant was cooperative. While in our view, this should mitigate the decision of the Board, we cannot determine what weight, if any, the Board gave to this fact in issuing the penalty. The inclusion of such a clause is void against public policy when entered into after a complaint is pending. As such, the Board properly deemed that Appellant’s settlement with Smith was not “conduct in the interest of protecting safety, health, and welfare of the public,” thus violating the Board’s Professional Rules of Conduct. *See* 21 NCAC 56.0701(b).

The record also reflects that Appellant issued Piercy a preliminary map knowing that she intended to record it. The Board found that “the recording of a preliminary plat is harmful to the public because Smith and third parties cannot rely on the data recorded on the map.” As a result, the Board held that Appellant’s actions regarding the preliminary plat also violated the Board’s requirement that he “protect the public in the performance of [his] professional duties.” *See* 21 NCAC 56.0701(b).

In order to be recordable in North Carolina, a plat must bear the certification of a land surveyor. N.C. Gen. Stat. § 47-30(d) (2011). The Board requires certifications on all maps except those where the public is to be placed on notice that this map is not a final product. *See* 21 NCAC 56.1103. Preliminary Plats, according to the Board rules, should bear a marking that states: “Preliminary Plat—Not for recordation, conveyances, or sales.” 21 NCAC 56.1103(c)(3).

Here, Appellant instead provided Piercy with a preliminary map bearing the marking: “Preliminary Plat Only, Not for Conveyances.”

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Such marking omitted the Board's standard language that would have indicated to Piercy that the preliminary plat may not properly be used for recordation purposes. Thus, by marking the map "preliminary," Appellant essentially negated the effect of his certification. The record also reflects that Appellant had not used this kind of notation before, and that Appellant knew that preliminary maps are not to be recorded (excepting Appellant's experience with previous instances where preliminary subdivision maps are replaced by final maps shortly thereafter). As such, Appellant must have understood, as any reasonably intelligent member of the profession would have understood, that issuing a preliminary plat with knowledge that it would be improperly recorded violated the Board's rules.

IV. Conclusion

The Legislature has granted the Board broad discretion to adjudicate disciplinary matters. *See* N.C. Gen. Stat. §§ 89C-10, 89C-20, 89C-21, 89C-22. The Board's decision to suspend Appellant's license and to reprimand Suttles Surveying was neither in excess of the Board's statutory authority nor in violation of the law. Moreover, contrary the claim of Appellant, the Board reached its decision not on the basis of any contractual obligations owed by Appellant to Smith, but rather on the basis of: (1) Appellant's lack of honesty in dealing with Smith before, during, and after settling their contractual dispute; (2) Appellant's harm to Smith and the general public in vouching for the recordability of an unrecordable preliminary plat; and (3) Appellant's promulgation of a contractual provision aimed to hinder Smith from prosecuting a complaint he had filed with the Board, thus obstructing the Board investigation. As such, we hold the Board's decision was within its disciplinary power. Accordingly, the trial court's affirmance of the Board's decision is

AFFIRMED.

Judges BRYANT and MCCULLOUGH concur.

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IN THE MATTER OF V.C.R., JUVENILE

No. COA12-1127

Filed 7 May 2013

Search and Seizure—juvenile—no probable cause

The trial court erred in a juvenile case by denying juvenile defendant's motion to suppress evidence seized from her person. When the officer ordered the juvenile to empty her pockets, he conducted a search lacking probable cause and not incident to arrest or custody.

STEPHENS, J., concurring with a separate opinion.

Appeal by juvenile from order entered 23 May 2012 by Judge Jennifer J. Knox in Wake County District Court. Heard in the Court of Appeals 28 February 2013.

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

Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn; and The Frickey Law Firm, PLLC, by Michael A. Frickey, for juvenile appellant.

McCULLOUGH, Judge.

BACKGROUND

This case stems from an encounter between then fifteen-year-old juvenile, V.C.R., and Officer D.L. Bond of the Raleigh Police Department on 9 June 2010. On that date, Officer Bond seized some marijuana from V.C.R.'s person. This led to the State filing misdemeanor simple possession of marijuana charges against V.C.R. on 19 November 2010. Counsel for V.C.R. filed a motion to suppress on 17 February 2011, requesting the trial court

suppress any and all evidence seized and obtained from the illegal detention, search, and seizure of the Juvenile.

The Juvenile contends that the exclusion of the evidence and statements is required by the Fourth, Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution

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and by Article I, Sections 20 and 23 of the North Carolina Constitution.

On 21 March 2011, the trial court held an adjudicatory hearing where both Officer Bond and V.C.R. testified. Following this hearing, the trial court denied the motion to suppress and entered a dispositional order placing V.C.R. on probation for six months and imposing five 24-hour periods of intermittent confinement in a delinquency facility. The juvenile appealed, arguing that the evidence was the unlawful product of two seizures and a search that each violated the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution.

In that initial appeal, in an unpublished opinion, this Court remanded the case to the lower court so that appropriate findings of fact and conclusions of law could be entered, stating:

[T]he record before [this Court was] inadequate to permit meaningful appellate review of the questions of law raised by V.C.R.'s appeal. Accordingly, we remand[ed] the case to the Wake County District Court for written findings of fact and conclusions of law "sufficient to resolve all issues raised by the motion to suppress."

In re V.C.R., No. COA11-1108, slip op. at 3-4 (N.C. Ct. of App. 3 April 2012) (citation omitted).

In the first appeal, our Court summarized the facts as follows:

Sergeant D.L. Bond (Bond) of the Raleigh Police Department was patrolling the Thornton's Square town home community on 9 June 2010 when he spotted a group of juveniles walking down the sidewalk. As Bond approached in his patrol car, he observed V.C.R. smoking a cigarette. Bond stopped and asked V.C.R. how old she was. V.C.R. responded that she was 15 years old. Bond asked V.C.R. to put out her cigarette and give him the pack of cigarettes she was holding. V.C.R. complied with both requests.

Bond began to drive away. When he was about ten to twenty yards away, he heard a female voice say "What the f---, man." In response, Bond stopped his vehicle, got out, and approached the group. He ordered all of the juveniles to keep walking except V.C.R., whom he ordered to stay with him. He then asked V.C.R. for her identification. At

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one point during their conversation, V.C.R. raised her arms in the air, revealing what appeared to be a round bulge in her right front pocket. Bond instructed V.C.R. to empty her pockets and turn them inside out. V.C.R. emptied her pockets, revealing a bag of marijuana.

Id.

On remand, the district court entered a written order on 23 May 2012, again denying juvenile's motion to suppress. Juvenile now appeals from the denial of that motion, as well as the resulting dispositional and adjudication orders.

STANDARD OF REVIEW

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).

DISCUSSION

On appeal, V.C.R. again argues that the lower court erred in denying her motion to suppress. Upon remand, the juvenile court entered the following order:

FINDINGS OF FACT

1. On March 21, 2011, the State of North Carolina called for trial the matter of State of North Carolina vs. V.C.R.
2. The State was represented by Assistant District Attorney Kathryn Pomeroy-Carter. The Juvenile was represented by Michael Frickey.
3. In the night-time hours of June 9, 2010, the Juvenile was walking down the sidewalk with several other juveniles in a residential community within the City of Raleigh, smoking a cigarette. Sergeant D.L. Bond of the Raleigh Police Department, while on routine patrol, saw her and pulled over to ask her age.
4. After the Juvenile responded that she was fifteen years old, Sergeant Bond told her to put out her

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cigarette and hand over her remaining cigarettes, which she did.

5. As Sergeant Bond drove away, he heard a female voice say, “What the [f--], man?” Since he believed that it was this juvenile who had said these words, Sergeant Bond stopped his patrol car, got out, and walked back to the Juvenile to speak with her.
6. As he spoke with the Juvenile about her foul language, he noticed a round bulge in her right front pocket. Based on his training and experience, Sergeant Bond believed that the object in her pocket was a bag of marijuana, so he asked her to empty her pockets, and she did so, revealing a small bag of marijuana.
7. Sergeant Bond subsequently filed a petition against this Juvenile for Simple Possession of Marijuana.

CONCLUSIONS OF LAW

1. While the Juvenile objected to Sergeant Bond’s initial stop of her (the “cigarette stop”), this objection is moot as it ended without any delinquent allegations being filed against her.
2. The Juvenile further objected to Sergeant Bond’s second stop of her (the “marijuana stop”).
3. N.C.G.S. 14-288.4(a)(2) makes it a Class 2 misdemeanor to intentionally cause a public disturbance by making or using “any utterance, gesture, display or abusive language which is intended and plainly likely to provoke a violent retaliation and thereby cause a breach of the peace.” A “public disturbance” is defined by our General Statutes as “[a]ny annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place[.]” N.C.G.S. 14-288.1(8) (2009).
4. The Juvenile’s abusive and foul language, directed at Sergeant Bond after he made her extinguish her cigarette and hand over her unsmoked cigarettes, certainly exceed the bounds of social toleration.

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5. The fact that Sergeant Bond is a police officer, rather than a civilian, does not create a distinction in this case. In fact, the North Carolina Court of Appeals has previously upheld convictions for disorderly conduct when abusive language was directed at a police officer. See, e.g., State v. McLoud, 26 N.C. App. 297, 300, 215 S.E.[2]d 872, 874 (1975).
6. Therefore, Sergeant Bond had reasonable, articulable suspicion to stop the Juvenile for disorderly conduct.
7. The Juvenile further objected to Sergeant Bond's "search" of her when she handed over the marijuana in her pocket.
8. Since a "search" typically involves an actual touching of a person or object, and there is no evidence that Sergeant Bond ever touched this Juvenile, there was no search under these facts.
9. However, it appears that the Juvenile is actually objecting to her confession that she possessed marijuana, as manifested by her reaching into her own pocket and giving the contraband to Sergeant Bond upon his request.
10. In this case, the Juvenile was never in custody, thus requiring that she be informed of her Juvenile Miranda rights.
11. In addition, there is no evidence of any coercion, threats, or undue pressure by Sergeant Bond to get her to hand over the marijuana. In fact, this second encounter with the Juvenile was extremely brief, and involved hardly any conversation at all.
12. Also, it is a stretch to believe that this Juvenile was intimidated by Sergeant Bond, since she had just used abusive language towards him not 3 minutes before this second encounter.
13. The mere facts that the Juvenile was fifteen years old and that Sergeant Bond is a police officer are not enough to render her confession invalid or coerced. To rule in such a way would mean that no voluntary

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statement given to a police officer by a juvenile could ever be used against them.

It is well settled that an investigatory stop must be justified upon “a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.” *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 363 (1979). Reasonable suspicion is determined in a commonsense manner, not as legal technicians might, *Ornelas v. U.S.*, 517 U.S. 690, 695-96, 134 L. Ed. 2d 911, 918 (1996), and requires only a minimal level of objective justification, something more than a hunch. *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989).

Juvenile argues that the marijuana seizure here was the product of two encounters, both of which were illegal. We disagree with these contentions; nevertheless, we agree that the seizure of marijuana was illegal, and we therefore reverse the trial court’s denial of V.C.R.’s motion to suppress.

As the findings of fact make clear, the first encounter began when Officer Bond saw V.C.R. smoking a cigarette while carrying a pack of cigarettes in her hand. Officer Bond verified that she was only fifteen years old before directing her to put the cigarette out and give the pack to him. The juvenile argues that the officer had no reasonable suspicion to believe that she was violating any law and that the officer acted on a mistake of law. Juvenile further argues that a mistake of law can never generate reasonable suspicion. Our Supreme Court has held otherwise, however. In *State v. Heien*, ___ N.C. ___, ___ S.E.2d ___ (No. 380PA11) (filed 14 December 2012), our Supreme Court held that an officer’s mistake of law does not always result in the lack of reasonable suspicion. The statute regulating possession of tobacco products by a minor states:

(c) Purchase by persons under the age of 18 years.—If any person under the age of 18 years purchases or accepts receipt, or attempts to purchase or accept receipt, of tobacco products or cigarette wrapping papers, . . . the person shall be guilty of a Class 2 misdemeanor.

N.C. Gen. Stat. § 14-313(c) (2011).

Juvenile maintains that when an officer observes a person with a pack of cigarettes in his/her hand, it is unreasonable for him to conclude that that person “accepted receipt” of that item, as her “possession” is legal if she found them on the street. Juvenile’s logic is flawed, however, because we are dealing with the concept of “reasonable suspicion” and not definitive proof of a statutory violation. *Terry v. Ohio*, 392 U.S. 1,

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20 L. Ed. 2d 889 (1968); *Heien*, ___ N.C. ___, ___ S.E.2d ___. We believe a reasonable person would find it more likely than not that a person in possession of a pack of cigarettes had “accepted receipt” of those items, and thus the officer had reasonable suspicion to approach V.C.R. and her companions. Here, the officer had something more than reasonable suspicion that V.C.R. was in violation of N.C. Gen. Stat. § 14-313(c). The officer could have charged her with violation of this statute by writing her a citation, as “probable cause” is tested in a “commonsense” manner as well. *State v. Sinapi*, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005); *Illinois v. Gates*, 462 U.S. 213, 230, 76 L. Ed. 2d 527, 543 (1983).

Despite having the authority to take legal action against V.C.R., Officer Bond merely confiscated the contraband and was preparing to depart the area when V.C.R. chose to scream an obscenity which he felt was directed at him. Citing several cases dealing with the use of obscenity in the presence of police officers, juvenile argues that one has a constitutional right to yell obscenities and that the police are powerless to approach an individual acting in such a manner because any approach to a person exercising their right of free speech necessarily infringes upon the exercise of that right. The State counters that the right of free speech is not without limits and that the “fighting words” or public disturbance statute still applies, even when the speech is directed at an officer.

That statute, N.C. Gen. Stat. § 14-288.4(a)(2) reads:

Makes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace.

While merely stating an obscenity to another individual, whether that person is a policeman or a civilian, may be protected speech, we believe an officer is not precluded from approaching any individual who is standing in public and yelling obscenities, as such actions might lead to a breach of the peace. In this case, Officer Bond’s second encounter with V.C.R. can also be seen as an extension of the first. *See U.S. v. Figueroa-Espana*, 511 F.3d 696, 702 (7th Cir. 2007).

That does not end our inquiry, however. We agree with juvenile that when Officer Bond directed V.C.R.’s companions to leave and began questioning the juvenile, V.C.R. was seized and was not free to leave nor would any reasonable person feel differently. *See In re I.R.T.*, 184 N.C. App. 579, 584-85, 647 S.E.2d 129, 134 (2007) (finding a seizure where two armed uniformed officers engaged juvenile); *State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009) (asking for identification is a seizure). While we find this encounter permissible, given V.C.R.’s loud

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and profane language, once she was calmly discussing matters while answering the officer's questions, the basis for continuing the seizure was rapidly dissipating. It was at this point Officer Bond directed the juvenile to empty her pockets. Directing an individual to empty their pockets constitutes a search even though the officer did not conduct it physically. By directing V.C.R. to take the items in her pockets out, he was accomplishing the search vicariously.

Officer Bond was not attempting to take a juvenile into custody pursuant to N.C. Gen. Stat. §§ 7B-1900 or -1901, as he did not follow the procedures mandated there. While normally we look at whether an officer had objective facts justifying his actions, *see Whren v. U.S.*, 517 U.S. 806, 135 L. Ed. 2d 89 (1996), here we look subjectively at the officer's conduct and find the search to be unlawful. A search incident to arrest must accompany an actual arrest. *Rawlings v. Kentucky*, 448 U.S. 98, 65 L. Ed. 2d 633 (1980). In this case, the officer was neither taking the juvenile into custody nor effecting an arrest. He merely conducted a search. The trial court also attempted to justify the search as consensual, but the record evidence does not support that conclusion. Once V.C.R. was directed to empty her pockets, none of her actions thereafter can be considered to be consensual. Her production of the marijuana was in response to the officer's command, not some voluntary action on her part.

CONCLUSION

In summary, we find that the officer in this case had reasonable suspicion to approach the juvenile, V.C.R., on both occasions. On the first occasion, he observed the juvenile smoking and in possession of cigarettes, while the second approach, which can also be viewed as an extension of the first, was reasonable given her behavior. The second encounter was a seizure but did not authorize a search of V.C.R., as the officer was not threatened by her behavior so that a frisk could be conducted nor was he taking V.C.R. into custody. Thus, when the officer ordered the juvenile to empty her pockets, he conducted a search for which probable cause was lacking, was not incident to arrest or custody, and therefore cannot be upheld.

The order of the trial court denying juvenile's motion to suppress is reversed.

Reversed.

Judge DILLON concurs.

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Judge STEPHENS concurs in result only with a separate concurring opinion.

STEPHENS, Judge, concurring in result only.

I concur with the majority opinion in result only. I write separately because I believe that the majority opinion's resolution of Juvenile's argument regarding the constitutionality of Bond's second investigatory stop represents a misperception of the evidence before the juvenile court in this case and/or a significant departure from the well-established jurisprudence on investigatory stops.

"The right to be free from unreasonable searches and seizures applies to seizures of the person, including brief investigatory stops." *In re J.L.B.M.*, 176 N.C. App. 613, 619, 627 S.E.2d 239, 243 (2006) (citation omitted). "An investigatory stop is a brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information." *State v. White*, ___ N.C. App. ___, ___, 712 S.E.2d 921, 925 (2011) (citation, quotation marks, and brackets omitted). As the majority notes, investigatory stops are permitted only where a law enforcement officer has "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979); *see also State v. Barnard*, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007) ("A police officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may be underway.").

An 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. . . . While something more than a mere hunch is required, the reasonable suspicion standard demands less than probable cause and considerably less than preponderance of the evidence.

State v. Williams, ___ N.C. ___, ___, 726 S.E.2d 161, 167 (2012) (citations and quotation marks omitted).

In conclusion of law 6, the juvenile court concluded that Bond had reasonable and articulable suspicion to stop Juvenile for suspicion of disorderly conduct. In support of this conclusion, the court found that "Juvenile's abusive and foul language, directed at Sergeant Bond" could

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have fallen under subsection (a)(2) of the disorderly conduct statute. That subsection criminalizes the use of “any utterance, gesture, display[,] or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace.” N.C. Gen. Stat. § 14-288.4 (2011).

The majority would find the second stop of Juvenile constitutional because “an officer is not precluded from approaching any individual who is standing in public and yelling obscenities as such actions might lead to a breach of the peace.” I believe this reasoning is based upon a critical misapprehension of the law regarding investigatory stops and/or of the evidence before the juvenile court in this case. Bond would certainly have been entitled to conduct an investigatory stop of Juvenile *if he had suspected she was engaged in disorderly conduct* under section 14-288.4(a)(2). I also wholeheartedly agree with the majority that investigatory stops require a fairly low level of justification. *See Williams*, __ N.C. at __, 726 S.E.2d at 167 (“While something more than a mere hunch is required, the reasonable suspicion standard demands less than probable cause and considerably less than preponderance of the evidence.”) (citations and quotation marks omitted). However, my review of the court’s order and the hearing transcript reveal that the conclusion that Bond had reasonable and articulable suspicion to stop Juvenile for disorderly conduct is utterly unsupported by the findings of fact or the evidence before the court.

There were material conflicts in the evidence about Juvenile’s remark, “What the fuck, man?”¹ Juvenile contended she said it to her friends, while Bond believed Juvenile made the comment to him. The court resolved that conflict, finding that the remark was directed at Bond and was “abusive.” However, there was absolutely no conflict in the evidence about Bond’s reaction to or understanding of the remark or the reason for the investigatory stop: Bond stopped Juvenile because he wanted to talk to her parents about her profane language, not because he suspected her of disorderly conduct.

Bond was clear and specific about the reason he returned to confront Juvenile the second time:

1. This single brief remark was the *only* conduct by Juvenile. While the majority opinion characterizes Juvenile’s conduct as “scream[ing] an obscenity at [Bond,]” I would observe that the juvenile court found in unchallenged finding of fact 5 that Bond “heard a female voice *say*” the remark. (Emphasis added). No findings of fact or any of the evidence at the hearing suggested Juvenile *screamed* anything. Bond never testified that any remark was yelled, shouted, or screamed at him.

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At that point I was going to talk to [Juvenile] about her language and the consequences of using that type of language out in public like that. My purpose initially was to actually just get some contact information for her parents from her and, you know, make contact with her parents and explain to her parents the behavior that I witnessed.

In sum, Bond explained, his “initial objective was to get contact information for the parents to explain to them the behavior of the whole encounter.”

Nothing in Bond’s testimony suggests he anticipated any violent reaction to or breach of the peace as a result of Juvenile’s remark. Bond never mentioned that he suspected any crimes were occurring or about to occur in connection with the remark, nor did he express any concern about public disturbances or disorderly conduct.

Indeed, *Bond never mentioned disorderly conduct or anything remotely connected to that offense at any point during the hearing.* The only use of that term was by the juvenile court in announcing its denial of Juvenile’s motion to suppress in open court:

THE COURT: Thank you. Well, I think the argument that — because a police officer is trained to not respond to abusive language, therefore, it’s not — doesn’t qualify as essentially disorderly conduct that that fails. That would leave everybody open to just go ahead and say these things and other things to police officers whenever they felt like it. Anyway, I’m going to deny the motion. Back on evidence for the State.

All of the evidence offered at the hearing makes clear that Bond (1) stopped Juvenile the second time to speak to her about her language and (2) did not “believe that criminal activity [wa]s afoot” or about to occur when he heard Juvenile’s remark. *See Id.* at ___, 726 S.E.2d at 167.

As noted *supra*, Fourth Amendment jurisprudence is similarly clear that, “[a] police officer may effect a brief investigatory seizure of an individual *where the officer has reasonable, articulable suspicion that a crime may be underway.*” *Barnard*, 184 N.C. App. at 29, 645 S.E.2d at 783 (emphasis added). This quotation from *Barnard* and a plain reading of the relevant case law reveal that (1) the *officer* who performs the investigatory stop must have a reasonable and articulable suspicion (2) *of criminal activity* (3) *at the time of the stop*. Here, Bond clearly and repeatedly articulated that, at the time of the stop, he suspected Juvenile

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was essentially being a disrespectful brat and he simply wanted to talk to Juvenile about her profane language and report it to her parents. Being a disrespectful brat and using profanity are not criminal offenses and, in his testimony, Bond appropriately refrained from suggesting he believed otherwise. That the *juvenile court, more than nine months after the stop occurred*, was able to articulate a *hypothetical basis* for suspecting criminal activity by Juvenile in connection with her remark is legally irrelevant and of no consequence whatsoever to this Court's consideration of the constitutionality of Bond's second stop of Juvenile.

The majority opinion's holding suggests that an investigatory stop is constitutionally permissible *even when a law enforcement officer has no suspicion whatsoever of criminal activity at the time he detains an individual*. This holding shifts this Court's constitutional analysis from a consideration of an officer's thoughts and perceptions at the time of the stop to a determination of whether the officer, or indeed a court, can come up with a hypothetical suspicion months later that could have served to justify the stop. Perhaps some disreputable law enforcement officers make investigatory stops without reasonable suspicion and later invent such hypothetical, after-the-fact justifications for purposes of their suppression hearing testimony. Here, however, Bond testified clearly and honestly about his reasons for stopping Juvenile the second time and never said he had reasonable suspicion of any criminal activity. The juvenile court essentially responded, "Don't worry, I have an idea about reasonable suspicion for you." I cannot agree with the majority that an intrusion into an individual's constitutional right against unreasonable search and seizure can be based upon a complete and unbridled lack of any evidence of reasonable suspicion, nor can I endorse this dramatic departure from the long-established precedent of this Court, our North Carolina Supreme Court, and the United States Supreme Court.

Conclusion of law 6, that Bond had reasonable articulable suspicion to stop Juvenile for disorderly conduct, is not supported by the evidence before the juvenile court or by its findings of fact. Where "the stop of the juvenile was unreasonable[,] . . . evidence obtained as a result of the illegal stop should have been suppressed[.]" *In re J.L.B.M.*, 176 N.C. App. at 623, 627 S.E.2d at 245. Thus, I would reverse the denial of V.C.R.'s motion to suppress the marijuana seized and Juvenile's statements on this basis. In the absence of this evidence, nothing remains to support Juvenile's adjudication. Accordingly, I would also vacate the juvenile court's orders adjudicating V.C.R. delinquent and entering a level 1 disposition.

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CHAUNCEY ANDREW LUDLUM, PLAINTIFF

v.

STATE OF NORTH CAROLINA, AND ITS AGENTS REUBEN YOUNG, SECRETARY OF
PUBLIC SAFETY, AND JANET COWELL, STATE TREASURER, DEFENDANTS

No. COA12-1398

Filed 7 May 2013

Statutes of Limitation and Repose—declaratory judgment—non-payment of retirement benefits

The trial court did not err in a declaratory judgment action involving the State's refusal to pay plaintiff's retirement benefits by dismissing plaintiff's complaint. Plaintiff's action was barred by the three-year statute of limitations and the doctrine of continuing wrong was inapplicable.

Appeal by plaintiff from order entered 29 May 2012 by Judge Douglas B. Sasser in Bladen County Superior Court. Heard in the Court of Appeals 28 March 2013.

H. Clifton Hester, Hester, Grady & Hester, PLLC, for defendant.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins, for the State.

ELMORE, Judge.

Chauncey Andrew Ludlum (plaintiff) appeals from an order entered 29 May 2012, dismissing his complaint. After careful consideration, we conclude that plaintiff's action is barred by the applicable statute of limitations. We therefore affirm the trial court's order dismissing plaintiff's complaint.

I. Background

Plaintiff is a former member of the North Carolina National Guard (NCNG). As of April 1997, plaintiff had accrued over 17 years of service toward the 20 years necessary for retirement benefits under state and federal law. That same year, plaintiff alleges that the North Carolina Army Reserve National Guard (NCARNG) was advising certain service members that had accrued at least 15 but not 20 years of service of a new retirement program. Under the new program, identified as the "Retired Reserve," an eligible member could opt to end their service

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with the National Guard early, and upon reaching age 60, apply for a certain reduced amount of retirement benefits. Plaintiff opted to transfer to the new status under the program and was, thereafter, discharged from the NCNG on 15 October 1997.

On 12 June 2008 plaintiff reached age 60. Earlier that year, on 17 January 2008, in anticipation of his new eligibility, plaintiff applied for his retirement benefits under the NCARNG “Retired Reserve” program. On 5 August 2008, the State advised plaintiff that his application for benefits would be denied because he had not accrued the necessary 20 years of service as required under N.C. Gen. Stat. § 127A-40.

On 18 January 2012, plaintiff filed a complaint with the trial court, and the complaint was amended on 3 February 2012. Plaintiff’s complaint asked the trial court for declaratory relief and a determination that plaintiff was deprived of a contractual and statutory right when the NCARNG denied him benefits under the “Retired Reserve” program.

The State successfully moved to dismiss the lawsuit pursuant to Rule 12(b)(6), under the theory that the cause of action was time-barred by the 3-year statute of limitations. Following a hearing on the State’s motion to dismiss, the trial court entered an order of dismissal on 29 May 2012. Plaintiff now appeals.

II. Analysis

Plaintiff presents a single argument on appeal: that the trial court erred in granting the State’s motion to dismiss because the 3-year statute of limitations has been continuously triggered each time the State failed to pay plaintiff benefits under the “Retired Reserve” program, and therefore has not expired his claim. We disagree.

This Court reviews an order dismissing a claim under 12(b)(6) *de novo*. “This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.” *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff’d per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

Plaintiff’s claims are brought under the Declaratory Judgment Act, N.C. Gen. Stat. § 1-253. The Declaratory Judgment Act provides, in pertinent part, that “[a]ny person interested under a . . . written contract . . . or whose rights . . . are affected by a statute . . . may have determined any question of construction or validity arising under the instrument [or] statute . . . and obtain a declaration of rights, status, or other legal relations thereunder.” N.C. Gen. Stat. § 1-254.

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Plaintiff's claims were properly dismissed under the Act if the statute of limitations bars any claim, because "jurisdiction under the Declaratory Judgment Act may be invoked only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute." *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338, 323 S.E.2d 294, 303 (1984) (citations omitted). Therefore, if the statute of limitations was properly applied to plaintiff's underlying claims, no relief can be afforded under the Declaratory Judgment Act.

In his complaint, plaintiff alleges that 1) the State violated an agreement with the plaintiff when it failed to award him retirement benefits, and 2) the State violated N.C. Gen. Stat. § 127A-40 when it failed to apply the NCARNG "Retired Reserve" program to his eligibility for retirement benefits. Plaintiff's contentions, at least with regard to his breach of contract claim, appear consistent with his discharge orders, which read "[y]ou are transferred to the Retired Reserve until you reach age 60, at which time you will be placed on the retired list and will be eligible to receive retirement pay and benefits."

Assuming plaintiff has alleged a proper violation of the State's promise to pay some amount of retirement benefits, he is outside the 3-year window in which he must bring the claim. "The statute of limitations for a breach of contract action is three years. The claim accrues at the time of notice of the breach." *Henlajon, Inc. v. Branch Highways, Inc.*, 149 N.C. App. 329, 335, 560 S.E.2d 598, 603 (2002). Plaintiff alleged that he was on notice of the State's refusal to pay on 5 August 2008. Plaintiff filed his lawsuit on 18 January 2012. Plaintiff let approximately 3 years, 5 months, and 13 days pass before filing. Therefore, his claim is barred.

The result is the same even if plaintiff's theory of liability is born out of a violation of N.C. Gen. Stat. § 127A-40. Under our General Statutes, a party's claims are also limited to a 3-year window when brought "[u]pon a liability created by statute, either state or federal[.]" N.C. Gen. Stat. § 1-52(2).

Plaintiff's only theory to avoid this result is that his initial notice of denial on 5 August 2008 did not begin the running of the limitation period on his claim because of the "continuing wrong" doctrine articulated by our Supreme Court in *Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N. Carolina*, 345 N.C. 683, 483 S.E.2d 422 (1997). Under this theory, plaintiff argues, the continuous failure to pay benefits has constituted a continuing wrong, and not a single violation of which the future failure to pay relates back.

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However, as the State correctly points out, this Court's holding in *Liptrap v. City of High Point* clarified the *Faulkenberry* holding regarding the applicable statute of limitations. In *Liptrap*, this Court noted that the 3 year statute of limitations under N.C. Gen. Stat. § 1-53 (claims for breach of contract) were distinguishable from the more specific limitations in N.C. Gen. Stat. § 128-27 and § 135-5 (as used in *Faulkenbury*) because those provisions specifically mention triggering by periodic payments. *Liptrap*, 128 N.C. App. 353, 360, 496 S.E.2d 817, 822 (1998). Here, as in *Liptrap*, plaintiff sought a declaration that he was owed any benefits at all, not that he has missed payments every month triggering perpetually new statutes of limitation. Because plaintiff waited too long to file his claim, he is barred from a determination that he is owed any benefits at all, and, accordingly, any application of the continuing wrong doctrine would be inappropriate in this case.

We therefore affirm the order of the trial court dismissing plaintiff's claims.

Affirmed.

Judges STEELMAN and STROUD concur.

WILLIAM R. NUNN, PLAINTIFF

v.

N.C. DEPARTMENT OF PUBLIC SAFETY
(F/K/A DEPARTMENT OF CORRECTION), DEFENDANT

No. COA12-1307

Filed 7 May 2013

Tort Claims Act—negligence—insufficient findings of fact—contributory negligence

The Full Industrial Commission erred in a negligence case brought by a former prison inmate for injuries he suffered as a result of an assault by another inmate. The Commission failed to make the necessary findings to support its conclusion that there was insufficient evidence that defendant's employees breached their duty to plaintiff. On remand, the Commission must also make a finding of fact and conclusion of law regarding contributory negligence.

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Appeal by defendant from Decision and Order entered 24 July 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 March 2013.

N.C. Prisoner Legal Services, Inc. by Ben Finholt and Elizabeth Albiston, for plaintiff-appellee.

Attorney General Roy A. Cooper, III by Associate Attorney General Adrian W. Dellinger, for the State.

STROUD, Judge.

The N.C. Department of Public Safety¹ (“DPS” or “defendant”) appeals from a Decision and Order entered 24 July 2012 awarding William Nunn (“plaintiff”), a former inmate in the Division of Adult Correction, damages for injuries he suffered as a result of an assault by another inmate at the Caswell Correctional Institution. For the following reasons, we reverse and remand for additional findings.

I. Background

Plaintiff was incarcerated at Caswell Correctional Institution (“Caswell”) in Yanceyville, North Carolina, on 30 May 2006, though he has since been released. Caswell provides inmates with a canteen building where inmates can go to buy food and personal items with a canteen card. The canteen building has two windows that open twice a day to an outdoor area called the East Yard. Inmates run to the canteen when released into the yard and stand in line waiting for it to open.

On 30 May 2006, plaintiff stood in a line to buy food from one of the two canteen windows that had not yet opened. Plaintiff had been waiting in line for approximately two hours when another inmate, Mike Mitchell, approached the line of inmates and said that he wanted to get in the line ahead of some of the inmates. Plaintiff and other inmates objected, but Mitchell announced he was going to go get his canteen card. While Mitchell was away, the canteen window opened and the line tightened, so that there was little space between inmates in the line. When Mitchell came back into the yard, he approached the canteen line, began cursing, and then hit plaintiff repeatedly.

1. At the time of the incidents at issue in this case, the relevant department was the Department of Correction. That department has since been merged into the new Department of Public Safety. 2011 Sess. Laws 145, § 19.1. We will therefore refer to defendant as the Department of Public Safety.

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Prior to this attack, there had been several other fights in the canteen lines, including a severe beating of an inmate just over three months prior to the attack on plaintiff. Caswell correctional officers had responsibility to maintain the safety and security of inmates in the area of the officer's control. Sergeant Alma Harrison testified that there was one officer who patrols the East Yard and a roving patrol that "looks over the whole yard." Plaintiff testified that he saw no officer in the canteen line area during his wait in line, during the assault, or after the assault.

Plaintiff filed an affidavit with the Industrial Commission on 14 December 2006 alleging that the Department of Correction, now known as the Department of Public Safety, through the officers on duty during his attack negligently failed to protect him from an assault by Mitchell. Plaintiff named "Lt. MacKenny, Sgt. Harriston, Sgt. Long, Officer McCollum, and Officer Carter" as the alleged negligent employees.

On 14 October 2009, Deputy Commissioner George T. Glenn, II granted plaintiff's motion to sever the issues of liability and damages. On 20 November 2009, there was an evidentiary hearing before Deputy Commissioner Glenn on liability. Deputy Commissioner Glenn, based only on the testimony of plaintiff and Sergeant Harrison, found that plaintiff had not met his burden of showing negligence and dismissed the case despite plaintiff's request to have testimony from another inmate, James Evans. On 12 January 2010, plaintiff filed a Notice of Appeal to the Full Commission. On 1 July 2010, the Full Commission issued an Order reopening the record for the testimony of inmate Evans. Evans' testimony was taken before Deputy Commissioner Robert J. Harris on 23 September 2010.

After reviewing the 2010 testimony of Evans and the 2009 testimony of plaintiff and Sergeant Harrison, the Full Commission found defendant negligent and remanded the case for a hearing on damages by Decision and Order entered 24 January 2011. On 4 February 2011, defendant filed a notice of exception to the Full Commission's Decision and Order on the issue of liability. On 24 July 2012, the Full Commission entered an amended Decision and Order finding defendant negligent, ordering payment of \$12,000 in damages, and incorporating its findings and conclusions from the 24 January 2011 Decision and Order. On 23 August 2012, defendant filed its Notice of Appeal to this Court.

II. Sufficiency of the Findings

Defendant argues that the Full Commission failed to make necessary findings to support its conclusion and that there was insufficient

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evidence to support the Full Commission's conclusion that defendant's employees breached its duty to plaintiff. Defendant does not, however, specifically challenge any of the Commission's findings of fact.

The Industrial Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there is evidence which would support findings to the contrary. Appellate review is limited to two questions of law: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the findings of fact of the Commission justify its legal conclusion and decision.

Taylor v. North Carolina Dept. of Correction, 88 N.C. App. 446, 448, 363 S.E.2d 868, 869 (1988) (citation omitted). "The Commission's conclusions of law are reviewed de novo." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted).

"The Tort Claims Act, G.S. 143-291, partially waives . . . sovereign immunity in cases in which the negligence of a State employee acting within the scope of his employment proximately causes injury." *Woolard v. North Carolina Dept. of Transp.*, 93 N.C. App. 214, 216, 377 S.E.2d 267, 268-69 (citation omitted), *cert. denied*, 325 N.C. 230, 381 S.E.2d 792 (1989). In a complaint under the Tort Claims Act, a plaintiff must generally name the State employees he alleges negligently caused his injury, N.C. Gen. Stat. § 143-297 (2005), and then prove that at least one of the named employees did, in fact, negligently cause his injury. *See Floyd v. North Carolina State Highway and Public Works Commission*, 241 N.C. 461, 465, 85 S.E.2d 703, 705 (1955) ("It isn't enough to say that some employee's negligence caused the injury. The claim *and the evidence* must identify the employee and set forth his act or acts of negligence which are relied upon." (emphasis added)), *overruled in part on other grounds by Barney v. North Carolina State Highway Commission*, 282 N.C. 278, 192 S.E.2d 273 (1972); *Thornton v. F.J. Cherry Hosp.*, 183 N.C. App. 177, 185, 644 S.E.2d 369, 375 (2007) (affirming the Commission's conclusion that the plaintiff's claim must fail where he failed to show that any of the named State employees were negligent), *aff'd*, 362 N.C. 173, 655 S.E.2d 350 (2008); *Register v. Administrative Office of Courts*, 70 N.C. App. 763, 766, 321 S.E.2d 24, 27 (1984) ("[T]o recover under the State Tort Claims Act, it must be shown that a negligent act of a state employee, acting in the course of his or her employment, proximately caused the injuries or damages asserted.").

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Nevertheless, a plaintiff may recover if he proves that the negligent state employee was a subordinate to one of the named employees and the affidavit provides the defendant sufficient notice to investigate the claim, even if that particular subordinate was not named in the affidavit. See, e.g., *Davis v. North Carolina Dept. of Human Resources*, 121 N.C. App. 105, 111, 465 S.E.2d 2, 6 (1995) (holding that the plaintiff could recover even though the negligent employee was not named in the affidavit where the affidavit named the employee's supervising physician), *disc. rev. denied*, 343 N.C. 750, 473 S.E.2d 612 (1996); *Cherney v. North Carolina Zoological Park*, 166 N.C. App. 684, 692-93, 603 S.E.2d 842, 847 (2004) (Timmons-Goodson, J., dissenting) (holding that the Industrial Commission must consider not only the actions of the named employees, but also those employees subordinate to the named employees, and that the complaint gave the State sufficient notice that the actions of the subordinates would be considered), *rev'd per curiam for the reasons stated in the dissent*, 359 N.C. 419, 613 S.E.2d 498 (2005).

To recover under the Tort Claims Act, a plaintiff must prove that an employee, agent, or servant of the State negligently caused his injury. *Floyd*, 241 N.C. at 465, 85 S.E.2d at 705. Therefore, to award a plaintiff compensation, the Commission must find that a particular state employee negligently acted or failed to act in a manner that caused the plaintiff's injury. See *Sheehan v. Perry M. Alexander Const. Co.*, 150 N.C. App. 506, 511, 563 S.E.2d 300, 303 (2002) ("[T]he Commission must make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends." (citation and quotation marks omitted)); *Thornton*, 183 N.C. App. at 185, 644 S.E.2d at 375.

Here, the Commission made the following relevant ultimate findings and conclusions of law:

FINDINGS OF FACT

. . . .

12. Based on the greater weight of the competent, credible evidence of record, the Full Commission finds that plaintiff's injuries are a direct result of the negligence of Department of Correction employees who failed to adequately supervise the first shift canteen line on May 30, 2006 and allowed inmate Mitchell to assault plaintiff, resulting in serious injuries.

. . . .

CONCLUSIONS OF LAW

....

4. With respect to defendant's employees' duty of reasonable care in the instant case, the evidence shows that the canteen area at Caswell was within the control of the officer assigned to the East Yard, and that it was that officer's primary responsibility to maintain the safety and security of the inmates and staff in his or her area of control. Defendant breached this duty of exercising reasonable care to protect plaintiff from harm by failing to take reasonable steps, such as posting a guard at the canteen window, a measure employed during the second shift which made fights during that shift less likely.

Plaintiff has principally relied on two theories of negligence: first, that the East Yard officer failed to make his rounds as required; and second, that the prison administrators failed to assign a sufficient number of guards to watch the yard. Although the Commission mentions the East Yard officer in its conclusion, it did not clearly find that he failed to make his required rounds or was otherwise negligent, though the findings could be read as implying that the East Yard officer was negligent. The Commission did find that defendant negligently failed to post a guard at the canteen. The Commission made no findings, however, about which employee or supervisor was responsible for such decisions, or if any employee at the prison had such authority.

We confronted a comparable, though ultimately distinguishable, situation in *Smith v. N.C. Dep't of Transp.*, 156 N.C. App. 92, 576 S.E.2d 345 (2003), where we affirmed a Decision and Order despite a finding that some unknown supervisor failed to properly instruct an employee. In *Smith*, the Commission found:

23. The Department of Transportation employee, Brian Pleasants, who was responsible for placing signage in the general area that is the subject of this claim, was not instructed to place a warning sign at the intersection of Aviation Parkway and Highway 54. There is no physical reason why the appropriate signage could not have been placed either at the intersection in question or elsewhere on southbound Aviation Parkway.

24. Despite being aware of the potential danger to motorists, and despite its duty to do the same, defendant through

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its employees and agents failed to place adequate signage at and near the Aviation Parkway/Highway 54 intersection that would warn motorists traveling from this direction, or those motorists [sic] traveling southbound on Aviation Parkway, that a potentially dangerous railroad crossing was imminent. This failure to erect adequate signage was the proximate cause of plaintiff's September 22, 1994 accident. Plaintiff's expert witness corroborates this assessment.

Smith, 156 N.C. App. at 100, 576 S.E.2d at 351. We held that these findings met the requirement of "a finding of a negligent act by an officer, employee, servant or agent of the State." *Id.* at 100-01, 576 S.E.2d at 351 (citation omitted).

Smith is distinguishable from the present case because the Commission in *Smith* specifically found that a particular employee failed to place adequate signage, even if the Commission ultimately concluded that he failed to do so because he was not properly instructed by an unknown supervisor. *Id.* In this case, by contrast, it is unclear who the Commission believed failed to post another guard at the canteen or whether any of the named employees or someone subordinate to any of the named employees even had the authority to do so. This fact is vital to plaintiff's right to compensation, *see Floyd*, 241 N.C. at 465, 85 S.E.2d at 705, but the Full Commission failed to make an adequate finding as to that fact.

Accordingly, we must remand to the Industrial Commission to make a specific finding about which of defendant's employees it believes breached defendant's duty to plaintiff. *See Sheehan*, 150 N.C. App. at 511, 563 S.E.2d at 303 ("[T]he Commission must make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends."); *Floyd*, 241 N.C. at 465, 85 S.E.2d at 705 ("The claim and the evidence must identify the employee and set forth his act or acts of negligence which are relied upon."); *Bailey v. North Carolina Dept. of Mental Health*, 272 N.C. 680, 685, 159 S.E.2d 28, 31 (1968) ("When the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded to the Commission for proper findings." (citation omitted)).

Additionally, the Commission failed to make any finding regarding the defense of contributory negligence. Defendant raised the issue of contributory negligence before the Deputy Commissioner, but he did not reach this issue because he concluded that plaintiff had failed

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to show negligence. When the Full Commission reversed the Deputy Commissioner's decision as to negligence, it should have also addressed the issue of contributory negligence because defendant specifically raised that issue and a finding of contributory negligence would preclude plaintiff's right to recover. *Thornton*, 183 N.C. App. at 187, 644 S.E.2d at 376; *see Sheehan*, 150 N.C. App. at 511, 563 S.E.2d at 303. On remand, the Full Commission must also make a finding of fact and conclusion of law regarding contributory negligence.

REVERSED and REMANDED.

Judges ELMORE and STEELMAN concur.

REVOLUTIONARY CONCEPTS, INC., A NORTH CAROLINA CORPORATION, AND
RONALD CARTER, PLAINTIFFS

v.

CLEMENTS WALKER PLLC, A NORTH CAROLINA PROFESSIONAL LIMITED LIABILITY COMPANY;
F. RHETT BROCKINGTON, AN INDIVIDUAL; RALPH H. DOUGHERTY, AN INDIVIDUAL;
GREG N. CLEMENTS, AN INDIVIDUAL; CHRISTOPHER L. BERNARD, AN INDIVIDUAL; AND
JASON S. MILLER, AN INDIVIDUAL, DEFENDANTS

No. COA12-1167

Filed 7 May 2013

1. Jurisdiction—standing—professional malpractice—assignment invalid—claim vested

The trial court erred in a professional malpractice case by concluding that plaintiff Carter lacked standing to assert the claims. Malpractice claims are not assignable in North Carolina so Carter's attempted assignment was invalid. Furthermore, Carter's right to assert this claim had vested prior to the attempted assignment.

2. Jurisdiction—standing—professional malpractice—assignment invalid—no post-merger action to assert claims

The trial court did not err in a professional malpractice case by concluding that plaintiff RCI-NV did not have standing to assert the malpractice claims at issue and granting defendants' motion for summary judgment. RCI-NV did not acquire the claims as a result of the assignment from RCI-NC and RCI-NV did not take any action post-merger to assert those claims as the surviving entity of the merger.

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3. Parties—motion to amend complaint—futile—claims time-barred—motion to substitute party—failure to substitute within reasonable time

The trial court did not err in a professional negligence case by denying plaintiff's N.C.G.S. § 1A-1, Rule 15 motion to amend the complaint to add RCI-NC as a plaintiff and by not giving post-merger RCI-NV the opportunity to be substituted in as the real party in interest pursuant to Rule 17. Plaintiff's claims would have been time-barred and the amendment would have been futile and plaintiffs failed to offer any compelling reason why they failed to substitute RCI-NV in a reasonable time after the merger.

4. Attorneys—professional malpractice—failure to supervise—no knowledge of wrongdoing

The trial court did not err in a professional malpractice case by granting defendants Clements' and Bernard's individual motions for summary judgment. Plaintiff failed to present evidence that Clements and Bernard knew that another member of the limited liability company was engaged in wrongdoing.

Appeal by plaintiffs from orders entered 9 March 2010 by Chief Special Superior Court Judge for Complex Business Cases Ben F. Tennille and 8 March 2012 by Superior Court Judge for Complex Business Cases James L. Gale in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 February 2013.

Harrington Law, P.C., by James M. Harrington, for plaintiffs-appellants.

Poyner Spruill LLP, by Cynthia L. Van Horne and E. Fitzgerald Parnell, III, for defendants-appellees Clements Walker, PLLC, F. Rhett Brockington, Greg N. Clements, and Christopher L. Bernard.

James, McElroy & Diehl, P.A., by Edward T. Hinson, Jr. and John S. Arrowood, for defendant-appellee Ralph H. Dougherty.

HUNTER, Robert C., Judge.

Plaintiffs Revolutionary Concepts, Inc. and Ronald Carter appeal the order issued 9 March 2010 granting defendants' motions to dismiss Ronald Carter's claims for lack of standing and the order issued 8 March

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2012 granting defendants' motion for summary judgment. After careful review, we reverse and remand in part and affirm in part.

Background

Ronald Carter ("Carter") is the inventor of a certain technology known as an "Automated Audio Video Messaging and Answering System." Carter is the founder and owner of Revolutionary Concepts, Inc., a North Carolina corporation ("RCI-NC"). At some point, Carter also founded Revolutionary Concepts, Inc., a Nevada corporation ("RCI-NV"), which is the plaintiff in the current appeal. The defendants include: (1) Clements Walker, PLLC ("CW"), a law firm; (2) F. Rhett Brockington ("Brockington"), a patent agent employed by CW; and (3) Ralph Dougherty ("Dougherty"), Gregory N. Clements ("Clements"), Christopher Bernard ("Bernard"), and Jason Miller ("Miller"), all licensed patent attorneys employed by CW.

In 2003, Carter retained CW to file an application for a patent ("application") in the United States Patent and Trademark Office ("USPTO"). However, to protect his right to obtain patent protection for his invention in foreign jurisdictions, Carter requested defendants not publish his application until he could file an application for international patent rights under procedures established by the Patent Cooperation Treaty and U.S. law (the "PCT application"). In July 2005, Carter and RCI-NC requested CW file the PCT application. However, Carter and RCI-NV allege that defendants never filed the PCT application, and Brockington filed a form causing the application to be published by the USPTO on 29 December 2005. As a result, Carter and RCI-NV were unable to obtain patent protection for their invention in foreign jurisdictions.

Prior to the commencement of the current action, on 17 July 2006, Carter assigned all rights, title, and interest in the application to RCI-NV. On 19 January 2007, RCI-NC and Carter filed a complaint against defendants¹ asserting claims of professional malpractice, failure to supervise, respondeat superior, misappropriation of funds, and breach of contract. RCI-NC and Carter voluntarily dismissed the claims against defendants Clements, Walker, Bernard, Miller, and CW on 7 February 2007. RCI-NC and Carter filed an amended complaint that same day against defendants. This amended complaint was also voluntarily dismissed on 29 February 2008. RCI-NC did not refile any claims against defendants.

1. This initial complaint was commenced against Dougherty & Clements Law Group PLLC, which is now known as Clements Walker PLLC. All other defendants were the same.

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On 29 February 2008, the same day RCI-NC's complaint was voluntarily dismissed, RCI-NV² and Carter (collectively "plaintiffs") filed a complaint against defendants alleging six causes of action. This 29 February 2008 complaint is the subject of the current appeal. Plaintiffs asserted six causes of action: (1) professional malpractice of a patent agent against Brockington individually; (2) professional malpractice by attorneys against CW, Bernard, Clements, Dougherty, and Miller; (3) failure to supervise a non-attorney employee against CW, Clements, Bernard, Miller, and Dougherty; (4) respondeat superior against CW, Clements, Bernard, Miller, and Dougherty for failing to supervise Brockington; (5) misappropriation of funds against all defendants; and (6) breach of contract against all defendants. The case was designated as a mandatory complex business case and assigned to the North Carolina Business Court. At some point, the breach of contract claim was dismissed. Moreover, it appears that defendant Miller was dismissed from the case as pleadings filed after the complaint do not list him as a defendant. However, there is nothing in the record evidencing this. After plaintiffs filed the 29 February 2008 complaint, on 14 August 2008, RCI-NC and RCI-NV merged, with RCI-NV as the surviving entity.

In May 2008, defendants moved to dismiss the action on two grounds. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), defendants contended that because the case arose under the patent laws, it falls under the exclusive jurisdiction of the federal courts. Moreover, defendants argued that, pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and (6), Carter had no standing to bring the claims asserted because he had transferred all of his rights, title, and interest in the application to RCI-NV.

On 9 March 2010, the Honorable Ben F. Tennille granted defendants' motion to dismiss Carter for lack of standing and denied defendants' motion to dismiss for lack of jurisdiction³ (the "2010 Order"). With regards to the standing issue, the trial court concluded that all the remaining claims, besides the breach of contract claim that had already been dismissed, "belong to [RCI-NV], the undisputed assignee of the

2. While the caption of the 29 February 2008 complaint lists RCI-NC as the plaintiff, the body refers to the plaintiff as RCI-NV. Moreover, the parties stipulated that the actual plaintiff in this complaint was RCI-NV, not RCI-NC.

3. Defendants appealed the 2010 Order and petitioned this Court for a writ of *certiorari*. In an unpublished opinion, the Court dismissed the appeal and denied *certiorari*. *Revolutionary Concepts, Inc. v. Clements Walker, PLLC*, __ N.C. App. __, 714 S.E.2d 210 (2011).

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technology”; thus, Carter no longer had any standing to assert a claim against defendants.

On 7 October 2011, defendants jointly moved for summary judgment (the “joint MSJ”). Specifically, defendants contended that the claims of malpractice, failure to supervise, and respondeat superior should be dismissed because: (1) RCI-NV (the only remaining plaintiff in the action) was not a client of defendants; and (2) RCI-NV cannot establish it suffered damages as a proximate result of any act or omission of defendants. Defendants Clements and Bernard moved separately for summary judgment (the “individual MSJ”), arguing that they are protected from liability as members of a limited liability company pursuant to N.C. Gen. Stat. § 57C-3-30.

On 8 March 2012, Judge James L. Gale entered an order: (1) granting the joint MSJ; (2) denying RCI-NV’s oral Rule 15 motion to amend its complaint; (3) denying RCI-NV’s Rule 17 motion; and (4) granting the individual MSJ.⁴ For purposes of this opinion, this order is referred to as the “2012 Order.” Plaintiffs appealed both the 2010 and 2012 Orders.

Arguments

A. The 2010 Order

[1] Plaintiffs first argue that the trial court erred by concluding Carter lacked standing to assert the malpractice claims because this conclusion is inconsistent with the trial court’s 2012 Order.⁵ Because we conclude that malpractice claims are not assignable in North Carolina, we agree that the trial court erred in dismissing Carter’s claims for lack of standing.

In order for a court to have subject matter jurisdiction to hear a claim, the party bringing the claim must have standing. *Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16, *disc. review denied*, 359 N.C. 631, 613 S.E.2d 688 (2005). Standing may be challenged by a Rule 12(b)(1) motion. N.C. Gen. Stat. § 1A-1, Rule 12 (2011). This Court reviews the trial court’s granting of a motion

4. We note that the transcript of this hearing was not included in the record on appeal. This Court requested plaintiffs’ counsel file one but none was ever received.

5. While we note that plaintiffs’ 29 February 2008 complaint included additional causes of action than the malpractice claims, their arguments on appeal focus only on the malpractice claims. Thus, we do not address plaintiffs’ other claims for relief in their complaint on appeal.

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to dismiss under Rule 12(b)(1) *de novo*. *Blinson v. State*, 186 N.C. App. 328, 334, 651 S.E.2d 268, 273 (2007).

In the 2010 Order, the trial court concluded that once Carter assigned all his rights, title, and interest in the application to RCI-NV on 17 July 2006, he no longer had standing to assert the tort claims against defendants. Instead, “[t]he remaining claims belong[ed] to [RCI-NV], the undisputed assignee of the technology.” Implicit in this conclusion is that malpractice claims are assignable in North Carolina.

Our Courts have not specifically addressed whether malpractice claims are assignable. However, they have generally addressed the assignability of tort claims and have held that “[a]n action ‘arising out of contract’ generally can be assigned.” *Horton v. New S. Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858 (1996). In contrast, “assignments of personal tort claims are void as against public policy because they promote champerty. Personal tort claims that may not be assigned include claims for defamation, abuse of process, malicious prosecution or conspiracy to injure another’s business, unfair and deceptive trade practices and conspiracy to commit fraud.” *Id.* (internal citations omitted). Since our courts have not yet specifically addressed the assignability of malpractice claims, we will examine how other jurisdictions treat this issue.

The majority of courts have held that legal malpractice claims are unassignable as a matter of public policy. *Can Do, Inc. Pension & Profit Sharing Plan & Successor Plans v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865, 868 (Tenn. 1996); *see also Botma v. Huser*, 39 P.3d 538, 541-42 (Ariz. Ct. App. 2002) (holding that “[legal] [m]alpractice claims are regarded as personal injury claims, and personal injury claims are not assignable in Arizona). Concerns cited by these courts include the potential for a conflict of interest, the compromise of confidentiality, and the negative effect assignment would have on the integrity of the legal profession and the administration of justice. *Botma*, 202 Ariz. at 17; *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 318 (Tex. Ct. App. 1994). In contrast, however, some jurisdictions determine the assignability of malpractice claims on a case by case basis and only prohibit the assignment of legal malpractice claims to an adverse party. *See Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 167 (Conn. 2005); *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627, 633 (Tex. Ct. App. 2000); *Kommavongsa v. Haskell*, 67 P.3d 1068, 1070 (Wash. 2003).

Based on our courts’ treatment of the assignability of other personal tort claims and the valid concerns cited by the majority of jurisdictions should malpractice claims be assignable, we adopt the majority view and

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conclude that malpractice claims are not assignable in North Carolina. Thus, Carter's attempted assignment was invalid, and those tort claims remained with Carter.⁶ Moreover, it should be noted that Carter's right to assert this claim had vested prior to the attempted assignment. The alleged injury occurred in December 2005, the point at which the application was published by the USPTO, and the attempted assignment occurred in July 2006. Therefore, the trial court erred in holding that Carter no longer had standing to assert the malpractice claims as they remained with him, and we reverse and remand the 2010 Order on this issue. While we have concluded that Carter had standing to bring the malpractice claims, we note that the trial court will have to determine the effect of the 2006 assignment on the issue of damages. *See Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985) (noting that a showing of damages is an essential element of a professional malpractice claim based on an attorney's negligence). Specifically, the trial court will have to decide whether or not the assignment of Carter's rights in the patent affects his entitlement to assert damages.

Defendants argue that even if the malpractice claims were not assignable, Carter still does not have standing because he was not named as an applicant in the PCT application. In support of their argument, defendants rely on plaintiffs' statement in paragraph 26 of the 29 February 2008 complaint that RCI-NC was the applicant on the PCT application with Carter listed only as the inventor. Thus, defendants allege that Carter had no foreign patent rights since he was not listed as the applicant.

While it is true that the 29 February 2008 complaint does seem to imply that Carter was listed only as the inventor on the PCT application, not as the applicant, a copy of the PCT application included in the record on appeal lists Carter as both an applicant and inventor. Thus, defendants' argument is without merit.

B. The 2012 Order - Defendants' Joint MSJ

[2] Next, plaintiffs argue that the trial court erred in granting defendants' motion for summary judgment by concluding that RCI-NV did not have standing to assert the malpractice claims. Specifically, they contend that either Carter's attempted assignment of the malpractice claims was void, and the 2010 Order was incorrect, or that the assignment was

6. We note that RCI-NC also had the right to assert those tort claims, along with Carter.

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valid and the 2012 Order was erroneous as those claims would lie with RCI-NV after the assignment. We disagree.

“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) (internal quotation marks omitted).

In the 2012 Order, the trial court reasoned that RCI-NV could not have asserted the malpractice claims on 29 February 2008 because the merger had not yet occurred. Because the trial court concluded that an action brought in the name of RCI-NV pre-merger is not necessarily converted into an action by RCI-NC automatically without some action by RCI-NV after the merger, RCI-NV did not have the right to assert those claims.

Although we have concluded that the malpractice claims were unassignable and remained with Carter, we still must determine whether RCI-NV acquired the right to assert those claims by virtue of the merger with RCI-NC in August 2008, six months after RCI-NV filed its complaint asserting those rights. Accordingly, the issue becomes whether RCI-NV, as surviving entity of the merger, was required to take some procedural action post-merger to assert the malpractice claims.

Pursuant to N.C. Gen. Stat. § 55-11-06(a)(4), “[a] proceeding pending by or against any merging corporation may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for a merging corporation whose separate existence ceases in the merger.” RCI-NC was the “merging corporation” with RCI-NV being the “surviving corporation.” Applying this statute, any proceedings pending by RCI-NC could be automatically continued by RCI-NV without any action by RCI-NV. However, here, there were no pending claims against defendants for malpractice by RCI-NC. RCI-NC’s claims were voluntarily dismissed on 29 February 2008, and RCI-NC never reasserted those claims. Instead of RCI-NC refiling those claims, RCI-NV asserted those claims in February 2008, prior to the August 2008 merger. However, RCI-NV, as the surviving entity of the merger, took no action to amend the 29 February 2008 complaint or reassert those claims post-merger until the January 2012 hearing. In other words, when RCI-NV filed the complaint in February 2008, it could not have asserted the rights of RCI-NC since the merger had not happened. However, RCI-NV could have asserted those rights once the merger happened but never did so

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as the surviving entity of the merger. RCI-NV only asserted those claims as the assignee of Carter's rights, title, and interest in the application.

There is no legal authority for RCI-NV's contention that an action brought in the name of RCI-NV pre-merger was automatically converted as a result of the merger into an action by RCI-NC. Moreover, N.C. Gen. Stat. § 55-11-06(a)(4) does not apply as there were no pending claims asserted against defendants by RCI-NC at the time of the merger. Accordingly, without some action by RCI-NV post-merger to assert those claims as the surviving entity of the merger, its claims brought in February 2008 do not automatically incorporate any claims RCI-NC could have brought but failed to do so simply by virtue of the merger. Thus, because RCI-NV did not acquire the claims as a result of the assignment, as discussed above, and RCI-NV did not take any action post-merger to assert those claims as the surviving entity of the merger, we affirm the trial court's 2012 Order granting the joint MSJ.

C. RCI-NV's Rule 15 and 17 Motions - The 2012 Order

[3] Next, RCI-NV argues that the trial court erred in denying its oral Rule 15 motion to amend the complaint to add RCI-NC as a plaintiff on the basis of futility. Specifically, RCI-NV contends that since the 29 February 2008 complaint gave notice of the transactions or occurrences that gave rise to the claim, the proposed amendment would not be futile since it would relate back to the filing of the original complaint on 29 February 2008. Relatedly, plaintiffs allege that the trial court erred by not giving post-merger RCI-NV the opportunity to be substituted in as the real party in interest pursuant to Rule 17. We disagree.

"[O]ur standard of review for motions to amend pleadings requires a showing that the trial court abused its discretion." *Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 165, 510 S.E.2d 690, 694 (1999). "A trial court abuses its discretion when its decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Ehrenhaus v. Baker*, __ N.C. App. __, __, 717 S.E.2d 9, 18 (2011) (internal quotation marks omitted), *appeal dismissed and disc. review denied*, __N.C. __, 735 S.E.2d 332 (2012). Proper reasons for denying a motion to amend include undue delay, unfair prejudice, bad faith, futility of amendment, and repeated failure of the moving party to cure defects by other amendments. *Delta*, 132 N.C. App. at 166, 510 S.E.2d at 694.

Rule 15(c) provides that:

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A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (2011). Here, in the 29 February 2008 complaint, RCI-NV identified itself as the assignee of Carter's rights, interest, and title in the application. At the January 2012 hearing, RCI-NV, as the surviving entity of the merger, attempted to amend its complaint by substituting itself as the plaintiff. In other words, the amendment sought by RCI-NV would change the identity of plaintiff from an entity that acquired its rights to pursue claims against defendants via an assignment from Carter to one that acquired its rights through the merger with RCI-NC.

Here, the trial court concluded that, pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a)(1), RCI-NC had until 29 February 2009 to refile its claims against defendants, one year after RCI-NC took a voluntary dismissal of its claims. Therefore, any claims RCI-NV acquired from RC-NC by virtue of the merger had to be filed either by post-merger RCI-NV, identifying itself as the surviving entity of the merger, or by RCI-NC by 29 February 2009. Neither of these things occurred. Thus, unless RCI-NV's amendment could relate back pursuant to Rule 15(c), those claims would be time-barred. Since the complaint did not give fair notice the claims asserted by RCI-NV were intended to include those still held by RCI-NC at the time, the trial court concluded that the amendment would not relate back. Thus, RCI-NV's attempted amendment was futile, and the trial court denied the Rule 15 motion.

We believe that the trial court's order denying the Rule 15 motion was supported by reason. Defendants had no notice that the allegations in RCI-NV's 29 February 2008 complaint were intended to include those claims which were held by RCI-NC at the time the complaint was filed. While RCI-NV could have amended its complaint any time after August 2008, once the merger occurred, it never attempted to do so until the 13 January 2012 hearing. Critical to application of Rule 15(c) is not only notice of the events that led to the cause of action but also the identity of the party bringing those claims. Here, RCI-NV only identified itself as the assignee of Carter's rights, not as the surviving entity of the August 2008 merger. Thus, defendants would not be on notice that RCI-NV's claims were based on a merger that had not occurred yet. The statute

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of limitations on RCI-NC's claims against defendants ran on 29 February 2009, one year after RCI-NC voluntarily dismissed its claims. N.C. Gen. Stat. § 1A-1, Rule 41(a) (2011). Therefore, plaintiffs' claims would be time-barred, and the amendment would be futile. Pursuant to *Delta*, 132 N.C. App. at 166, 510 S.E.2d at 694, the trial court properly denied the motion to amend the complaint on the basis of futility.

Although we conclude that Rule 15(c) would not permit RCI-NV's claims to relate back, we must determine whether the trial court erred in not permitting post-merger RCI-NV to substitute itself in as the real party in interest under Rule 17. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 17(a), "[e]very claim shall be prosecuted in the name of the real party in interest[.]" The Rule goes on to say that:

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Here, we can discern no abuse of discretion in denying the Rule 17 motion because plaintiffs could have substituted post-merger RCI-NV at any point after the August 2008 merger. However, they did not attempt to do so for over three years, until the hearing in January 2012. Although our Courts generally permit liberal amendment of pleadings, here, we believe that the trial court's decision to not allow post-merger RCI-NV to be substituted as the real party in interest at the summary judgment hearing does not constitute an abuse of discretion. Plaintiffs have failed to offer any compelling reason why they failed to do so in a reasonable time after the merger. Moreover, the fact that the 29 February 2008 complaint only included claims asserted by pre-merger RCI-NV was known to them. Therefore, we conclude that the trial court did not abuse its discretion in denying RCI-NV's motion to substitute itself as the real party in interest pursuant to Rule 17.

D. The 2012 Order Granting the Individual MSJ

[4] Finally, RCI-NV argues that the trial court erred in granting defendant Clements' and Bernard's individual MSJ. Specifically, RCI-NV contends that there was sufficient evidence establishing that Clements and Bernard had a personal responsibility to supervise Brockington's work in Dougherty's absence. We disagree.

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Pursuant to *Babb v. Bynum & Murphrey*, 182 N.C. App. 750, 643 S.E.2d 55 (2007), *cert. denied*, 362 N.C. 233, 659 S.E.2d 434 (2008), the trial court concluded that as members of an LLC, Clements and Bernard did not have an affirmative duty to investigate the actions of others without actual knowledge of wrongdoing. Accordingly, because RCI-NV failed to present evidence that Clements and Bernard knew that Brockington was engaged in wrongdoing, there was an absence of a genuine issue of material fact, and summary judgment was appropriate.

In *Babb*, 182 N.C. App. at 753, 643 S.E.2d at 57, this Court interpreted N.C. Gen. Stat. § 57C-3-30(a) to mean that a member or manager of an LLC does not have an affirmative duty to investigate the acts of another member without actual knowledge of wrongdoing. Here, plaintiffs fail to point to any evidence that Clements and Bernard had knowledge of wrongdoing. Moreover, plaintiffs conceded the lack of evidence showing knowledge of wrongdoing at oral argument. Thus, based on our Court's holding in *Babb* and the absence of any evidence establishing knowledge of wrongdoing, the individual MSJ was properly granted, and we affirm the 2012 Order on this issue.

Conclusion

Because we hold that malpractice tort claims are not assignable, we reverse and remand the 2010 Order granting defendants' motion to dismiss Carter for lack of standing. With regard to the trial court's grant of the joint MSJ and individual MSJ, we affirm the trial court's 2012 Order on these issues. Finally, we affirm the trial court's 2012 Order denying plaintiffs' Rule 15 and 17 motions raised at the 13 January 2012 hearing.

Reversed and remanded in part; affirmed in part.

Judges McCULLOUGH and DAVIS concur.

STATE HEALTH PLAN FOR TEACHERS & STATE EMPS. v. BARNETT

[227 N.C. App. 114 (2013)]

STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, PLAINTIFF

v.

JENNIFER BARNETT AND EUGENE W. ELLISON, DEFENDANTS

No. COA12-999

Filed 7 May 2013

1. Liens—State Health Plan—settlement from auto accident

The trial court erred by granting plaintiff's motion for summary judgment in a case arising from an automobile accident where there was a settlement and plaintiff sought a lien on the proceeds. The plain language of N.C.G.S. § 135-45.15 places a duty upon an injured party's attorney to direct settlement funds recovered by an injured State Health Plan member to plaintiff in satisfaction of its statutory lien. An attorney cannot ignore a valid State Health Plan lien when disbursing settlement funds, regardless of his client's wishes.

2. Appeal and Error—preservation of issues—argument not raised below—not supported by evidence

The trial court did not err by granting summary judgment to plaintiff in an action arising from an automobile accident and a lien on settlement proceeds sought by plaintiff where defendant Ellison argued the possibility that plaintiff failed to mitigate its damages by filing a proof of claim against defendant Barnett in her bankruptcy case. The record did not reflect that Ellison raised this issue before the trial court, and, even assuming that the issue was preserved, there was no evidence in the record which established whether or not plaintiff filed a claim in Barnett's bankruptcy proceeding.

Appeal by defendant Eugene W. Ellison from order entered 15 May 2012 by Judge Laura J. Bridges in McDowell County Superior Court. Heard in the Court of Appeals 9 January 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Heather H. Freeman, for plaintiff-appellee.

Constangy, Brooks & Smith, LLP, by Michelle Rippon, for defendant-appellant Eugene W. Ellison.

CALABRIA, Judge.

STATE HEALTH PLAN FOR TEACHERS & STATE EMP. v. BARNETT

[227 N.C. App. 114 (2013)]

Eugene W. Ellison (“Ellison”) appeals the trial court’s order granting summary judgment in favor of The State Health Plan for Teachers and State Employees (“State Health Plan” or “plaintiff”). We affirm.

I. Background

On 3 September 2007, Jennifer Barnett (“Barnett”) sustained injuries in an automobile accident caused by a third party. Plaintiff provided Barnett, a State Health Plan member, with \$73,075.43 in benefits for the treatment of her injuries. Ellison, an attorney, represented Barnett and three other individuals who were also riding in the vehicle with Barnett in their personal injury claims against the third-party driver. On 24 October 2007, the claims of all four of Ellison’s clients were collectively settled for \$100,000.00. Barnett received \$70,000.00 in the settlement, minus \$14,000.00 in attorney’s fees, \$9,386.50 in medical expenses, and \$222.98 in rental car expenses. Thus, Ellison ultimately disbursed \$43,390.52 to Barnett. Upon receipt of those funds, Barnett executed a “Summary of Disbursements” which purported to “releas[e] the Law Office of Eugene W. Ellison from any further obligation as to the medical bills or liens from any insurance providers.” Ellison informed Barnett that plaintiff had a lien on her settlement funds, but she directed him not to disburse any proceeds to it.

Plaintiff sent Ellison and Barnett multiple letters requesting satisfaction of the amount owed to plaintiff pursuant to plaintiff’s right of subrogation under N.C. Gen. Stat. § 135-45.15. However, neither party disbursed any settlement proceeds to plaintiff.

On 30 August 2010, plaintiff initiated an action against Barnett and Ellison in McDowell County Superior Court seeking to recover \$28,000.00¹ in satisfaction of its lien. Plaintiff filed a motion for summary judgment on 20 October 2011. On 2 April 2012, Barnett filed a voluntary petition for Chapter 13 bankruptcy and the proceedings against her were automatically stayed. On 15 May 2012, the trial court granted plaintiff’s summary judgment motion and ordered Ellison to reimburse plaintiff in the amount of \$28,000.00. Ellison appeals.

II. Summary Judgment

[1] Ellison argues that the trial court erred by granting plaintiff’s motion for summary judgment. Specifically, he contends that N.C. Gen. Stat. § 135-45.15 does not authorize the recovery of settlement proceeds

1. This amount represented 50% of Barnett’s total recovery after the payment of attorney’s fees.

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directly from an attorney who represents a State Health Plan member in a personal injury action. We disagree.

“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)). N.C. Gen. Stat. § 135-45.15 provides that

(a) The [State Health] Plan shall have the right of subrogation upon all of the Plan member’s right to recover from a liable third party for payment made under the Plan, for all medical expenses, including provider, hospital, surgical, or prescription drug expenses, to the extent those payments are related to an injury caused by a liable third party. The Plan member shall do nothing to prejudice these rights. The Plan has the right to first recovery on any amounts so recovered, whether by the Plan or the Plan member, and whether recovered by litigation, arbitration, mediation, settlement, or otherwise.

...

(d) In no event shall the Plan’s lien exceed fifty percent (50%) of the total damages recovered by the Plan member, exclusive of the Plan member’s reasonable costs of collection as determined by the Plan in the Plan’s sole discretion. ... Notice of the Plan’s lien or right to recovery shall be presumed when a Plan member is represented by an attorney, and the attorney shall disburse proceeds pursuant to this section.

N.C. Gen. Stat. § 135-45.15 (2009).² Thus, under this statute, the State Health Plan is authorized to recover up to one-half of the total damages, less attorney’s fees, recovered by a Plan member from a third party. Moreover, the statute explicitly requires an attorney representing a Plan member to “disburse proceeds pursuant to this section.” *Id.* The question before this Court is whether Ellison’s failure to do so in the instant case made him liable for satisfying plaintiff’s lien against Barnett under the statute.

2. This statute has been recodified as N.C. Gen. Stat. § 135-48.37 as of 1 January 2012. See 2011 N.C. Sess. Law 85.

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“Issues 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). Our appellate courts have not previously interpreted N.C. Gen. Stat. § 135-45.15. However, there are several cases which have interpreted an analogous statute, N.C. Gen. Stat. § 44-50.

N.C. Gen. Stat. § 44-50 requires any person who receives settlement funds, including an attorney, to “retain out of any recovery or any compensation . . . received . . . a sufficient amount to pay the just and bona fide claims for any drugs, medical supplies, ambulance services, services rendered by any physician, dentist, nurse, or hospital, or hospital attention or services, after having received notice of those claims.” N.C. Gen. Stat. § 44-50 (2011). Thus, this statute places an affirmative duty on an attorney for an injured party to retain the full amount of a medical provider’s lien before disbursing settlement proceeds. Our Supreme Court has acknowledged that an attorney who violates this duty is subject to legal liability for the amount of the lien under the statute. *See N.C. Baptist Hospitals, Inc. v. Mitchell*, 323 N.C. 528, 532, 374 S.E.2d 844, 846 (1988)(agreeing with the defendant’s argument that “N.C.G.S. § 44-50 provides the only mechanism by which to obtain funds from an attorney who has received them for a client in satisfaction of a personal injury claim.”); *see also Triangle Park Chiropractic v. Battaglia*, 139 N.C. App. 201, 205, 532 S.E.2d 833, 836 (2000)(permitting medical provider to seek enforcement of its lien against an injured party’s attorney using N.C. Gen. Stat. § 44-50 where the attorney was on notice of the lien but chose to pay the entire settlement amount directly to his client.).

The plain language of N.C. Gen. Stat. § 135-45.15 similarly places a duty upon an injured party’s attorney to direct settlement funds recovered by an injured State Health Plan member to plaintiff in satisfaction of its statutory lien. By establishing this duty, the statute necessarily also creates a cause of action by which the State Health Plan may enforce its lien under the statute against an attorney who violates its requirements by failing to disburse his client’s settlement proceeds in accordance with the statute. *See Mitchell*, 323 N.C. at 532, 374 S.E.2d at 846. Since it is undisputed that Ellison failed to comply with the requirements of N.C. Gen. Stat. § 135-45.15 in the instant case, the trial court properly concluded that he was liable for the amount of plaintiff’s lien.

Ellison additionally claims that his failure to comply with the requirements of N.C. Gen. Stat. § 135-45.15 should be excused because he only violated the statute based upon Barnett’s instructions. However, he cites no authority for the proposition that an attorney may violate a statutory duty based upon his client’s instructions. Instead, he cites North

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Carolina State Bar Ethics Opinion RPC 69, which states that “[a] lawyer is generally obliged . . . to disburse settlement proceeds in accordance with his client’s instructions. The only exception to this rule arises when the medical provider has managed to perfect a valid physician’s lien.” North Carolina State Bar RPC 69 (October 20, 1989). This opinion by the State Bar does not excuse Ellison’s failure to disburse any of Barnett’s settlement funds to plaintiff. Instead, the opinion clearly acknowledges that, regardless of a client’s instructions, an attorney cannot ignore a valid statutory lien, a physician’s lien under N.C. Gen. Stat. § 44-50. An attorney likewise cannot ignore a valid State Health Plan lien under N.C. Gen. Stat. § 135-45.15 when disbursing settlement funds, regardless of his client’s wishes. Accordingly, it is immaterial to the determination of Ellison’s liability that Barnett may have directed him to disburse all of her settlement funds directly to her. Ultimately, the trial court correctly concluded that Ellison was liable for his failure to disburse settlement funds to plaintiff pursuant to N.C. Gen. Stat. § 135-45.15, and thus properly granted summary judgment to plaintiff. This argument is overruled.

III. Mitigation of Damages

[2] Ellison also argues that the trial court erred by granting summary judgment to plaintiff because of the possibility that plaintiff failed to mitigate its damages by filing a proof of claim against Barnett in her bankruptcy case. We disagree.

The record does not reflect that Ellison raised this issue before the trial court and therefore this argument is not preserved for appeal. See *Westminister Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) (“[I]ssues and theories of a case not raised below will not be considered on appeal.”). Moreover, even assuming, *arguendo*, that Ellison did preserve this issue, there is no evidence in the record which establishes whether or not plaintiff filed a claim in Barnett’s bankruptcy proceeding. Ellison’s mere speculation that plaintiff may not have filed such a bankruptcy claim is insufficient to create a genuine issue of material fact precluding summary judgment. See *Johnson v. Scott*, 137 N.C. App. 534, 537, 528 S.E.2d 402, 404 (2000) (“[O]nce the moving party presents an adequately supported [summary judgment] motion, the opposing party must come forward with specific facts (not mere allegations or speculation) that controvert the facts set forth in the movant’s evidentiary forecast.”). This argument is overruled.

IV. Conclusion

Pursuant to N.C. Gen. Stat. § 135-45.15 (now N.C. Gen. Stat. § 135-48.37), the State Health Plan has the right to first recovery of up to 50%

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of any amounts recovered by a Plan member for injuries which were inflicted by a third party and for which the State Health Plan provided treatment benefits. The statute places an affirmative duty on the attorney representing the State Health Plan member to use any settlement proceeds to first satisfy the State Health Plan's lien, and failure to comply with the statute subjects the attorney to liability for the amount of the lien. Since Ellison's failure to comply with N.C. Gen. Stat. § 135-45.15 is undisputed in the instant case, the trial court properly granted summary judgment to plaintiff. The trial court's order is affirmed.

Affirmed.

Judges ELMORE and GEER concur.

STATE OF NORTH CAROLINA

v.

JOSHUA K. CAUDILL

No. COA12-1064

Filed 7 May 2013

Confessions and Incriminating Statements—motion to suppress statements—right to be taken before court official without unnecessary delay following arrest

The trial court did not err in a first-degree murder, robbery with a dangerous weapon, and felony conspiracy to commit robbery with a dangerous weapon case by denying defendant's second motion to suppress his statements to officers of the Oak Island Police Department. The trial court's findings of fact supported its conclusion that there was no violation of defendant's rights under N.C.G.S. § 15A-501(2) or defendant's constitutional right to be taken before a court official without unnecessary delay following his arrest.

Appeal by defendant from judgments entered 1 June 2010 by Judge Thomas H. Lock in Brunswick County Superior Court. Heard in the Court of Appeals 13 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General Nicholaos G. Vlahos, for the State.

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Russell J. Hollers III for defendant-appellant.

BRYANT, Judge.

Where the trial court's findings of fact supported its conclusion that there was no violation of defendant's statutory rights pursuant to section 15A-501(2) of the North Carolina General Statutes and defendant's constitutional right to be taken before a court official without unnecessary delay following his arrest, we hold no error.

Facts and Procedural History

On 5 November 2007, defendant Joshua K. Caudill was indicted on charges of first degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Evidence at trial tended to show that on 8 July 2007, defendant, James Martin, Whitney Jenkins, and Amber Wood ("the four subjects") were living together at a home located at Northwest 10th Street, Oak Island, North Carolina. The four subjects discussed plans to rob Phillip Cook in order to obtain money to pay for rent and buy drugs. Phillip Cook was the owner of Island Way Restaurant and Jenkins was an employee there.

Jenkins testified that she knew Cook would close the restaurant at about 10:00 p.m. and would have more than \$500.00 on his person. The plan was that defendant and Martin would be dropped off at Cook's residence and Jenkins and Wood would wait at the restaurant until Cook left. Jenkins and Wood were to notify defendant and Martin of Cook's departure from the restaurant – a plan to which everyone agreed.

Jenkins and Wood dropped off defendant and Martin at Cook's residence. Defendant and Martin were dressed in hoodies and jeans and each was armed with a bedpost. Jenkins and Wood then drove to the Island Way Restaurant and waited outside in their vehicle. At about 10:00 pm, Jenkins and Wood saw Cook leave the restaurant carrying a brown briefcase, and enter his truck. Wood called defendant to tell him that Cook had left the restaurant and was on his way to his residence.

Jenkins and Wood followed Cook's truck to Cook's residence. Approximately five minutes after Jenkins and Wood began sitting in their parked car at the end of Cook's driveway, defendant and Martin came out of Cook's residence. They were out of breath and had Cook's brown briefcase and the bedposts with them. Jenkins recalled one of them saying that they had "hit [Cook] and knocked him out." The four subjects returned to their residence. They split the \$500.00 in cash found

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in the brown briefcase – half went to defendant and Wood and the other half to Martin and Jenkins. Days later, the four subjects learned through a newscast that Cook had died.

Doctor William Kelly, a pathologist for the State Medical Examiner, performed an autopsy on Cook's body on 10 July 2007. Dr. Kelly testified that the cause of death was "blunt head injury to the . . . left side."

Sergeant Loren Lewis of the Oak Island Police Department testified that on 18 July 2007, at approximately 5:45 am, he received a call to respond to a breaking and entering at Northwest 10th Street. Several other officers were already at the scene. Upon her arrival, Sergeant Lewis observed the four subjects sitting on a bench outside of the house. Sergeant Lewis noticed that "[a]ll four subjects seemed to be nervous. They were stretching and tugging at their clothing. Kind of hyper, excited." Pursuant to a protective sweep of the house, officers discovered a "plate that contained a crystal substance[.]" It was Sergeant Lewis' opinion, based on his training and experience, that the crystal substance was methamphetamine. Although all four subjects admitted that the substance was crystal methamphetamine, no one would say to whom it belonged.

According to Sergeant Lewis "some noise or something outside the residence, spooked [the four subjects]." The four subjects "huddled up . . . like someone was going to come after them. They [had] an exaggerated, startled response to the noise[.]" Officers attempted to calm the subjects down and have them sit down. When the subjects refused to sit down, they were handcuffed. After about ten minutes, when the subjects "calmed back down[.]" the handcuffs were taken off them.

Officers conducted a search of the residence pursuant to a consent to search form signed by all four subjects, including defendant. Following the search, the four subjects were placed under arrest for possession of methamphetamine and transported to the Oak Island Police Department. Previously at the residence, defendant had been advised of his Miranda rights, indicated that he understood his Miranda rights, and signed a waiver of rights form.

Sergeant Lewis testified that he left Northwest 10th Street with defendant at 8:56 a.m. and that they arrived at the police department at 9:02 a.m. Approximately an hour and 42 minutes later, defendant was transported by Sergeant Lewis to the Brunswick County Jail. Defendant was checked into the Brunswick County Jail at 11:12 a.m.

Sergeant Lewis turned defendant over to Detective Tony Burke of the Oak Island Police Department while he went to secure warrants for

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the narcotics charges. Detective Burke interviewed all four subjects. Defendant was interviewed from 1:59 p.m. until 2:53 p.m.

Detective Burke testified that he advised defendant of his Miranda rights. Defendant indicated to Detective Burke that he “remembered his being advised of his Miranda Rights” and “that he was still willing to talk[.]” During this interview, defendant admitted his involvement in the robbery and murder of Cook.

On 1 June 2010, defendant was convicted by a jury of first degree murder, robbery with a dangerous weapon, and felony conspiracy to commit robbery with a dangerous weapon. Defendant was sentenced to life imprisonment without parole for the first degree murder conviction. Defendant was sentenced to 51 to 71 months for the remaining convictions. Defendant appeals.

On 20 May 2010, defendant filed two pre-trial motions to suppress. Defendant argues that the trial court erred by denying his second motion to suppress, in which he alleged that his statements to officers of the Oak Island Police Department were obtained in violation of section 15A-501(2) of the North Carolina General Statutes.¹

Section 15A-501(2) of the North Carolina General Statutes provides that “upon the arrest of a person he must be taken before a judicial official without unnecessary delay.” *State v. Littlejohn*, 340 N.C. 750, 757, 459 S.E.2d 629, 633 (1995).

G.S. 15A-974(2) provides that evidence “obtained as a result” of a substantial violation of the provisions of Chapter 15A must be suppressed upon timely motion, and that the use of the term “result” in the statute indicated that *a causal relationship between a violation of the statute and the acquisition of the evidence sought to be suppressed must exist.*

State v. Hunter, 305 N.C. 106, 113, 286 S.E.2d 535, 539 (1982) (emphasis added).

1. The motion to suppress that is not the subject of this appeal requested that the trial court suppress all statements made by defendant alleged to have been taken in violation of his Fifth and Fourteenth Amendment rights under the United States Constitution and Article I, §§ 19, 23, and 24 of the North Carolina Constitution.

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This Court's review of a trial court's denial of a motion to suppress in a criminal proceeding is strictly limited to a determination of whether the court's findings are supported by competent evidence, even if the evidence is conflicting, and in turn, whether those findings support the court's conclusions of law. [I]f so, the trial court's conclusions of law are binding on appeal. If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal. However, the trial court's conclusions of law are reviewed de novo and must be legally correct.

State v. Scruggs, 209 N.C. App. 725, 727, 706 S.E.2d 836, 838 (2011) (citations omitted).

Following a hearing, the trial court entered an order denying defendant's motions to suppress. Defendant does not challenge the trial court's findings of fact. Rather, defendant contends that the trial court erred in reaching conclusion of law number 7:

7. The time spent by the officers in transporting defendant from his residence to the Oak Island Police Department, in processing the four individuals arrested at defendant's residence on the drug charges, in thereafter transporting defendant to the Brunswick County Sheriff's Department for an interview, in holding defendant while the officers interviewed the three other individuals arrested at defendant's residence, and in thereafter interviewing defendant before taking him before a magistrate did not constitute such unnecessary delay as to substantially violate defendant's statutory right under NCGS 15A-501(2) to be taken before a magistrate without unnecessary delay following his arrest.

"Where a defendant fails to challenge the findings of fact in an order denying a motion to suppress, this Court's review is limited to whether the trial court's findings of fact support its conclusions of law." *State v. Little*, 203 N.C. App. 684, 687, 692 S.E.2d 451, 454 (2010) (citation and quotation marks omitted). Therefore, our review is limited to whether the findings of fact support the trial court's conclusion of law number 7.

In the instant case, the trial court's conclusion of law number 7 was supported by the following uncontested findings of fact:

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11. At approximately 7:35 a.m., Sgt. Lewis asked defendant for consent to search the residence. Defendant consented and executed a written form giving the officers permission to search (State's Exhibit 1). Defendant appeared to be aware of his situation and appeared to understand the contents of State's Exhibit 1.

12. At approximately 8:10 a.m., Sgt. Lewis advised all four individuals simultaneously of their *Miranda* rights [at the residence]. Defendant . . . signed a written waiver of those rights (State's Exhibit 3), affirming that [he] understood [his] rights and [that he was] willing to talk to the officers without counsel.

. . .

17. At approximately 9:00 a.m., the officers placed all four individuals under arrest for possession of the methamphetamine and transported them to the Oak Island Police Department for processing. . . .

18. The trip from the residence to the police department took between five and ten minutes. The officers then kept defendant . . . at the police department for about an hour and forty-five minutes for processing, including photographing and fingerprinting them.

19. The officers then transported all four individuals to the Brunswick County Sheriff's Department. Based on information Det. Burke had received from an anonymous telephone caller prior to 18 July 2007, Det. Burke wanted to interview the four about the 8 July 2007 homicide of [Cook] in Oak Island.

20. The trip from the Oak Island Police Department to the Brunswick County Sheriff's Department took about 30 minutes. Upon arrival, Det. Burke and Sheriff's Det. David Crocker met with each of the four individuals separately and attempted to interview them. . . .

21 Defendant's interview lasted about one hour, beginning at 1:59 p.m. and ending at 2:53 p.m.

22. Before beginning the interview, Det. Burke reminded defendant of his *Miranda* rights. Defendant stated that he

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still understood his rights and that he was willing to waive those rights and talk with the officers.

23. The officers questioned defendant extensively about the murder of [Cook]. Defendant initially denied any knowledge about the murder, but then made statements incriminating himself and the other three individuals.

...

28. Upon the conclusion of the interview, the officers immediately took defendant before a magistrate and obtained warrants charging him with the drug offenses and with the murder and robbery of [Cook]. The officers thereafter committed defendant to the Brunswick County jail.

Defendant argues that the delay between his arrival at the jail and his initial appearance before a magistrate to set bond on the methamphetamine charges constituted an “unnecessary delay.” He contends that had bail been set in a timely manner on the methamphetamine charge, “he would have gone to work on posting bond instead of talking further with the police.” Defendant also argues that the delay violated his right to due process under the fifth and fourteenth amendments of the United States Constitution and Article I, Section 19 of the North Carolina Constitution. We disagree.

Several prior cases decided by the Supreme Court reject similar challenges to a trial court’s denial of a defendant’s motion to suppress based on alleged violations of N.C.G.S. § 15A-501(2). *Littlejohn*, 340 N.C. 750, 459 S.E.2d 269 (A thirteen-hour delay between the time the defendant was taken into custody and the time he was taken before a magistrate did not constitute a substantial violation of Chapter 15A where officers fully advised the defendant of his constitutional rights before the interrogation began); *State v. Reynolds*, 298 N.C. 380, 259 S.E.2d 843 (1979) (The defendant was taken before a judicial official “without unnecessary delay” where questioning began at noon, the defendant confessed his guilt within 40 minutes, and he was taken to a magistrate sometime between 2:00 p.m. and 3:00 p.m. The defendant was fully informed of his rights on two occasions within those 40 minutes and he made an intelligent waiver of counsel); *State v. Chapman*, 343 N.C. 495, 471 S.E.2d 354 (1996) (There was no unnecessary delay for purposes of Chapter 15A where the defendant was arrested at 9:30 a.m. and taken to a magistrate at 8:00 p.m. where a large part of the time was spent interrogating the defendant); and *State v. Wallace*, 351 N.C.

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481, 528 S.E.2d 326 (2000) (The defendant was arrested at 5:00 p.m. on 12 March 1994, met with investigators in an interview at 6:43 p.m. that same day, was advised of his *Miranda* rights at 10:00 p.m., and was questioned during the evening of 12 March and early morning of 13 March 1994. The defendant was allowed to sleep from 7:30 a.m. until 11:45 a.m. and then taken before a magistrate around noon on the 13th. The Supreme Court held that because the defendant had been advised of his constitutional rights prior to his interrogation regarding the crimes he was suspected of committing, because the number of crimes to which defendant confessed and the amount of time necessary to record the details of the crimes, along with the investigators' decision to allow the defendant to sleep, the delay in taking the defendant before a judicial official was not "unnecessary" within the meaning of Chapter 15A). We hold these cases to be controlling.

Here, defendant was advised of his constitutional rights before he was interviewed regarding the homicide of Cook. Defendant has failed to show he would not have admitted to the robbery and homicide of Cook had he been advised of the same rights again by the magistrate and therefore, we are unable to find a causal relationship between the delay and defendant's incriminating statements made during his interview. *See Hunter*, 305 N.C. at 113, 286 S.E.2d at 539. Therefore, we are unable to hold that the delay between defendant's arrest at approximately 9:00 a.m. and his appearance before a magistrate immediately after the conclusion of his interview at 2:53 p.m. amounted to unnecessary delay pursuant to N.C.G.S. § 15A-501(2) and his argument is overruled.

Defendant's argument regarding a violation of his constitutional rights pursuant to the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 19 of the North Carolina Constitution is also without merit. Defendant relies on *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661 (1991), and *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854 (1975). "These two cases deal with the promptness required for a determination of probable cause by a neutral magistrate after a person has been arrested without a warrant." *Chapman*, 343 N.C. at 499, 471 S.E.2d at 356. As previously stated, defendant was arrested at 9:00 a.m. by officers without a warrant, and after his interview concluded at 2:53 p.m., a magistrate issued warrants charging him with the drug offenses and with the murder and robbery of Cook. We hold that "[t]his satisfies the requirement of *Riverside* and *Gerstein* that a magistrate promptly determine probable cause." *Id.* (holding that there was no constitutional violation where the defendant was arrested at 9:30 a.m. without a warrant and after his interrogation

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was complete at 12:30 p.m., a magistrate issued an arrest warrant for him based on probable cause). Based on the foregoing, defendant's argument is overruled.

No error.

Judges ELMORE and ERVIN concur.

STATE OF NORTH CAROLINA

v.

JOHNNY RICHARD GERALD, JR.

No. COA12-1231

Filed 7 May 2013

1. Appeal and Error—notice of appeal—proof of service

The State waived defendant's failure to include proof of service on the State in his notice of appeal where the State did not object to the appeal and participated by filing a responsive brief on the merits. Furthermore, the State acknowledged that the Court of Appeals had the discretion to hear the appeal and defendant's petition for writ of *certiorari*, included as part of his appellate brief, was denied as moot.

2. Constitutional Law—ineffective assistance of counsel—failure to object

Defendant received ineffective assistance of counsel when his trial counsel did not make a timely motion to suppress the statements and observations made during the warrantless entry of defendant's home. Because credibility was central to the jury's ultimate decision, and because the evidence had a strong tendency to corroborate the victim's account and contradict the defendant's version of events, it could not be concluded that there was not a reasonable probability of a different result in the absence of the alleged errors by counsel.

Appeal by Defendant from judgment entered 9 March 2012 by Judge W. David Lee in Richmond County Superior Court. Heard in the Court of Appeals 25 March 2013.

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Attorney General Roy Cooper, by Assistant Attorney General Thomas O. Lawton III, for the State.

Michele Goldman for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

This matter arises from a violent encounter between Defendant Johnny R. Gerald and his then-girlfriend Lafonda Lee on the night of 2 July 2011. Defendant was tried on charges of attempted murder, assault with a deadly weapon inflicting serious injury (“AWDWISI”), and first-degree kidnapping. The jury acquitted Defendant of attempted murder, but returned guilty verdicts on the other two charges. Defendant then pleaded guilty to having attained the status of habitual felon. The trial court imposed an active sentence of 110 to 141 months imprisonment.

[1] Defendant timely filed a written notice of appeal. However, Defendant’s notice of appeal failed to include proof of service on the State as required by our Rules of Appellate Procedure. *See* N.C.R. App. P. 4(a)(2). Our Supreme Court has noted that

failure to serve the notice of appeal [is] a 98defect in the record analogous to failure to serve process. Therefore, 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-American Arts Int’l, Inc., 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993) (per curiam). Here, the State has not objected to the appeal by motion or otherwise and has participated by filing a responsive brief on the merits. Further, the State has acknowledged that this Court has the discretion to hear this appeal. We conclude that the State has waived the failure of service, and accordingly, we deny Defendant’s petition for writ of *certiorari*, included as part of his appellate brief, as moot.

The evidence at trial tended to show the following: On the evening of 2 July 2011, Defendant and Lee returned to Defendant’s home after spending several hours drinking tequila with another couple. Lee also smoked marijuana and used other drugs. Defendant and Lee planned to attend a Fourth of July party later that evening at a bar where Lee

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worked as a bartender. Defendant and Lee gave drastically different accounts of the events that unfolded next.

Defendant testified that he wanted to call for a ride to the party because Lee was very impaired, while Lee insisted on driving herself. During the debate about driving, Defendant discovered cocaine in Lee's belongings and flushed it down the toilet. Lee became enraged and punched Defendant in the nose and hit him with a stick. As Defendant tried to stop his nose from bleeding, he saw Lee pulling a gun from her purse. Defendant grabbed the gun away from Lee, who then went into a bedroom. Defendant hid the gun and then went into the bedroom where he discovered Lee partially undressed. Defendant told Lee to get ready because he was going to call her brother to come and pick her up. Lee came at Defendant with a knife, cutting him in the side. Defendant grabbed the knife away from Lee cutting her hand in the process and hitting her near the right eye. Lee fled into a bathroom. Shortly thereafter, Defendant heard a noise and went to check on Lee. He discovered the bathroom window open and looked out to see Lee running across the yard away from the house.

In contrast, Lee testified that once she and Defendant returned to his house, Defendant decided he did not want to go to the party. Lee still planned to go and went into the bathroom to get ready. When Lee came out of the bathroom, Defendant punched her twice in the face, and after she fell to the floor, continued to hit and kick her with his motorcycle boots. Lee testified that she lost consciousness repeatedly during this assault. At one point, Lee was able to get free and went to the living room to retrieve her gun from her purse but could not find it. Defendant wrestled Lee to the floor, kicked her in the face, and pushed and shoved her back into the bedroom, continuing to beat her. Lee also testified that Defendant pulled her hair out at several points during the assault. In the bedroom, Defendant assaulted Lee with a knife, cutting her hand as she tried to defend herself. Defendant then pulled off some of Lee's clothes and shoved her into the bathroom. Once Defendant closed the door, Lee climbed out the window and dropped about nine feet to the rocky ground below. Lee fled to the home of a neighbor, who called 911. Emergency medical service workers took Lee to the hospital.

Lee's brother, Eric Bullard ("Bullard"), and his wife Christy were notified by the neighbor about what had happened. Bullard went to Defendant's home later that night, but the door was locked and no one answered. The next day, Bullard returned to Defendant's home with his wife where they met Deputy Clyde William Smith, Jr. ("Deputy Smith"),

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of the Richmond County Sheriff's Office ("RCSO"). The three entered Defendant's home, and while Deputy Smith waited in the living room, the Bullards spent about 30 to 45 minutes gathering "evidence" and taking photographs throughout the house. Deputy Smith testified about his observations of blood and disarray in the living room area of the home. The case was assigned to Detective Dennis Smith of the RCSO on 5 July 2011. The Bullards then turned over to Detective Smith most of the evidence they had collected from Defendant's home ("the Bullards' evidence"). Detective Smith testified that the scene of the crimes (Defendant's home) was not properly secured and that no warrant was obtained for the Bullards' search of Defendant's home.

The Bullards' evidence was admitted at trial without objection. Specifically, the State introduced Lee's torn, bloody clothes and photographs showing blood and disarray at Defendant's home. However, Defendant's trial counsel did make an oral motion to suppress the Bullards' evidence *after* its admission, suggesting some items might have been tampered with. The trial court denied the motion, noting that the evidence had already been admitted without objection and was before the jury.

Discussion

On appeal, Defendant makes three arguments: that (1) he received ineffective assistance of counsel ("IAC") when his trial counsel failed to make a timely motion to suppress the Bullards' evidence and Deputy Smith's testimony, (2) the trial court erred in denying his motion to dismiss the first-degree kidnapping charge, and (3) the trial court erred in determining Defendant's prior record level for sentencing him following his guilty plea to having attained the status of habitual felon.

[2] Defendant first argues that he received IAC when his trial counsel failed to make a timely motion to suppress the Bullards' evidence and Deputy Smith's observations during the warrantless entry of Defendant's home. We agree.

In his brief, Defendant specifically contends that there could be no trial strategy that could justify a decision not to try to suppress the Bullards' evidence and Smith's observations and that Defendant was prejudiced by that decision. On 19 March 2013, Defendant filed a motion for appropriate relief with this Court alleging IAC and making substantially the same arguments as contained his brief. The MAR includes an affidavit by Defendant's trial counsel stating that he had no "strategic or tactical reason for not challenging the constitutionality of the warrantless entry into [Defendant's] home[.]"

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When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. In order to meet this burden [the] defendant must satisfy a two part test.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Braswell, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citations, quotation marks, and emphasis omitted).

Claims of IAC "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." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citation omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). However, "should 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 MAR proceeding." *Id.* at 167, 557 S.E.2d at 525 (citation omitted).

Defendant's trial essentially came down to a question of credibility between Defendant and Lee. Both parties testified to a bloody and physical confrontation that moved from room to room in Defendant's home and during which some of Lee's clothes were removed. The contested issues were who had instigated the conflict and which party had done what during its course. The Bullards' evidence and Deputy Smith's observations were the result of a patently unconstitutional seizure, and the trial court would certainly have suppressed the evidence had trial counsel made a proper motion to do so. The State agrees that the evidence was obtained in violation of Defendant's constitutional rights, but asserts that trial counsel's failure to move for its suppression could have been the result of trial strategy. Specifically, the State contends that admission of this evidence was not prejudicial because it was not inconsistent with Defendant's account of the confrontation. Further,

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the State asserts that admission of the evidence may even have been beneficial to Defendant because it permitted him to establish on cross-examination that law enforcement officers failed to properly secure the scene and never performed blood tests or took fingerprints from any of the evidence.

Our review of the Bullards' evidence and Deputy Smith's testimony reveals that they are much more consistent with Lee's account of the confrontation than with Defendant's, and that several observations and photos are directly contradictory to Defendant's version of events. In particular, Deputy Smith described his observation of bloody handprints along a wall in the hallway, bloody handprints where someone had held onto the wall, and bloody fingerprints "dragging down the wall" of the hallway. These observations all support Lee's account of Defendant beating her bloody in the living room and then dragging her down the hall back to the bedroom. Defendant specifically denied dragging Lee down the hall and denied seeing any blood on the walls of the hallway. Thus, Deputy Smith's testimony regarding his observations of the scene completely corroborates Lee's version of what happened and completely contradicts Defendant's testimony.

In addition, photos taken by the Bullards showed Lee's ripped bra and torn shirt, which supports Lee's description of Defendant tearing her clothes off. Defendant, however, denied ripping Lee's clothing. Further, a photo showing blood and hair in the shower also supports Lee's testimony about Defendant pulling her hair out at several points during the struggle. Defendant denied pulling Lee's hair.

As for the idea that Defendant may have benefitted from showing law enforcement incompetency on cross-examination, as noted above, the central issue here was whether Defendant or Lee was most credible in their testimony about the events of 2 July 2011. We see little if any benefit to a general challenge to the work or professionalism of the RSCO. Only Deputy Smith's testimony about his observations during the warrantless search was pertinent to any disputed issues at trial. We find it nonsensical to assert that permitting damaging testimony in order to impeach the witness with that testimony could be a valid strategic decision, when a motion to suppress would have kept the damaging evidence out entirely. Further, with his MAR, Defendant has submitted an affidavit from his trial counsel which flatly states that trial counsel "did not have a strategic or tactical reason for not challenging the constitutionality of the warrantless entry into [Defendant]'s home either before or during trial." In light of these circumstances, we conclude that trial

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counsel’s “conduct fell below an objective standard of reasonableness.” *Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248 (citation and quotation marks omitted).

For the same reasons discussed above — the centrality of Defendant’s and Lee’s credibility to the jury’s ultimate decision and the strong tendency of the Bullards’ evidence and Deputy Smith’s observations to corroborate Lee’s account and contradict Defendant’s version of events — we cannot conclude that there is not a “reasonable probability that in the absence of [trial] counsel’s alleged errors the result of the proceeding would have been different[.]” *Id.* at 563, 324 S.E.2d at 249. Accordingly, Defendant has established that he received ineffective assistance of counsel and is entitled to a new trial.¹ In light of this result, we need not address Defendant’s remaining arguments.

NEW TRIAL.

Chief Judge MARTIN and Judge HUNTER, ROBERT C., concur.

STATE OF NORTH CAROLINA

v.

BRAD DAMONE GREENLEE

No. COA12-419

Filed 7 May 2013

1. False Pretense—motion to dismiss—stolen items sold to pawn shop

The trial court did not err by denying defendant’s motion to dismiss two charges of obtaining property by false pretense in cases 10 CRS 64054 and 11 CRS 00066. There was sufficient evidence that the items sold by defendant to a pawn shop were stolen.

2. False Pretense—motion to dismiss—acting in concert—no actual or constructive presence

The trial court erred by denying defendant’s motion to dismiss the two charges of obtaining property by false pretenses in cases

1. The record on appeal, including Defendant’s MAR, is entirely sufficient for this Court to resolve Defendant’s IAC claim without further investigation or development of his claims. *See Fair*, 354 N.C. at 166, 557 S.E.2d at 524.

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11 CRS 50681 and 11 CRS 50682 based upon the theory of acting in concert. The State failed to present evidence of defendant's actual or constructive presence at the time his friend sold or pawned the item. The remaining cases were remanded for resentencing.

Appeal by Defendant from judgment entered 7 December 2011 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 28 November 2012.

Attorney General Roy Cooper, by Assistant Attorney General Melody R. Hairston for the State.

Marie H. Mobley, for defendant-appellant.

STEELMAN, Judge.

Considering the evidence presented by the State in the light most favorable to the State, there was sufficient evidence that the items sold by defendant to a pawn shop were stolen. The trial court did not err in denying defendant's motion to dismiss these two charges of obtaining property by false pretense. Where the State failed to present evidence of defendant's actual or constructive presence at the time Summers sold or pawned items, the trial court erred in denying defendant's motion to dismiss the other two charges of obtaining property by false pretense, which were based upon the theory of acting in concert.

I. Factual and Procedural Background

On or about 4 November 2010, Richard Perkins noticed that the Global Positioning System (GPS) was missing from his motor vehicle. Mr. Perkins reported the theft to police, advising that the GPS was a TomTom, model number XL 335-s 4.3, with serial number RU3539A01739. On the morning of 4 November 2010, Matthew Shanor discovered that his GPS and digital camera were missing from his work truck. Mr. Shanor reported to police that the stolen GPS was a Magellan Roadmate 1424 with serial number 0789001642302. On 12 November 2010, Samantha Brackett discovered that a GPS and iPod Touch were missing from her motor vehicle. Ms. Brackett reported to police that the missing GPS was a Garmin NUVI 1300 with serial number INVG37535, and the iPod Touch had serial number 9C82913R14N. On or about 31 October 2010, Marcellus Fariss and Christopher O'Neil returned home to discover that there had been a break-in at their residence. They reported many items missing, including two watches, one of which was a men's Seiko sports

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watch, and a Tascam eight-track digital recorder, model DP-008, with serial number DO, or D0, 1092520A. On 27 November 2010, Officer Meg Donahue completed two incident reports, one in response to a larceny from a motor vehicle belonging to David Carlos Bruner, and another in response to a theft reported by Craig Chenevert. Mr. Bruner reported that his Apple iPod, with serial number JQ531643S47, had been stolen, and Mr. Chenevert reported that his GPS, a Garmin NUVI 260 with serial number 17T486845, had been stolen. None of the victims to these thefts saw the person who stole the items.

Following these thefts, multiple items were sold or pawned by either defendant or Farron Lene Summers (Summers), at a pawn shop in Asheville. On 8 November 2010, defendant sold a TomTom GPS, model number N14644, with serial number RU3539A01739. On 26 November, defendant sold a Seiko watch and pawned a Tascam Pocket DP-008 studio recorder with serial number 0050869. On 15 November 2010, Summers sold a Magellan Roadmate GPS, model number 1424, with serial number 0789001642302, and an iPod Touch with serial number 9C82913R14N. On 28 November 2010, Summers sold a Garmin NUVI 260 GPS with serial number 17T486845, and an iPod 4 GB Classic with serial number JQ531G43S47. The documents submitted by defendant and Summers for each of these items stated: “The pledgor of the item(s) attests that it is not stolen, has no liens or encumbrances, and is the pledger’s to sell or pawn.” Both the defendant and Summers signed the documents for the items they sold or pawned.

Police investigators identified defendant and Summers as suspects in the thefts after matching some of the items reported stolen to those sold at the pawn shop. On 30 November 2010, Detective Matt Davis located defendant and Summers at the home of Summers’ mother. Detective Davis spoke with defendant, who told him “that he was a drug dealer, that he sold crack cocaine in Pisgah View Apartments, and that several individuals . . . had the habit of trading items to him for crack.” According to Detective Davis, defendant stated that “he didn’t care whether [the items people would bring to him] were stolen or not, but he would take it if he thought he could make a profit off of it.” Defendant also stated that he had asked Summers to sell items for him.

Summers’ mother consented to a search of her home. She told the investigators that she “found some bags that were stuffed under a bed in the room where [defendant] was sleeping.” The bags contained items similar to those previously sold, (power cords, iPod cords etc.), as well as a Garmin NUVI 1300 GPS with serial number 1NVG37535, and a Sony Walkman digital recorder.

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Defendant was indicted on four counts of obtaining property by false pretense, two counts of conspiring to obtain property by false pretense, and one count of being an habitual felon. At the close of the State's evidence, the trial court granted defendant's motion to dismiss the two conspiracy counts. The jury found defendant guilty of the remaining four charges of obtaining property by false pretense. Defendant pled guilty to being an habitual felon. The trial court consolidated all of the convictions for judgment, found defendant to be a Level V offender for purposes of felony sentencing, and imposed an active sentence of 127-162 months.

Defendant appeals.

II. Standard of Review

This Court reviews an appeal of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). When ruling on a motion to dismiss, "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).

A motion to dismiss should be denied if "there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *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).

Circumstantial evidence may be sufficient to support a conviction "even when the evidence does not rule out every hypothesis of innocence." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citations and quotations omitted).

If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in*

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combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Id. (citations and quotations omitted).

III. Analysis

A. Sufficiency of the Evidence to Support Defendant's Convictions for Items sold by Defendant

[1] In his first argument, defendant contends that the trial court erred, in cases 10 CRS 64054 and 11 CRS 00066, in denying his motion to dismiss the charges, at the close of the State's evidence, based upon a lack of evidence that the items he sold were stolen. We disagree.

These two charges are based upon the defendant's sale of Perkin's TomTom GPS (case 10 CRS 64054), and Fariss' Seiko watch and O'Neil's Tascam recorder (case 11 CRS 00066). Defendant contends that the evidence presented by the State "only rises to the level of suspicion or conjecture, and is not sufficient to support a conviction."

With respect to case 10 CRS 64054, defendant argues that the model number of the TomTom GPS that Perkins reported missing differed from that shown on the sales documents completed by the defendant at the pawn shop.

While there was a variance between the model numbers of the GPS reported stolen by Perkins and that sold by defendant, the serial number of the stolen device was identical to that sold by defendant. Considering this evidence in the light most favorable to the State, and resolving any contradictions in its favor, the trial court did not err in denying defendant's motion to dismiss case 10 CRS 64054.

With respect to case 11 CRS 00066, defendant argues that the serial number contained in the incident report of O'Neil's Tascam Recorder differed from that shown on the sales documents completed by defendant at the pawn shop. Defendant also argues that the description of the watch in the incident report of, "Seiko dive watch with steel band..." is generic, while the description of the watch sold by defendant was of a specific watch, a Seiko 5 men's sports watch with serial number 861921.

While there was a variance between the serial number of the Tascam Recorder, the model number of the recorder reported stolen was identical to the one sold by defendant. Further, O'Neil testified that the 8 track pocket recorder was "a very uncommon piece of equipment." He identified a photograph of the recorder that had been sold and testified that he received his recorder back from the police.

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Fariss testified that his Seiko sports watch was taken during the break-in. Chris Shepherd, an employee of the pawn shop testified that defendant sold the Seiko sports watch at the same time that he pawned the Tascam recorder, on 26 November 2010. Considering this evidence in the light most favorable to the State, and resolving any contradictions in its favor, the trial court did not err in denying defendant's motion to dismiss in case 11 CRS 00066.

Defendant's arguments regarding cases 10 CRS 64054 and 11 CRS 00066 are without merit.

B. Sufficiency of the Evidence to Support Defendant's Convictions
for Items Sold By Summers

[2] In his second argument, defendant contends that the trial court erred in denying his motion to dismiss the charges in cases 11 CRS 50681 and 11 CRS 50682 where the items were sold by Summers, because there was insufficient evidence that defendant and Summers acted in concert. We agree.

[I]f two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose ... or as a natural or probable consequence thereof.

State v. Mason, ___ N.C. App. ___, ___, 730 S.E.2d 795, 800 (2012) (quoting *State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997)). “[C]onstructive presence is not determined by the defendant's actual distance from the crime; the accused simply must be near enough to render assistance if need be and to encourage the actual perpetration of the crime.” *Id.* (quoting *State v. Combs*, 182 N.C. App. 365, 370, 642 S.E.2d 491, 496, *aff'd per curiam*, 361 N.C. 585, 650 S.E.2d 594 (2007)).

For the State to show that defendant and Summers acted in concert, the State had the burden of showing (1) that a crime was committed, (2) that defendant and Summers had a common purpose, and (3) that defendant was either actually present, or near enough to render assistance as needed. Regardless of the evidence presented to support the first two elements, we can find no evidence in the record supporting the required third element. The State presented no evidence as to defendant's location during the offenses enumerated in cases 11 CRS 50681 and 11 CRS 50682. The State did not present any evidence that defendant was present, nearby, or even in the same county. In the absence of any evidence

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showing actual or constructive presence, the trial court erred in denying defendant's motion to dismiss these charges.

We reverse defendant's convictions in cases 11 CRS 50681 and 11 CRS 50682.

IV. Conclusion

The trial court did not err in denying defendant's motion to dismiss in cases 10 CRS 64054 and 11 CRS 00066. However, the trial court erred in denying defendant's motion to dismiss as to cases 11 CRS 50681 and 11 CRS 50682, and the convictions in these cases are reversed.

Since we have reversed defendant's convictions in cases 11 CRS 50681 and 11 CRS 50682, the remaining cases must be remanded for resentencing. *See State v. McLaughlin*, 321 N.C. 267, 272, 362 S.E.2d 280, 283 (1987).

NO ERROR IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING.

Judges STEPHENS and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
BRENT SHAUN HEAVNER

No. COA12-1005

Filed 7 May 2013

1. Prisons and Prisoners—malicious conduct by a prisoner—statute not ambiguous—two distinct acts

The trial court did not err in a malicious conduct by a prisoner case by failing to dismiss one of the two charges. The rule of lenity, which requires that ambiguity concerning the ambit of a criminal statute be resolved in favor of lenity, was not applicable as there is no ambiguity in the statute defining malicious conduct by prisoner. Furthermore, defendant was charged with two separate, distinct acts.

2. Jury—extraneous information—admission erroneous—no contribution to conviction

The trial court did not err in a malicious conduct by a prisoner

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case by denying defendant's motion for appropriate relief. Although it was error for the trial court to receive evidence about the subjective impact of extraneous information a juror received from a conversation the juror had with defendant's mother while waiting in the courthouse hallway prior to jury selection, there was no reasonable possibility that the violation might have contributed to the conviction.

Appeal by Defendant from judgments entered 13 July 2010 by Judge F. Lane Williamson in Lincoln County Superior Court and from order entered 1 March 2012 by Judge Forrest D. Bridges in Lincoln County Superior Court. Heard in the Court of Appeals 31 January 2013.

Attorney General Roy Cooper, by Assistant Attorney General Thomas H. Moore, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Anne M. Gomez, for Defendant.

DILLON, Judge.

Brent Shaun Heavner (Defendant) appeals from judgments entered upon his convictions of three counts of assault on a governmental official and two counts of malicious conduct by prisoner. Defendant also appeals from the trial court's denial of his motion for appropriate relief. We find no error.

The evidence of record tends to show the following: In 2008, Defendant, who was in his early twenties, lived with his grandmother ("Ms. Heavner"), who was eighty-three years old, in Vale, North Carolina. Defendant had substance abuse problems. Ms. Heavner testified that when Defendant drinks alcohol, "he just loses it."

On 16 February 2008, Defendant started drinking alcohol late in the afternoon, which concerned Ms. Heavner. Later that evening, Defendant became violent towards Ms. Heavner and also threatened to harm himself. Ms. Heavner testified that at approximately 10:00 p.m., Defendant "went and got the butcher knife and told [her] that he was going to cut himself, which he . . . did quite often." Ms. Heavner retreated from the house and started across the street to the home of her sister and brother-in-law (the Lovings). Defendant followed her and encouraged her to come back into the house. Ms. Heavner testified that Defendant did not want her to "call the law."

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The Lovings heard the disturbance and turned their porch light on, whereupon Defendant retreated to Ms. Heavner's house. However, Ms. Heavner proceeded to the Lovings' house, and Mr. Loving called the police.

Deputy Christopher Locklear (Deputy Locklear), Deputy J. Owens (Deputy Owens), and Sergeant C.D. Stamper (Sergeant Stamper) responded to Mr. Loving's call. The officers saw Defendant on the front porch of Ms. Heavner's house, but when the officers reached the driveway, Defendant retreated inside. The officers then saw Defendant through a kitchen window holding a butcher knife. The officers discovered that the front door to the house was unlocked, and the officers entered the house. Deputy Locklear approached Defendant, placed him under arrest, and attempted to handcuff Defendant. Deputy Locklear said, when he attempted to handcuff Defendant, the following transpired:

I reached for his right hand, and as soon as I did that he kind of blew up, started resisting. . . . He bucked up and kind of pulled away . . . for me not to be able to handcuff him. . . . We took him to the floor . . . and told him to stay on the ground while we tried to handcuff him. . . . He was very belligerent, started threatening to kill all of us. . . . [W]e finally got his other hand cuffed, [but] he continued to try to get up. . . . I think I asked him to calm down and let us help . . . get him up and he told me I could go to hell. He proceeded to . . . try to call his dog to attack us.

[We] [f]inally got him on his feet, where we held his arm. We walked him 3 to 4 [feet], [but then he] fell to the floor. I asked him to stand back up. And that's when he stated that if he was going anywhere we [had to] carry him, and he wished he could spit in our mouths. . . . [So] when I went to pick him up he spit towards my face [and] hit me in the forehead area. . . . Sergeant Stamper began to help Deputy Owens try to get [Defendant] up, as I was wiping the spit off my forehead.

They got him up . . . and before they could get him out of the house . . . we placed him on the ground one more time because he was kicking. . . . After he got back up I think Sergeant Stamper and Deputy Owens had carried him and placed him on the ground outside in the driveway. . . . [W]e got him outside, stuck him on the ground, his clothes were pulled off where he had struggled so much, his pants. So we pulled his clothes back up so he would be more

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appropriate. When I went to try to pull his clothes back on him he attempted to bite me on the leg, and then spit on me again. It hit me on the right arm. . . . And after he had spit on me for the second time, and this was probably a five minute difference, a five minute time frame difference in between the first spit and the second spit, after he had done that I think I – I don't think I even wiped it off that time. I think we just – myself and Sergeant Stamper picked him up and put him in the back seat of Deputy Owens' car. . . .

Defendant was indicted on two counts of malicious conduct by prisoner based on the two alleged instances of spitting on Deputy Locklear and on three counts of assault on a governmental official.¹ Defendant's case came on for trial at the 12 July 2010 session of Lincoln County Superior Court. On 13 July 2010, the jury found Defendant guilty of three counts of assault on a governmental official and two counts of malicious conduct by prisoner. The trial court, the Honorable F. Lane Williamson presiding, entered judgments on 13 July 2010 consistent with the jury's verdicts, sentencing Defendant to two consecutive terms of 28 to 34 months incarceration.

The day after the jury returned its verdict, Defendant's mother, Janet Elmore, contacted defense counsel and informed him that while waiting in the courthouse hallway prior to jury selection, she had spoken extensively to a person about Defendant's case and about Defendant's mental and substance abuse problems. She later realized that the person served on the jury in Defendant's case. Defendant filed a motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1414(b)(3), alleging that Defendant did not receive a fair trial based on this contact. At the hearing on Defendant's motion for appropriate relief, the juror to whom Ms. Elmore had spoken, Roger Diffendarfer, admitted that the conversation took place but that he did not take it into account in arriving at a verdict. The trial court, the Honorable Forrest D. Bridges presiding, denied Defendant's motion for appropriate relief after making oral findings and conclusions in open court. Judge Bridges also entered a written order denying Defendant's motion for appropriate relief.

Defendant appeals from the 13 July 2010 judgments. Defendant also appeals from the trial court's order denying his motion for appropriate relief.

1. Defendant was also indicted on two counts of communicating threats, which the State voluntarily dismissed during the trial.

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I: Motion to Dismiss

[1] In Defendant's first argument on appeal, he contends the trial court erred in denying his motion to dismiss one of the two malicious conduct by prisoner charges because "the Legislature did not intend multiple punishment[s] for more than one instance of emission of bodily fluids during the same continuous transaction." We disagree.

"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, *cert. denied*, 531 U.S. 890 (2000) (quotation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

N.C. Gen. Stat. § 14-258.4 (2011), defines malicious conduct by prisoner, in pertinent part, as follows:

Any person in the custody of . . . any law enforcement officer, . . . who knowingly and willfully throws, emits, or causes to be used as a projectile, bodily fluids or excrement at a person who is an employee of the State or a local government while the employee is in the performance of the employee's duties is guilty of a Class F felony. . . .

The crime of malicious conduct by a prisoner, as defined by the foregoing statute, has the following elements:

- (1) the defendant threw, emitted, or caused to be used as a projectile a bodily fluid or excrement at the victim;
- (2) the victim was a State or local government employee;
- (3) the victim was in the performance of his or her State or local government duties at the time the fluid or excrement was released;
- (4) the defendant acted knowingly and willfully; and
- (5) the defendant was in the custody of . . . any law enforcement officer. . . .

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State v. Noel, 202 N.C. App. 715, 718, 690 S.E.2d 10, 13, *disc. review denied*, 364 N.C. 246, 699 S.E.2d 642 (2010).

Defendant's argument in this case is not based on an alleged failure by the State to present substantial evidence to support each of the foregoing elements of malicious conduct by prisoner. Rather, Defendant argues that because the evidence in this case shows that the two charges of malicious conduct by prisoner stem from "the same continuous transaction[,]” and because the "Legislature did not intend multiple punishments for more than one instance of emission of bodily fluids[,]” the trial court erred by failing to dismiss one of the charges of malicious conduct by prisoner.² We find this argument without merit.

The question posed by Defendant in this appeal is essentially whether the two incidents of spitting on Deputy Locklear by Defendant constitute two separate charges of malicious conduct by prisoner in violation of N.C. Gen. Stat. § 14-258.4. *See generally*, *State v. Smith*, 323 N.C. 439, 441, 373 S.E.2d 435, 437 (1988) (explaining *Bell v. United States*, 349 U.S. 81 (1955), which the Court describes as "a landmark case" regarding the principal of lenity in construing a criminal statute). Defendant argues the rule of lenity requires that N.C. Gen. Stat. § 14-258.4 be interpreted to support only one charge if, as in this case, a defendant completes multiple acts constituting malicious conduct by prisoner, but does so in one continuous transaction. The rule of lenity, however, "applies only when the applicable criminal statute is ambiguous[,]” *State v. Crawford*, 167 N.C. App. 777, 780, 606 S.E.2d 375, 378, *disc. review denied*, 359 N.C. 412, 612 S.E.2d 324 (2005) (citation omitted), and when applicable, the rule of lenity requires that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity[,]” *Rewis v. United States*, 401 U.S. 808, 812 (1971). Our Supreme Court has declined to apply the rule of lenity to interpret a criminal statute when the statute "only [has one] plausible reading that comports with the legislative purpose" of enacting the statute. *State v. Abshire*, 363 N.C. 322, 332, 677 S.E.2d 444, 451 (2009) (stating that "the word 'address' in terms of indicating defendant's residence is not a liberal reading in favor of the State"); *see also State v. Ellison*, __ N.C. App. __, __, 713 S.E.2d 228, 244 (2011), *aff'd*, __ N.C.

2. The State argues in its brief that the Defendant failed to preserve this argument on appeal because "Defendant made his motion to dismiss only after the close of the State's evidence and did not renew his motion after declining to put on evidence." However, Rule 10(a)(3) of the North Carolina Rules of Appellate Procedure states that a motion to dismiss at the close of the State's evidence is waived only if "the defendant then introduces evidence." In this case, Defendant did not put on evidence; and, therefore, Defendant's appeal on this issue is preserved.

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___, 738 S.E.2d 161 (2013) (declining to apply the rule of lenity when the Court did not “find any ambiguity in the relevant statutory provisions”).

When there is ambiguity in a criminal statute, however, the rule of lenity “forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention.” *State v. Wiggins*, 210 N.C. App. 128, 133, 707 S.E.2d 664, 669, *cert. denied*, 365 N.C. 189, 707 S.E.2d 242 (2011) (quotation omitted). For example, in cases of possession of a firearm by a felon, this Court has held that a “defendant should be convicted and sentenced only once for possession of a firearm by a felon based on his simultaneous possession of [multiple] firearms[.]” *State v. Garris*, 191 N.C. App. 276, 285, 663 S.E.2d 340, 348, *disc. review denied*, 362 N.C. 684, 670 S.E.2d 907 (2008); *see also State v. Whitaker*, 201 N.C. App. 190, 207-08, 689 S.E.2d 395, 405-06 (2009), *aff’d*, 364 N.C. 404, 700 S.E.2d 215 (2010) (reversing ten of eleven convictions for possession of a firearm by a convicted felon where defendant possessed all eleven firearms simultaneously); *compare Smith*, 323 N.C. at 443, 373 S.E.2d at 438 (holding that a single transaction involving multiple obscene materials constitutes but one offense). This is because “the applicable . . . statute [in each case] shows no indication that the North Carolina Legislature intended for [the statute] to impose multiple penalties[.]” *Wiggins*, 210 N.C. App. at 134, 707 S.E.2d at 669 (quotation omitted).

In the case *sub judice*, Defendant relies on *State v. Dilldine*, 22 N.C. App. 229, 206 S.E.2d 364 (1974), to support his assertion that because the two spitting incidents arose out of the same transaction, i.e., Defendant’s arrest, only one act of malicious conduct occurred. In *Dilldine*, the defendant fired five bullets in succession at the victim, though three of the bullets hit the victim in the front, and, after the victim turned away from the defendant, two bullets hit the victim in the back. *Id.* at 231, 206 S.E.2d at 366. The defendant was charged with two separate counts of felonious assault with intent to kill, one count for the three bullets that hit the victim in the front and another count for the two bullets that hit the victim in the back. *Id.* This Court held that “[i]t was improper to have two bills of indictment and two offenses growing out of this one episode.” *Id.*

We believe, however, that this case is distinguishable from *Dilldine*. The facts of this case are more analogous to the facts in a case subsequent to *Dilldine* decided by our Supreme Court in *State v. Rambert*, 341 N.C. 173, 175, 459 S.E.2d 510, 512 (1995). In *Rambert*, the Supreme Court reversed this Court’s ruling that the “defendant could be convicted of and sentenced for only one count of discharging a firearm into occupied

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property” when the defendant “fired three shots from one gun into occupied property within a short period of time[.]” *Id.* at 174-75, 459 S.E.2d at 511. The *Rambert* court reasoned that “the evidence clearly shows that defendant was not charged three times with the same offense for the same act but was charged for three separate and distinct acts.” *Id.* at 176, 459 S.E.2d at 512.

In *State v. Maddox*, 159 N.C. App. 127, 583 S.E.2d 601 (2003), this Court compared *Dilldine* and *Rambert* as follows:

The scenario cautioned against in *Dilldine* is exactly the scenario presented in the case *sub judice*. There is no evidence that the five shots fired by defendant at [the victim] were separate assaults[.] . . . The State’s attempt to analogize this case to *State v. Nobles*, 350 N.C. 483, 515 S.E.2d 885 (1999)[,] and *State v. Rambert*, 341 N.C. 173, 459 S.E.2d 510 (1995)[,] are unpersuasive. First of all, both cases are distinguishable in that neither involved charges of assault but instead multiple charges of discharging a weapon into occupied property. (citations omitted).

. . . .

[T]he North Carolina Supreme Court [in *Rambert*] concluded the evidence was sufficient to support the multiple charges of discharging a weapon into occupied property as it showed [the] defendant had been required to “ ‘employ his thought processes each time he fired the weapon’ ” and that each shot was an “ ‘act . . . distinct in time, and each bullet hit the vehicle in a different place.’ ”

Id. at 132-133, 583 S.E.2d at 605 (internal citations omitted). Employing the Court’s reasoning in *Maddox*, we believe *Dilldine* is distinguishable from the case *sub judice*, and the principle of *Rambert* is applicable here. Similar to the facts in *Rambert*, Defendant was not charged with assault but rather with spitting at a police officer in violation of N.C. Gen. Stat. § 14-258.4. Each act was distinct in time and location. The first act involved Defendant spitting on Officer Locklear’s forehead while Defendant was still in the house. The second act occurred five minutes later and involved Defendant spitting on Officer Locklear’s arm after Defendant had been taken out of the house.

Furthermore, we believe the statute defining the crime of malicious conduct by prisoner is not ambiguous. The statute clearly states the elements necessary to constitute and complete the act of malicious

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conduct by prisoner. Assuming the other elements are met, the definition of malicious conduct by prisoner allows for the crime to be complete when “the defendant thr[ows], emit[s], or cause[s] to be used as a projectile a bodily fluid or excrement at the victim[.]” *Noel*, 202 N.C. App. at 718, 690 S.E.2d at 13. Because there is no ambiguity in the statute defining malicious conduct by prisoner, and in accordance with the Supreme Court’s holding in *Rambert*, we conclude that the trial court did not err by denying Defendant’s motion to dismiss one of the charges of malicious conduct by prisoner.

II: Motion for Appropriate Relief

[2] In Defendant’s second argument on appeal, he contends the trial court erred in denying his motion for appropriate relief because the trial court erroneously allowed the juror, Mr. Diffendarfer, to testify about the effect of Ms. Elmore’s statements on his mental processes and further erroneously took the foregoing testimony into account in denying Defendant’s motion for appropriate relief.

“A motion for appropriate relief is a *post-verdict* motion (or a post-sentencing motion where there is no verdict) made to correct errors occurring prior to, during, and after a criminal trial.” *State v. Handy*, 326 N.C. 532, 535, 391 S.E.2d 159, 160-61 (1990) (emphasis in original). Our standard of review from a trial court’s denial of a motion for appropriate relief is well-established:

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. However, the trial court’s conclusions are fully reviewable on appeal.

State v. Lutz, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quotation omitted).

In his brief, Defendant raises the issue of extraneous evidence presented to the jury outside the courtroom, quoting N.C. Gen. Stat. §15A-1240(c)(1) which states the following:

(c) After the jury has dispersed, the testimony of a juror may be received to impeach the verdict of the jury on which he served, subject to the limitations in subsection (a), only when it concerns:

(1) Matters not in evidence which has come to the attention of one or more jurors under circumstances which would violate the defendant’s

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constitutional *right to confront the witnesses against him*[,] . . .

Id. (emphasis added.)

When a motion asserting the right to a new trial is based on the violation of a constitutional right, “the ruling becomes a question of law, fully reviewable on appeal.” *State v. Lyles*, 94 N.C. App. 240, 248, 380 S.E.2d 380, 395 (1989) (citation omitted). “Under North Carolina law, the violation of any right guaranteed by the United States Constitution is presumed to be prejudicial, and the *burden is then on the State* to show that it was harmless beyond a reasonable doubt.” *Id.* (emphasis in original); see also *United States v. Bassler*, 651 F.2d 600, 603 (8th Cir. 1981) (stating that “[b]ecause Rule 606(b) precludes the district court from investigating the subjective effects of any extrinsic material on the jurors, whether such effects might be shown to affirm or negate the conclusion of actual prejudice, a presumption of prejudice is created and the burden is on the government to prove harmlessness”) (citations omitted).

An error of constitutional magnitude will be held to be harmless beyond a reasonable doubt only when the court can declare a belief that there is no reasonable possibility that the violation might have contributed to the conviction. In the context of jury exposure to extraneous information, because inquiry into jurors’ mental processes is prohibited, the test for determining harmlessness generally has been whether there was “no reasonable possibility” that “an average juror” could have been affected by it.

Lyles, 94 N.C. App. at 249, 380 S.E.2d at 396 (emphasis in original).

In *Lyles*, we laid out a factor test to assess whether the introduction of extraneous evidence is harmless beyond a reasonable doubt:

In assessing the impact of the extraneous evidence on the mind of the hypothetical “average juror,” the court should consider: (1) the nature of the extrinsic information and the circumstances under which it was brought to the jury’s attention; (2) the nature of the State’s case; (3) the defense presented at trial; and (4) the connection between the extraneous information and a material issue in the case.

Id. (citation omitted).

Although the trial court’s order does not clearly identify its allocation of the burden of proof and fails to apply the proper analysis, most

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of the findings of fact are not challenged by Defendant and are therefore binding on this court. We will therefore consider *de novo* whether these facts support a conclusion that the extraneous information was harmless beyond a reasonable doubt.

We agree with Defendant that the trial court should not have considered Mr. Diffendarfer's mental processes regarding the extraneous information. "Generally, once a verdict is rendered, jurors may not impeach it." *State v. Heatwole*, 344 N.C. 1, 12, 473 S.E.2d 310, 314 (1996), *cert. denied*, 520 U.S. 1122 (1997) (citation omitted). However, N.C. Gen. Stat. § 15A-1240 (2011), and N.C. Gen. Stat. § 8(c)-1, Rule 606(b) (2011), provide limited exceptions to the rule against impeachment of a verdict.

Section 15A-1240 allows impeachment of a verdict only in a criminal case . . . [in situations where] matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him. Rule 606(b) provides that when the validity of a verdict is challenged, a juror is competent to testify only "on the question [of] whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

Heatwole, 344 N.C. at 12, 473 S.E.2d at 314-15. We believe, in the case *sub judice*, that the conversation between Ms. Elmore and Mr. Diffendarfer was both "extraneous information" within the meaning of Rule 606(b) and a "matter not in evidence" that implicated Defendant's confrontation right within the meaning of N.C. Gen. Stat. § 15A-1240(c)(1). The trial court's findings of fact, as discussed in more detail below, reveal that Ms. Elmore did discuss Defendant's case, to some degree, with Mr. Diffendarfer. This, we believe, was "information dealing with the defendant [and] the case" being tried, which "reache[d] a juror without being introduced in evidence." *State v. Rosier*, 322 N.C. 826, 832, 370 S.E. 2d 359, 363 (1988).

Though N.C. Gen. Stat. § 8C-1, Rule 606(b) allows a juror to testify about the information that was improperly brought to his attention, this Court has held a juror may not testify as to how the information may have affected his verdict:

Rule 606(b) plainly states that "*a juror may not testify as to . . . the effect of anything upon his or any other*

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juror's mind or emotions as influencing him to assent to or dissent from the verdict . . . or concerning his mental processes in connection therewith. . . ." Similarly, Section 15A-1240(a) provides that "no evidence may be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined." Thus, it is clear that jurors may testify regarding the *objective events* listed as exceptions in the statutes, but are prohibited from testifying to the *subjective effect* those matters had on their verdict.

Lyles, 94 N.C. App. at 245-46, 380 S.E.2d at 394 (1989) (emphasis in original) (internal citations omitted). Defendant specifically argues on appeal that the trial court committed error by allowing Mr. Diffendarfer to testify about his mental processes in finding Defendant guilty and by considering Mr. Diffendarfer's testimony regarding his mental processes in its denial of Defendant's motion for appropriate relief.

The trial court's written order denying Defendant's motion for appropriate relief includes the following findings of fact:

10. That Roger Diffendarfer, juror, testified that he had not connected the Defendant with Janet Elmore, that it was a casual conversation, and that *it did not in any way affect his deliberations in the Defendant's case.*

. . . .

12. That the testimony of the juror Roger Diffendarfer was believable, credible and unbiased; that he testified without emotion, and that his testimony was in stark contrast to that of Janet Elmore, who had reason to be biased for her son; further, that it is not credible that she would be so focused on her son that she would not notice said juror for two days.

Based upon the foregoing the court finds that as a matter of law that there was no actual or potential prejudice to the Defendant.

(emphasis added). As evidenced in its findings, the trial court admitted and considered Mr. Diffendarfer's testimony that his conversation with

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Ms. Elmore “did not in any way affect his deliberations in the Defendant’s case.” See *Lyles*, 94 N.C. App. at 245-46, 380 S.E.2d at 394. This was error.

Although it was error for the trial court to receive evidence about the subjective impact of the extraneous information on the juror, the other findings of fact are not challenged on appeal and are sufficient to support the trial court’s conclusion. Applying the *Lyles* test here, based only upon the uncontested facts as found by the trial court and excluding any consideration of the juror’s mental processes, there is no reasonable possibility that a juror could have been affected by the extraneous information.

The trial court specifically found Mr. Diffendarfer’s testimony about the conversation between himself and Ms. Elmore credible. Mr. Diffendarfer testified that Ms. Elmore “said that [her son] was in trouble and she had come up from somewhere down south to support him, and that he had been in trouble some time before. And that was it. She never said what the trouble was.” The juror further testified that Ms. Elmore never told him her son’s name or what he had been charged with.

Ms. Elmore did testify to a more detailed and substantial conversation. Specifically, she testified that she told him the following:

[I] was here from Florida to support my son, that he was accused of spitting on a police officer. I also told him that my son had been in trouble before, he had a record, and that – I told him several things about my son. To sum everything up, I told him that my son was a drug addict, he was an alcoholic, that he self mutilated. I told him a lot of things about my son.

Ms. Elmore also testified that she told Mr. Diffendarfer her son’s name was Brent.

The trial court specifically found Mr. Diffendarfer’s testimony regarding the content of the conversation credible and found Ms. Elmore’s testimony not credible. The trial court specifically noted that it did not find Ms. Elmore’s testimony credible because she had reason to be biased, and the trial court contrasted her demeanor with the unemotional testimony of Mr. Diffendarfer. Such determinations are the province of the trial court and not reviewable on appeal. *Nix v. Nix*, 80 N.C. App. 110, 115, 341 S.E.2d 116, 119 (1986); *Headen v. Insurance Co.*, 206 N.C. 860, 862, 175 S.E. 282, 283 (1934). In any event, Defendant has not challenged any of the trial court’s findings regarding the content of the information or the manner of its presentation.

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Based upon the findings which are not challenged on appeal, we conclude that there is no reasonable possibility that an average juror could have been affected by the extraneous information conveyed in the conversation Mr. Diffendarfer had with Ms. Elmore. As to the nature of the extrinsic information and circumstances under which the juror was exposed to this information, the findings show that the information was quite vague. According to the findings of fact, Ms. Elmore did not tell the juror any of the details of her son's case or even his name. Nothing she said was material to the issues in the case. As to the nature of the State's case, the evidence against Defendant was overwhelming. Defendant did not present any evidence at trial. There was no connection between the extraneous information and any issue, much less a material issue, in the case. Every factor as identified in *Lyles* clearly weighs against any prejudice to Defendant. Under these facts, there is "no reasonable possibility that the violation might have contributed to the conviction." *Lyles*, 94 N.C. App. at 249, 380 S.E.2d at 396. The State therefore met its burden of demonstrating that this error was harmless beyond a reasonable doubt. Therefore, we affirm the trial court's order denying Defendant's motion for appropriate relief.

NO ERROR.

Judge STEPHENS and Judge STROUD concur.

STATE OF NORTH CAROLINA

v.

MADISA BENEIA MACON, DEFENDANT

No. COA12-812

Filed 7 May 2013

1. Criminal Law—retrial following mistrial—de novo—refusal to give instruction at first trial—not binding at second

The judge in a driving while impaired prosecution following a mistrial did not err by giving an instruction that refusal to take an alcohol breath test could be considered as evidence of guilt even though the judge in the first trial had refused to give the instruction. A trial following a mistrial is *de novo*, unaffected by rulings made during the original trial, and the rule that one superior court judge cannot overrule another in the same matter does not apply.

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Moreover, the doctrine of collateral estoppel applies only to an issue of ultimate fact determined by a final judgment. In this case, since there was no final judgment because of the mistrial, collateral estoppel cannot apply.

2. Motor Vehicles—driving while impaired—instructions—refusal to take alcohol breath test—sufficient evidence

The judge in a driving while impaired prosecution that followed an initial mistrial did not err by giving an instruction that refusal to take the alcohol breath test could be considered as evidence of guilt where there was evidence supporting the instruction. Evidence of defendant's failure to follow instructions regarding the breath test was evidence that defendant refused to take the test, despite the fact that she did blow into the instrument. The officer's testimony that he did not mark the test as a refusal immediately following administration of the test and did not report defendant's test as a refusal to the Department of Motor Vehicles went only to the weight and credibility of the evidence.

Appeal by defendant from judgment entered 25 January 2012 by Judge R. Allen Baddour in Orange County Superior Court. Heard in the Court of Appeals 12 December 2012.

Attorney General Roy Cooper, by Assistant Attorney General Carrie D. Randa, for the State.

Richard Croutharmel for defendant-appellant.

GEER, Judge.

Defendant Madisa Benea Macon appeals from her conviction of driving while impaired ("DWI"). Following the declaration of a mistrial when the jury could not reach a verdict on the DWI charge, defendant was retried. During the retrial, the trial judge instructed the jury that it could consider her refusal to take a breath test as evidence of her guilt even though, during defendant's first trial, a different trial judge had ruled that the instruction was not supported by the evidence. Although defendant argues that the second trial judge was bound by the first judge's legal ruling based on collateral estoppel and the principle that one superior court judge may not overrule another judge, we hold that neither doctrine applies to legal rulings in a retrial following a mistrial.

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Facts

The State's evidence tended to show the following facts. At approximately 4:00 a.m. on 24 April 2010, Officer Gideon LeCraft of the Chapel Hill Police Department was driving on Franklin Street in Chapel Hill, North Carolina, when he noticed a vehicle stopped at a traffic light in the opposite lane with its lights off. Officer LeCraft flashed his lights to inform the driver that his or her lights were off. When the light turned green, the driver remained stopped for roughly 30 seconds, the windshield wipers on the vehicle came on, and then the vehicle proceeded forward. Because the vehicle's lights remained off, Officer LeCraft made a U-turn, drove up behind the vehicle, activated his blue lights, and initiated a traffic stop.

Officer LeCraft approached the vehicle and asked defendant, the driver, for her license and registration. Officer LeCraft smelled a "slight to moderate" odor of alcohol coming from the vehicle as well as an odor of alcohol coming from defendant's breath. He further observed that defendant's eyes "were red, glassy" and that defendant's speech was "sort of slurred." Defendant also had difficulty locating her license in her wallet until Officer LeCraft identified it for her. Officer LeCraft also noted that there was a passenger in the vehicle who appeared to be "extremely intoxicated."

Officer LeCraft then administered certain field sobriety tests. He first conducted the Horizontal Gaze Nystagmus ("HGN") test. Of the six clues of impairment Officer LeCraft was trained to identify when performing the HGN test, he observed five in defendant. Defendant then exhibited clues of impairment during the "walk-and-turn" test by failing to maintain her balance, stepping off the line, and making an improper turn. Defendant failed to comply with instructions during the "one-legged stand" test by counting incorrectly and putting her foot down. Defendant additionally tested positive for alcohol on the officer's portable breath test instrument. Officer LeCraft then arrested defendant for DWI.

Officer Charles Shehan of the Chapel Hill Police Department responded to the traffic stop as a "cover officer." Once defendant was arrested and transported to the police department, Officer Shehan conducted a chemical breath test on defendant. Officer Shehan read defendant her rights regarding the test and explained the proper method for completing the test. Defendant blew into the instrument, but allowed her breath to taper off such that the instrument could not register a breath sample. On two more tries, defendant, in a similar manner, provided insufficient samples of her breath. The instrument then "timed out."

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Defendant was given a second opportunity to provide breath samples, but she again provided three insufficient samples, each time allowing her breath to taper off prematurely. As a result, the instrument timed out a second time. Officer Shehan believed defendant was not attempting to provide a sufficient breath sample. The officer did not mark defendant's breath test as a refusal although he could have. Based on his observation of defendant, Officer Shehan formed the opinion that defendant had consumed a sufficient quantity of alcohol as to appreciably impair her mental and physical abilities.

On 24 April 2010, defendant was cited for DWI and failing to operate a vehicle's headlamps between sunset and sunrise. Defendant was convicted of DWI in Orange County District Court. Defendant appealed to superior court for a trial *de novo*. Following a trial on 22 July 2011 (the "2011 trial"), the jury found defendant guilty of failing to burn headlamps, but it was unable to reach a verdict as to the DWI charge. The presiding judge, Judge Michael R. Morgan, accordingly declared a mistrial as to the DWI charge.

On 23 January 2012, defendant was again tried for DWI in superior court. At the second trial (the "2012 trial"), Cyril Broderick testified for the defense that he is the owner of Cafe Beyond, a bar located on Franklin Street in Chapel Hill. Defendant came to his bar on 24 April 2010 and stayed at the bar for roughly two hours and 30 minutes, but did not drink alcohol at the bar. Defendant's interactions with friends and her motor skills appeared "fine" to Mr. Broderick.

Between 2:30 and 2:40 a.m., Mr. Broderick asked defendant to give his friend "Roger" a ride home because Roger had been drinking, and defendant had not and was not impaired. When Mr. Broderick was driving himself home roughly 15 minutes later, he saw defendant's car pulled over for a traffic stop. He called the police department to ask if defendant was in custody, was informed that she was, and drove to the police department. Upon arriving, Mr. Broderick saw defendant crying and defendant told him she was "very, very tired, had a long day, [and] that she had been up since 4:00 in the morning." Mr. Broderick again observed that defendant's motor skills were "fine," and she did not appear impaired.

Following the 2012 trial, the jury found defendant guilty of DWI. The presiding judge, Judge R. Allen Baddour, sentenced defendant to a term of 60 days imprisonment, but suspended the sentence and placed defendant on 12 months of supervised probation. Defendant timely appealed to this Court.

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Discussion

Defendant argues on appeal that the trial court erred by instructing the jury that it could consider whether defendant refused to submit to a breath test in deciding her guilt for DWI. At the 2011 trial, Judge Morgan ruled that a jury instruction on defendant's refusal to submit to a breath test was not supported by the evidence. At the 2012 trial, however, Judge Baddour ruled, over defendant's objection, that the refusal instruction was supported by the evidence and, accordingly, gave the instruction.

[1] Defendant first contends that Judge Baddour was barred from giving the refusal instruction at the 2012 trial because, defendant asserts, "rulings made as a matter of law in the first trial are binding on the judge in a second trial, even when the first trial resulted in a mistrial." Defendant's argument is primarily premised upon her contention that the doctrine of collateral estoppel applied here to bar the State from re-litigating Judge Morgan's ruling that the refusal instruction was not warranted based on the evidence presented in the 2011 trial. Defendant's argument also appears to be partially premised upon the rule that " 'no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.' " *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987) (quoting *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)).

We find *State v. Harris*, 198 N.C. App. 371, 679 S.E.2d 464 (2009), controlling with respect to both prongs of defendant's argument. First, the rule that one superior court judge cannot overrule another in the same matter does not apply to rulings made following a mistrial because, as this Court explained in *Harris*, "[w]hen the trial court declares a mistrial, 'in legal contemplation there has been no trial.' " *Id.* at 376, 679 S.E.2d at 468 (quoting *State v. Sanders*, 347 N.C. 587, 599, 496 S.E.2d 568, 576 (1998)). Thus, "[w]hen a defendant's trial results in a hung jury and a new trial is ordered, the new trial is '[a] trial *de novo*, unaffected by rulings made therein during the [original] trial.' " *Id.* (first alteration added) (quoting *Burchette v. Lynch*, 139 N.C. App. 756, 760, 535 S.E.2d 77, 80 (2000)). *See also Burchette*, 139 N.C. App. at 760, 535 S.E.2d at 80 ("[A] 'mistrial results in nullification of a pending jury trial.' " (quoting 75B Am. Jur. 2d *Trial* § 1713 (1992))).

In *Harris*, the defendant was charged with, among other offenses, possession with intent to sell or deliver cocaine and, at his first trial, the jury deadlocked on that charge causing the trial judge, Judge Henry E. Frye, Jr., to declare a partial mistrial. 198 N.C. App. at 373, 374, 679 S.E.2d at 466. At the first trial, Judge Frye excluded certain evidence

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under Rule 404(b) of the North Carolina Rules of Evidence. *Id.* at 373, 679 S.E.2d at 466. The defendant was retried and, at his second trial, Judge Judson D. DeRamus, Jr. ruled that the same evidence was admissible under Rule 404(b). *Id.* at 374, 679 S.E.2d at 466.

On appeal, the defendant in *Harris* argued that Judge DeRamus erred in admitting the evidence both because Judge DeRamus was bound by Judge Frye's ruling regarding admissibility of the evidence and because admission of the evidence was barred by collateral estoppel. *Id.* at 375, 679 S.E.2d at 467. The Court rejected the arguments, reasoning that "[w]hen Judge Frye declared a mistrial on the charge of possession with intent to sell or deliver cocaine, his evidentiary rulings on the 404(b) evidence no longer had legal effect." *Id.* at 376, 679 S.E.2d at 468. Accordingly, the Court held, "neither the doctrine of collateral estoppel nor the one judge overruling another rule can apply to th[at] ruling." *Id.*

The defendant in *Harris* further argued that Judge DeRamus erred by failing to follow a ruling made by Judge Frye granting the defendant's motion to record all of the proceedings. *Id.* at 377, 679 S.E.2d at 468. Again, this Court held, "[a]s Judge DeRamus was not bound by any of Judge Frye's rulings in the [first] trial, he did not err by failing to comply with Judge Frye's order for complete recordation." *Id.* (emphasis added).

Similarly, in this case, after Judge Morgan declared a mistrial as to the DWI charge following defendant's first trial, "in legal contemplation there ha[d] been no trial." *Id.* at 376, 679 S.E.2d at 468 (quoting *Sanders*, 347 N.C. at 599, 496 S.E.2d at 576). On retrial de novo, Judge Baddour was not bound by jury instruction rulings made during the first trial. *Id.* See also *Simpson v. Plyler*, 258 N.C. 390, 398, 128 S.E.2d 843, 849 (1963) (holding rule that one superior court judge cannot overrule another was not violated during retrial because in first trial, when judge set aside verdict and ordered new trial, he "vacated *all rulings* made by him in the course of the trial" (emphasis added)). Therefore, under *Harris*, Judge Baddour's decision to give the refusal instruction did not violate the rule that one superior court judge cannot overrule another in the same matter or the doctrine of collateral estoppel.

Moreover, the doctrine of collateral estoppel applies only to an issue of ultimate fact determined by a final judgment. *State v. Edwards*, 310 N.C. 142, 145, 310 S.E.2d 610, 613 (1984) ("Under the doctrine of collateral estoppel, an *issue* of ultimate fact, once determined by a valid and final judgment, cannot again be litigated between the same parties in any future lawsuit."). Here, Judge Morgan's ruling involved a question of law, not fact, and there was no final judgment because of the mistrial on the DWI charge. Collateral estoppel cannot, therefore, apply to this

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case. See *State v. Davis*, 106 N.C. App. 596, 600-01, 418 S.E.2d 263, 266 (1992) (when jury acquitted defendant on charges relating to one victim but could not reach verdict on charges relating to second victim and trial court ordered a mistrial with respect to second victim, holding that “[t]he jury was hung . . . and the protections of . . . collateral estoppel [we]re inapplicable” upon retrial).

Defendant nonetheless cites *State v. Cornelius*, 219 N.C. App.329, 723 S.E.2d 783, *appeal dismissed and disc. review denied*, 366 N.C. 236 731 S.E.2d 173 (2012), *State v. Dial*, 122 N.C. App. 298, 470 S.E.2d 84 (1996), and *State v. Melvin*, 99 N.C. App. 16, 392 S.E.2d 740 (1990), in support of her argument. None of these cases involved the same procedural posture as this case.

In both *Dial* and *Cornelius*, the juries in the first trial reached verdicts on certain issues, but the trial court was required to declare a partial mistrial on other issues. *Cornelius*, 219 N.C. App. at 331, 723 S.E.2d at 785; *Dial*, 122 N.C. App. at 302, 470 S.E.2d at 87. This Court held in both cases that collateral estoppel applied during the retrials with respect to the already-rendered verdicts, and the defendants could not re-litigate the issues determined by the prior verdicts. *Cornelius*, 219 N.C. App. at 337, 723 S.E.2d at 788, 789; *Dial*, 122 N.C. App. at 306, 470 S.E.2d at 89. Neither *Cornelius* nor *Dial* applies when, as here, there was no relevant jury verdict accepted by the trial court during the 2011 trial and defendant, instead, challenges a legal ruling by the court.

Defendant’s reliance on *Melvin* is also misplaced. There, during the first trial, the trial court heard voir dire testimony prior to denying the defendant’s motion to suppress his confession. 99 N.C. App. at 20, 392 S.E.2d at 742. During the defendant’s retrial following a mistrial, the court refused to grant a voir dire hearing on the confession evidence since one had been held during the first trial. *Id.* On appeal, the defendant contended that “a voir dire hearing must be held in order to determine whether any additional evidence could be brought out which would warrant reconsideration of the order from the first trial.” *Id.*, 392 S.E.2d at 743. While this Court upheld the trial court’s decision not to conduct a new voir dire hearing because the defendant failed to produce any additional evidence not heard in the first hearing and because the trial court had reviewed the prior order and decided it should remain in effect, *id.*, nothing in *Melvin* holds or even suggests that the trial court, on retrial, was bound by the order entered during the defendant’s first trial.

Consequently, as this Court held in *Harris*, Judge Baddour was not bound by Judge Morgan’s legal rulings during the first trial and was

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entitled to revisit the issue whether to instruct the jury that if it found defendant had refused to submit to a breath test, it could consider that refusal as evidence of guilt. Based on the evidence before him, Judge Baddour gave the following instruction over defendant's objection:

If the evidence tends to show that a chemical test known as an Intoximeter was offered to the defendant by a law enforcement officer and that the defendant refused to take the test, you may consider this evidence together with all other evidence in determining whether the defendant was under the influence of an impairing substance at the time the defendant drove a motor vehicle.

[2] Defendant argues alternatively that the evidence at his second trial still did not support the giving of the instruction. Jury instructions are meant to "clarify issues so that the jury can apply the law to the facts of the case." *State v. Williams*, 136 N.C. App. 218, 222, 523 S.E.2d 428, 432 (1999). Accordingly, a trial judge may "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). The question whether the evidence presented at trial was sufficient to support a jury instruction is reviewed de novo by this Court. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

This Court addressed whether the evidence sufficiently showed a refusal to take a breath test in *Tedder v. Hodges*, 119 N.C. App. 169, 457 S.E.2d 881 (1995). There, the petitioner driver appealed from the revocation of his driver's license arguing, among other things, that the respondent Commissioner of the North Carolina Department of Motor Vehicles' evidence "failed to prove that petitioner willfully refused to submit to the chemical analysis." *Id.* at 174, 457 S.E.2d at 884. This Court summarized the pertinent evidence as follows:

Here, Officer Kapps testified that after Officer Hutchins requested petitioner to take a breathalyzer test, petitioner put his fingers in his mouth and Officer Kapps had to restart the observation. Officer Kapps admitted that she had not told petitioner not to put anything in his mouth, but after he put his fingers in his mouth, she instructed him that if he did it again, he would be written up as a refusal. Officer Kapps further testified that after the second observation period, petitioner blew into the instrument five or six times, but that "when he got the tone to start, he would stop blowing." Officer Kapps

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testified that she told petitioner before he started blowing that she “needed for him to blow hard enough to bring that tone on and to blow until [she] told him to stop.” Officer Kapps testified that she could not tell if petitioner physically could not blow into the machine or if he was intentionally not blowing. Although Officer Hutchins testified that petitioner appeared to be generally cooperative, Officer Hutchins also testified that petitioner “kept leaning over and putting his fingers in his mouth” and that Officer Kapps and he had to tell petitioner several times not to put his fingers in his mouth or they would write him up as a refusal.

Id. at 174-75, 457 S.E.2d at 884-85. The Court concluded that the “respondent’s evidence showed that petitioner failed to follow the instructions of the breathalyzer operator.” *Id.* at 175, 457 S.E.2d at 885. Further, a “[f]ailure to follow the instructions of the breathalyzer operator is an adequate basis for the trial court to conclude that petitioner willfully refused to submit to a chemical analysis.” *Id.*

Here, Officer Shehan testified that he “explain[ed] the process of the instrument” and “the proper method on how to administer the test” to defendant. He then asked defendant to provide a breath sample. Officer Shehan testified that defendant blew into the instrument three times during the first administration of the breath test, but provided three insufficient samples because, each time, “[s]he would start to blow and then taper off on the breath which would be indicated by the bars [on the instrument] which would show initially how much breath was going in and then it would then taper back to the point to where the instrument would say ‘insufficient sample.’” After these three insufficient attempts, the instrument “‘timed out.’”

Officer Shehan then gave defendant a second opportunity to provide sufficient breath samples, but defendant again repeatedly provided insufficient samples by initially blowing into the instrument but then tapering off her breath prematurely such that the instrument read “‘insufficient sample’” after timing out a second time. In total, defendant provided six insufficient breath samples.

Based on this behavior, Officer Shehan formed the opinion that defendant was not attempting to give a sufficient breath sample. He testified that defendant appeared to be breathing normally and that he has never observed a person who appeared to be breathing normally who was unable to provide a sufficient breath sample. Officer Shehan also

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noted that he had observed people who did appear to have difficulty breathing who nonetheless were able to provide sufficient breath samples. Officer Shehan testified at trial that he “could have and should have submitted . . . the test tickets in addition to the affidavits that were signed to DMV . . . and request[ed] a revocation of [defendant’s] driver’s license based on a nonaggressive refusal.” In addition, Officer Shehan testified that he could have marked, although he did not, defendant’s breath test as a refusal based on her behavior during the testing. Finally, Officer Shehan testified that defendant displayed a “passive resistance . . . towards following orders and following directions” during the testing process.

As in *Tedder*, the evidence of defendant’s failure to follow instructions regarding the breath test was evidence that defendant refused to take the test, despite the fact that she did blow into the instrument. Accordingly, the trial court did not err, based on the evidence, in giving the refusal instruction to the jury.

Defendant nonetheless argues that because Officer Shehan did not mark the test as a refusal immediately following administration of the test and did not report defendant’s test as a refusal to the Department of Motor Vehicles, his “oral testimony that he would have done things differently if he had them to do over was insufficient to counter the weight of his actions at the time of the breath test.” This argument goes to the weight and credibility of the evidence, which were questions for the jury to decide in determining whether the evidence did, in fact, demonstrate defendant’s guilt. Because there was evidence supporting the refusal instruction, defendant has not shown error by the trial court.

No error.

Judges BRYANT and CALABRIA concur.

STATE v. NORMAN

[227 N.C. App. 162 (2013)]

STATE OF NORTH CAROLINA

v.

KENNETH OLSON NORMAN

No. COA12-599

Filed 7 May 2013

1. Rape—second-degree rape—second-degree sexual offense—sufficient evidence—use of force

The trial court did not err in a second-degree rape and second-degree sexual offense case by failing to dismiss the charges for insufficient evidence. There was sufficient evidence of all the elements of the charges, including defendant's use of force to overcome the victim's will.

2. Rape—second-degree rape—lesser-included offense—attempted second-degree rape—jury instruction

The trial court did not err in a second-degree rape and second-degree sexual offense case by failing to submit a lesser-included offense of attempted second-degree rape. There was clear and positive evidence of intercourse between defendant and the victim.

Appeal by defendant from judgment entered 16 November 2011 by Judge Robert F. Johnson in Nash County Superior Court. Heard in the Court of Appeals 13 November 2012.

Attorney General Roy Cooper, by Assistant Attorney General Linda Kimbell, for the State.

Geoffrey W. Hosford for defendant-appellant.

BRYANT, Judge.

Where there was sufficient evidence of force to support submitting the charges of second-degree rape and second-degree sexual offense to the jury, the trial court did not err in denying defendant's motion to dismiss. Where there was clear and positive evidence of intercourse between defendant and the victim, the trial court did not err in failing to submit a lesser included offense of attempted second-degree rape.

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On 14 December 2009, defendant was indicted on charges of one count of second-degree rape and one count of second-degree sexual offense in Nash County Superior Court. A trial commenced during the Nash County Criminal Court Term beginning 14 November 2011, the Honorable Robert F. Johnson, Judge presiding.

The evidence presented at trial tended to show that the victim, a twenty-five year old woman at the time of trial, went to Club 252 in Rocky Mount around midnight on the evening of 9 October 2009. The victim had been to the club several times in the past, usually with her sisters and her friend. This night, she was alone. While the victim sat at the bar, a security guard, defendant Kenneth Norman, approached and asked where her friends were. Then he started making sexual advances toward her, which the victim rejected – dancing behind her, leaning in trying to kiss her, and continuing to attempt to kiss her even after she told him she had a girlfriend and did not date guys. At about 2:30 a.m., on the morning of 10 October, after the victim had consumed several mixed drinks, the female bartender took the victim's car keys and escorted her outside the bar. Defendant accompanied them. The bartender and defendant walked the victim around the parking lot attempting to help her sober up. The victim sat in defendant's car while the bartender went back inside. Meanwhile, defendant continued to make sexual advances toward the victim, asking if he could take her to a hotel and could he "get [her] p**y." At about 3:00 a.m., the club closed and the bartender said that she would give the victim a ride home but she had to take three or four employees home in her truck first. The victim had tried several times to reach her girlfriend to drive her home but was unsuccessful. Defendant volunteered to stay with the victim until the bartender returned.

Alone in the parking lot, defendant took the victim's hand and pulled her over to a swing located on the edge of the property near a wooded area at the rear end of the building. He pushed the victim down on the swing seat and told her they would wait for the bartender to return. There defendant began touching the victim in a sexual manner: kissing her, fondling her breasts, and pulling on her clothes. The victim testified that she resisted defendant by telling him no, and that she did not want him to touch her, and by struggling to make it difficult for him to kiss her or remove her clothing. The victim testified that she was crying, but she didn't want to anger defendant, knowing they were the only two people on the property. Defendant picked the victim up, pulled her pants down and pushed her down on the ground. As defendant unzipped his pants, and lay on top of her, the victim "clinch[ed] [her] legs together" and continually "scoot[ed] back away from him"; however, the victim

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testified that defendant's penis entered her vagina three times. At some point, defendant put his penis in victim's mouth before she turned away. Defendant also put his mouth between her legs, and his tongue in her vagina. The victim also testified defendant digitally penetrated her anus with his finger before she pulled away. The victim's mother and sister arrived to find the victim hysterical and defendant's clothes in disarray. Law enforcement officers were called, and the victim was taken to Nash General Hospital to undergo an evaluation, including the collection of possible evidence for a rape kit.

Following the presentation of evidence, the jury returned guilty verdicts on the charges of second-degree rape and second-degree sexual offense. The trial court entered judgment in accordance with the jury verdicts and sentenced defendant to active terms of 100 to 129 months imprisonment for second-degree rape and 80 to 105 months imprisonment for second-degree sexual offense, to be served consecutively. The trial court further ordered that upon release from prison, defendant register as a sex offender and that he enroll in satellite based monitoring for his natural life. Defendant appeals.

On appeal, defendant raises two issues: whether the trial court erred (I) in denying his motion to dismiss the charges; and (II) in failing to instruct the jury on the lesser-included offense of attempted second-degree rape.

I

[1] Defendant first argues that the trial court erred in failing to dismiss the charges of second-degree rape and second-degree sexual offense. Defendant contends that the evidence fails to establish defendant used force to overcome the victim's will. Specifically, defendant argues that he did not threaten the victim with bodily harm, she did not resist his sexual advances, and there was no history of violence. 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. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. 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) (citations

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and quotations 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) (citation omitted).

Defendant was charged with second-degree rape and second-degree sexual offense. “A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person: (1) [b]y force and against the will of the other person” N.C. Gen. Stat. § 14-27.3 (a)(1) (2011). “A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person: (1) [b]y force and against the will of the other person” N.C. Gen. Stat. § 14-27.5 (a)(1) (2011).

As to both charges, defendant challenges whether there was sufficient evidence to find he used force to overcome the victim’s will. Defendant cites *State v. Alston*, 310 N.C. 399, 312 S.E.2d 470 (1984), for the proposition that in the absence of evidence that a defendant used force or threats to overcome the will of the victim, generalized fear is not sufficient to establish the force required to support a conviction of rape. *Id.* at 409, 312 S.E.2d at 476 (finding substantial evidence of intercourse against the victim’s will but not substantial evidence of actual force or threat of force sufficient to overcome the victim’s will).

Our Supreme Court later specifically limited the application of the “general fear theory” “to fact situations similar to those in *Alston*.”¹

1. In *Alston*, the defendant and the victim had had a prior sexual relationship for approximately six months. On the day in question, the victim wanted to break up with the defendant, but agreed to walk with him and talk with him and went to the home of a friend where she and the defendant had engaged in sexual intercourse on other occasions. The victim said although she told the defendant she was not going to have sex with him, and that she did not consent to have sex, that she nevertheless complied with the defendant and did not try to push him away during the act of intercourse. Further, sometime after the date of the nonconsensual intercourse the victim again had intercourse with the defendant as well as oral sex which the victim testified that she enjoyed. *Alston*, 310 N.C. at 400-03, 312 S.E.2d 471-73.

The Court determined that absent an explicit threat and absent circumstances that would give rise to a reasonable inference an unspoken threat was used to force unwanted sexual intercourse, the evidence was insufficient to support a conviction of rape. The Court stated that “[w]here as here the victim has engaged in a prior continuing consensual sexual relationship with the defendant, [] determining the victim’s state of mind at the time of the alleged rape obviously is made more difficult.” *Alston*, 310 N.C. at 407, 312 S.E.2d at 475.

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State v. Strickland, 318 N.C. 653, 656, 351 S.E.2d 281, 283 (1987) (citation omitted). The *Strickland* Court stated that “[t]he force necessary to sustain a conviction of rape under N.C.G.S. § 14-27.3(a)(1) need not be actual physical force, but may be constructive force such as fear, fright, or coercion.” *Id.* at 656, 351 S.E.2d at 282 (citations omitted).

In [*Strickland*], not only had the victim and defendant had no prior sexual relationship, but the state submitted substantial evidence that defendant used both actual physical force and constructive force against the victim during the course of the offense. The victim testified that after defendant learned she was not feeling well, he refused to leave her premises, broke the latch off her screen door, forced his way into her home, and “grabbed [her] from behind and put his hand over [her] mouth.” . . .

Q. And he pulled you into the bedroom?

A. He pulled me into the bedroom by my arm.

Q. Did you scream or holler?

A. I couldn’t, I was scared of what would happen.

....

Q. How did you get on the bed?

A. He pushed me on the bed.

Q. Did you fight with him, at the time?

A. I couldn’t fight with him.

Q. Did he have a hold of you at that time?

A. Yes, sir.

Q. What happened when he pushed you onto the bed?

A. He pulled my panties off and had sex with me.

....

Q. Did he have power over you the entire time?

A. Yes, sir.

...

[The *Strickland* Court held] that the evidence [was]

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sufficient to show that defendant used physical force as well as the victim's fear and fright to commit the crime.

Id. at 656-57, 351 S.E.2d at 283 (citations omitted).

Considering defendant's argument as to a lack of force or threat sufficient to overcome the victim's will as it relates to the conviction for second-degree rape, we note the following observation by the *Alston* Court:

[T]he State ordinarily will be able to show the victim's lack of consent to the specific act charged only by evidence of statements or actions by the victim which were clearly communicated to the defendant and which expressly and unequivocally indicated the victim's . . . lack of consent to the particular act of intercourse.

Alston, 310 N.C. at 407-08, 312 S.E.2d at 475.

Here, the victim testified that while she was in the bar, defendant said "sexual things" to her: "he wanted to feel my tongue ring and . . . could we basically have sex." "I told him no[.]" Just before the bar closed, the female bartender took the victim's keys and, along with defendant, walked the victim around to help her sober up. While the bartender went to retrieve a bottle of water for the victim, defendant "kept asking me could he take me to a hotel[;] [a]sking me could he get my p**y . . . And I was saying no. The whole time I was saying no." After the club closed at 3:00 a.m., the bartender came out and let the victim know that she would give the victim a ride home after taking a few co-workers home, first. Defendant volunteered to stay with the victim. Defendant walked the victim to a wooden swing located at the "back end" of the club away from the club's exit door and sat her down. After the bartender left, "it was just me and him there. And he started -- he put his arms around me, he started touching me and kissing on my face and on my neck. And kept on asking me to go to a hotel with him and then he started touching me inside of my shirt. And basically pulling on my clothes to the point where he pulled me up off of the swing and unbuttoned my pants."

Q. What were you doing or saying at this time?

A. I was telling him no. Stop. Why are you doing this? Why? I don't want it. I just kept on saying I don't want it . . . [A]nd I mean, at that point, like tears were coming out of my eyes, but I mean, I wasn't trying to -- I didn't want to upset him to the point where anything -- it was just me and him there, but I was just telling him no. . . . So, he pulled me up and basically just started unbutton -- undoing my

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clothes, pulled them down halfway, pushed me down on the ground, got on top of me, which I was holding my legs together and he – he really couldn't get my pants down passed my thighs because I was holding my legs together. I was clinching my legs together and I was scooting back away from him And he had already undid his pants and while he was on top of me, he started kissing on my neck, kissing on my breasts, my stomach, kissing in between my legs and the whole time, I'm pushing on him. I'm squeezing – I'm pushing away from him.

The victim went on to describe continuous acts of resistance throughout the sexual assault, which included penile-vaginal penetration, digital-anal penetration, as well as fellatio and cunnilingus.

The record presents evidence of force and constructive force by defendant, and statements and actions by the victim which were clearly communicated to defendant and which expressly and unequivocally indicated the victim's lack of consent to intercourse or a sexual act.² *See id.* (the victim's lack of consent is ordinarily shown by evidence of statements or actions clearly communicated to the defendant). Viewing the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in favor of the State, there was sufficient evidence to find that defendant used sufficient force to overcome the victim's will. *See Strickland*, 318 N.C. 653, 351 S.E.2d 281. Thus, the trial court properly denied defendant's motion to dismiss, and we overrule defendant's argument.

II

[2] Next, defendant argues that the trial court erred in failing to instruct the jury concerning the issue of defendant's guilt of the lesser-included offense of attempted second-degree rape. Specifically, defendant contends that the evidence of penetration was not "clear and positive." We disagree.

A trial court must give instructions on all lesser-included offenses that are supported by the evidence, even in the absence of a special request for such an instruction; and the failure to so instruct constitutes

2. While defendant would have us evaluate the evidence in the light most favorable to him, our duty is to evaluate the evidence in the light most favorable to the State. *See Rose*, 339 N.C. at 192, 451 S.E.2d at 223.

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reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense. . . . The trial court may refrain from submitting the lesser offense to the jury only where the evidence is clear and positive as to each element of the offense charged and no evidence supports a lesser-included offense.

State v. Speight, ___ N.C. App. ___, ___, 711 S.E.2d 808, 815 (2011) (citation omitted).

“A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person: (1) [b]y force and against the will of the other person . . .” N.C.G.S. § 14-27.3(a)(1). Defendant specifically asserts that the evidence of intercourse was not “clear and positive.” We look to the record.

During trial, the victim gave the following testimony about the rape:

And so, I’m scooting on this – on the ground away from him and he’s still forcing himself on me. And – and then he – I felt his penis and – . . . [H]e was on top of me and he was just pushing and pushing but my legs were clinching, so it was just hard – it was just – but eventually, he did get his penis in for a short while and I would say it was – it was in and out maybe three times

After the rape, the victim’s mother and sister arrived to pick her up. The victim testified that she was crying hysterically and that she told her sister exactly what happened. Law enforcement arrived shortly thereafter and transported the victim to Nash General Hospital.

At trial, a sexual assault nurse examiner (SANE) working for Nash Healthcare Systems was received as an expert in the field of sexual assault examination and testified to her examination of the victim. On voir dire, the SANE nurse testified that as part of the documentation typically generated by a SANE nurse in completing a rape kit, she asked the victim specifically what happened and then wrote down the victim’s statement in the victim’s words as she was saying it. Before the jury, the SANE nurse was asked to read the words that the victim told her during the course of her rape kit evaluation as corroboration of the victim’s testimony. In pertinent part, the SANE nurse read the following into the record:

At the swing, he stood me up and unbuckled my pants and pushed me on the ground. He pulled my shirt up and started kissing me all over. I told him no and I – I told him

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no and I – excuse me. I told him no and I told him to give me my phone because he took my phone from me. I was kicking because he tried to pull my pants all the way off and my shoes off, but I wouldn't let him. He put his finger in my booty hole. He did get my pants down some more, but not all the way down. That is when he put his penis in my vagina again.

We hold the record reflects clear and positive evidence that defendant's penis penetrated the victim's vagina; therefore, defendant was not entitled to an instruction on attempted second-degree rape. Accordingly, defendant's argument is overruled.

No error.

Judges McGEE and ERVIN concur.

STATE OF NORTH CAROLINA
v.
JEFFRY ALLEN THOMAS

No. COA12-979

Filed 7 May 2013

Criminal Law—jury instruction—entrapment

The trial court did not err in a drugs case by failing to instruct the jury on the theory of entrapment. The record failed to indicate that law enforcement officers utilized acts of persuasion, trickery or fraud to induce defendant to commit a crime, or that the criminal design originated in the minds of law enforcement, rather than with defendant.

Appeal by defendant from judgment entered 11 January 2012 by Judge Anna Mills Wagoner in Rowan County Superior Court. Heard in the Court of Appeals 27 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General Carole Biggers, for the State.

Guy J. Loranger for defendant-appellant.

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BRYANT, Judge.

Where the record fails to indicate that law enforcement officers utilized acts of persuasion, trickery or fraud to induce defendant to commit a crime, or that the criminal design originated in the minds of law enforcement, rather than with defendant, the trial court did not err in failing to instruct the jury on the theory of entrapment.

Defendant Jeffry Allen Thomas was indicted on charges of trafficking in opium or heroin by possession, trafficking in opium or heroin by transportation, and felonious possession with intent to sell or deliver a controlled substance. On 10 January 2012, in Rowan County Superior Court, a jury trial was commenced before the Honorable Anna Mills Wagoner, Judge presiding.

The evidence presented tended to show that defendant was a retail store manager who began taking prescription pain pills provided to him by one of the store employees, Stephanie Griggs. Defendant testified that over a nine month period Griggs provided him with 100 pills. On the morning of 4 August 2010, Griggs called defendant, stating that she had access to pain medication containing hydrocodone and asking if he was interested in making a purchase. Defendant requested between ten and twenty pills. The two agreed to meet in the parking lot of a local grocery store. Prior to the exchange, Griggs met with officers in the Rowan County Sheriff's Department. An officer provided Griggs with fourteen pills containing hydrocodone, an opiate derivative and schedule III controlled substance. Griggs then met with defendant and exchanged the fourteen pills for eighty dollars. Defendant was arrested upon exiting the grocery store parking lot.

Following the close of the evidence, the jury returned guilty verdicts on the charges of trafficking in opium or heroin by possession, trafficking in opium or heroin by transportation and guilty of possession of hydrocodone. The trial court arrested judgment on the charge of possession of hydrocodone and entered judgment on the remaining charges. Defendant was sentenced to an active term of seventy to eighty-four months. Defendant appeals.

On appeal, defendant raises only one issue: whether the trial court erred in failing to instruct the jury on the defense of entrapment. Defendant acknowledges on appeal that he did not request that the trial court instruct the jury on entrapment; however, he argues that in the light most favorable to him, the evidence in this case gives rise to an

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entrapment defense because: (1) the offer for defendant to purchase pain medication originated with law enforcement; (2) law enforcement officers determined that hydrocodone would be the narcotic defendant received; and (3) the pills law enforcement officers found in defendant's vehicle were left there despite defendant's rejection of the offer to purchase the pills. Defendant seeks a new trial, contending that the failure to instruct the jury on entrapment amounts to plain error. We disagree.

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

State v. Lawrence, ___ N.C. ___, ___, 723 S.E.2d 326, 333 (2012) (citation omitted); see also, *State v. Broome*, 136 N.C. App. 82, 88, 523 S.E.2d 448, 453 (1999) (noting that where the defendant failed to request an entrapment instruction at trial, he must show the trial court's failure to so instruct amounted to plain error).

"Entrapment is the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting a criminal prosecution against him." *State v. Stanley*, 288 N.C. 19, 27, 215 S.E.2d 589, 594 (1975) (citation and quotations omitted). "To be entitled to an instruction on entrapment, the defendant must produce some credible evidence tending to support the defendant's contention that he was a victim of entrapment, as that term is known to the law." *State v. Redmon*, 164 N.C. App. 658, 662, 596 S.E.2d 854, 858 (2004) (citation and quotations omitted). The evidence is to be viewed in the light most favorable to the defendant. *Id.* at 663, 596 S.E.2d at 858 (citation omitted).

The entrapment defense consists of two elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, [and] (2) when the criminal design originated in the minds of the government officials, rather than with

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the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities.

State v. Reid, ___ N.C. App. ___, ___, 735 S.E.2d 389, 398 (2012).

Law enforcement may rightfully furnish to the players of [the drug] trade opportunity to commit the crime in order that they may be apprehended. It is only when a person is induced by the officer to commit a crime which he did not contemplate that we must draw the line.

Broome, 136 N.C. App. at 89, 523 S.E.2d at 454 (citation, quotations, and emphasis omitted).

In the absence of evidence tending to show both inducement by government agents and that the intention to commit the crime originated not in the mind of the defendant, but with the law enforcement officers, the question of entrapment has not been sufficiently raised to permit its submission to the jury.

State v. Walker, 295 N.C. 510, 513, 246 S.E.2d 748, 750 (1978) (citations omitted).

Here, considering the evidence in the light most favorable to defendant, it is insufficient to support defendant's entrapment claim. Defendant testified that during the nine months prior to the day of his arrest, Griggs had provided him with prescription pain pills referred to as "Norcos" or "tens" to help him manage pain from an aggravated injury. Defendant further testified that on the morning of 4 August 2010, he received a phone call from Griggs. Griggs indicated to him that she had access to pills. Defendant wanted to purchase between ten and twenty pills and agreed to meet Griggs in the grocery store parking lot in order to purchase the pills.

Defendant then met Griggs in the grocery store parking lot and Griggs entered his vehicle. Defendant gave her eighty dollars and received fourteen pills. The fourteen pills were within the range of the ten to twenty pills defendant had requested.

Defendant testified that while in his vehicle, he noted that the pills he was given were not the type of pills that Griggs had previously provided him. Defendant further testified that he handed the pills back to Griggs; that Griggs refused to refund the money; and that instead, Griggs leaned over and hugged defendant before exiting the vehicle. Defendant testified that he believed that Griggs kept both the pills and the money when she exited the vehicle.

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Officers of the Rowan County Sheriff's Department stopped defendant as he left the parking lot. An initial search of defendant and his car yielded no pills. However, during a second search of defendant's car while preparing to remove the driver's seat from the vehicle, a detective noticed a bulge in the seat. Upon removing the cushion on the driver's seat, the officer observed a plastic bag with fourteen pills.

Griggs testified as a witness for the State. Prior to the morning of 4 August 2010, Griggs had been approached by Detective K.L. Meyers with the Rowan County Sheriff's Department who asked if she would help "get [defendant] caught with pills." On the morning of 4 August 2010, she made a recorded phone call to defendant in the presence of Det. Meyers. Griggs asked defendant "if he wanted hydrocodone[,] and the two agreed to meet. Det. Meyers provided Griggs with fourteen oblong pills marked M357. A chemical analysis performed later determined that the pills weighed 9.0 grams and contained dihydrocodone / hydrocodone – a narcotic, an opiate derivative, and a schedule III controlled substance. At trial, a witness testifying as an expert in forensic chemistry stated that the markings, M357, on the pills indicated that they were a generic form of Vicodin, containing hydrocodone acetaminophen.

Defendant contends that the plan for him to buy prescription pain medication originated with law enforcement and that he was not predisposed to commit the crime of trafficking in opiates. Defendant also contends that he lacked any knowledge he was in possession of the pills Griggs offered him and that on these bases, he was entitled to an instruction on entrapment.

By his own admission defendant had acquired pills for pain from Griggs over a nine month period. Then on 4 August, when Griggs asked defendant if he was interested in purchasing pain pills with hydrocodone, defendant requested at least ten to twenty pills and agreed to meet Griggs that same day. Viewed in the light most favorable to defendant, the record shows that defendant had obtained pain pills many times before law enforcement became involved; that on 4 August, law enforcement afforded defendant an opportunity to acquire pain pills, that defendant did in fact acquire the pills and that they were pain pills, albeit not the same type as those defendant had obtained before. On this record, defendant has failed to produce credible evidence that he was induced by persuasion, trickery or fraud to commit a crime he otherwise had no intention of committing. *See Reid*, ___ N.C. App. at ___, 735 S.E.2d at 398. In fact, much of this evidence, including defendant's obtaining, 100

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pills from Griggs over a period of several months shows a predisposition to commit the offense of possession of a controlled substance. As the contentions brought forth on appeal do not illustrate circumstances that would entitle defendant to an instruction on entrapment, we hold that the trial court did not err in failing to so instruct the jury. Accordingly, defendant's arguments are overruled.

No error.

Judges ELMORE and ERVIN concur.

STATE OF NORTH CAROLINA
v.
MICHAEL HAMILTON THREADGILL

No. COA12-1293

Filed 7 MAY 2013

1. Sentencing—prior record level points—South Carolina conviction—felony

The trial court did not err in a forgery and obtaining property by false pretenses case by assigning two points to defendant's prior record level based upon a South Carolina conviction. The trial court correctly classified the South Carolina conviction as a Class I felony and assigned two points to defendant's prior record level on this basis.

2. Sentencing—prior record level points—no ex post facto violation—prior conviction

The trial court did not violate defendant's rights under the *ex post facto* clause of the United States Constitution in a forgery and obtaining property by false pretenses case by assigning two points to his prior record level. Defendant's Anson County conviction was entered more than one year prior to entry of judgment and sentencing in the instant case, and the plain language of N.C.G.S. § 15A-1340.11(7) defines a prior conviction as one that exists on the date a criminal judgment is entered.

Appeal by Defendant from judgment entered 11 June 2012 by Judge William R. Pittman in Moore County Superior Court. Heard in the Court of Appeals 28 February 2013.

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Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr., for Defendant.

DILLON, Judge.

Michael Hamilton Threadgill (Defendant) appeals from a judgment entered upon convictions for forgery, obtaining property by false pretenses, and attaining the status of an habitual felon. Defendant contends that the trial court erred in designating him a prior record level VI offender, instead of a prior record level V offender, in that (1) the trial court incorrectly classified a prior South Carolina conviction as a Class I felony for purposes of assigning prior record level points; and (2) the trial court violated Defendant's rights under the ex post facto clause of the United States Constitution when it erroneously assigned two points to his prior record level based upon a conviction that was entered after the date of the offenses for which he was sentenced in the present case. For the following reasons, we find no error.

I. Factual & Procedural Background

On 14 March 2011, Defendant was indicted in Moore County on charges of uttering a forged instrument, forgery of an instrument, obtaining property by false pretenses, and attaining habitual felon status. Thereafter, Defendant entered into a plea arrangement with the State, whereby Defendant agreed to "receive one consolidated sentence as an habitual felon for a term of the minimum mitigated sentence at his record level."¹ The State agreed to dismiss two charges of identity theft and one charge of conspiracy as part of the plea arrangement.

These matters came on for hearing in Moore County Superior Court on 11 June 2012. At the hearing, Defendant admitted to "making counterfeit payroll checks" and stated that he agreed to the terms of the plea arrangement. Following Defendant's entry of an *Alford* plea², the purpose of the hearing shifted to the issue of sentencing. The State introduced a copy of Defendant's prior record level worksheet, which set

1. Defendant also agreed to pay restitution in the amounts of \$388.07 and \$283.07.

2. Defendant denied guilt as to the charge of obtaining property by false pretenses, and thus converted his initial guilty plea to an *Alford* plea.

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forth Defendant's numerous – approximately three dozen – prior convictions, including three drug-related Montana convictions and one South Carolina conviction for “Financial Transaction Card Theft” (the South Carolina conviction). The State noted that the worksheet did not reflect a more recent conviction entered against Defendant in Anson County on 6 June 2011 (the Anson County conviction).³ The State also introduced – over Defendant's objection – a printout reflecting records maintained by the Division of Criminal Information (the DCI Printout) as further evidence of Defendant's prior convictions. Defendant objected to the court's consideration of the Anson County conviction on the basis that it occurred subsequent to the offenses for which he was being sentenced in this case. Defendant also objected to the worksheet's classification of one of his Montana drug possession convictions (the Montana conviction) as a felony, contending that the offense was classified as only a misdemeanor in Montana. The trial court determined that the Anson County conviction should be included in calculating Defendant's prior record level, but agreed with Defendant that the Montana conviction should be classified as a misdemeanor. The trial court concluded that Defendant had accumulated 18 prior record level points⁴ and designated Defendant a prior record level VI offender. *See* N.C. Gen. Stat. § 15A-1340.14(c)(6) (2011). In accordance with the plea arrangement, the trial court sentenced Defendant to a minimum of 87 months and a maximum of 114 months imprisonment. Defendant appeals.

II. Analysis

Defendant raises two contentions on appeal, both of which pertain to the trial court's determination of his prior record level. We address these contentions in turn.

A. Defendant's South Carolina Conviction

[1] Defendant first contends that the trial court erred in assigning two points to his prior record level based upon the South Carolina conviction, as “the State failed to prove by a preponderance of the evidence that the South Carolina conviction was a felony, rather than a misdemeanor.” Defendant admits to the existence of the South Carolina conviction, but argues that the State failed to prove that the conviction was

3. The prior record level worksheet included in the record on appeal reflects the Anson County conviction.

4. The State asserts that the trial court mistakenly calculated 18, instead of 19 record level points; this distinction is immaterial in light of our resolution of this appeal.

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a felony offense and that, accordingly, only one point should have been added to his prior record level on this basis.

At the outset, we note that this issue is preserved for appellate review, notwithstanding Defendant's failure to object to the South Carolina conviction at his sentencing hearing. *See State v. Cao*, 175 N.C. App. 434, 441, 626 S.E.2d 301, 306 (2006) (holding that an assignment of error of this nature is "not evidentiary; rather, it challenges whether the prosecution met its burden of proof at the sentencing hearing[, and an error] based on insufficient evidence as a matter of law does not require an objection at the sentencing hearing to be preserved for appellate review"); *State v. Boyd*, 207 N.C. App. 632, 642, 701 S.E.2d 255, 261 (2010); *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009); N.C. Gen. Stat. § 15A-1446(d)(18) (2011). The trial court's determination of a defendant's prior record level is a conclusion of law, which this Court reviews *de novo* on appeal. *Boyd*, 207 N.C. App. at 642, 701 S.E.2d at 261; *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007). " 'As a result, the issue before [this Court] is simply whether the competent evidence in the record adequately supports the trial court's decision [about how many total points to award a defendant and what his resulting prior record level is].' " *State v. Powell*, _ N.C. App. _, _, 732 S.E.2d 491, 494 (2012) (quoting *Bohler*, 198 N.C. App. at 633, 681 S.E.2d at 804) (second alteration in original).

A defendant's prior convictions must be proved by one of the following methods:

- (1) Stipulation of the parties.
- (2) An original or copy of the court record of the prior conviction.
- (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or the Administrative Office of the Courts.
- (4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f)(1)-(4) (2011). With respect to the classification of an out-of-state conviction, the relevant statute provides, in part, as follows:

Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or

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is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. . . .

N.C. Gen. Stat. § 15A-1340.14(e) (2011). The State bears the burden of proving by a preponderance of the evidence that an out-of-state conviction is a felony for sentencing purposes. *Cao*, 175 N.C. App. at 443, 626 S.E.2d at 307. However, a defendant may stipulate both that an out-of-state conviction exists and that the conviction is classified as a felony offense in the relevant jurisdiction. *Bohler*, 198 N.C. App. at 637-38, 681 S.E.2d at 806. Stipulations in this context “do not require affirmative statements and silence may be deemed assent in some circumstances, particularly if the defendant had an opportunity to object, yet failed to do so.” *State v. Hurley*, 180 N.C. App. 680, 684, 637 S.E.2d 919, 923 (2006) (citing *State v. Alexander*, 359 N.C. 824, 828-29, 616 S.E.2d 914, 917-18 (2005)).

Here, the State introduced Defendant’s prior record level worksheet and the DCI Printout as evidence of Defendant’s prior convictions. Both the worksheet and the DCI Printout include the South Carolina conviction; however, only the worksheet specifically classifies the South Carolina conviction as a Class I felony. The DCI Printout does not indicate whether the offense listed therein as “FINANCIAL TRANSACTION CARD THEFT” is classified as a felony or a misdemeanor under South Carolina law. Defendant thus contends that the worksheet alone was insufficient to prove that the South Carolina conviction was a felony.

While we recognize that a prior record level worksheet alone is insufficient to prove the *existence* of a prior conviction, *State v. Morgan*, 164 N.C. App. 298, 304, 595 S.E.2d 804, 809 (2004) (citing *State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002)); compare *State v. Hinton*, 196 N.C. App. 750, 751, 675 S.E.2d 672, 673 (2009) (holding that “[a] sentencing worksheet coupled with statements by counsel may constitute a stipulation to the existence of the prior convictions listed therein”), it is the *classification*, rather than the mere existence, of the South Carolina conviction that is at issue in the instant case. Defendant acknowledges this distinction in his brief but argues that “the same principles [that apply to proving the existence of a prior conviction should also] apply to proving whether or not a particular prior conviction involved a misdemeanor or a felony.” We note that Defendant presents no case authority in support of this specific contention. See N.C. R. App. P. 28(b)(6) (2013). We further note that the offense which served as the basis for the South Carolina conviction is, in fact, classified as a felony

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under South Carolina law. *See* S.C. Code Ann. § 16-14-20 (2011) (providing that “[a] person who commits financial transaction card or number theft is guilty of a felony”). Regardless, our holding in the present case does not turn on the sufficiency of the State’s evidence, as our review of the transcript reveals that Defendant stipulated to the worksheet’s classification of the South Carolina conviction as a Class I felony. Indeed, during sentencing, Defendant vigorously challenged both the worksheet’s classification of the Montana conviction as a felony offense and the trial court’s assignment of two prior record level points based upon the Anson County conviction. Defendant raised no objection, however, to the South Carolina conviction – or to the worksheet’s classification of that offense as a Class I felony – even after the State specifically noted the South Carolina conviction and its classification:

[PROSECUTOR]: We’re asking the Court to impose essentially the same sentence for the same offenses, and with someone whose record worksheet fills an entire page almost exclusively with fraud-type felony convictions, there are a number of obtaining properties by false pretense, common law uttering, possession of stolen goods, a couple of drug violations, *a financial transaction card theft from South Carolina, which is a Class I felony.*

Furthermore, shortly before the prosecutor made the foregoing reference, the prosecutor remarked, “as I understand it the only dispute between what the State’s contending his record level is and what the defense is willing to stipulate is that there’s one offense in Montana from 2000 . . . that the defendant contends was a misdemeanor conviction, and the State would contend is a felony based on the D.C.I. printout[,]” to which Defendant responded with challenges only to the Montana and Anson County convictions. It is thus apparent that Defendant knew of the worksheet’s contents and had ample opportunity to object to them. We, therefore, conclude that Defendant’s silence regarding the worksheet’s classification of the South Carolina conviction as a Class I felony constituted a stipulation with respect to that classification. *See, e.g., Alexander*, 359 N.C. at 830, 616 S.E.2d at 918 (holding that defense counsel stipulated to contents of prior record level worksheet where his conduct indicated that he knew of worksheet’s contents but did not object to them); *State v. Wade*, 181 N.C. App. 295, 299, 639 S.E.2d 82, 86 (2007) (holding that defense counsel’s failure to object to worksheet constituted a stipulation to the defendant’s prior convictions for sentencing purposes). Moreover, because Class I is the “default” classification for

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an out-of-state felony conviction, *Powell*, _ N.C. App. at _ , 732 S.E.2d at 494 (citing N.C. Gen. Stat. § 15A-1340.14(e)), the State met its burden and was required to prove nothing further in support of that classification. We accordingly hold that the trial court correctly classified the South Carolina conviction as a Class I felony, and, further, that the trial court correctly assigned two points to Defendant's prior record level on this basis. *See* N.C. Gen. Stat. § 15A-1340.14(b)(4) (2011) (providing that two points shall be assigned "[f]or each prior felony Class H or I conviction"). Defendant's contention is overruled.

B. N.C. Gen. Stat. § 15A-1340.11(7)

[2] Defendant next asserts a challenge to the constitutionality of N.C. Gen. Stat. § 15A-1340.11(7), the provision of our General Statutes defining what constitutes a "prior conviction" for sentencing purposes. Defendant argues that application of this provision to the facts of this case violates the ex post facto clause of the United States Constitution. We disagree.

In accordance with our General Statutes, "[t]he prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's *prior convictions* . . ." N.C. Gen. Stat. § 15A-1340.14(a) (2011) (emphasis added). N.C. Gen. Stat. § 15A-1340.11(7) defines a "prior conviction" as follows:

Prior conviction[:] A person has a prior conviction when, *on the date a criminal judgment is entered*, the person being sentenced has been previously convicted of a crime[.]

N.C. Gen. Stat. § 15A-1340.11(7) (2011) (emphasis added).

Here, Defendant's Anson County conviction was entered on 6 June 2011, more than one year prior to entry of judgment and sentencing in the instant case, which occurred on 11 June 2012. Thus, the Anson County conviction was clearly a "prior conviction" as defined under N.C. Gen. Stat. § 15A-1340.11(7), *supra*. Defendant concedes that the law is clear in this respect; however, he contends that application of N.C. Gen. Stat. § 15A-1340.11(7) in the present case "has resulted in the Defendant facing a greater sentence at the time of sentencing than he faced on the date of the offense, in violation of the Ex Post Facto clause of the United States Constitution." Defendant cites the fact that "[t]he [two prior record level] points associated with the Anson County conviction . . . increased the punishment for the offense to 146 to 185 months" in support of his argument. This contention is meritless.

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Article I, section 10 of the United States Constitution provides that “[n]o State shall . . . pass any . . . ex post facto Law . . .” U.S. Const. art. I, § 10, cl. 1.⁵ “[A]n impermissible *ex post facto* law is one which, among other things, aggravates a crime or makes it a greater crime than when committed, or changes the punishment of a crime to make the punishment greater than the law permitted when the crime was committed.” *State v. Mason*, 126 N.C. App. 318, 324, 484 S.E.2d 818, 821 (1997).

We cannot agree with Defendant that the ex post facto clause is implicated in the present case. As Defendant concedes in his brief, N.C. Gen. Stat. § 15A-1340.11(7) was enacted prior to 30 October 2010 – the date of the offenses for which he was sentenced in this case – and remained unchanged through the date of his sentencing. The addition of two points to Defendant’s prior record level and the resulting increase in his prior record level from a level V to a level VI offender were consequences of Defendant’s increased culpability represented by the Anson County conviction; the enhancement in Defendant’s sentence, in turn, resulted from application of our habitual felon statute, N.C. Gen. Stat. § 14-7.1 *et seq.*, which our Supreme Court has specifically upheld as constitutional. *See State v. Todd*, 313 N.C. 110, 117, 326 S.E.2d 249, 253 (1985) (“rejecting outright the suggestion that our legislature is constitutionally prohibited from enhancing punishment for habitual offenders as violations of constitutional strictures dealing with . . . ex post facto laws” and noting that “[t]hese challenges have been addressed and rejected by the United States Supreme Court” (citing *Rummell v. Estelle*, 445 U.S. 263 (1980); *Spencer v. Texas*, 385 U.S. 554 (1967))). Moreover, we have implicitly recognized the validity of N.C. Gen. Stat. § 15A-1340.11(7) in holding that, for sentencing purposes, a defendant’s prior convictions are those that exist at the time of sentencing. *See, e.g., State v. Pritchard*, 186 N.C. App. 128, 131, 649 S.E.2d 917, 919 (2007); *State v. Mixion*, 118 N.C. App. 559, 563, 455 S.E.2d 904, 906 (1995) (citing N.C. Gen. Stat. § 15A-1340.11(7)). Finally, we note that under Defendant’s theory, the close temporal proximity of two convictions entered on separate dates in separate counties would render neither conviction a “prior conviction” for sentencing purposes. In other words, the Anson County conviction could not be used in

5. Defendant incorrectly cites Article I, section 9 of the United States Constitution, which limits the power of the *federal* government. *See Marshall v. Garrison*, 659 F.2d 440, 444 n.5 (4th Cir. 1981). Additionally, we note that the North Carolina Constitution, Art. I, § 16, also prohibits our Legislature from enacting ex post facto laws, providing, in pertinent part, that “[r]etrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted.”

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determining Defendant's prior record level in this case, and the convictions in this case could not be used in determining Defendant's prior record level in the Anson County case since Defendant had not yet been convicted in this case when he was sentenced in Anson County. This illogical result is avoided by application of the plain language of N.C. Gen. Stat. § 15A-1340.11(7), which clearly defines a prior conviction as one that exists "on the date a criminal judgment is entered." Defendant's contention is overruled.

For the foregoing reasons, we find no error.

NO ERROR.

Judges STEPHENS and STROUD concur.

STATE OF NORTH CAROLINA
v.
HOLLY DAWN TINDALL

No. COA12-1145

Filed 7 May 2013

Probation and Parole—revocation—notice—insufficient

The trial court improperly revoked defendant's probation where defendant received notice that she had violated the conditions of her probation by using illegal drugs and failing to comply with treatment requirements but was not notified that her probation could be revoked when she appeared at the hearing.

Appeal by defendant from judgments entered 12 March 2012 by Judge James M. Webb in Moore County Superior Court. Heard in

Attorney General Roy Cooper, by Assistant Attorney General Jason P. Burton, for the State.

Don Willey, for defendant-appellant.

CALABRIA, Judge.

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Holly Dawn Tindall (“defendant”) appeals from judgments entered upon revocation of her probation. We reverse and remand.

On 21 November 2011, defendant pled guilty to forgery of an instrument, uttering a forged instrument, obtaining property by false pretenses, obtaining controlled substance (“CS”) by fraud, financial transaction card theft, three counts of financial transaction card fraud, and three counts of larceny. The court found, and defendant admitted to, an aggravating factor, namely that defendant committed the offenses while on pretrial release from another charge. The trial court sentenced defendant to a minimum of eight and a maximum of ten months for one count of larceny. Defendant was placed on supervised probation for sixty months. The trial court consolidated defendant’s sentences for obtaining CS by fraud, three counts of financial card fraud, financial card theft, forgery of an instrument, uttering a forged instrument and two counts of larceny. Defendant was sentenced to a minimum of eight and a maximum of ten months. For obtaining property by false pretenses, defendant was sentenced to a minimum of eight and a maximum of ten months. Defendant was ordered to comply with the conditions set forth in the previous sentence. All sentences were suspended, were to run consecutively and were to be served in the North Carolina Department of Correction. One of the conditions of defendant’s probation was that she was to comply with a substance abuse program at a facility called Crystal Lake.

Defendant was admitted to the Crystal Lake treatment facility on 28 January 2012. Defendant’s probation officer (“PO”) was contacted in February, after defendant was caught “partying” with other residents. Defendant admitted to snorting ten lines of cocaine. At the time defendant was arrested, the PO found a diet pill on defendant’s person. On 23 February 2012, the PO filed violation reports indicating that defendant had violated her probation by using illegal drugs because she “admitted to using 10 lines of cocaine while at Cosa Works treatment center on 19 February 2012” and by failing to “complete Crystal Lakes treatment program” as ordered.

At the probation revocation hearing in Moore County Superior Court, defendant’s PO testified that defendant had been “arrested.” The trial court found that defendant “did unlawfully willfully without legal justification violate[] the terms and conditions of her probation as alleged in the violation report, and the [c]ourt specifically [found] that she [] committed a subsequent offense while on probation.” The trial court then activated defendant’s suspended sentences, with modifications. The trial court sentenced defendant to three consecutive sentences of a

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minimum of six and a maximum of eight months in the North Carolina Division of Adult Correction. Defendant appeals.

Defendant contends that the trial court lacked jurisdiction to enter judgments revoking defendant's probation on the basis of a probation violation that was not alleged in the violation report and of which she was not given notice. We agree.

Pursuant to statute, "probation may be reduced, terminated, continued, extended, modified, or revoked..." N.C. Gen. Stat. § 15A-1344(a) (2011). The Justice Reinvestment Act of 2011 ("the Act") amended the statutes governing probation revocation. *See State v. Jones*, __ N.C. App. __, __, 736 S.E.2d 634, 637 (2013). The Act amended subsection (a) of N.C. Gen. Stat. § 15A-1344 by adding the following provision: "[t]he court may only revoke probation for a violation of a condition of probation under G.S. 15A-1343(b)(1)" or N.C. Gen. Stat. § 15A-1343(b)(3a), except as provided in N.C. Gen. Stat. § 15A-1344(d2). *Id.* N.C. Gen. Stat. § 15A-1343(b)(1) imposes a "commit no criminal offense" condition and N.C. Gen. Stat. § 15A-1343(b)(3a) provides that a probationer cannot "abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer." N.C. Gen. Stat. § 15A-1343(b)(1); (3a) (2011). In addition, the Act added a subsection entitled "Confinement in Response to Violation" ("CRV") which provides that the court may revoke probation for violations other than N.C. Gen. Stat. § 15A-1343(b)(1) or N.C. Gen. Stat. § 15A-1343(b)(3a), only if the probationer has already served two periods of confinement in response to a violation under this subsection. N.C. Gen. Stat. § 15A-1344(d2) (2011); *Jones*, __ N.C. App. at __, 736 S.E.2d at 637. "Accordingly, under these revised provisions, the trial court 'may *only* revoke probation if the defendant commits a criminal offense or absconds[,] and may 'impose a ninety-day period of confinement for a probation violation other than committing a criminal offense or absconding.'" *Jones*, __ N.C. App. at __, 736 S.E.2d at 637.

Prior to revocation of probation, the court must hold a hearing, "unless the probationer waives the hearing..." N.C. Gen. Stat. § 15A-1345(e) (2011). "The State must give the probationer notice of the [probation revocation] hearing and its purpose, including a statement of the violations alleged." *Id.* "The notice, unless waived by the probationer, must be given at least 24 hours before the hearing." *Id.* "The purpose of the notice mandated by this section is to allow the defendant to prepare a defense and to protect the defendant from a second probation violation hearing for the same act." *State v. Hubbard*, 198 N.C. App. 154, 158, 678 S.E.2d 390, 393 (2009).

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This Court has reversed revocation of a defendant's probation when the revocation was based, in part, on a violation for which defendant had no notice. *State v. Cunningham*, 63 N.C. App. 470, 475, 305 S.E.2d 193, 196-97 (1983). In *Cunningham*, the violation reports alleged that the defendant played loud music which disturbed his neighbors and removed their personal property, but "the State sought to prove additional conduct ... that defendant trespassed upon and damaged real and personal property...." *Id.* at 475, 305 S.E.2d at 196. Since the defendant did not receive notice of the additional conduct alleging a violation based on trespass and damage to property, the Court held that the trial court erred by revoking the defendant's suspended sentence based on alleged violations that were not included in the violation report. *Id.* at 475, 305 S.E.2d at 196-97.

In contrast, this Court has found that a defendant received sufficient notice when the violation report alleged the behavior that was the basis of the revocation, even if the violation report alleged that the probationer violated a different condition of probation. *Hubbard*, 198 N.C. App. at 159, 678 S.E.2d at 394. In *Hubbard*, the violation report alleged that the defendant "failed to report in a reasonable manner to his probation officer during a curfew check" which constituted a violation of Regular Condition number six that the defendant "failed to 'report as directed by the [c]ourt or the probation officer to the officer....'" *Id.* at 158, 678 S.E.2d at 394. The trial court interpreted the language as a violation of Special Condition number four, that the "[d]efendant 'failed to ... submit to supervision by officers of the intensive probation program and comply with the rules adopted by that program....'" *Id.* The specific facts that constituted the violation indicated that the defendant was "so drunk that he could hardly walk" when the probation officer checked his curfew, the probation officer left and returned later to find that despite his instructions, defendant "was still drinking and raising cain [sic]." *Id.* at 159, 678 S.E.2d at 394. The Court found that "the evidence at the revocation hearing established these same facts[,]" that the defendant "received notice of the specific behavior [the] [d]efendant was alleged and found to have committed in violation of [the] [d]efendant's probation" and thus the defendant received "sufficient notice of the alleged violation." *Id.*

In the instant case, the violation reports alleged that defendant violated two conditions of her probation: to "[n]ot use, possess or control any illegal drug" and to "participate in further evaluation, counseling, treatment or education programs recommended ... and comply with all further therapeutic requirements...." The specific facts upon which the

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State relied were that “defendant admitted to using 10 lines of cocaine while at Cosa Works Treatment Center on 2/19/2012” and that defendant failed to comply with treatment as ordered. In the judgments, the trial court found that defendant violated the conditions alleged in the violation reports and that defendant’s probation was revoked “for the willful violation of the condition(s) that he/she not commit any criminal offense ... or abscond from supervision”

Defendant contends that *Cunningham* controls because the violation reports alleged that defendant violated her probation by using illegal drugs and failing to comply with treatment requirements, but her probation was revoked because she committed a criminal offense. Therefore, according to *Cunningham*, her judgments must be reversed. According to the reasoning in *Hubbard*, cited by the State, defendant had notice of conduct that potentially supported the revocation of her probation: use of illegal drugs. However, since *Hubbard* was decided prior to the Justice Reinvestment Act, we hold that it does not control in the instant case.

Here, although defendant received notice that she violated conditions of her probation, by using illegal drugs and failing to comply with treatment requirements, such violations do not support a revocation of her probation. *See Jones*, __ N.C. App. at ___, 736 S.E.2d at 637. At the hearing, defendant’s PO testified that defendant was “arrested” but did not allege in the violation report that she violated her probation by committing a criminal offense. Based upon the PO’s report and testimony, the trial court determined that defendant had committed a criminal offense and revoked her probation. However, defendant did not have notice that her probation could potentially be revoked when she appeared at the hearing. Defendant should have either received notice that the alleged violation was the type of violation that could potentially result in a revocation of her probation or had the opportunity to waive notice prior to having her probation revoked. Since the violation reports did not allege that defendant had committed a criminal act, absconded, or had two prior Confinements in Response to Violations, she had no notice and did not waive the notice. Therefore, the trial court improperly revoked her probation. We reverse and remand.

Reversed and Remanded.

Judges ERVIN and DILLON concur.

STATE v. TORRES-GONZALEZ

[227 N.C. App. 188 (2013)]

STATE OF NORTH CAROLINA

v.

JOSE JOEL TORRES-GONZALEZ

No. COA12-831

Filed 7 May 2013

1. Search and Seizure—warrant—probable cause—drugs

The search warrant in a cocaine trafficking prosecution was supported by probable cause where the detective laid out a number of specific facts that would have supported a belief that the contraband could have been found at the location to be searched.

2. Drugs—cocaine—conspiracy to traffic and constructive possession—evidence sufficient

The trial court properly denied defendant's motion to dismiss charges of conspiracy to traffic in cocaine by possession and trafficking in cocaine by possession where a reasonable juror could have inferred that defendant and another individual (Blanco) agreed to traffic in and constructively possessed approximately 425 grams of cocaine. A series of events with a detective, Blanco, and defendant, taken together, constituted substantial evidence sufficient to establish conspiracy to traffic, and the fact that Blanco went to defendant's house to pick up the drugs before driving to a parking lot to complete the sale with the detective was substantial evidence of constructive possession.

3. Drugs—verdicts—conspiracy to traffic —trafficking by possession—not inconsistent

Verdicts convicting defendant of conspiracy to traffic in cocaine by possession but not convicting him of trafficking by possession did not present any inconsistency, legal or otherwise, because conspiracy to traffic by possession does not include possession as an element.

Appeal by Defendant from Judgment entered 24 January 2012 by Judge Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 14 February 2013.

Attorney General Roy Cooper, by Special Deputy Attorneys General Lars F. Nance and Valerie Bateman, for the State.

A. Wayne Harrison for Defendant.

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STEPHENS, Judge.

Procedural History and Evidence

From 17 to 20 January 2012, Jose¹ Joel Torres-Gonzalez (“Defendant”) was tried on charges of conspiracy to traffic in cocaine and trafficking by possession of cocaine. The evidence presented at trial tended to show the following:

Detective Mounce,² an officer with the Guilford County Sheriff’s Department in the Vice Narcotics Division, was working undercover when he was introduced to Ramone Ramirez Blanco (“Blanco”) on 22 October 2010. At that time, Blanco was a suspected drug dealer, and Detective Mounce was meeting with him to purchase a small amount of cocaine, make sure it was of good quality, and then build a relationship with Blanco in order to buy larger amounts of cocaine.

After the initial meeting, Detective Mounce continued to meet with Blanco and started to inquire about larger quantities of cocaine. Blanco told Detective Mounce that his source was nervous about selling to someone the source did not know. Despite that, Detective Mounce and Blanco eventually set up a deal for 16 November 2010. The deal was for the sale of fifteen ounces, about 425 grams, of cocaine to Detective Mounce for \$18,000.

On 16 November 2010, Detective Mounce arrived at the planned meeting location, the Belk Lot at the Four Seasons Mall, around 6:30 p.m. The meeting was set for 7:00 p.m. and Detective Mounce called Blanco at 6:49 p.m. to make sure he was going to arrive at the agreed-upon time. Blanco arrived at 7:07 p.m. Detective Mounce identified Blanco because he was driving the same green F-150 truck that he had driven throughout Detective Mounce’s dealings with him.

Blanco arrived at the meeting with Defendant in the passenger seat. This was the first time that Detective Mounce had come in contact with Defendant. Blanco told Detective Mounce that they would get the cocaine once they saw the money. Detective Mounce then waved for undercover Detective Gordon Snaden, who had the money, to drive over. Both Blanco and Defendant observed the money in the car and then nodded their heads. At that point, Blanco informed Detective Mounce that

1. To the extent that the name “José” is typically written with an accent on the letter “e,” that diacritic is not reflected in the court records.

2. Detective Mounce’s first name is not provided in the record on appeal.

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he and Defendant had to go get the cocaine, and all four people left the parking lot.

After leaving the lot, Detective Mounce went to Gander Mountain, a hunting and fishing store, to wait for Blanco to contact him. The plan was to meet back in the same parking lot to complete the transaction. While Detective Mounce waited at Gander Mountain, Blanco and Defendant drove to Blanco's home where Defendant's vehicle was parked. The plan was for Defendant to go to his home, get the drugs, and then meet Blanco at a nearby Food Lion where Blanco would pick up the drugs.

Shortly after, Blanco left his house and went to Food Lion. After waiting for a period of time, Blanco called Defendant, and Defendant told Blanco that there were people at his house and that Blanco needed to come there to pick up the cocaine. Around the same time, the Sheriff's Department — having used a GPS to track Blanco's vehicle to Food Lion — enlisted Captain Anthony Caliendo ("Captain Caliendo") to follow Blanco. Captain Caliendo arrived at Food Lion around 8:10 p.m. and began surveillance on Blanco's green pickup truck.

After speaking with Defendant, at 8:37 p.m., Blanco left Food Lion and went to Defendant's house to pick up the drugs. Blanco was followed clandestinely by Captain Caliendo, who had been told to keep the vehicle under surveillance. When Blanco retrieved the drugs, Defendant told him to come back with the money and make sure he was not being followed. Captain Caliendo was given instructions to remain at Defendant's home and keep the residence under observation.

At 8:39 p.m., Blanco called Detective Mounce and told him that he would be at the Belk parking lot with the drugs in ten minutes. However, at 9:01 p.m., when Blanco arrived in the green pickup truck, he noticed a Greensboro Police Department ("GPD") patrol car in the parking lot, which caused him to move the location of the meeting to a nearby Home Depot. The sale of cocaine between Blanco and Detective Mounce was completed in the Home Depot parking lot and Blanco was arrested thereafter.

While the police were processing Blanco's possessions, they confiscated two cell phones, one of which had been ringing repeatedly. The number listed by caller ID was later matched to Defendant. By tracing the caller's phone number, the police were able to determine Defendant's address. This was the same address Blanco had visited to pick up the cocaine.

The police obtained a search warrant for Defendant's address around 11:20 p.m. Captain Caliendo had been watching the house

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throughout the application process. The search warrant identified the house and address to be searched and the applicant — Detective J.D. Murphy. The first paragraph of the attached affidavit stated the facts concerning Detective Mounce’s dealings with Blanco and a then-unidentified “Hispanic male,” who was later determined to be Defendant. It stated that Blanco and Defendant met with Detective Mounce, that Blanco went to Defendant’s address to get the drugs, and that Blanco delivered the drugs to Detective Mounce. The affidavit also identified the cell phone that was confiscated from Blanco as registered to Defendant, who lived at the address that was the subject of the search.

The additional paragraphs of the affidavit laid out the items that could be found during the search and why such items, in the applicant’s experience, were related to the dealing of narcotics. Some of the items identified in the application were drugs, guns, jewelry, U.S. currency, and paraphernalia used to measure or weigh various controlled substances.

The warrant was issued, and, during the search, police found two \$100 bills, two cardboard boxes containing a total of fifteen bundles of money, a paper bag with seven envelopes of money, two individual envelopes containing more cash, and Defendant’s wallet, which contained \$342. The cash found at the scene totaled \$115,371. The police also found triple-beam scales and a business card with Defendant’s name and a phone number. The number on the card matched the number that had repeatedly appeared on Blanco’s caller ID. Further, the mail found at the address was directed to Defendant. Based on that evidence, Defendant was arrested and taken into custody.

At the close of the State’s evidence, Defendant moved to dismiss both counts, and the trial court denied that motion. Defendant did not put on any evidence, and, following the trial, the jury returned a verdict of guilty on the felony charge of conspiracy to traffic in cocaine and not guilty on the felony charge of trafficking by possession of cocaine. Defendant was sentenced to a minimum of 70 months and a maximum of 84 months in prison, with credit for seven days served. Defendant appeals, and we find no error.

*Discussion**I. Motion to Suppress the Evidence Obtained Pursuant to the Search Warrant*

[1] Defendant first argues that the search warrant was not supported by probable cause and the trial court erred in denying his motion to

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suppress the evidence obtained through execution of the search warrant. 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). "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 standard for a court reviewing the issuance of a search warrant is whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." *State v. Ledbetter*, 120 N.C. App. 117, 121, 461 S.E.2d 341, 343 (1995) (citation and quotation marks omitted). "[T]he duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for . . . conclud[ing] that probable cause existed." *State v. Edwards*, 185 N.C. App. 701, 703, 649 S.E.2d 646, 648 (citation and quotation marks omitted), *disc. review denied*, 362 N.C. 89, 656 S.E.2d 281 (2007).

An application for a search warrant must contain "[a]llegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched[.]" N.C. Gen. Stat. § 15A-244(3) (2011). "Probable cause need not be shown by proof beyond a reasonable doubt, but rather [by] whether it is more probable than not that drugs or other contraband will be found at a specifically described location." *Edwards*, 185 N.C. App. at 704, 649 S.E.2d at 649 (2007). "Probable cause cannot be shown by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based[.]" *State v. Campbell*, 282 N.C. 125, 130-31, 191 S.E.2d 752, 756 (1972) (citation and quotation marks omitted).

In *Campbell*, our Supreme Court held that a search warrant lacked probable cause when the affidavit failed to provide any underlying details and merely stated that the affiant had arrest warrants for different subjects who allegedly lived at the prescribed address. *Id.* at 130-32, 191 S.E.2d at 756-57 ("Therefore, nothing in the foregoing affidavit affords a reasonable basis upon which the issuing magistrate could conclude that any illegal possession or sale of narcotic drugs had occurred, or was occurring, on the premises to be searched."). Here, the affiant was an officer with more than twenty-two years of experience in law

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enforcement who had previously been involved in numerous investigations concerning the sale of illegal substances. The affidavit attached to the application included (1) background on the circumstances of Detective Mounce's dealings with Blanco, (2) details that the person who acquired the cocaine went to the house identified in the search warrant, (3) the fact that the same person then delivered the cocaine to Detective Mounce, (4) the fact that a phone registered to Defendant repeatedly called Blanco after Blanco was arrested, and (5) the fact that Defendant resided at the house that was the subject of the search warrant.

The information provided in the application for the search warrant in this case provides a factual basis for making a probable cause determination. Unlike *Campbell*, where the officer making the application only made conclusory statements, the detective in this case laid out a number of specific facts that would support a belief that the contraband could be found at the location to be searched. We hold that the information provided in the application constituted a "substantial basis" from which the magistrate could find probable cause existed, and, thus, that the trial court did not err in denying the motion to suppress.

II. Defendant's Motion to Dismiss

[2] Defendant argues that the trial court erred in denying his motion to dismiss as to both counts. "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). "[T]he question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of [the] defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). When ruling on a motion to dismiss for insufficient evidence, "the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009).

"The test of the sufficiency of the evidence to withstand [a motion to dismiss] is the same whether the evidence is circumstantial, direct, or both." *State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967) (citation omitted). Where the evidence is solely circumstantial, "[t]he question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *Id.* (citation and quotation marks omitted). "[T]he question for the trial court is not

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one of weight, but of the sufficiency of the evidence.” *State v. Harris*, 361 N.C. 400, 402, 646 S.E.2d 526, 528 (2007). “Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.” *State v. Tyson*, 195 N.C. App. 327, 330, 672 S.E.2d 700, 703 (2009) (citation and quotation marks omitted). However, where the “evidence raises merely a suspicion or conjecture as to . . . [the] defendant’s identity as the perpetrator, the motion should be allowed.” *State v. Collins*, 50 N.C. App. 155, 158, 272 S.E.2d 603, 605 (1980).

“A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner.” *State v. Worthington*, 84 N.C. App. 150, 162, 352 S.E.2d 695, 703, disc. review denied, 319 N.C. 677, 356 S.E.2d 785 (1987). “The charge of conspiracy to violate the law and the charge of the consummation of the conspiracy by an actual violation of the law are charges of separate offenses.” *State v. Lippard*, 223 N.C. 167, 169, 25 S.E.2d 594, 596 (citation omitted), cert. denied, 320 U.S. 749, 88 L. Ed. 445 (1943). “In order for a defendant to be found guilty of the substantive crime of conspiracy, the State must prove that there was an agreement to perform every element of the underlying offense.” *State v. Dubose*, 208 N.C. App. 406, 409, 702 S.E.2d 330, 333 (2010). “As soon as the union of wills for the unlawful purpose is perfected, the crime of conspiracy is complete, and no overt act is required.” *State v. Merrill*, 138 N.C. App. 215, 218, 530 S.E.2d 608, 611 (2000) (citations omitted). Furthermore, “the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice to withstand [the] defendant’s motion to dismiss. . . . [and t]he existence of a conspiracy may be established by direct or circumstantial evidence[.]” *Worthington*, 84 N.C. App. at 162, 352 S.E.2d at 703 (citation omitted). This may be shown “by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy.” *Id.* (citation omitted). Therefore, “[i]n order to find [the] defendant guilty of conspiracy to traffic in cocaine . . . , the State must prove that [the] defendant entered into an agreement to traffic by possessing cocaine . . . , and intended the agreement to be carried out at the time it was made.” *State v. Jenkins*, 167 N.C. App. 696, 700–01, 606 S.E.2d 430, 433 (citation omitted) (holding that the “evidence was sufficient to submit the charge of conspiracy to traffic in cocaine by possession to the jury” when the defendant and two co-conspirators were pulled over in the process of counting thousands of dollars and a sufficient amount of cocaine was later found in the cabin of the truck), affirmed per curiam, 359 N.C. 423, 611 S.E.2d 833 (2005).

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“To establish trafficking by possession, the State must show that a defendant (1) knowingly possessed a given controlled substance; and (2) that the amount possessed was greater than 28 grams.” *State v. Wiggins*, 185 N.C. App. 376, 386, 648 S.E.2d 865, 872 (citation omitted), *disc. review denied*, 361 N.C. 703, 653 S.E.2d 160 (2007). The element of knowing possession may be proved by showing constructive possession. *State v. Thorpe*, 326 N.C. 451, 454, 390 S.E.2d 311, 313 (1990). “An accused has possession of [contraband] . . . when he has both the power and the intent to control its disposition or use.” *Id.* (citation and quotation marks omitted). “[Constructive possession] must be inferred from the circumstances. Where such materials are found on the premises under the control of an accused, this fact . . . gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury[.]” *Id.* (citation omitted). Thus, “[c]onstructive possession has been found when the contraband was on the property in which the defendant had some exclusive possessory interest and there was evidence of his or her presence on the property.” *Id.* at 454–55, 390 S.E.2d at 313.

In this case, the evidence offered by the State shows that Detective Mounce had set up a time and location for the sale of approximately 425 grams of cocaine and that, when Blanco arrived at the location, he was with Defendant. Then Defendant, not just Blanco, came to Detective Mounce to look at the money. Defendant and Blanco left the location together, and Defendant told Blanco to wait at the Food Lion parking lot where the drugs would be delivered. Later, Defendant told Blanco to come back to Defendant’s house to pick up the drugs to complete the sale. These events, taken together, constitute substantial evidence sufficient to establish conspiracy to traffic in cocaine by possession. Additionally, the fact that the State’s evidence tended to show that Blanco went to Defendant’s house to pick up the drugs before driving to the Four Seasons and Home Depot parking lots to complete the sale with Detective Mounce could lead the jury to infer that the “contraband was on the property in which the defendant had some exclusive possessory interest and there was evidence of his or her presence on the property.” This constitutes substantial evidence of constructive possession of the cocaine and, thus, trafficking in cocaine by possession. *See Thorpe*, 326 N.C. at 454–55, 390 S.E.2d at 313.

From this evidence, a reasonable juror could infer that Defendant and Blanco agreed to traffic in and constructively possessed approximately 425 grams of cocaine. Viewing the evidence in a light most favorable to the State, we therefore hold that the trial court did not err in

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denying Defendant's motion to dismiss as to either conspiracy to traffic in cocaine by possession or trafficking in cocaine by possession.

III. The Jury Verdicts and Inconsistency

[3] Defendant's final argument is that the jury verdicts convicting him of conspiracy to commit the felony of trafficking by possession, but finding him not guilty of committing the felony of trafficking by possession, are legally inconsistent and cannot be "logically or rationally supported" because both crimes require Defendant to have "possession." Defendant asserts that the jury verdicts were legally inconsistent because the jury was required to find that Defendant possessed cocaine for both conspiracy to traffic by possession and trafficking by possession, but he was only found guilty of the former. He contends that the jury, by finding Defendant not guilty of trafficking by possession, conclusively answered the question of possession for both charges and precluded itself from finding that he was guilty of the other charge, conspiracy to traffic by possession. We are unpersuaded.

When reviewing jury verdicts for inconsistency, "a distinction is drawn between verdicts that are merely inconsistent and those which are legally inconsistent and contradictory." *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010) (emphasis in original). A verdict is legally inconsistent or mutually exclusive "when [it] purports to establish that the defendant *is guilty* of two separate and distinct criminal offenses, the nature of which is such that guilt of one necessarily excludes guilt of the other." *Id.* at 400, 699 S.E.2d at 915 (citation, quotation marks, and brackets omitted) (emphasis added).

In *State v. Speckman*, 326 N.C. 576, 391 S.E.2d 165 (1990), a conviction was reversed when the defendant was found guilty of both embezzlement and obtaining property by false pretenses. *Id.* at 580, 391 S.E.2d at 168. There the Court held that the crimes were mutually exclusive because embezzlement required that the property be obtained *lawfully* and the false pretenses charge required that the property be obtained *unlawfully*. *Id.* at 578, 391 S.E.2d at 166-67. Thus, under *Speckman*, a person cannot be found *guilty* of two crimes "arising from the same act or transaction" where their elements are mutually exclusive. *See id.* at 578, 391 S.E.2d at 167.

A verdict can be valid, however, when it is "merely inconsistent." A verdict is merely inconsistent when its rendering "represent[s] an apparent flaw in the jury's logic," but the elements of the crimes are not mutually exclusive. *See Mumford*, 364 N.C. at 400, 699 S.E.2d at 915.

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“[B]ecause each count of an indictment is, in fact and theory, a separate indictment, [i]nconsistencies [are] permissible, and not found to be legally contradictory, as long as there [is] sufficient evidence to support the guilty verdict.” *See id.* (citation and quotation marks omitted). Put simply, conviction for an overarching offense does not require a conviction of the lesser-included offense. *See State v. Blackmon*, 208 N.C. App. 397, 405, 702 S.E.2d 833, 839 (2010) (citation, quotation marks, and brackets omitted) (holding that the jury’s conviction for felonious larceny and deadlock as to the charge of breaking and entering was merely inconsistent and not mutually exclusive because the jury’s failure to convict on the lesser-included charge of breaking and entering does not preclude a conviction of the “larger” offense — *i.e.*, felonious larceny — when there is a finding that “the defendant was engaged in the conduct described under either of the offenses”).

Defendant’s argument here, however, is based on a flawed understanding of the nature of the crime of conspiracy to traffic by possession. Despite its name, the crime does not require that the State prove possession. *See Jenkins*, 167 N.C. App. at 700, 606 S.E.2d at 433. Indeed, possession cannot be an element of the crime of conspiracy to traffic by possession because the crime of *conspiracy* is only “an agreement to commit a substantive criminal act, here trafficking by possession of cocaine. . . . [N]o overt act in furtherance of the agreement is required.” *State v. Ledwell*, 171 N.C. App. 328, 333–34, 614 S.E.2d 412, 415 (citations omitted), *disc. review denied*, 360 N.C. 73, 622 S.E.2d 624 (2005); *see also State v. Suggs*, 117 N.C. App. 654, 661, 453 S.E.2d 211, 215 (1995) (“To hold a defendant liable for the substantive crime of conspiracy, the State must prove an *agreement to perform* every element of the crime.”) (citations omitted) (emphasis added). In other words, upon the State’s proof that Defendant and Blanco entered into an agreement to traffic by possessing cocaine weighing at least 28 grams and intended the agreement to be carried out when it was made, the crime of conspiracy to traffic in cocaine was complete.

Because the crime of conspiracy to traffic by possession does not include possession as an element, the fact that Defendant was convicted of that crime and not convicted of the crime of trafficking by possession does not present any inconsistency, legal or otherwise. Accordingly, Defendant’s argument is overruled.

NO ERROR.

Judges STROUD and DILLON concur.

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STATE OF NORTH CAROLINA

v.

KEISHA MALARIAN VAUGHN

No. COA12-1179

Filed 7 May 2013

Criminal Law—self-defense—instruction on defendant as aggressor—not supported by evidence

There was plain error in a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury where there was a stabbing in a night club parking lot, defendant claimed self-defense, and the judge instructed the jury that defendant was not entitled to the benefit of self-defense if she was the aggressor in the altercation. The undisputed evidence showed that the victim lunged at defendant before she was able to initiate any action and was not sufficient to support the instruction.

Appeal by Defendant from Judgment entered 12 March 2012 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 11 March 2013.

Attorney General Roy Cooper, by Assistant Attorney General Susannah P. Holloway, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

From 5 to 7 March 2012, Keisha Malarian Vaughn (“Defendant”) was tried on charges of assault with a deadly weapon with intent to kill, inflicting serious injury. The evidence presented at trial tended to show the following:

On the night of 18 April 2009, Defendant and her friend Latisha Shea Kenney (“Kenney”) attended the Music City nightclub (“Music City”), located at 7700 Boeing Drive in Greensboro, with Kenney’s romantic interest, Shawn Pressley (“Pressley”). Kenney and Pressley arrived first, in Pressley’s car. Though the car belonged to Pressley, Kenney held the

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keys for the majority of the night. Shortly after Defendant arrived, the three of them entered the nightclub.

Once inside, Pressley went to find his friends and Kenney and Defendant went to find a table. Later that night, around 2:00 a.m., Pressley approached Kenney and Defendant on the dance floor. Kenney was visibly upset by the interaction and wanted to leave the nightclub. Kenney left with Defendant, and they went to a nearby gas station so that Defendant could fill her car's fuel tank. Afterward, they headed back to Music City so that Kenney could return Pressley's keys. As they arrived, Defendant backed her car into the space immediately to the right of Pressley's vehicle, which was also backed in, so that the driver's side of her car was closest to the passenger side of his car. Kenney was in the passenger seat of Defendant's car.

Kenney and Defendant waited in Defendant's car until Pressley came out of Music City. When that occurred, Pressley forced open the passenger-side door and confronted Kenney. They began to argue about a number of things, including Pressley's car keys, Kenney's decision to leave the nightclub, and Pressley's inability to get in touch with her. When Kenney attempted to elicit a confirmation from Defendant that she had not heard Pressley's attempts to call her, Pressley focused his anger on Defendant. The two began arguing and Pressley directed Defendant to get out of the car, referring to her as a "lesbian" in the process. Defendant exited her car "hoping to, you know, diffuse the situation, clear my name, and I wanted to re[-]ask the question, like, why would you even think that that about me? So I got out of the car hoping to do that."

According to Defendant, the argument turned physical within a matter of seconds. Pressley began to beat her with his fists and then picked her up and body slammed her into the pavement. As she was being dropped, Defendant gripped Pressley's dreadlocks "to kind of break the fall and not hit the ground so hard[.]" At some point, Defendant lost one of her contacts. While Pressley was attacking Defendant, Kenney got out of the passenger seat, rounded the front of Defendant's car, and pulled Pressley off of her. Pressley then resumed his original argument with Kenney, escalating matters by pushing her. After a brief period of time, Kenney began to hear air coming out of Pressley's tires. She informed him of this and he "pushed [her] a little bit harder." At that point, Kenney walked away while continuing her argument with Pressley, who had begun shoving her around the Music City parking lot.

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While this was occurring, Defendant got back into her car to examine the injuries inflicted by Pressley. When she saw the swelling and gashes on her face, she became angry “that he had beat me that bad[ly] for no reason.” Aware that Kenney and Pressley had experienced instances of domestic violence in the past, upset, and concerned for Kenney’s safety, Defendant equipped herself with a knife and exited the car. At trial, Defendant testified that she left the safety of her car because she “wanted to make sure [Kenney] was okay. I had seen my face and I was just thinking, wow, he hurt me this bad[ly] for no reason. Imagine what he might do to [Kenney.] I didn’t want to leave her out there.”

Unable to see clearly without her second contact, Defendant could not spot Kenney. Almost immediately, however, Defendant perceived Pressley charging toward her “like a bull” from the front of his vehicle. Defendant testified that there was no time to run, so “I just kind of tensed up and tried to protect my face and blindly swung the knife, and then [Pressley] turned and punched me several other times, and I fell back down.” In that moment, Defendant stabbed Pressley in the chest and pierced his heart. Pressley then punched Defendant, at least twice more, and she fell down to the ground. Worried that Pressley would “get away with what he had just [done] to [her],” Defendant cut his tires and crawled back to her car. An unidentified bystander took the knife and told Defendant to leave the scene. She did, driving to a nearby McDonald’s to meet with a friend. From there, she was convinced to go to the hospital and seek treatment for her injuries. Defendant saw the police for the first time when she arrived at the hospital.

That same night, officers R.R. Neal, Jr., (“Neal”) and Adam Deal of the Greensboro Police Department (“GPD”) were at Music City responding to an unrelated matter. When that disturbance was over, they noticed a confrontation in the parking lot and a gathering crowd. As they approached the scene, the crowd began to disperse and Neal noticed Pressley leaning over, next to his car, with his hands on his knees. Neal asked Pressley whether he was okay, and Pressley responded that he was not, indicating that he had been stabbed. At that point, Neal noticed a dime-sized hole in Pressley’s chest and called EMS to the scene. While waiting for EMS, Pressley became less responsive and stopped speaking. Pressley was still alive at the time of the trial, but had suffered an anoxic brain injury resulting from lack of oxygen to the brain. His mother testified that he was non-responsive, required full-time care, and lived with her in her apartment.

Defendant was treated at the hospital and has not sustained any permanent physical disability. Afterward, she gave a voluntary statement to GPD. Defendant’s injuries were documented at the police station, and

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she was interviewed by Detective Mike Matthews (“Matthews”), who was the lead investigator on the case. During the interview, Defendant indicated to Matthews that she chose to exit her car the second time — *i.e.*, immediately before Pressley charged at her like a bull — at least in part because she was upset about her injuries. She also admitted that she should have left the scene instead of exiting her car.

At the end of the trial, the jury was instructed on the doctrine of self-defense, including the rule that self-defense is justified only if the defendant is not the aggressor. No objection was raised to this instruction at trial. Defendant was found guilty of the offense of assault with a deadly weapon inflicting serious injury on 7 March 2012.¹ She was sentenced to a minimum of 25 months and a maximum of 39 months in prison. Defendant was also ordered to pay a total of \$2,944.73 in costs and restitution. Defendant appeals.

Standard of Review

“In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). The North Carolina Supreme Court “has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge’s instructions to the jury, or (2) rulings on the admissibility of evidence.” *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

Plain error arises when the error is “so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and quotation marks omitted). “Under the plain error rule, [the] defendant must convince [the appellate 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).

Discussion

On appeal, Defendant contends that the trial court committed plain error by instructing the jury that she was not entitled to the benefit of

1. This is a lesser-included offense of the charge of assault with a deadly weapon, inflicting serious injury, with the intent to kill.

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self-defense if she was the aggressor in her altercation with Pressley because “no evidence suggested that [she] was the aggressor.” We agree.

This Court has repeatedly held that “where the evidence does not indicate that the defendant was the aggressor, the trial court should not instruct on that element of self-defense.” *State v. Jenkins*, 202 N.C. App. 291, 297, 688 S.E.2d 101, 105 (2010) (awarding a new trial after the defendant was tackled to the floor by the victim, pushed the victim away, and shot the victim with a gun he kept on a nearby nightstand before the victim was able to attack again). Our Supreme Court has also directed that “[w]here jury instructions are given without supporting evidence, a new trial is required.” *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995). Broadly speaking, the defendant can be considered the aggressor when she “aggressively and willingly enters into a fight without legal excuse or provocation.” *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971).

In support of her contention that the evidence was inadequate to support an instruction on the aggressor element of self-defense, Defendant compares this case to *State v. Tann*, 57 N.C. App. 527, 291 S.E.2d 824 (1982). In *Tann*, the defendant and victim were second cousins. *Id.* at 527, 291 S.E.2d at 825. On at least two prior occasions, the victim had threatened to do harm to the defendant. *Id.* at 527–28, 291 S.E.2d at 825. One evening at a convenience store, the victim grabbed the defendant and began arguing with him. *Id.* They struggled and the defendant pushed the victim back before shooting him twice with a pistol, seriously injuring him. *Id.* Despite the fact that the defendant had armed himself in anticipation of the confrontation, we determined that “[t]here [was] no conflict of evidence as to which of the parties was the aggressor. [The d]efendant did not start the fight.” *Id.* at 530, 291 S.E.2d at 827. While the defendant was entitled to an instruction on self-defense, we reasoned that he was “prejudiced by the further instruction that he could not avail himself of the doctrine of self-defense if he . . . was the aggressor.” *Id.* at 531, 291 S.E.2d at 827 (citation, quotation marks, and emphasis omitted). Accordingly, we held that the trial court erred in its instruction and awarded a new trial. *Id.* at 531–32, 291 S.E.2d at 827; *see also State v. Ward*, 26 N.C. App. 159, 215 S.E.2d 394 (1975) (awarding a new trial on grounds that the trial court prejudicially erred by instructing on the aggressor doctrine when the defendant shot and killed the victim — who regularly carried a pistol in his rear pocket, had often threatened to kill the defendant with it, had recently assaulted the defendant, and, before being shot, threatened to blow the defendant’s brains out while reaching for his back pocket).

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We also find instructive an opinion of our Supreme Court in the case of *State v. Washington*, 234 N.C. 531, 67 S.E.2d 498 (1951). There the defendant-wife was charged with murdering her husband of five years. *Id.* at 532, 67 S.E.2d at 499. The husband had assaulted the wife in the past and had an altercation with her sister the day before he was killed. *Id.* at 533, 67 S.E.2d at 499. That morning, after being released from police custody, he returned to the house and attempted to drag the wife outside. *Id.* He was unsuccessful, but reappeared a few hours later and asked the wife for some money to pay for breakfast. *Id.* Leaving him outside, the wife went back into the house to retrieve the money and equip herself with a knife. *Id.* When she returned to the front door, the husband “pulled her out by the wrist, dragged her off the porch, down the street, knocked her over an embankment, jumped down on top of her and beat her with his fists,” at which point she “nicked” him with the knife. *Id.* The husband then picked up a large stick, struck her several times, dragged her up the embankment, continued to beat her, and threatened her. *Id.* at 533, 67 S.E.2d at 499–500. The wife then “stabbed him in the chest to get loose because, as she put it, ‘he told me what he was going to do to me and I knowed what would happen.’” *Id.* On those facts, our Supreme Court awarded a new trial and determined, in pertinent part, that “the record here discloses no evidence tending to show that the defendant brought on the difficulty or was the aggressor,” and, thus, the trial court’s instruction regarding the aggressor doctrine “was partially inapplicable, incomplete and misleading [to the jury].” *Id.* at 535, 67 S.E.2d at 501.

The State contends that these cases are not applicable primarily because of the “salient fact that [Defendant] was sitting in the safety of her car when she decided to get her knife, fold open the blade, get out of her car, and confront the victim, who was holding nothing but keys.” In addition, the State cites “evidence . . . that the defendant acted out of vengefulness [because she] herself stated that she was angry that [Pressley] had hurt her so badly in the first attack[.]” We are unpersuaded.

Defendant’s decision to arm herself and leave the vehicle, while perhaps unwise, was not, in and of itself, evidence that she brought on the difficulty, “aggressively and willingly” entered the fight, or intended to continue the altercation. There is no evidence that Defendant believed Pressley was still near her car or that she was preparing to continue the confrontation. Indeed, the evidence shows that Pressley appeared to be (and, for a time, was) in a separate altercation with Kenney — not that he was waiting for Defendant to come back out of her car and fight with him. Defendant knew that Pressley and Kenney had suffered bouts of

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domestic violence and had reason to believe that Kenney was in danger and that Defendant would be in danger if she left the car. Given this context, the fact that Defendant was upset about her injuries, even though she decided to leave the safety of the vehicle, is not evidence that she was the aggressor.

In both *Tann* and *Washington*, the respective defendants armed themselves in anticipation of a potential confrontation with their assailants. We determined in *Tann* that, despite the defendant's "fail[ure] to avoid the fight," there was no evidence that he was the aggressor when he shot the victim in a convenience store. *Tann*, 57 N.C. App. at 531, 291 S.E.2d at 827 (emphasis added). In *Washington*, the wife — who was aware of her husband's aggressive tendencies and recent assaults — opened the door of her home, thereby allowing the confrontation to occur. *Washington*, 234 N.C. at 533, 67 S.E.2d at 499. Yet, despite the fact that the wife had armed herself before giving her husband money for breakfast and even though she opened the door, our Supreme Court found no evidence that she was the aggressor. *Id.* at 535, 67 S.E.2d at 501.

Thus, in accordance with the opinions of this Court and our Supreme Court, we hold that the evidence presented at trial was insufficient to support the instruction that Defendant would lose the benefit of self-defense if she were the aggressor. The undisputed evidence shows that Pressley lunged at Defendant before she was able to initiate any action. Therefore, because it cannot be assumed "that the jury was more discriminating than the judge and ignored the erroneous instruction while applying the correct one," *see Ward*, 26 N.C. App. at 163, 215 S.E.2d at 396–97, we hold that the court's error was prejudicial and award a new trial.

NEW TRIAL.

Judges MARTIN and HUNTER, ROBERT C., concur.

STATE v. WEBB

[227 N.C. App. 205 (2013)]

STATE OF NORTH CAROLINA

v.

LEDONTA WEBB

No. COA12-1268

Filed 7 May 2013

Probation and Parole—activation of sentence—substitution of counsel—failure to show prejudice

The trial court did not err by allowing an attorney to represent defendant at a probation revocation hearing even though he was not the attorney appointed to represent defendant. Defendant did not provide any reasonable possibility that the result of his hearing would have been different had the trial court followed the statutory mandate and either made the proper findings in open court or refused to allow the substitute attorney to represent defendant.

Appeal by defendant from judgment entered 16 April 2012 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 27 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General Andrew O. Furuseth, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Mary Cook, for defendant.

HUNTER, JR., Robert N., Judge.

Ledonta Webb (“Defendant”) appeals from judgments revoking his probation and activating his sentences. Defendant argues that the trial court erred in allowing an attorney to represent Defendant at the probation revocation hearing because that attorney was not the attorney appointed to represent Defendant. We find no prejudicial error.

I. Procedural History

On 15 October 2008, Defendant pled guilty to one count of possession of stolen goods and two counts of common law robbery. One of the counts of common law robbery was consolidated with the possession of stolen goods charge, and Defendant was sentenced to two consecutive sentences of 13-16 months imprisonment each. Those sentences were suspended and Defendant was placed on supervised probation for 36

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months with special probation conditions. Defendant's probation was modified several times. The modifications included an extension of the term of probation to include 24 additional months.

On 23 January 2012, violation reports were filed alleging violations of the conditions of Defendant's probation. The reports were partially based on Defendant's guilty plea for possession of a firearm by a felon on 20 December 2011 in Craven County Superior Court. On 19 March 2012, Kelly Greene was appointed as counsel for Defendant. A probation revocation hearing was held on 16 April 2012 before Judge Benjamin G. Alford in Craven County Superior Court.

At the hearing, Tom Wilson represented Defendant. Mr. Wilson requested a continuance because Defendant was hoping "that his federal attorney might be able to work out something along the line with his probation." Defendant's motion to continue was denied. Mr. Wilson then said that "having spoken with my client, reviewed the violations and as to the condition number two where [Defendant] acknowledges he has pled guilty to felony possession of a firearm, we'd be admitting to that."

The following exchange then occurred:

THE COURT: Are you appointed?

MR. WILSON: Two hours in the case.

THE COURT: Mr. Webb, I'm inclined to assess the value of your lawyer's legal services at 120 dollars. Do you think that's fair?

DEFENDANT: Yes.

THE COURT: Anything you want to tell me sir?

DEFENDANT: . . . I got two, 13-16 months sentences, I would ask if they can be ran concurrents [sic].

On 16 April 2012, judgments were entered finding Defendant had violated his probation and activating both 13-16 month sentences to run consecutively. As Defendant appeals from the final judgment of a superior court, an appeal lies of right with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

Defendant filed a *pro se* written notice of appeal on 19 April 2012. On 22 October 2012, after the filing of the Record on Appeal in the present case, Defendant filed a petition for writ of certiorari as his notice of appeal was technically deficient. We grant Defendant's petition for writ of certiorari and proceed on the merits of the case.

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II. Analysis

Defendant argues that Mr. Wilson was not appointed to represent Defendant and that the trial court did not make necessary findings in open court regarding a substitute attorney. For the following reasons, we find that any error by the trial court was not prejudicial.

Our General Statutes state that “counsel shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services [“IDS”].” N.C. Gen. Stat. § 7A-452(a) (2011). Rule 1.5(d)(2) of the Rules of the Commission on Indigent Defense Services states:

The attorney named in the appointment order shall not delegate to another attorney any material responsibilities to the client, including representation at critical stages of the case, unless the court finds in open court that the substitute attorney practices in the same law firm as the appointed attorney and is on the list of attorneys who are eligible for appointment to the particular case, that the client and the substitute attorney both consent to the delegation, and that the delegation is in the best interests of the client.

IDS Rule 1.5(d)(2) (2011).

Since there were no findings in open court regarding Mr. Wilson’s ability to serve as Defendant’s lawyer, Defendant contends that the trial court failed to follow the statute requiring appointment of counsel pursuant to IDS Rules and that Defendant should therefore be granted a new probation revocation hearing.

“ ‘When a trial court acts contrary to a statutory mandate, the defendant’s right to appeal is preserved despite the defendant’s failure to object during trial.’ ” *State v. Braxton*, 352 N.C. 158, 177, 531 S.E.2d 428, 439 (2000) (quoting *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000)), *cert. denied*, 531 U.S. 1130 (2001); *see also State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (“[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 [the] defendant’s failure to object at trial.”). “However, a new trial does not necessarily follow a violation of statutory mandate. Defendants must show not only that a statutory violation occurred, but also that they were prejudiced by this violation.” *State v. Love*, 177 N.C. App. 614, 623, 630 S.E.2d 234, 240—41 (2006).

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Defendant argues that there is no need to show prejudice because his argument is a constitutional argument. *See* N.C. Gen. Stat. § 15A-1443(b) (2011) (“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.”). However, Defendant’s argument is clearly statutory in nature.

Defendant did not reference either the U.S. Constitution or the N.C. Constitution in his initial brief. In his reply brief, Defendant makes a limited constitutional argument regarding Defendant’s right to counsel before returning to the statutory argument. Defendant’s constitutional right to counsel is not at issue in the present case. Defendant had counsel for his hearing and does not allege that he received ineffective assistance of counsel. He only alleges that the statutory requirements for substitution of counsel were not met. The argument, therefore, is a statutory argument, and Defendant must demonstrate prejudice. *See* N.C. Gen. Stat. § 15A-1443(a) (2011) (stating that prejudice occurs “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”).

Defendant violated the terms of his probation by pleading guilty to possession of a firearm by a felon. Defendant did not dispute this guilty plea at his hearing and does not dispute it before this Court. The trial court directly addressed Defendant at the hearing, explicitly asking him about Mr. Wilson’s fees and whether he had anything else to tell the trial court. Defendant said that he would like his sentences to run concurrently, but never expressed any dissatisfaction with Mr. Wilson or even confusion over the substitution of counsel. Defendant does not provide any reasonable possibility that the result of his hearing would have been different had the trial court followed the statutory mandate and either made the proper findings in open court or refused to allow Mr. Wilson to represent Defendant. Thus, the trial court did not commit prejudicial error.

III. Conclusion

For the foregoing reasons, we find

NO ERROR.

Judges STEELMAN and GEER concur.

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[227 N.C. App. 209 (2013)]

STATE OF NORTH CAROLINA

v.

ERIC LAMAR WILLIAMS, JR., DEFENDANT

No. COA12-1323

Filed 7 May 2013

1. Criminal Law—motion for appropriate relief—*sua sponte*—change of sentence

The trial court supplied appropriate notice of a *sua sponte* motion for appropriate relief (MAR) to change a sentence imposed the day before where the judge announced his *sua sponte* MAR in open court; he was the judge who presided over the guilty plea and sentencing hearing; the guilty plea, sentencing hearing, and MAR were all made during the same criminal session; and the notice came much sooner than within 10 days after entry of judgment.

2. Criminal Law—motion for appropriate relief hearing—statutory mandates—request for continuance

The trial court complied with statutory mandates for raising and allowing its *sua sponte* motion for appropriate relief (MAR) to change a criminal sentence imposed the day before. Furthermore, although the State contended that the trial court erred by failing to conduct a hearing, the State asked for a continuance so that the prosecutor from the day before could decide how to proceed and did not argue that the trial court erred by refusing the continuance.

3. Criminal Law—motion for appropriate relief—*sua sponte*—sentence altered—burden not shifted to State

At a hearing on a trial court's *sua sponte* motion for appropriate relief (MAR) at which a sentence imposed the previous day was altered, the trial court did not place the burden on the State to disprove the existence of extraordinary mitigation

4. Sentencing—change of sentence—extraordinary mitigation—findings required

The trial court's granting of its *sua sponte* motion for appropriate relief and change of a sentence imposed the day before was reversed and remanded for appropriate findings as to the factors of extraordinary mitigation. While there was certainly evidence in the record to support extraordinary mitigation, appellate review is not *de novo* and the trial court must make the appropriate findings based upon the evidence in order to support its determination.

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Appeal by the State from judgment entered on or about 3 May 2012 by Judge Joseph E. Turner in Superior Court, Forsyth County. Heard in the Court of Appeals 28 March 2013.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Staples Hughes by Assistant Appellate Defender Benjamin Dowling-Sendor, for defendant-appellee.

STROUD, Judge.

Defendant pled guilty to attempted second degree sex offense, felonious restraint, and indecent liberties with a child. The trial court rendered an oral judgment imposing an active term of imprisonment, but thereafter sua sponte raised a motion for appropriate relief, found extraordinary mitigating factors, and ultimately entered a written judgment suspending defendant's active sentence. The State appeals; for the following reasons, we reverse and remand.

I. Background

On or about 3 May 2012, defendant pled guilty to attempted second degree sex offense, felonious restraint, and indecent liberties. Before the trial court the State summarized the evidence, and defendant stipulated to the State's summary. The State summarized that Mr. Brian Johnson had arranged for himself and his friends to receive fellatio from a 14-year-old girl in exchange for cigars. Mr. Johnson and his friends, including defendant, drove to pick up the girl at her home, and then took her to a park. En route to the park they smoked some cigars. The girl performed fellatio on Mr. Johnson and then defendant. Defendant also asked the girl to lift her shirt so he could see her breasts, and she did. They gave the girl cigars, as agreed, and then they smoked some cigars. There was no evidence that any of the sexual acts that occurred were performed by force or against the girl's will. Neither defendant or the others knew the girl's age; she was 5'8" tall and weighed about 185 pounds. At the time of the offense defendant was 20 years old; defendant also had an IQ of 77 and thus was on the "borderline range of intellectual functioning."

The trial court orally rendered judgment by finding ten mitigating factors and ultimately sentencing defendant "at the bottom of the mitigated range" to an active sentence. The next day, the trial court called the parties back into court and the following dialogue took place:

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THE COURT: Mr. Williams, in this court yesterday I found you guilty and sentenced you on charges of an attempted second degree sex offense, of felonious restraint, and indecent liberties with a child; and I sentenced you to the minimum term required by law of 38 months with a corresponding maximum sentence of 155 months.

And if you will recall, all of you that were here yesterday, it took me a while to come to that conclusion. And I was less than convicted [sic] in my decision I guess because last night I woke up at 2:15 in the morning and I didn't go back to sleep until a quarter of 5 because I couldn't get you and this case off my mind. I've been a judge for 22 years, and I think there have been three or four occasions when a decision of mine kept me awake at night.

And so on my own motion, I am considering a motion for appropriate relief under G.S. 15A-1414(b)(4) in that I believe the sentence imposed was not supported by the evidence in the sentencing hearing.

I've given notice to you, Mr. Williams. I've given notice to your attorney. I've given notice to the district attorney and the victim's family through the district attorney.

And 15A-1420 requires that even when the judge gives notice, it needs to be in writing unless it's in open court during the same session or before the same judge who presided. And since all of those factors apply, I do not believe that written notice is required.

And I gave that notice just as early this morning as I reasonably could so that everybody could have an opportunity to be present. And pursuant to my motion for appropriate relief, I am setting aside the judgment I entered yesterday and entering a new judgment based on the evidence that I heard in the belief that this new judgment would be an appropriate judgment under the law.

MR. O'NEILL: Your Honor, with all due respect, if I may interrupt you just for a moment.

THE COURT: Yes.

MR. O'NEILL: So is the purpose of the hearing that you're putting the district attorney's office on notice that

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we are going to schedule a hearing on a motion for appropriate relief?

THE COURT: No. This is to strike the judgment I entered yesterday and enter a new judgment in its place.

MR. O'NEILL: Okay. If that's the case then, Your Honor -- again, the Court may have already made up its mind as to what it's going to do on this -- but I would make a motion to have the matter at least continued to Monday so the prosecuting attorney who is more familiar with the facts of this case will be able to be present and be heard. And we have not had an opportunity to brief the family on any of these issues and determine whether or not they wanted to present any evidence.

So it would be my motion to continue the matter to Monday when both sides would be able to address the Court prior to making its ruling.

THE COURT: Okay. I thank you for that and understand it. I'm gonna deny it because we had a very lengthy sentencing hearing, and I have heard the [S]tate's arguments in favor of the judgment I entered yesterday and in fact did what the [S]tate argued at that time. And my decision is simply correcting what I did yesterday to comply with what I should have done yesterday. And so I will deny that motion.

And in this case -- if you'll stand up, Mr. Williams -- I'm going to find -- actually you don't need to stand up yet -- I'm going to find that there are extraordinary mitigating factors in the case.

I will first of all find that he is convicted of a Class D felony, and that that offense by statute requires an active sentence; that after hearing the evidence and the arguments of counsel yesterday on the issue of deviation for extraordinary mitigation, I would find -- in addition to the mitigating factors that I stated in open court as part of the judgment yesterday, I would find the extraordinary mitigating factor that the defendant's level of mental functioning was insufficient to constitute a defense but significantly reduced his culpability.

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I would further find that all of the evidence was to the effect that the defendant was absolutely a passive participant in the entire affair in that he was -- quote -- "hanging out" -- closed quote -- with friends; that he was propositioned by the victim, and simply conceded to her performing fellatio upon him; and his only involvement was the physical reaction to her administrations. And that from the evidence -- well, just strike that.

Based on those findings, I would find that extraordinary mitigating factors of a kind significantly greater than in the normal case are present; that those factors substantially outweigh any factors in aggravation; and there were no findings of any aggravating factors.

And I would conclude further that it would be manifest injustice to impose an active sentence in the case.

And now you can stand up.

The State objected on the grounds of notice as the attorney who had handled the hearing the previous day was unavailable. The trial court ultimately entered judgment consistent with its rendition on the second day of sentencing making findings of extraordinary mitigation and suspending defendant's sentence; thus, instead of imprisonment, defendant received 60 months of supervised probation. The State appeals.

II. Motion for Appropriate Relief

The State contends that "the trial court erred by not following the statutory procedure for conducting a hearing on an MAR[.]" (original in all caps), including "not providing notice as required by section 15A-1420" and "by not conducting a hearing pursuant to subsection (c)." "Questions of statutory interpretation are questions of law, which are reviewed de novo by an appellate court." *State v. Williams*, ___ N.C. App. ___, ___, 725 S.E.2d 7, 8 (2012) (citation and quotation marks omitted).

Here, the trial court chose to raise and grant its own motion for appropriate relief ("MAR"). Trial judges may raise MARs *sua sponte* "[a]t any time that a defendant would be entitled to relief by a motion for appropriate relief[.]" N.C. Gen. Stat. § 15A-1420(d) (2011). As MARs may be "made before or after entry of judgment" and "for any error committed" if raised "[a]fter the verdict but not more than 10 days after entry of judgment" the trial court did not err in raising an MAR in this manner. N.C. Gen. Stat. §§ 15A-1411(b), -1414(a) (2011).

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A. Notice

[1] The State contends that the trial court failed to provide proper notice pursuant to North Carolina General Statute § 15A-1420. When the trial court raises a MAR *sua sponte*, the trial court “must cause appropriate notice to be given to the parties.” N.C. Gen. Stat. § 15A-1420(d) (2011). An MAR need not be made in writing if “it is made: 1. In open court; 2. Before the judge who presided at trial; 3. Before the end of the session if made in superior court; and 4. Within 10 days after entry of judgment[.]” N.C. Gen. Stat. § 15A-1420(a)(1) (2011). The trial judge here announced his *sua sponte* MAR “[i]n open court;” he was “the judge who presided” over the guilty plea and sentencing hearing; the guilty plea, sentencing hearing, and MAR were all made during “the April 30, 2012 Criminal Session[;]” and as judgment had only been rendered the day before the notice of the MAR, the notice came much sooner than “[w]ithin 10 days after entry of judgment[.]” *Id.* North Carolina General Statute § 15A-1420 also requires that the notice provided for a MAR “[s]tate the grounds for the motion” and “[s]et forth the relief sought[.]” N.C. Gen. Stat. § 15A-1420(a)(1)(b), (c) (2011). The trial court also complied with North Carolina General Statute § 15A-1420(a)(1)(b) and (c) as at the time it gave the oral notice of its decision to raise a MAR it also stated it “believe[d] the sentence imposed was not supported by the evidence in the sentencing hearing” and was “setting aside the judgment I entered yesterday and entering a new judgment based on the evidence that I heard in the belief that this new judgment would be an appropriate judgment under the law.” Accordingly, the trial court provided appropriate notice.

B. Hearing

[2] The State also contends that the trial court erred in failing to conduct a hearing pursuant to North Carolina General Statute § 15A-1420(c). Pursuant to North Carolina General Statute § 15A-1420(c)(1), “[a]ny party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented[.]” N.C. Gen. Stat. § 15A-1420(c)(1) (2011). However, the State did not request a hearing, but instead asked for a continuance so that the prosecutor from the day before could decide how to proceed. The State has not argued that the trial court erred by refusing to continue the matter simply so another prosecutor could be present. The trial court complied with statutory mandates for raising and allowing its MAR, *see generally* N.C. Gen. Stat. §§ 15A-1411, -1414, -1420, so this argument is overruled.

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III. Mitigated Sentence

The State presents three arguments as to why the trial court erred in sentencing defendant.

A. Burden on the State

[3] The State first contends that “the trial court erred by placing the burden on the State to disprove the existence of extraordinary mitigation[,]” (original in all caps), as is evidenced by the following dialogue:

THE COURT: It would be more helpful to me at this point I believe to start by asking Miss Glanton[, the State,] to tell me why you think I should not find extraordinary mitigating factors given his age is — level of maturity and intellect and his lack of any prior criminal conduct and being invited to participate.

....

MISS GLANTON: It sounds to me you’re saying you’re finding this and I need to tell you why you shouldn’t find it.

THE COURT: No. I said it would be more helpful to my analysis of the case if you would talk to me about why you don’t think I should qualify extraordinary mitigating factors.

The State does not contend that defendant failed to carry his burden of proving extraordinary mitigating factors existed; instead, the State contends that the trial court erroneously placed the burden on the State to disprove the extraordinary mitigating factors. We do not believe the trial court did this.

Pursuant to N.C. Gen. Stat. § 15A-1340.16(a),

The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court. The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

N.C. Gen. Stat. § 15A-1340.16(a) (2011).

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Here, defendant presented extensive and compelling evidence of mitigating factors. The trial court then asked the State to respond to defendant's evidence by explaining why it believed defendant's "age[,] . . . level of maturity and intellect and his lack of any prior criminal conduct and being invited to participate" were not sufficient reasons for finding extraordinary mitigating factors; the trial court makes it clear that it is trying to determine whether it will find extraordinary mitigating factors based on the evidence presented by defendant. The trial court did not presume extraordinary mitigating factors and then ask the State to present evidence to explain why extraordinary mitigating factors did not exist; this would have been improperly shifting the burden to the State. Since the trial court did not do this, this argument is overruled. See generally *State ex rel. Edmisten v. Challenge, Inc.*, 71 N.C. App. 575, 579-80, 322 S.E.2d 658, 660 (1984) ("The record in this case was voluminous, containing many affidavits and depositions, transcriptions of tape recorded conversations, and several lengthy and detailed motions, among other items. The hearing on the plaintiff's 18 December 1981 motion was Judge Farmer's first contact with the case, and, in order to perform his duty under Rule 56(d), Judge Farmer asked the defendants to come forth and provide the court information as to which portion of each matter is in good faith controverted as opposed to a broad statement that the entire matter is controverted. In our view, Judge Farmer's order does not require the defendants to assume a burden of proof; it does not require them to produce additional evidence. It merely orders them, pursuant to Rule 56(d), to explain by argument and reference to the record, how each matter they claim was in controversy was disputed." (quotation marks omitted)), *disc. review denied*, 313 N.C. 336, 327 S.E.2d 899 (1985).

B. Factors for Extraordinary Mitigation

[4] The State contends that "the trial court erred in finding extraordinary mitigation based on two statutory mitigating factors." (Original in all caps.)

North Carolina General Statute § 15A-1340.13(g) provides,

(g) Dispositional Deviation for Extraordinary Mitigation. – Except as provided in subsection (h) of this section, the court may impose an intermediate punishment for a class of offense and prior record level that requires the imposition of an active punishment if it finds in writing all of the following:

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- (1) That extraordinary mitigating factors of a kind significantly greater than in the normal case are present.
- (2) Those factors substantially outweigh any factors in aggravation.
- (3) It would be a manifest injustice to impose an active punishment in the case.

The court shall consider evidence of extraordinary mitigating factors, but the decision to find any such factors, or to impose an intermediate punishment is in the discretion of the court. The extraordinary mitigating factors which the court finds shall be specified in its judgment.

N.C. Gen. Stat. § 15A-1340.13(g) (2011).

In *State v. Melvin*, this Court explained the application of extraordinary mitigation factors in sentencing:

Part 2 of Article 81B of Chapter 15A of the General Statutes sets forth North Carolina's framework of Structured Sentencing for felons. Felony sentences are determined by the classification of the felony and the defendant's prior record level. The felony sentencing grid set forth in N.C. Gen. Stat. § 15A-1340.17 provides for three possible sentencing dispositions: (1) C being community punishment as defined in N.C. Gen. Stat. § 15A-1340.11(2); (2) I being intermediate punishment as defined in N.C. Gen. Stat. § 15A-1340.11(6); and (3) A being active imprisonment in the Department of Corrections. If a particular cell in the sentencing grid contains only an A as a sentencing disposition, the trial court is required to impose an active prison sentence, and not suspend the sentence. The only exception to this is found in N.C. Gen. Stat. § 15A-1340.13(g), which allows the sentencing judge to impose an intermediate punishment upon a finding that an extraordinary mitigating factor exists in the case.

An extraordinary mitigation factor is defined as being of a kind significantly greater than in the normal case. The decision to find an extraordinary mitigating factor rests in the discretion of the presiding judge. Upon the finding of a factor of extraordinary mitigation, the trial judge

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presiding must then make two additional findings before an intermediate punishment may be imposed in lieu of an active sentence. The factor(s) in extraordinary mitigation must substantially outweigh any factors in aggravation, and it must be found that it would be a manifest injustice to impose an active punishment in the case. The decision to find these additional factors rests in the discretion of the presiding judge. Finally, the ultimate decision of whether to impose an intermediate punishment rests in the discretion of the presiding judge.

A finding of extraordinary mitigation does not authorize the trial court to modify the length of a sentence imposed, only to impose an intermediate punishment in lieu of active punishment. . . .

On appeal, the decisions made by the trial court under N.C. Gen. Stat. § 15A-1340.13(g) are reviewed under an abuse of discretion standard. An abuse of discretion occurs only when the trial court's ruling is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.

188 N.C. App. 827, 829-31, 656 S.E.2d 701, 702-03 (2008) (citations, quotation marks, brackets, and heading omitted).

In *Melvin*, the trial court did not find extraordinary mitigation despite finding several statutory mitigation factors, and the defendant argued that the trial court abused its discretion by holding that "a large number of mitigating factors don't add up to one extraordinary mitigating factor[.]" *Id.* at 831, 656 S.E.2d at 703 (quotation marks omitted). This Court determined that "[t]he sheer number of mitigating factors" is not controlling; quality of factors, not quantity, is the prime consideration for the trial court. *Id.*

Subsection (1) clearly states that to be a factor of extraordinary mitigation, the factor must be of a kind significantly greater than in the normal case. The trial court must look to the quality and nature of the factor to determine whether it is an extraordinary factor in mitigation. Unless the factor is significantly greater it cannot be a factor of extraordinary mitigation. The sheer number of mitigating factors cannot in and of itself support a finding of extraordinary mitigation.

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Id. (citation and quotation marks omitted).

The defendant in *Melvin* also argued that the trial court abused “its discretion by holding that a statutory mitigating factor cannot be the basis for an extraordinary mitigating factor.” *Id.* Although we noted that the trial court did not so hold, but rather merely expressed doubt on this issue, this Court stated that

a factor of extraordinary mitigation must be of a kind significantly greater than in the normal case. The statutory mitigating factors set forth in N.C. Gen. Stat. § 15A-1340.16(e) are mitigating factors found in a normal case. While the trial court is not precluded from making a finding of extraordinary mitigation based upon the same facts as would support one of the mitigating factors listed in the statute, in order to be extraordinary mitigation there must be additional facts present, over and above the facts required to support a normal statutory mitigation factor.

Id. (quotation marks omitted). The trial court in *Melvin* had carefully considered the evidence of twelve mitigating factors, found six, but properly exercised its discretion in declining to find extraordinary mitigation based on the number or quality of those six factors. *Id.* at 828-29, 656 S.E.2d at 702.

In *State v. Riley*, the trial court found extraordinary mitigation based upon two statutory factors: “(1) The defendant was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced the defendant’s culpability for the offense . . .; and (2) The defendant aided in the apprehension of another felon.” 202 N.C. App. 299, 308, 688 S.E.2d 477, 483 (quotation marks omitted), *cert. denied*, 364 N.C. 246, 699 S.E.2d 644 (2010). This Court relied upon *Melvin* to reverse the trial court’s sentence and remand for resentencing. *Id.* Again, we noted that the trial court’s findings must address the quality, not quantity, of factors to find extraordinary mitigation. *Id.*

[T]he normal mitigating factors set forth in N.C. Gen. Stat. § 15A-1340.16(e) are not in and of themselves sufficient to support a finding of extraordinary mitigation. There must be additional facts present, over and above the facts required to support a normal statutory mitigation factor. It was an abuse of discretion for the trial court to hold that a normal mitigating factor, without additional facts being present, constituted an extraordinary mitigating factor.

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The fact that the trial court found two normal mitigating factors does not alter our conclusion. It is the quality and not the quantity of mitigating factors that qualify them as factors of extraordinary mitigation.

This case is remanded to the trial court for resentencing as to whether there exists a factor or factors of extraordinary mitigation.

Id. (citation, quotation marks, and brackets omitted).

We will now examine the trial court's findings in light of *Melvin* and *Riley*. See *Riley*, 202 N.C. App. 299, 688 S.E.2d 477; *Melvin*, 188 N.C. App. 827, 656 S.E.2d 701. Here, the trial court found ten statutory mitigating factors:

2. The defendant:

....

b. played a minor role in the commission of the offense.

3. The defendant was suffering from a:

a. mental condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.

....

4. The defendant's:

a. age, or immaturity, at the time of the commission of the offense significantly reduced the defendant's culpability for the offense.

....

....

8. a. The defendant acted upon strong provocation.

....

....

11. The defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer:

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a. at an early stage of the criminal process.

....

12. The defendant has been a person of good character or has had a good reputation in the community in which the defendant liv[es].

....

15. The defendant has accepted responsibility for the defendant's criminal conduct.

....

18. The defendant has a support system in the community.

19. The defendant has a positive employment history or is gainfully employed.

20. The defendant has a good treatment prognosis and a workable treatment plan is available.

In addition, in support of extraordinary mitigation, *see* N.C. Gen. Stat. § 15A-1340.13(g)(1)-(3), the trial court also found that

[t]he defendant's level of mental functioning was insufficient to constitute a defense but significantly reduced his culpability. The defendant was a passive participant in that he was 'hanging out' with friends and that he was propositioned by the victim, and simp[ly] conced[ed] to her performing fellatio upon him and his only involvement was the physical reaction to her ministrations.

Thus, the trial court essentially found four extraordinary factors.

First, the trial court first found that "[t]he defendant's level of mental functioning was insufficient to constitute a defense but significantly reduced his culpability[;]" this factor is almost a verbatim recitation of the normal statutory mitigating factor that "[t]he defendant was suffering from a mental . . . condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability[.]" N.C. Gen. Stat. § 15A-1340.16(e)(3) (2011).

While the trial court is not precluded from making a finding of extraordinary mitigation based upon the same facts as would support one of the mitigating factors listed in the statute, in order to be extraordinary mitigation there

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must be additional facts present, over and above the facts required to support a normal statutory mitigation factor.

Melvin, 188 N.C. App. 831, 656 S.E.2d at 703. So, although the trial court could properly decide to allow extraordinary mitigation based upon defendant's mental condition, the trial court must make additional findings to support this, "over and above the facts required to support a normal statutory mitigation factor." *Id.*

The second extraordinary factor found by the trial court was that "[t]he defendant was a passive participant in that he was 'hanging out' with friends[;]" this too is merely a rewording of a normal mitigating factor "[t]he defendant was a passive participant . . . in the commission of the offense[;]" N.C. Gen. Stat. § 15A-1340.16(e)(2) (2011). Again, this finding as stated in the order is not sufficient as a factor of extraordinary mitigation as it fails to address additional facts which raise this factor above the normal statutory factor. *See id.*

The third finding in extraordinary mitigation was that defendant "was propositioned by the victim and simply conceded[ed] to her performing fellatio upon him[.]" In this case, due to the victim's age, the victim's consent, or even outright proposition, is not a proper factor in support of mitigation. *See generally* N.C. Gen. Stat. § 15A-1340.16(e). Here, the victim was 14 years old and defendant was 20. There is a normal statutory mitigating factor, which the trial court properly did not find here, that the victim "was a voluntary participant" or "consented" to the crime, but this factor applies only if the victim was 16 years old or older. *See* N.C. Gen. Stat. § 15A-1340.16(e)(6). Because the victim here was 14 years old, as a matter of law her voluntary conduct or consent cannot serve as a normal mitigating factor on behalf of defendant, much less an extraordinary mitigating factor. *See id.*

Lastly, the trial court's fourth extraordinary mitigation finding was that defendant's "only involvement was the physical reaction to her ministrations." This finding, as worded by the trial court, is not supported by the evidence. The evidence showed that in addition to passively receiving fellatio, defendant requested the victim to lift her shirt and show him her breasts.

Accordingly, we reverse and remand defendant's sentence for the trial court to make appropriate findings as to the factors of extraordinary mitigation "over and above" the findings required for the normal statutory factors, with a focus on the quality, not quantity, of the factors. *Riley*, 202 N.C. App. at 308, 688 S.E.2d at 483. As noted above,

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extraordinary mitigation is only appropriate when the facts are “of a kind significantly greater than in the normal case.” *Melvin*, 188 N.C. App. at 831, 656 S.E.2d at 703. While from the record there is certainly evidence to support a determination of extraordinary mitigation, we do not review the evidence de novo and as such the trial court must make the appropriate findings based upon the evidence in order to support its determination of extraordinary mitigation. *See Melvin*, 188 N.C. App. at 830-31, 656 S.E.2d at 703.

C. Term of Sentence

Lastly, the State contends that “the trial court erred by imposing a term of imprisonment for a duration not authorized for the defendant’s class of offense and prior record level.” (Original in all caps.) The State argues that

[t]he trial court ordered Defendant to register as a sex offender, and sentenced him to a minimum 60, maximum 81 months, suspended. . . . A minimum term of 60 months falls within the presumptive range for Defendant’s class of offense and prior record level. The trial court erred however in determining the maximum term. Under section 15A-1340.17(f), the maximum term should have been 72 months plus 60 additional months, or 132 months. Because Defendant’s conviction was a reportable conviction, the trial court should have determined the maximum term pursuant to subsection (f).

Defendant agrees with the State that he was erroneously sentenced. As we are reversing and remanding defendant’s judgment we need not address this issue, but we point it out to direct the attention of the trial court to this statutory mandate at resentencing.

IV. Conclusion

For the foregoing reasons, we reverse and remand for resentencing.

REVERSED and REMANDED for RESENTENCING.

Judges ELMORE and STEELMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 07 MAY 2013)

ARBONA v. WILLIAMS No. 12-1048	Wake (11CVD11400)	No Error
BARTLETT v. WAYNE CNTY. BD. OF EDUC. No. 12-672	N.C. Industrial Commission (TA-21085) (TA-21086) (TA-21087)	Affirmed
BLEDSON v. BLEDSON No. 12-1043	New Hanover (07CVD1763)	Dismissed in part and reversed and remanded in part.
CAROLINA BUILDERS, INC. v. BIBLE WAY CMTY. DEV. CORP. No. 12-1416	Cumberland (11CVS7622)	Affirmed
EDWARDS v. HACKNEY No. 12-1146	Alleghany (11CVS202)	Affirmed
EMBRACE US, INC. v. THE GUILFORD CTR. FOR BEHAVIORAL HEALTH No. 12-970	Guilford (11CVS11643)	Affirmed
FIA CARD SERVS., N.A. v. ASHWORTH No. 12-958	Union (11CVD1156)	Affirmed
IN RE C.S.E. No. 12-1207	New Hanover (11JT258)	Remanded
IN RE E.L.R. No. 12-1302	Durham (09JB144)	Affirmed
IN RE G.R. No. 12-1391	Sampson (11JB38)	Vacated and Remanded
IN RE J.B. No. 12-1393	Dare (10JA16) (10JA17)	Affirmed
IN RE J.K.T. No. 12-1409	Forsyth (10JT192)	Affirmed

IN RE J.P. No. 12-1343	Wake (12JA150)	Affirmed
IN RE R.L.M. No. 12-1538	Cumberland (08JT175-176)	Affirmed
IN RE V.C.B. No. 12-1162	Bertie (07J29) (08J23)	Affirmed
IN RE A.C. No. 13-28	New Hanover (11JT244-247)	Affirmed
MANCUSO v. CITY OF DURHAM No. 12-1331	Durham (12CVS2667)	Vacated and Remanded
METTS v. PARKINSON No. 12-1357	Durham (10CVS5717)	Reversed and Remanded
NALL FARM RD., LLC v. WATSON No. 12-1420	Macon (10CVS550)	Affirmed
ODUGBA v. ODUGBA No. 12-733	Gaston (09CVD7013)	Reversed and Remanded
PINEHURST SURGICAL CLINIC, P.A. v. DIMICHELE-MANES No. 12-830	Moore (12CVS296)	Reversed and Remanded
SCHEERER v. FISHER No. 12-1002	Haywood (08CVS11)	Affirmed in part; Reversed and New Trial in part
STATE BD. OF EXAMINERS OF PLUMBING, HEATING, & FIRE SPRINKLER CONTR'RS v. KANUPP No. 12-1306	Catawba (11CVS1837)	Dismissed
STATE v. ADAMS No. 12-1345	Iredell (10CRS57175) (10CRS58162) (11CRS1962) (11CRS50467)	Affirmed
STATE v. ALLEN No. 12-1338	Pender (11CRS2309-10)	Affirmed

STATE v. ANDERSON No. 12-1218	New Hanover (11CRS59303)	No Error
STATE v. BROWN No. 12-952	Cumberland (09CRS63716)	No prejudicial error in part; no error in part.
STATE v. BYNUM No. 12-1180	Durham (08CRS40134)	Judgment vacated
STATE v. CORBETT No. 12-1122	New Hanover (11CRS54475)	No Error; Remand for Resentencing
STATE v. DAVIS No. 12-1120	Mecklenburg (10CRS232587-9)	No Error
STATE v. DICKENS No. 12-1353	Alamance (09CRS56590-1)	No Error
STATE v. FUENTES No. 12-1148	Durham (06CRS48821)	No Error
STATE v. FULLER No. 12-1351	Mecklenburg (11CRS218536)	No Error
STATE v. GRIMES No. 12-1096	Pitt (11CRS53007)	Affirmed
STATE v. HAIRSTON No. 12-985	Rockingham (11CRS51121) (12CRS372)	No Error
STATE v. HARTE No. 12-1191	Mecklenburg (09CRS226360) (12CRS4664)	No Error
STATE v. HERNANDEZ No. 12-899	Moore (10CRS53979) (11CRS559)	Vacated and remanded; new sentencing hearing
STATE v. HOPKINS No. 12-1296	Mecklenburg (11CRS240125) (11CRS62790)	No error in part; remanded to correct clerical error
STATE v. JOHNSON No. 12-1026	Forsyth (10CRS23595) (10CRS53280) (10CRS53281)	No Error

STATE v. KAALUND No. 12-1335	Durham (08CRS50979)	No Error
STATE v. KANAPAUX No. 12-739	Brunswick (09CRS53418)	Reversed and Remanded
STATE v. KIVETT No. 12-1324	Guilford (10CRS76426) (10CRS76445) (10CRS76447-49)	No Error
STATE v. LEAVITT No. 12-1045	Alexander (11CRS686)	No Error
STATE v. LINCOURT No. 12-1249	Harnett (10CRS2162)	Affirmed
STATE v. MARTIN No. 12-1076	Mecklenburg (11CRS208980) (11CRS208981) (11CRS208983) (11CRS211166)	No Error
STATE v. MAYES No. 12-1241	Cumberland (08CRS57332) (08CRS63626)	Affirmed
STATE v. MCLAURIN No. 12-980	Cumberland (09CRS59798) (09CRS59801)	No Error
STATE v. MCLEAN No. 12-910	Wake (09CRS208619) (09CRS58187)	No Error
STATE v. MURCHISON No. 12-1321	Moore (10CRS53284) (10CRS53470) (11CRS51566)	Reversed
STATE v. NARRON No. 12-1077	Johnston (10CRS57277) (10CRS57284) (11CRS4365)	No Error
STATE v. PRICE No. 12-1317	Wayne (10CRS54814)	Affirmed

STATE v. SANDERS No. 12-1192	Mecklenburg (10CRS231264) (10CRS231265)	No Error
STATE v. SHELTON No. 12-968	Buncombe (10CRS376) (10CRS50887-88) (10CRS54432)	No Error
STATE v. SMITH No. 12-1477	Person (11CRS51795)	No Error
STATE v. SWEATT No. 12-1050	Cumberland (09CRS65181)	No Error
STATE v. TARLETON No. 12-916	Union (04CRS50813) (04CRS50815-18) (04CRS5427) (04CRS5428) (04CRS5430)	No Error
STATE v. TOWNSEND No. 12-1228	Robeson (02CRS56726)	Dismissed in Part, Affirmed in Part
STATE v. WILLIAMSON No. 12-1215	Moore (12CRS1028)	Dismissed
STATE v. WOODS No. 12-1189	Alamance (09CRS55561)	No Error
THRUSH v. JONES No. 12-1147	Richmond (11CVS1083)	Reversed and Remanded
TUTTLE v. TUTTLE No. 12-728	Cabarrus (12CVD0977)	Dismissed in part, affirmed in part
TUTTLE v. TUTTLE No. 12-1437	Cabarrus (12CVD977)	Dismissed in part, affirmed in part.

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DANNY K. ALLRED, EMPLOYEE, PLAINTIFF

v.

EXCEPTIONAL LANDSCAPES, INC., EMPLOYER, NONINSURED, AND TED WILLIAM WRIGHT, INDIVIDUALLY, AND JOHN THOMPSON SUMMEY, INDIVIDUALLY, AND JOY WRIGHT, INDIVIDUALLY; AND/OR T&J SERVICES, DEFENDANTS

No. COA12-1278

Filed 21 May 2013

1. Workers' Compensation—jurisdiction—Form 33 filed

The Industrial Commission had jurisdiction over plaintiff's workers' compensation claim. Plaintiff initiated a workers' compensation claim before the Commission when he filed his Form 33. Once filed, the Commission retained continuing and exclusive jurisdiction over that claim and all related matters.

2. Workers' Compensation—settlement agreement—not fair and just

The Industrial Commission did not err in a workers' compensation case by ruling that the parties' settlement was not fair and just. The settlement agreement did not comply with the statutory requirements in that the agreement did not make any provision for payment of plaintiff's medical expenses, and did not provide adequate indemnity compensation given plaintiff's physical and vocational limitations at the time of the settlement. Further, the agreement made no mention of payment of unpaid medical bills, as required by Industrial Commission Rule 502.

3. Worker's Compensation—attorney fees—insurer

The Industrial Commission erred in a workers' compensation case by assessing attorney fees against defendants under N.C. Gen. Stat. § 97-88. Defendants were not "insurers" and the "insurer" did not appeal the decision of the Deputy Commissioner to the Full Commission.

4. Corporations—piercing the corporate veil—no alter ego

The Industrial Commission erred in a worker's compensation case by piercing the corporate veil as to defendant J. Wright because she was not a shareholder of the defendant corporation. The findings of fact were insufficient to support a conclusion of law that J. Wright was an alter ego of the corporation.

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5. Appeal and Error—issue not addressed—motion to withdraw appeal—previously granted

Defendant J. Wright’s argument that the Industrial Commission erred in a workers’ compensation case by ordering her to pay a civil penalty for the failure to bring defendant Exceptional Landscapes into compliance with the requirements of N.C.G.S. § 97-93 was not addressed. Wright’s motion to withdraw her appeal of that issue had been previously granted.

6. Appeal and Error—issue on appeal—deemed abandoned

Defendants’ argument on appeal concerning the Industrial Commission’s findings of fact and conclusions of law piercing the corporate veil as to them was deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

Appeal by defendants from the Opinion and Award entered 30 March 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 March 2013.

Holt, Longest, Wall, Blaetz & Moseley, PLLC, by W. Phillip Moseley, for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by W. Scott Fuller and Jaye E. Bingham-Hinch, for defendant-appellant Exceptional Landscapes, Inc., and/or T&J Services.

McCullers & Whitaker, PLLC, by Christopher Mann, for defendant-appellant Joy Wright.

Ted William Wright, pro se, for defendant-appellant.

John Thompson Summey, pro se, for defendant-appellant.

STEELMAN, Judge.

Where plaintiff filed a claim with the North Carolina Industrial Commission, the Commission retained exclusive and continuing jurisdiction over that claim. Where the parties’ settlement agreement did not provide for the reimbursement of unpaid medical bills, the Commission properly determined it was not fair and just. Where defendants were not an “insurer” as defined by statute, the Commission erred in assessing attorney’s fees against defendants under N.C. Gen. Stat. § 97-88. Where

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one defendant did not have dominion or control over business decisions of the corporation, the Commission erred in piercing the corporate veil as to that defendant.

I. Factual and Procedural History

On 17 August 2006, Danny K. Allred (plaintiff) was in a motor vehicle accident while performing duties on behalf of his employer, Exceptional Landscapes (Exceptional Landscapes), and suffered injuries. Exceptional Landscapes did not have workers' compensation insurance, nor was it self-insured at the time of the accident. Ted William Wright (T. Wright) and John Summey (Summey) were the shareholders of Exceptional Landscapes, and Joy Wright (J. Wright) was treasurer of Exceptional Landscapes and the spouse of T. Wright.

In September 2006, plaintiff filed a Form 18 and Form 33 with the Industrial Commission. A mediation conference was held on 27 February 2007. During the conference, the parties could not reach an agreement as to the workers' compensation claim and instead, attempted to reach an agreement as to a liability claim, based upon the assumption that plaintiff was going to withdraw his claim with the Industrial Commission. An agreement was reached under the terms of which Exceptional Landscapes would pay plaintiff a lump sum of \$26,000. The agreement made no mention of the payment of plaintiff's outstanding medical bills. Pursuant to this agreement, the sum of \$26,000 was paid to plaintiff and his then counsel. Plaintiff never withdrew the Form 33, and the case was scheduled for hearing in front of the Commission.

On 30 March 2012, the Full Commission entered an Opinion and Award. The Opinion and Award found that the Commission had jurisdiction over the matter and that the settlement agreement did not comply with the requirements of N.C. Gen. Stat. § 97-17. The Commission did not approve the settlement because it was not fair and just. Piercing the corporate veil, the Commission held T. Wright, J. Wright, and Summey "individually liable jointly and severally for the indemnity and medical compensation due in this case." The Commission ordered: (1) T. Wright, Summey, and J. Wright to pay plaintiff temporary total disability compensation at the rate of \$211.34 per week and to pay all medical expenses incurred as a result of the accident; (2) an attorney's fee to be paid to plaintiff's counsel; (3) a penalty to be assessed pursuant to N.C. Gen. Stat. § 97-94(b) against T. Wright, Summey, and J. Wright for failing to procure workers' compensation insurance; and (4) T. Wright and J. Wright to pay an additional penalty pursuant to N.C. Gen. Stat. § 97-94(d) for failing to bring Exceptional Landscapes into compliance.

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The Commission held the imposition of both penalties under N.C. Gen. Stat. § 97-94 in abeyance.

Defendants appeal.

II. Standard of Review

“Appellate review of an order and award of the Industrial Commission is limited to a determination of whether the findings of the Commission are supported by the evidence and whether the findings in turn support the legal conclusions of the Commission.” *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 41, 415 S.E.2d 105, 106 (1992). Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal. *Johnson v. Herbie’s Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003). The Commission’s conclusions of law are reviewable *de novo*. *Id.* at 171, 579 S.E.2d at 113.

III. Jurisdiction

[1] In its first argument, Exceptional Landscapes contends that the Commission did not have jurisdiction over plaintiff’s claim when there was a settlement agreement as to plaintiff’s claim. We disagree.

“The jurisdiction of the Commission is limited and conferred by statute.” *Pearson v. C.P. Buckner Steel Erection Co.*, 348 N.C. 239, 241, 498 S.E.2d 818, 819 (1998). Under N.C. Gen. Stat. § 97-91, the Commission has the power to administrate the Workers’ Compensation Act and to hear “all questions arising under the Article if not settled by agreements of the parties interested therein, with the approval of the Commission” N.C. Gen. Stat. § 97-91 (2011). The exclusive venue for a claim by an employee against an employer for injuries arising in the course of employment is the Commission when the employer has “complied with provisions of the [Workers’ Compensation Act].” N.C. Gen. Stat. § 97-10.1 (2011); *see also Seigel v. Patel*, 132 N.C. App. 783, 785-86, 513 S.E.2d 602, 604 (1999). In order to invoke such jurisdiction, an employee must either file a claim for compensation or submit a voluntary settlement for approval. *Tabron v. Gold Leaf Farms, Inc.*, 269 N.C. 393, 396, 152 S.E.2d 533, 535 (1967). Once jurisdiction is invoked, the Commission retains continuing jurisdiction of all proceedings begun before it. *See Pearson*, 348 N.C. at 241-42, 498 S.E.2d at 820. (“This Court has recognized that the General Assembly intended the Commission to have continuing jurisdiction of proceedings begun before it.”).

Exceptional Landscapes contends that plaintiff elected a remedy “at law” and that the Commission thereby lost its jurisdiction. N.C. Gen. Stat. § 97-94(b) states:

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(b) Any employer required to secure the payment of compensation under this Article who refuses or neglects to secure such compensation shall be punished by a penalty . . . and the employer shall be liable during continuance of such refusal or neglect to an employee either for compensation *under this Article or at law* at the election of the injured employee.

N.C. Gen. Stat. § 97-94(b) (2011) (emphasis added). While this section “may arguably permit plaintiff to bring her claim at law,” the Commission is not precluded from hearing claims against noncompliant employers. *Seigel*, 132 N.C. App. at 786, 513 S.E.2d at 604. In fact, when a claim is filed with the Commission and jurisdiction is invoked, the Commission will retain “exclusive jurisdiction over workers’ compensation claims and all related matters. . . .” *Johnson v. First Union Corp.*, 131 N.C. App. 142, 143-44, 504 S.E.2d 808, 809 (1998). In *Johnson*, a plaintiff-employee filed suit in superior court alleging various claims against the defendant-employer, including that the employer had committed fraud in submitting certain forms to the Industrial Commission. *Id.* We held that the Industrial Commission retained exclusive jurisdiction over that matter, including the claims for fraud and all related matters. *Id.*

In the instant case, Exceptional Landscapes does not challenge any of the findings of fact of the Industrial Commission and they are therefore binding on appeal. *Johnson*, 157 N.C. App. at 180, 579 S.E.2d at 118. When plaintiff filed Form 18 and Form 33 with the Commission regarding plaintiff’s 17 August 2006 work-related injury, plaintiff invoked the jurisdiction of the Commission. Once filed, the Commission retained “exclusive jurisdiction over workers’ compensation claims and all related matters. . . .” *Johnson*, 131 N.C. App. at 143-44, 504 S.E.2d at 809. The parties negotiated an agreement at the mediation conference for what they believed to be a liability claim “at law.” While the language of N.C. Gen. Stat. § 97-94(b) “may arguably permit plaintiff to bring [his] claim at law,” *Seigel*, 132 N.C. App. at 786, 513 S.E.2d at 604, plaintiff did not bring his claim at law. Instead, plaintiff initiated a workers’ compensation claim before the Commission when he filed his Form 33. Once filed, the Commission retained continuing and exclusive jurisdiction over that claim and all related matters. *See Pearson*, 348 N.C. at 241-42, 498 S.E.2d at 820; *Johnson*, 131 N.C. App. at 143-44, 504 S.E.2d at 809. While nothing in the Workers’ Compensation Act “prevent[s] settlements made by and between the employee and employer[,]” the Act requires “[a] copy of a settlement agreement [to] be filed by the employer with

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and approved by the Commission.” N.C. Gen. Stat. § 97-17 (2011). The settlement agreement in this case was not filed with nor approved by the Industrial Commission. The Commission’s findings of fact therefore support its conclusion that the Industrial Commission had jurisdiction over the claim and the subject matter of this case.

This argument is without merit.

IV. Fair and Just Settlement

[2] In its second argument, Exceptional Landscapes contends that if this Court holds that the Commission had jurisdiction over plaintiff’s claim, then the Commission erred in ruling that the parties’ settlement was not fair and just. We disagree.

“The Industrial Commission must review all compromise settlement agreements to make sure they comply with the Workers’ Compensation Act and the Rules of the Industrial Commission, and to ensure that they are fair and reasonable.” *Smythe v. Waffle House*, 170 N.C. App. 361, 364, 612 S.E.2d 345, 348 (2005). In the instant case, Exceptional Landscapes does not challenge any of the Commission’s findings of fact, and thus, the findings of fact are binding on appeal. *Johnson*, 157 N.C. App. at 180, 579 S.E.2d at 118. Finding of fact 37 states that the settlement agreement did not comply with the statutory requirements of N.C. Gen. Stat. § 97-17, in that the agreement did not make any provision for payment of plaintiff’s medical expenses, and that the agreement did not provide adequate indemnity compensation given plaintiff’s physical and vocational limitations at the time of the settlement. Further, finding of fact 35 states, “[t]he Mediated Settlement Agreement made no mention of payment of unpaid medical bills and did not include all of the terms required by Rule 502 of the Rules of the Industrial Commission.” Rule 502 sets forth the requirements of compromise agreements, including: that the employer, if liability is admitted, undertakes to pay all medical expenses to date of the agreement; that the employer, if liability is denied, undertakes to pay all unpaid medical expenses to the date of the agreement; that the employer will pay all costs incurred; and that no rights other than those arising under the Workers’ Compensation Act are compromised or released. 4 N.C. Admin. Code 10A.0502 (2012). The Commission’s findings of fact support the conclusion that the settlement agreement did not comply with the Worker’s Compensation Act or Industrial Commission Rule 502. The Commission’s conclusion that the agreement was not fair and just was supported by its findings of fact.

This argument is without merit.

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V. Attorney's Fees

[3] Exceptional Landscapes and J. Wright contend that the Commission erred in assessing attorney's fees under N.C. Gen. Stat. § 97-88. We agree.

Under N.C. Gen. Stat. § 97-88, "the Commission may award attorney's fees to an injured employee if (1) the *insurer* has appealed a decision to the full Commission or to any court, and (2) on appeal, the Commission or court has ordered the *insurer* to make, or continue making, payments of benefits to the employee." *Estes v. N.C. State Univ.*, 117 N.C. App. 126, 128, 449 S.E.2d 762, 764 (1994) (emphasis added); *see also* N.C. Gen. Stat. § 97-88 (2011). The term "insurer" is defined as "any person or fund authorized under G.S. 97-93 to insure under this Article, and includes self-insurers." N.C. Gen. Stat. § 97-2(7) (2011). A "self-insurer" must be licensed by the Commissioner of Insurance under the provisions of N.C. Gen. Stat. § 58-47-65 (2011).

In the instant case, none of the defendants are "insurers" as defined by statute. "[I]f the language of the statute is clear and not ambiguous, we must conclude that the General Assembly intended the statute to be implemented according to the plain meaning of its terms." *Childress v. Trion, Inc.*, 125 N.C. App. 588, 591, 481 S.E.2d 697, 699 (1997). Although defendants appealed the decision of the Deputy Commissioner to the Full Commission, the plain language of the statute precludes the application of attorney's fees in this case because the "insurer" did not appeal this decision. The Commission erred in assessing attorney's fees against defendants.

We note that the remedy for failure to procure workers' compensation insurance is governed by N.C. Gen. Stat. § 97-94, which provides for civil penalties against the employer and civil and criminal sanctions against individual employees. N.C. Gen. Stat. § 97-94 (2011). In the instant case, the Commission assessed civil penalties pursuant to N.C. Gen. Stat. § 97-94(b) against T. Wright, Summey, and J. Wright and pursuant to N.C. Gen. Stat. § 97-94(d) against T. Wright and J. Wright.

VI. Piercing the Corporate Veil

[4] In J. Wright's second argument, she contends that the Commission erred in piercing the corporate veil as to her because she was not a shareholder of the corporation. We agree.

North Carolina courts will "pierce the corporate veil" to extend liabilities of the corporation beyond the confines of the corporation's entity when it is necessary to achieve equity. *Glenn v. Wagner*, 313 N.C.

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450, 454, 329 S.E.2d 326, 330 (1985). Liability may be imposed on an individual who is operating a corporation as a mere instrumentality when the individual has:

- (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
- (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
- (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at 455, 329 S.E.2d at 330. Factors which have been considered in piercing the corporate veil include: inadequate capitalization, non-compliance with corporate formalities, complete domination and control of the corporation so that it had no independent identity, and excessive fragmentation of a single enterprise into separate corporations. *Id.* at 455, 329 S.E.2d at 330-31.

The only findings of fact made by the Industrial Commission that refer to any level of J. Wright's control are that she was an officer of Exceptional Landscapes, that T. Wright and J. Wright "did not observe any corporate formalities in the operation of Exceptional Landscapes, Inc.," that Exceptional Landscapes was not adequately capitalized, that J. Wright was treasurer of Exceptional Landscapes, that she "signed the banking authorization for the company," and that she "had the authority to write checks for the corporation." The Commission's findings do not demonstrate that J. Wright had complete domination of policy, finances, and business practices, nor that she exercised such control over Exceptional Landscapes that the corporate entity had no separate existence. These findings of fact are insufficient to support a conclusion of law that J. Wright was an alter ego of Exceptional Landscapes. The Industrial Commission's conclusion of law that pierced the corporate veil as to J. Wright and then imposed personal liability upon her is not supported by the Industrial Commission's findings of fact. We reverse the holding of the Industrial Commission imposing liability upon J. Wright.

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VII. Civil Penalty

[5] In J. Wright's third argument, she contends that the Commission erred in ordering her to pay a civil penalty for the failure to bring Exceptional Landscapes into compliance with the requirements of N.C. Gen. Stat. § 97-93 because she did not have the ability and authority to bring them into compliance. The Commission held the imposition of this penalty in abeyance. On 13 November 2012, J. Wright filed a motion to withdraw her appeal as to PH-1887 because the Commission's Opinion and Award as to PH-1887 was not a final award of the agency. We subsequently granted this motion and therefore do not address J. Wright's appeal as to the civil penalty.

VIII. The Appeals of T. Wright and Summey

[6] Defendants T. Wright and Summey filed *pro se* briefs incorporating and adopting by reference all of the sections of the briefs of Exceptional Landscapes and J. Wright. While T. Wright and Summey incorporated the arguments of J. Wright, her contentions that the Industrial Commission erred by piercing the corporate veil relate only to her, and not to any other defendant. Since T. Wright and Summey have made no argument on appeal as to the Commission's findings of fact and conclusions of law piercing the corporate veil as to them, any argument as to those two defendants has been waived and is deemed abandoned. N.C.R. App. P. 28(b)(6). We note that defendants T. Wright and Summey also filed motions to withdraw their appeal as to PH-1887, which was granted by this Court.

IX. Conclusion

We affirm the Industrial Commission's holding that the Commission had jurisdiction over plaintiff's claim and that the settlement agreement was not fair or just. We also affirm the holding of the Industrial Commission piercing the corporate veil as to T. Wright and Summey and imposing individual liability as to those defendants.

We reverse the Industrial Commission's ruling imposing attorney's fees against all defendants. We also reverse the Industrial Commission's holding imposing personal liability upon J. Wright.

AFFIRMED IN PART, REVERSED IN PART.

Judges ELMORE and STROUD concur.

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ERIE INSURANCE EXCHANGE, ERIE INDEMNITY COMPANY, AND TERRENCE P.
DUFFY BUILDER, INC., PLAINTIFFS

v.

BUILDERS MUTUAL INSURANCE COMPANY, DEFENDANT

No. COA12-1104

Filed 21 May 2013

1. Civil Procedure—judgment on the pleadings—consideration of contract—consideration of briefs—summary judgment

The trial court's consideration of defendant's insurance policy and the legal briefs submitted by the parties did not convert plaintiff's Rule 12(c) motion for judgment on the pleadings into a Rule 56 motion of summary judgment. Therefore, the trial court did not err in making a determination on the pleadings without allowing defendant the opportunity to present additional materials.

2. Insurance—duty to defend—unjustifiable refusal—judgment on the pleadings

The trial court properly granted judgment on the pleadings in favor of plaintiffs in a declaratory judgment action. As a matter of law, the allegations presented in the underlying action triggered defendant's duty to defend its insured under the terms of defendant's insurance policy. Because defendant unjustifiably refused to defend its insured in the underlying action, judgment on the pleadings in favor of plaintiffs for the amount expended in settlement of the underlying action on behalf of the insured was proper. However, plaintiffs' amended complaint failed to include allegations pertaining to any "defense costs" expended, and therefore, judgment on the pleadings in favor of plaintiffs for any such defense costs was improper.

Appeal by defendant from orders entered 7 June 2012 and 6 July 2012 by Judge Laura J. Bridges in Rutherford County Superior Court. Heard in the Court of Appeals 26 February 2013.

Martineau King, PLLC, by Elizabeth A. Martineau and Guiselle F. Mahon, for plaintiff appellees.

Nelson Levine de Luca & Hamilton, L.L.C., by John I. Malone, Jr. and David Harris, for defendant appellant.

McCULLOUGH, Judge.

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Builders Mutual Insurance Company (“Builders Mutual” or “defendant”) appeals from an order of the trial court entering judgment on the pleadings in favor of Erie Insurance Exchange, Erie Indemnity Company (collectively, “Erie”), and Terrence P. Duffy Builder, Inc. (“TPD Builder,” collectively with Erie, “plaintiffs”). Defendant further appeals from an order of the trial court denying its motion to alter, amend, or vacate the order granting judgment on the pleadings in favor of plaintiffs. Because we conclude defendant’s refusal to defend TPD Builder and Terrence P. Duffy (“Duffy”) in the underlying action was unjustified, we affirm that portion of the trial court’s order granting judgment on the pleadings in favor of plaintiffs for the amount expended in settlement of the underlying action. We reverse that portion of the trial court’s order granting judgment on the pleadings in favor of plaintiffs for any “defense costs,” as such costs are not supported by the pleadings.

I. Background

On 18 August 2006, TPD Builder, a licensed North Carolina general contractor, contracted to build a new single family residence for R. Michael Hardison and his wife, Sara E. Hardison (the “Hardisons”). In connection with the construction project, TPD Builder subcontracted the excavation of the building site and the stabilization of cut slopes above the residence to Wilbur Mosseller (“Mosseller”) of Mosseller Construction, LLC (“Mosseller Construction”) and Paul Lytle (“Lytle”). TPD Builder and its principal owner/officer Duffy, were insured under a commercial general liability insurance policy issued by Erie for the period of 7 May 2006 through 7 May 2009. TPD Builder and Duffy were then insured under a commercial general liability insurance policy issued by defendant for the period of 6 May 2009 through 6 May 2010.

On 21 September 2007, the construction of the Hardisons’ residence was substantially completed and a certificate of occupancy was issued. Thereafter, on 7 December 2009, the altered slope and retaining wall above the Hardisons’ residence collapsed causing extensive damage to the residence and the Hardisons’ personal property.

On 23 June 2010, the Hardisons filed an action against TPD Builder; Duffy and his wife, Lisa C. Duffy, individually; Mosseller Construction; and Mosseller and Lytle, individually (the “Hardison Action”). Erie agreed to defend TPD Builder and Duffy in the Hardison Action under a reservation of rights. Defendant refused to defend TPD Builder and Duffy in the Hardison Action.

On 21 December 2011, Erie filed a complaint against defendant; TPD Builder; Duffy and his wife, individually; and R. Michael Hardison,

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seeking a declaratory judgment addressing the rights and obligations of Erie and defendant under their respective insurance policies issued to TPD Builder and Duffy for the claims raised in the Hardison Action. On 7 March 2012, defendant filed a motion to dismiss, motion for judgment on the pleadings, and answer. Defendant renewed its motion for judgment on the pleadings on 25 April 2012, and on 3 May 2012, defendant filed a brief in support of its motion for judgment on the pleadings. Defendant's motion for judgment on the pleadings was noticed for hearing on 8 May 2012.

On 30 April 2012, Erie filed a motion for leave to amend its complaint for declaratory judgment. Specifically, as reflected in its proposed complaint, Erie sought to add TPD Builder as a plaintiff and to include allegations reflecting the fact that a settlement agreement had been reached in the Hardison Action under which Erie agreed to pay to the Hardisons the sum of \$170,000.00 on behalf of TPD Builder and Duffy. Erie's motion was also noticed for hearing on 8 May 2012. On 7 May 2012, Erie voluntarily dismissed TPD Builder, Duffy and his wife, and R. Michael Hardison from the present declaratory judgment action.

At the 8 May 2012 motions hearing, the trial court allowed Erie's motion to amend its complaint.¹ After allowing Erie's motion to amend its complaint, the trial court inquired as to whether defendant desired to proceed on its motion for judgment on the pleadings as to the amended complaint. Defendant agreed to proceed, stipulating that the trial court could consider defendant's answer to the original complaint in conjunction with the amended complaint for purposes of defendant's motion for judgment on the pleadings. Plaintiffs likewise agreed to proceed based upon the trial court's consideration of their amended complaint and defendant's answer to the original complaint. All parties agreed at the hearing that the amended complaint had no effect on defendant's assertion that it was entitled to judgment on the pleadings on the issue of whether it had a duty to defend and/or indemnify TPD Builder and Duffy in connection with the Hardison Action. During the course of the hearing, plaintiffs also made an oral motion for judgment on the pleadings.² Following the hearing, the trial court determined that judgment on the pleadings in favor of plaintiffs was proper, and on 7 June 2012, the trial court entered a written order denying defendant's motion for

1. A written order allowing plaintiffs' proposed amended complaint was entered 11 May 2012.

2. To the extent defendant asserts in its reply brief that plaintiffs' oral motion for judgment on the pleadings was improper because the pleadings had not been closed and because it had no notice of plaintiffs' motion, we note that the hearing at which plaintiffs

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judgment on the pleadings and entering judgment on the pleadings in favor of plaintiffs.

On 12 June 2012, defendant filed a motion to alter, amend, or vacate the trial court's 7 June 2012 order. In support of its motion, defendant attached multiple documents, including an affidavit of Carl Warbington, defendant's claims manager. The trial court held a hearing on defendant's motion on 26 June 2012, after which the trial court orally denied defendant's motion. The trial court entered a written order denying defendant's motion on 6 July 2012.

On 2 July 2012, defendant gave timely written notice of appeal from the trial court's 7 June 2012 order entering judgment on the pleadings in favor of plaintiffs, and on 20 July 2012, defendant gave timely written notice of appeal from the trial court's 6 July 2012 order denying its motion to alter, amend, or vacate the order granting judgment on the pleadings in favor of plaintiffs.

II. Standard of Review

A motion for judgment on the pleadings is governed under Rule 12(c) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 12(c) (2011). "Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Shehan v. Gaston Cty.*, 190 N.C. App. 803, 806, 661 S.E.2d 300, 303 (2008) (internal quotation marks and citation omitted). This Court reviews a trial court's order granting a motion for judgment on the pleadings *de novo*. *Reese v. Mecklenburg Cnty.*, 204 N.C. App. 410, 421, 694 S.E.2d 453, 461 (2010).

III. Conversion of Rule 12(c) Motion into Rule 56 Motion

We first address defendant's argument that the trial court erred in considering both the terms of defendant's insurance policy and the legal briefs submitted by the parties in making its Rule 12(c) determination. As to the insurance policy, defendant argues that plaintiffs neither attached nor incorporated defendant's insurance policy within their original or amended complaint, thereby precluding the trial court from considering it under Rule 12(c). Defendant further argues that the legal

orally moved for judgment on the pleadings was calendared to address defendant's own motion for judgment on the pleadings concerning the exact same issue for which plaintiffs orally moved for judgment on the pleadings. Thus, defendant can hardly complain on appeal that the trial court could not properly consider plaintiffs' motion for judgment on the pleadings at the same hearing and on the same issue as that presented in defendant's own motion for judgment on the pleadings.

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briefs submitted by the parties constituted matters outside the pleadings. Defendant contends that the trial court's consideration of these materials converted plaintiffs' Rule 12(c) motion into a Rule 56 motion for summary judgment. Defendant argues that the trial court violated the provisions of Rule 12(c) by making a determination without allowing defendant the opportunity to present additional materials pertinent to a Rule 56 determination.

The relevant provision of Rule 12(c) provides:

If, on a motion for judgment on the pleadings, matters outside the pleadings 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(c). Defendant is correct that “[i]n deciding a motion for judgment on the pleadings, the trial court looks solely to the pleadings and may only consider facts that have been properly pled and documents attached to or referred to in the pleadings.” *Reese*, 204 N.C. App. at 421, 694 S.E.2d at 461 (citation omitted).

However, this Court has previously held that where the trial court considers the terms of a contract that is both the subject of the action and specifically referenced in the complaint, a dispositive motion under Rule 12 is not thereby converted into a Rule 56 motion for summary judgment. *See Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60-61, 554 S.E.2d 840, 847 (2001); *Coley v. N.C. Nat'l Bank*, 41 N.C. App. 121, 126-27, 254 S.E.2d 217, 220 (1979).³ Notably, in *Coley*, this Court expressed that “[t]he obvious purpose” of the above quoted provision, contained in both Rule 12(b)(6) and Rule 12(c), “is to preclude any unfairness resulting from surprise when an adversary introduces extraneous material” on a dispositive motion under Rule 12, “and to allow a party a reasonable

3. Although the holdings in *Oberlin Capital* and *Coley* address the trial court's ruling on a Rule 12(b)(6) motion, the language at issue under Rule 12(b)(6) in those cases is identical to the language at issue in the present case under Rule 12(c). Rule 12(b) provides that a motion to dismiss for failure to state a claim under Rule 12(b)(6) “shall be treated as one for summary judgment and disposed of as provided in Rule 56” where “matters outside the pleadings are presented to and not excluded by the court” in ruling on the motion. N.C. Gen. Stat. § 1A-1, Rule 12(b) (2011); *see also Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 102, 545 S.E.2d 243, 247 (2001). Rule 12(c) contains an identical provision, stating that “[i]f, on a motion for judgment on the pleadings, matters outside the pleadings 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.” N.C. Gen. Stat. § 1A-1, Rule 12(c).

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time in which to produce materials to rebut an opponent's evidence once the motion is expanded to include matters beyond those contained in the pleadings." *Coley*, 41 N.C. App. at 126, 254 S.E.2d at 220. Accordingly, "a trial court's consideration of a contract which is the subject matter of an action does not expand the scope of a Rule 12(b) (6) [or Rule 12(c)] hearing and does not create justifiable surprise in the nonmoving party." *Oberlin Capital*, 147 N.C. App. at 60, 554 S.E.2d at 847.

Here, defendant complains that the trial court improperly considered the terms of its insurance policy in ruling on plaintiffs' Rule 12(c) motion. However, defendant's insurance policy was specifically referenced in plaintiffs' amended complaint. Paragraph nine of plaintiffs' amended complaint states:

Upon information and belief, Builders Mutual issued a Commercial Package Policy, no[.] CPP 0035392 00 to Plaintiff TPD Builder Inc., and said Builders Mutual policy had a policy period of May 6, 2009 through May 6, 2010.

In its answer, defendant expressly admitted issuing this insurance policy to TPD Builder. In addition, defendant included the relevant terms of its insurance policy within its brief to the trial court in support of its own motion for judgment on the pleadings. Plaintiffs' declaratory judgment action sought a declaration of the rights and obligations of the parties pursuant to their respective insurance policies, and therefore, defendant's insurance policy was the subject of plaintiffs' action. Accordingly, by considering the terms of defendant's insurance policy, the trial court "did not expand the hearing to include any new or different matters." *Coley*, 41 N.C. App. at 126, 254 S.E.2d at 220. Thus, the trial court's consideration of defendant's insurance policy in making its Rule 12(c) determination was proper and did not convert plaintiffs' Rule 12(c) motion into a Rule 56 motion for summary judgment.

Likewise, this Court has previously held that "[m]emoranda of points and authorities as well as briefs and oral arguments . . . are not considered matters outside the pleadings for purposes of converting a Rule 12 motion into a Rule 56 motion." *Privette v. University of North Carolina*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989) (ellipsis in original) (internal quotation marks and citation omitted); see also *Davis v. Durham Mental Health/Dev. Disabilities Area Auth.*, 165 N.C. App. 100, 104, 598 S.E.2d 237, 240 (2004).

Having reviewed the briefs submitted by the parties at the hearing below, we agree with plaintiffs that the briefs are simply memoranda

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of points and authorities and contain no factual allegations outside of those presented in the complaint. Thus, the trial court's consideration of the parties' briefs in the present case did not convert plaintiffs' Rule 12(c) motion into a Rule 56 motion for summary judgment. Because the trial court's consideration of both defendant's insurance policy and the legal briefs submitted by the parties did not convert the Rule 12(c) hearing into a Rule 56 hearing, the trial court did not err in making a determination on the pleadings without allowing defendant the opportunity to present additional materials. Defendant's argument on this issue is without merit.

IV. Judgment on the Pleadings

[2] We next address defendant's argument that the trial court erred in entering judgment on the pleadings in favor of plaintiffs. Defendant contends that the trial court erred in entering judgment on the pleadings in favor of plaintiffs because (1) plaintiffs' action required the trial court to determine "when the defect occurred from which all damages flowed" – an issue of fact – in order to determine which insurance policy was triggered, and (2) plaintiffs' claim for reimbursement of legal expenses pled alternative remedies and did not plead certain facts necessary for a determination of that issue, thereby making plaintiffs' claim an improper subject for a Rule 12(c) ruling. To the contrary, plaintiffs argue that their action required the trial court to determine whether defendant breached its duty to defend TPD Builder and Duffy in the Hardison Action. Plaintiffs contend the pleadings clearly show that defendant had a duty to defend TPD Builder and Duffy in the Hardison Action, thereby making defendant liable for the legal costs incurred by Erie in defending TPD Builder and Duffy and in settling the Hardison Action.

The issue of whether defendant's insurance policy required defendant to defend TPD Builder and Duffy in the Hardison Action is determined by interpreting the language of the policy. "The construction and interpretation of provisions in an insurance contract is a question of law." *Kessler v. Shimp*, 181 N.C. App. 753, 756, 640 S.E.2d 822, 824 (2007). Accordingly, the question of defendant's duty to defend may be resolved by judgment on the pleadings.

In determining whether alleged circumstances are covered by the provisions of an insurance policy under North Carolina law such that they give rise to a duty to defend, our Courts utilize the "comparison test." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 693, 340 S.E.2d 374, 378 (1986). In utilizing the comparison test, "the pleadings are read side-by-side with the policy to determine

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whether the events as alleged are covered or excluded.” *Id.* “The insurer’s duty to defend is determined by the pleadings in the underlying lawsuit. The duty to defend exists if the events alleged in the pleadings are covered under the terms of the policy, and any doubt as to coverage must be resolved in favor of the insured.” *Duke University v. St. Paul Fire and Marine Ins. Co.*, 96 N.C. App. 635, 637, 386 S.E.2d 762, 763-64 (1990) (citation omitted).

“The duty to defend is broad and is independent of the duty to pay.” *Builders Mut. Ins. Co. v. Mitchell*, 210 N.C. App. 657, 665, 709 S.E.2d 528, 534 (2011). “When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable.” *Waste Management*, 315 N.C. at 691, 340 S.E.2d at 377. “There is a duty to defend ‘[w]here the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy.’ This is true even where the facts appear to be outside coverage or within a policy exception.” *Mitchell*, 210 N.C. App. at 666, 709 S.E.2d at 535 (quoting *Waste Management*, 315 N.C. at 691-92, 340 S.E.2d at 377-78). “If the claim is within the coverage of the policy, the insurer’s refusal to defend is unjustified even if it is based upon an honest but mistaken belief that the claim is not covered.” *Duke University*, 96 N.C. App. at 637, 386 S.E.2d at 764.

Under the terms of defendant’s commercial general liability insurance policy in the present case, coverage is triggered by “property damage” when the property damage is caused by an “occurrence” and when the property damage “occurs during the policy period.” “Property Damage” is defined as “[p]hysical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it[.]” Further, an “occurrence” is defined in defendant’s insurance policy as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

“An ‘occurrence’ as defined by a [commercial general liability] policy can be an accident caused by or resulting from faulty workmanship including damage to any property other than the work product.” *Mitchell*, 210 N.C. App. at 661, 709 S.E.2d at 532 (internal quotation marks, citation, and emphasis omitted). “An accident is generally considered to be an unplanned and unforeseen happening or event, usually with unfortunate consequences.” *Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 302, 524 S.E.2d 558, 564 (2000). Whether events are accidental and constitute an occurrence depends

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upon whether they were “unexpected and unintended” from the point of view of the insured. *Waste Management*, 315 N.C. at 695, 340 S.E.2d at 379. “The fact that the accident may have arisen from [the insured’s] negligence does not prohibit coverage.” *Mitchell*, 210 N.C. App. at 663, 709 S.E.2d at 533.

In *Gaston County Dyeing*, 351 N.C. 293, 524 S.E.2d 558, our Supreme Court examined an insurance policy that contained identical provisions. *See id.* at 300-01, 524 S.E.2d at 563-64. In *Gaston County Dyeing*, the underlying complaint alleged defects in the design and manufacture of pressure vessels that were fabricated by Gaston County Dyeing Machine Company (“Gaston”) and ultimately sold through a distributor to Sterling Pharmaceuticals, Inc. (“Sterling”) for use in production of contrast media dyes for diagnostic medical imaging. *Id.* at 295, 524 S.E.2d at 560. On 21 June 1992, a pressure vessel ruptured causing a leakage and subsequent contamination of Sterling’s contrast media dye, which was thereafter discovered on 31 August 1992. *Id.* at 302, 524 S.E.2d at 564. As in the present case, coverage under the competing insurance policies at issue in *Gaston County Dyeing* was triggered by “ ‘property damage’ when the property damage [was] caused by an ‘occurrence’ and when the property damage occur[red] during the policy period.” *Id.* Our Supreme Court concluded that “[t]he sudden, unexpected leakage from the pressure vessel, causing release of a contaminant into Sterling’s dye product,” constituted an occurrence under the plain language of the insurance policies. *Id.* In addition, our Supreme Court noted the undisputed fact that the rupture of the pressure vessel occurred on 21 June 1992, thereby causing the property damage to the dye product, despite the fact that the contamination continued until it was subsequently discovered. *Id.*

Here, the allegations of the complaint in the Hardison Action state that the damage to the Hardisons’ residence and personal property occurred when the altered slope and retaining wall collapsed on 7 December 2009. Specifically, paragraphs twenty-five and twenty-six of the Hardison Action complaint state:

25. On the evening of December 7, 2009, the plaintiffs were inside the Residence when the altered slope and retaining wall collapsed, sending tons of dirt and rock onto the Residence, causing extensive damage to the Residence, the plaintiffs’ personal property, and land upon which the residence was constructed. . . .

26. After the slope collapse of December 7, 2009, the Hardison Residence was condemned by the Buncombe

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County Building Inspections Department. The plaintiffs are legally prohibited from occupying their home. After the occurrence they took shelter with relatives until they could rent an apartment. Their home is presently uninhabitable and worthless.

Pursuant to these allegations in the Hardison Action complaint, the physical injury to the Hardisons' property occurred during defendant's policy period of 6 May 2009 through 6 May 2010.

Further, although the Hardison Action complaint alleges that the bank collapse was a result of TPD Builder's negligent construction and faulty workmanship, there is no indication in the record that the destructive bank collapse was "expected or intended" by TPD Builder. Rather, the collapse of the altered slope and retaining wall was an accident resulting from the alleged faulty workmanship of TPD Builder according to the allegations in the Hardison Action complaint. Although the Hardison Action complaint does not contain any allegations that TPD Builder "engaged in some act or omission after the house was completed," as defendant maintains on appeal, the lack of such an allegation is immaterial. "Faulty workmanship is not included in the standard definition of 'property damage,' " and defendant's insurance policy requires only that the property damage occur during the policy period. *Mitchell*, 210 N.C. App. at 661, 709 S.E.2d at 532. Here, the property damage to the Hardisons' residence and personal property was caused by a single occurrence – the collapse of the altered slope and retaining wall – as defined in defendant's insurance policy. Based on a comparison test of the Hardison Action complaint and defendant's insurance policy, and following our Supreme Court's analysis and holding in *Gaston County Dyeing*, defendant's duty to defend TPD Builder and Duffy in the Hardison Action was clearly triggered.

Nonetheless, defendant maintains on appeal that under circumstances like those presented in the present case, the trial court must determine "when the *defect* occurred from which all damages flowed," rather than the date the harm manifested, in order to determine which insurance policy is triggered. (Emphasis added.) In support of its argument, defendant relies on this Court's opinion in *Hutchinson v. Nationwide Mut. Fire Ins. Co.*, 163 N.C. App. 601, 594 S.E.2d 61 (2004). However, defendant's argument and reliance on *Hutchinson* is misguided, as the language relied on by defendant as this Court's holding in *Hutchinson* is actually a summary of our Supreme Court's holding in *Gaston County Dyeing*.

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The pertinent terms of the insurance policy at issue in *Hutchinson* were substantively identical to those involved in both the present case and *Gaston County Dyeing*: “Under the insurance policy in [*Hutchinson*], coverage [was] triggered by ‘property damage’ when the property damage [was] caused by an ‘occurrence’ and when the property damage occur[red] within the policy period.” *Id.* at 604, 594 S.E.2d at 63. In *Hutchinson*, Dennis and Leanne Hutchinson (“the Hutchinsons”) contracted with a builder for the construction of a custom home, “includ[ing] the creation of a retaining wall[.]” *Id.* at 602, 594 S.E.2d at 62. On 18 November 2009, the Hutchinsons discovered that the retaining wall had been damaged by water entry, and the Hutchinsons filed suit against the builder. *Id.* at 602, 605, 594 S.E.2d at 62, 64. This Court observed that the Hutchinsons’ underlying complaint advanced two theories of liability against the builder of the retaining wall: “The property damage herein was allegedly caused by either (1) [the builder]’s failure to install a drainage system in the retaining wall and/or to use proper soil under the retaining wall, or (2) the continual entry of water into the soil from the compacted surface area.” *Id.* at 604, 594 S.E.2d at 63.

We further noted in *Hutchinson* that the uncontested facts revealed that “the building was complete before the end of October 1999 and that [the builder]’s new insurance policy was not available until 15 November 1999.” *Id.* at 605, 594 S.E.2d at 63. Accordingly, we held: “This Court can determine with certainty that [the builder]’s failure to install a drainage system in the retaining wall or to use the proper soil under the retaining wall occurred before 15 November 1999 and therefore [the builder]’s later insurance policy [was] not triggered if the damage was caused under those theories.” *Id.* In addition, after noting that the Hutchinsons’ “strongest argument [was] that [the builder] failed to construct any alternate means to protect the site and therefore allowed the continual entry of water into the soil under the retaining wall, creating significant damage to the retaining wall[.]” we observed that the evidence presented by the Hutchinsons clearly indicated that the builder’s “actions and inactions at the time the retaining wall was constructed caused the subsequent problems with water entry into the soil surrounding the retaining wall.” *Id.* at 605, 594 S.E.2d at 64. Summarizing our Supreme Court’s holding in *Gaston County Dyeing*, we stated that “even in situations where damage continues over time, if the court can determine when the *defect* occurred from which all subsequent damages flow, the court must use the date of the *defect* and trigger the coverage applicable on that date.” *Id.* (emphasis added). Thus, under the Hutchinsons’ remaining theory that the property damage was caused by the “continual entry of water” that began at the time the home was constructed, we held

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that the builder's later insurance policy was not triggered. *Id.* at 605, 594 S.E.2d at 64. Accordingly, we upheld the trial court's grant of summary judgment in favor of the builder's insurance company, as nothing "suggest[ed] that the damage was caused during the three days of coverage prior to discovery[.]" *Id.* at 606, 594 S.E.2d at 64.

However, we note that to the extent *Hutchinson* uses the term "defect" in summarizing our Supreme Court's holding in *Gaston County Dyeing*, such language mischaracterizes the holding in *Gaston County Dyeing*, as our Supreme Court did not use the term "defect," but rather, "injury-in-fact." In *Gaston County Dyeing*, our Supreme Court held that "where the date of the *injury-in-fact* can be known with certainty, the insurance policy or policies on the risk on that date are triggered." *Gaston County Dyeing*, 351 N.C. at 303, 524 S.E.2d at 564 (emphasis added). Notably, in *Gaston County Dyeing*, had our Supreme Court looked to the date the "defect" occurred in the underlying action, *i.e.*, when the faulty pressure vessel was fabricated by Gaston, the holding would have been markedly different. However, in *Gaston County Dyeing*, our Supreme Court looked to when the defective product failed and caused the property damage complained of, consistent with the terms of the insurance policy at issue. *Id.* at 302, 524 S.E.2d at 564. To the extent the language employed in *Hutchinson* is inconsistent with that employed by our Supreme Court in *Gaston County Dyeing*, we follow our Supreme Court's holding and analysis.

Moreover, both *Gaston County Dyeing* and *Hutchinson* address factual situations in which property damage occurred over an extended period of time, although the condition causing such damage was not discovered until after substantial property damage had already occurred. See *Gaston County Dyeing*, 351 N.C. at 302, 524 S.E.2d at 564; *Hutchinson*, 163 N.C. App. at 605, 594 S.E.2d at 64. As reflected by the allegations of the Hardison Action complaint, this is not a case of property damage that continued over time.⁴ Consequently, defendant's reliance on *Harleysville Mut. Ins. Co. v. Berkley Ins. Co. of the Carolinas*, 169 N.C. App. 556, 610 S.E.2d 215 (2005), and *Nelson v. Hartford Underwriters Ins. Co.*, 177 N.C. App. 595, 630 S.E.2d 221 (2006), is likewise misguided,

4. Although defendant argues in its reply brief that whether the property damage alleged in the Hardison Action was continual or progressive in nature was an issue of fact to be determined by the trial court, thereby preventing judgment on the pleadings, this argument is clearly unsupported by the allegations of the Hardison Action complaint, which definitively state that the damage to the Hardisons' residence and personal property occurred on the evening of 7 December 2009 when the altered slope and retaining wall collapsed.

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as both of those cases also addressed factual situations in which property damage continued over time, beginning at the time of the faulty construction alleged in the underlying complaint. See *Harleysville*, 169 N.C. App. at 557-58, 560-62, 610 S.E.2d at 216-19 (underlying action by homeowners against contractor for property damage resulting from the continual entry of moisture through a synthetic stucco system that was defectively installed by the contractor on the outside of the homeowners' residence; property damage began occurring at the time of construction, which occurred prior to the effective date of the insurance company's general commercial liability policy covering the contractor); *Nelson*, 177 N.C. App. at 598-600, 607, 630 S.E.2d at 224-26, 230 (underlying action by homeowners against insurer for property damage consisting of mold contamination that was attributed to three causes, all of which occurred during construction or repairs prior to effective date of insurance coverage and continued over time until discovery during the coverage period). To the contrary, in the present case, according to the allegations of the Hardison Action complaint, TPD Builder and its subcontractors negligently altered the slope and constructed an inadequate retaining wall, and this faulty construction ultimately caused the slope collapse that resulted in the property damage to the Hardisons' property. Nonetheless, all property damage alleged in the Hardison Action relates to the single occurrence of the slope collapse that occurred during defendant's policy period.

We note this Court's recent opinion in *Builders Mut. Ins. Co. v. Mitchell*, 210 N.C. App. 657, 709 S.E.2d 528 (2011), in which we held that an insurer's duty to defend was triggered when the facts alleged in the underlying action, if true, would point to property damage as defined under the insured's policy. *Id.* at 666-67, 709 S.E.2d at 535. In *Mitchell*, the underlying action alleged that a homeowner had suffered damages to his home as a result of the faulty workmanship performed by the insured. *Id.* at 658-59, 666, 709 S.E.2d at 530, 535. Builders Mutual defended the insured in the underlying action and settled the claim following mediation. *Id.* at 659, 709 S.E.2d at 530-31. Thereafter, Builders Mutual filed a declaratory judgment action seeking indemnity from a previous insurer for a portion of the settlement and defense costs. *Id.* In *Mitchell*, we held that given the broad definition of the duty to defend in our case law, and based on the allegations of the underlying action, "[t]here was a duty to defend, which is independent of the duty to pay, and [the previous insurer] should have defended the underlying action."⁵ *Id.* at 667, 709

5. We note that defendant's position in the present case is entirely contrary to and inconsistent with its position and argument in *Mitchell*.

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S.E.2d at 535. Similarly, in the present case, the Hardison Action complaint alleged facts which could have brought the claim within defendant's insurance policy, thereby triggering defendant's duty to defend the underlying action.

In light of the foregoing authority, and having utilized the comparison test, we hold defendant's refusal to defend TPD Builder and Duffy in the Hardison Action was unjustified as a matter of law. If the insurer's refusal to defend the underlying action was unjustified, the insurer obligates itself "to pay the amount and costs of a reasonable settlement." *Duke University*, 96 N.C. App. at 637, 386 S.E.2d at 763. "If the insurer fails to defend, it is at his own peril: if the evidence subsequently presented at trial reveals that the events are covered, the insurer will be responsible for the cost of the defense." *Mitchell*, 210 N.C. App. at 666, 709 S.E.2d at 535 (internal quotation marks and citation omitted). Here, because defendant's refusal to defend was unjustified, defendant obligated itself to pay the amount expended in settlement of the Hardison Action on behalf of TPD Builder and Duffy.

In their amended complaint, plaintiffs requested the trial court issue a declaratory judgment that in breaching its duty to defend, defendant "must reimburse Plaintiffs for the entire defense costs" and "fully indemnify and reimburse Plaintiffs for the entire amount of the settlement sums." The amended complaint contains an allegation that Erie paid on behalf of TPD Builder and Duffy "the sum of \$170,000.00" to settle the Hardison Action. Thus, the trial court's order granting judgment on the pleadings in favor of plaintiffs for the settlement sum of \$170,000.00 was proper in light of defendant's unjustified refusal to defend its insured in the Hardison Action and is therefore affirmed.

However, neither the original complaint nor the amended complaint in the present action state any amount as plaintiffs' "defense costs." Although plaintiffs pled they were entitled to legal fees for defense costs, they failed to include any supporting allegations addressing these "defense costs." Accordingly, the trial court's order granting judgment on the pleadings in favor of plaintiffs cannot extend to defense costs that were insufficiently pled. To the extent plaintiffs seek "defense costs," the trial court's order granting judgment on the pleadings in favor of plaintiffs is therefore reversed.

V. Conclusion

We hold the trial court did not err in considering the requisite terms of defendant's insurance policy as well as the legal briefs submitted by

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the parties in making a determination on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. The trial court's consideration of these documents did not convert the Rule 12(c) hearing into a Rule 56 hearing, and therefore, the trial court did not err in making its determination without allowing defendant the opportunity to present additional materials.

We further hold the trial court properly granted judgment on the pleadings in favor of plaintiffs in the present case. As a matter of law, the allegations presented in the underlying action triggered defendant's duty to defend its insured under the terms of defendant's insurance policy. Because defendant unjustifiably refused to defend its insured in the underlying action, judgment on the pleadings in favor of plaintiffs for the amount expended in settlement of the underlying action on behalf of the insured was proper. However, plaintiffs' amended complaint fails to include allegations pertaining to any "defense costs" expended, and therefore, judgment on the pleadings in favor of plaintiffs for any such defense costs was improper. Accordingly, we affirm in part and reverse in part the trial court's order granting judgment on the pleadings in favor of plaintiffs.

Affirmed in part and reversed in part.

Judges HUNTER (Robert C.) and DAVIS concur.

JOYCE COLLEEN HINKLE, PLAINTIFF
v.
DENNIS WAYNE HINKLE, DEFENDANT

No. COA12-781

Filed 21 May 2013

1. Divorce—equitable distribution—unequal division—findings

The trial court erred in an equitable distribution action by not addressing the parties' contentions regarding an unequal distribution where the parties presented evidence about those issues. On remand, the parties were permitted to offer additional evidence on the income, liabilities and property of the parties on the date of division, since the division had not yet become effective.

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2. Divorce—equitable distribution—value of property—findings

In an equitable distribution case remanded on other grounds, the trial court was directed to make findings clarifying the valuation of certain property where the trial court had not made a specific finding about the date of the valuation or of the value of the mortgage on the property.

Appeal by plaintiff from order entered 3 January 2012 by Judge C. Thomas Edwards in Catawba County District Court. Heard in the Court of Appeals 14 March 2013.

CROWE & DAVIS, P.A., by H. Kent Crowe, for plaintiff.

WESLEY E. STARNES, P.C., by Wesley E. Starnes, for defendant.

ELMORE, Judge.

Joyce Colleen Hinkle (plaintiff) appeals from the order of equitable distribution entered 3 January 2012. Plaintiff asserts that the trial court erred by failing to consider certain findings of fact per N.C. Gen. Stat. § 50-20(c). After careful consideration, we remand with further instruction consistent with this opinion.

I. Background

Plaintiff and Dennis Wayne Hinkle (defendant) were married on 29 July 1990 and lived together as husband and wife for approximately seventeen years. In July 2009, plaintiff filed a complaint in Catawba County District Court seeking an absolute divorce, equitable distribution with plaintiff receiving more than 50 percent of the marital property, and costs. Defendant filed an answer and counterclaim in October 2009, praying the trial court for an order of equitable distribution.

In its order, the trial court made findings of fact including, but not limited to, (1) the value of defendant's 401(k) retirement account, (2) the value of the 1448 Cauble Dairy Road property, (3) the value of the Connelly Springs property, (4) the value of a 2 acre tract of land in Cleveland County, (5) the sum of property taxes paid by the parties, and (6) the value of numerous household and personal items at the date of separation. The trial court then determined that the parties' marital assets totaled \$34,862.00, and ordered that that an equal division of the marital estate between the parties would be equitable. Plaintiff appeals.

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II. Analysis

[1] Plaintiff argues that the trial court erred by failing to consider certain factors set forth in N.C. Gen. Stat. § 50-20(c) before entering its order. We agree.

In North Carolina, we presume that an equal distribution of marital or divisible property is equitable. *See Warren v. Warren*, 175 N.C. App. 509, 514, 623 S.E.2d 800, 803 (2006) (quotations and citations omitted). “This presumption may be rebutted by the greater weight of the evidence[.]” *Id.* “Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute, N.C.G.S. § 50-20(c)[], will establish an abuse of discretion.” *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted).

Per N.C. Gen. Stat. § 50-20, a trial court “must make findings of fact under section 50-20[c] regarding any of the factors for which evidence is introduced at trial.” *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 395, 545 S.E.2d 788, 794 (2001) (citation omitted). This requirement exists regardless of whether the trial court ultimately decides to divide the property equally or unequally. *Armstrong v. Armstrong*, 322 N.C. 396, 403, 368 S.E.2d 595, 599 (1988).

The trial court entered a pretrial order by consent of the parties on 20 September 2010, and this order was not amended prior to or at trial. The pretrial order is no mere formality; it is required under 25 Jud. Dist. Family Domestic Rule 5.6, pursuant to N.C. Gen. Stat. § 50-21(d). The parties each set forth their contentions for unequal distribution in the pretrial order. Plaintiff set forth the following contentions for unequal distribution in her favor:

1. The income, property, and liabilities of each party at the time the division of property is to become effective;
2. The duration of the marriage and the age and physical and mental health of both parties;
3. Unequal division of property due to the fact of the Health Issues of the Plaintiff/Wife;
4. Waste by Husband, marital assets and use of wife’s separate property during marriage to support husband’s racing hobby; and

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5. Wife's care for Husband's mother which lived with the parties.
6. Money paid for bills, etc. on land Husband inherited then returned to uncle after Wife spent approximately \$7,000.00.
7. Payment of property taxes where he is currently living.
8. Any other factor which the court finds to be just and proper.

Defendant also set forth contentions for unequal distribution in his favor, as follows:

1. Marital funds were used to pay the ad valorem taxes on Wife's separate property in Kings Mountain.
2. Improvements made during the marriage to property at 1692 US Hwy 70, Connelly Springs, NC, including, but not limited to, reconstruction; bathroom; refinished cabinets; painted house; installed tile in kitchen and dining room; 16' X 40' garage; new windows; new deck – 20' X 24'; handicap ramp; new water heater; replaced lights, switches and receptacles; removal of 9 large trees; painted inside and out; new heat pump; plumbing, gutters, removal of three shed; taxes paid. Husband performed all labor. Some funds may have been borrowed by Wife against the property and some were marital funds.
3. The difficulty of establishing the marital interest due to the improvements made to the 1692 US Hwy 70, Connelly Springs, NC property.
4. The impact of the leasehold interest of Doris Barger on the value of the property at 1448 and 1450 Cauble Dairy Rd, Hickory, NC property.
5. The reasonable reliance by Husband upon the document signed December 6, 2007, by Wife.
6. If the mortgage on the 1692 US Hwy 70, Connelly Springs, N.C. property is found to be marital debt, which Husband denies, the use of this debt without the knowledge or consent of Husband.

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7. If the mortgage on the 1692 US Hwy 70, Connelly Springs, N.C. property is found to be marital debt, which Husband denies, the difficulty in establishing the use of these funds without the knowledge or consent of Husband.
8. Payments made by Husband on the Cauble Dairy Rd, Hickory, N.C. property mortgage and the debt on the mobile home.
9. The impact of Husband's reduced hours since the date of separation upon his financial condition.
10. The sale of the 1692 US Hwy 70, Connelly Springs, N.C. property to Wife's son by a prior marriage, resulting from Husband's reliance upon the document signed by Wife and dated December 6, 2007 at less than the Fair Market Value.
11. Husband's care for Wife's mother which resulted in the conveyance/inheritance of the 1692 Hwy 70, Connelly Springs, NC property to Wife.

Plaintiff argues that the trial court failed to make any findings of fact or conclusions of law regarding the contentions for unequal distribution. Defendant essentially concedes that none of the trial court's findings specifically address the distributional factors, but argues that we should simply assume that the trial court did consider the factors. For example, defendant notes that the trial court did not find the ages of the parties, but contends that "this is a mere oversight and has been considered in the trial court's decision."

Regarding plaintiff's health issues, defendant states that "it is again conceded that the trial court did not address these issues in its findings of fact. However, this factor is not included in the contentions of the plaintiff in the pretrial order." As is obvious from reference to the list of contentions in the pretrial order quoted above, this argument is simply false. Plaintiff did specifically note "the physical and mental condition health of both parties" as well as requesting "[u]nequal division of property due to the fact of the Health Issues of the Plaintiff/Wife." The parties presented evidence regarding the issues raised in their contentions for unequal distribution; defendant does not argue otherwise. It is apparent that the trial court failed to address any of the parties' contentions for unequal distribution in any substantive way, despite the fact that the parties presented evidence addressing these issues.¹

1. Perhaps the lack of findings on these issues is related to the fact that the trial court failed to enter its order until a year after the equitable distribution trial. The order

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Here, there is evidence in the record tending to show that plaintiff was sixty-five years old at the time of the equitable distribution hearing and was not in good health; she had been diagnosed with (among other things) stage two breast cancer, chronic obstructive pulmonary disease (COPD), and high blood pressure. Additionally, there is evidence in the record that plaintiff's income was approximately \$847.00 per month and defendant's was approximately \$1,600.00 per month. "The health and incomes of the parties are factors that must be considered, when evidence is presented, by the trial court in making a distribution of the marital property." *Collins v. Collins*, 125 N.C. App. 113, 117, 479 S.E.2d 240, 243 (1997) (citations omitted). The order in the case *sub judice* does not include any findings of fact tending to show that the trial court considered this evidence.

After reviewing the order, we conclude that the trial court made sufficient findings of fact regarding the duration of the parties' marriage. However, we must remand for the trial court to make findings of fact and appropriate conclusions of law regarding the other contentions for unequal distribution raised by both parties, as set forth in the pretrial order. Since one of the factors which the trial court must address on remand is "[t]he income, property, and liabilities of each party *at the time the division of property is to become effective*," prior to making its additional findings of fact and conclusions of law, the trial court shall permit the parties to offer additional evidence only as to this factor, if they so choose, as the trial of this matter was in January of 2011, and the division has not yet become effective, over two years later. Because we are remanding for additional findings of fact and conclusions of law, we will not address plaintiff's remaining argument on appeal.

[2] Although plaintiff has not specifically challenged the trial court's finding of the value of the Cauble Dairy Road property, on remand, the trial court should also make additional findings clarifying the valuation of the Cauble Dairy Road property since this particular property and associated debt was also the subject of some of the contentions for unequal distribution. The trial court did classify the Cauble Dairy Road property as marital and found that it was valued at \$6,000.00, but it made no specific finding about the date of this valuation or the value of the mortgage on that property. The value found by the trial court appears to be a net value based upon the fair market value of the property less the mortgage, but we cannot discern how the trial court reached that figure.

also states that was "Entered after deliberation this the 3rd day of January, 2012 and signed this 3rd day of January, 2012, nunc pro tunc. As the order was both announced and executed on the same day, it is unclear why it would be entered as nunc pro tunc.

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Because the valuation of this property and debt is related to the distributional issues raised by the parties, more specific findings are needed. *See Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986). (“The purpose for the requirement of specific findings of fact that support the court’s conclusion of law is to permit the appellate court on review to determine from the record whether the judgment-and the legal conclusions that underlie it-represent a correct application of the law.” (citation and quotation marks omitted)).

Plaintiff contended that the net value of the property was \$10,870.58, while defendant asserted it was worth nothing, given the life estate interest of Doris Barger. There was also some confusion at the hearing about what the actual value of the property was and how much remained on the mortgage. Indeed, there was some indication that the debt may have exceeded the value of the property. Given the conflicting evidence of the valuation of the property and the debt in the record and the fact that this particular property was the subject of some of the contentions for unequal distribution, on remand the trial court must also make findings clarifying the fair market value of the property and the amount of the mortgage debt as of the date of valuation and date of distribution, before proceeding to distribution.

Remanded.

Judges STEELMAN and STROUD concur.

IN THE MATTER OF WILLIAM BUNCH, III

No. COA12-1367

Filed 21 May 2013

Appeal and Error—preservation of issues—failure to present argument to trial court

The State’s appeal from the trial court’s order concluding that petitioner did not have a reportable out-of-state conviction and that petitioner was eligible for early termination under N.C.G.S. § 14-208.12A was dismissed. The State failed to preserve these arguments for appeal by presenting them at the trial level.

Appeal by the State from Order entered 19 June 2012 by Judge

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Forrest D. Bridges in Superior Court, Cleveland County. Heard in the Court of Appeals 11 April 2013.

Michael E. Casterline, for petitioner-appellee.

Attorney General Roy A. Cooper, III by Assistant Attorney General William P. Hart, Jr., for the State.

STROUD, Judge.

The State appeals from an order granting a petition filed by William Bunch, III, (“petitioner”) requesting termination of his sex offender registration requirement. The State argues on appeal that the trial court erred in concluding that petitioner did not have a reportable out-of-state conviction and that petitioner was eligible for early termination under N.C. Gen. Stat. § 14-208.12A (2011). Because the State has failed to preserve these arguments, we dismiss the State’s appeal.

I. Background

In April 1993, when he was seventeen years old, petitioner pleaded guilty to third-degree criminal sexual conduct in Wayne County, Michigan for sexual intercourse with a female between the ages of thirteen and fifteen. In Michigan, consensual sexual intercourse between a seventeen-year-old and a person “at least 13 years of age and under 16 years of age” constituted criminal sexual conduct in the third degree. Mich. Comp. Laws. § 750.520d(1)(a) (1993). Petitioner has no other convictions that could be considered reportable sexual offenses.

Nine years later, in July 2002, petitioner’s son was born. When his son was seven years old, the Circuit Court for the County of Wayne, Michigan, awarded petitioner sole custody of his child, by order entered 5 November 2009. On 18 January 2012, the Michigan court entered an order allowing petitioner to change the domicile of his child to North Carolina, and petitioner and his son moved to North Carolina. After consulting with the local sheriff, petitioner registered with the North Carolina Sex Offender Registry on 8 February 2012. He then filed a petition to terminate his registration requirement in superior court, Cleveland County. On 7 June 2012, the superior court held a hearing on his petition, wherein petitioner was represented by counsel and the State was represented by the elected District Attorney for Cleveland County.

At the hearing, petitioner presented the records of his Michigan conviction and records relating to the custody of his son and argued that he

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was never required to register in North Carolina because the offense for which he was convicted in Michigan is not a “reportable conviction,” or even a crime, in North Carolina; was not a “reportable conviction” in Michigan in 1993; and has not been a “reportable conviction” in Michigan since 1 July, 2011. In addition, petitioner presented evidence that he met all requirements under N.C. Gen. Stat. § 14-208.12A for termination of registration other than ten years of registration in North Carolina. *See* N.C. Gen. Stat. § 14-208.12A(a1).¹ The State presented no evidence and made no argument. After considering the documents and petitioner’s argument, the trial court announced that it was granting the petition on the basis that petitioner was never required to register in North Carolina, rather than on the passage of time. Again, the State registered no objection to the trial court’s decision. At the close of the hearing, the trial court executed an order on the preprinted form entitled Petition and Order for Termination of Sex Offender Registration, AOC-CR-263, Rev. 12/11,² granting the petition, but also directed petitioner’s attorney to prepare a more detailed order including the court’s rationale as stated in the rendition of the order in open court for allowing termination of petitioner’s registration. The trial court entered its full written order on 19 June 2012. The State filed written notice of appeal from the 19 June order on 19 July 2012.

II. Appellate Jurisdiction

At oral argument, petitioner contended that we should dismiss the State’s appeal because in its 19 July 2012 notice of appeal it only appealed from the full order entered 19 June 2012 and not from the form order entered 7 June 2012. It is clear from the trial court’s rendition of its ruling at the hearing that the court would enter the form order but that it would also enter another order that more fully and accurately stated its findings and conclusions. The trial court did so on 19 July 2012. Effectively, this order amended the trial court’s prior order. Because the State timely appealed from the amended order, we have jurisdiction to hear this appeal. *Cohen v. McLawhorn*, 208 N.C. App. 492, 497, 704

1. Petitioner submitted evidence that he had committed no more sexual offenses in the intervening years and that those around him did not consider him a threat to public safety. Additionally, if he was 17 and the person with whom he engaged in consensual intercourse was over the age of 13, as petitioner asserted and the State did not contest at the hearing, his offense would not be considered a sexual offense for purposes of the federal sex offender registration law and therefore not subject to the federal registration requirements. *See* 42 U.S.C. § 16911(5)(c) (2006).

2. Form AOC-CR-263, Rev. 12/11 includes both the petition which is filed by the petitioner and the order for execution by the court on the same form.

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S.E.2d 519, 523-24 (2010) (holding that the appeal was properly before the court where the appellant appealed from an order amending a prior order without appealing from the prior order).

III. Preservation

The State argues on appeal that we should vacate the lower court's order granting petitioner's petition to terminate his sex offender registration requirement because it is uncontested that petitioner has not been registered in North Carolina for ten years and is, therefore, ineligible for relief under N.C. Gen. Stat. § 14-208.12A. The State also contends that the trial court erred in concluding that petitioner's conviction for sexual conduct in the third degree is not a reportable conviction under N.C. Gen. Stat. § 14-208.6(4) (2011). We dismiss the State's appeal because it failed to preserve these arguments by presenting them to the trial court.

Rule 10(a)(1) of the Rules of Appellate Procedure states, "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P 10(a)(1). The district attorney present at the hearing here did not object or make any argument about the petition, let alone specifically argue that petitioner did not qualify for relief due to the statutory time requirement or that his conviction was a reportable conviction. Nevertheless, the State contends that these issues are preserved for our review because the trial court granted relief not authorized under the statute.

Although it is clear from the transcript that the trial court recognized that petitioner did not fit into the statutory grounds for relief under N.C. Gen. Stat. § 14-208.12A, as he had not been registered in North Carolina for ten years or more,³ the trial court's order granted no more relief than is authorized under that statute – termination of petitioner's sex offender registration requirement. If the superior court grants a petition to terminate the registration requirement, the clerk of superior court "forward[s] a certified copy of the order to the Division [of Criminal Information of the Department of Justice] to have the person's name removed from the registry." N.C. Gen. Stat. § 14-208.12A(a3). The order here merely terminated petitioner's registration requirement and ordered

3. A person "required to register" may petition under N.C. Gen. Stat. § 14-208.12A(a) to have his thirty year registration requirement terminated ten years after the date of his initial registration. The ten year period does not begin until the offender registers in North Carolina; any time registered in another state does not count toward the ten years. *In re Borden*, ___ N.C. App. ___, ___, 718 S.E.2d 683, 686 (2011).

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the clerk to forward a copy of the order to the Criminal Information and Identification Section of the State Bureau of Investigation, the section of the Department of Justice responsible for maintaining the registry, as it was empowered to do under the statute. Thus, we are unconvinced by the State's argument that the trial court exceeded its authority.

The State is correct that N.C. Gen. Stat. § 14-208.12A, by its plain terms, does not apply to someone who claims that he was never required to register in the first place, and so the State contends that petitioner should have filed suit against the Attorney General in his official capacity for a declaratory judgment that he was not required to register in North Carolina, as some others have done, *see, e.g., Walters v. Cooper*, ___ N.C. App. ___, ___, 739 S.E.2d 185, 186 (2013). Although we agree a declaratory judgment action is a more appropriate way of obtaining a ruling upon the registration requirement in these circumstances, it is not the exclusive method.⁴ But we would caution that those who seek to terminate registration as a sex offender under N.C. Gen. Stat. § 14-208.12A, for any reason other than fulfillment of the ten years of registration and other requirements of N.C. Gen. Stat. § 14-208.12A in the future will probably not succeed if the State does raise any objection or argument in opposition to the request. In the cases presented to this Court thus far, the State has either consented, as in *Hutchinson*, or stood silent.

Moreover, the alleged error below is not automatically preserved as a jurisdictional issue. The statute makes clear that a "person required to register" must have been registered for 10 years to be eligible for early termination of the registration requirement. *See* N.C. Gen. Stat. § 14-208.12A(a) ("[t]en years from the date of initial county registration, a person required to register under this Part may petition the superior court to terminate the 30-year registration requirement . . ."). This Court has interpreted that provision to require 10 years of registration in North Carolina such that the amount of time a petitioner has been registered in another state is irrelevant. *In re Borden*, ___ N.C. App. at ___, 718 S.E.2d at 686. Nevertheless, this Court has held that the fact that a petitioner has not actually been registered in North Carolina for ten years does not deprive the trial court of subject matter jurisdiction to rule upon the petition. *In re Hutchinson*, ___ N.C. App. ___, ___, 723 S.E.2d 131, 133, *disc. rev. denied*, ___ N.C. ___, 724 S.E.2d 910 (2012).

4. For instance, if a person is charged with failure to register, he may raise the argument that he was never required to register as a defense. *See, e.g., State v. Stanley*, 205 N.C. App. 707, 697 S.E.2d 389 (2010).

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The State argues that *Hutchinson* is distinguishable. We disagree. We are bound by *Hutchinson* and apply it here. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

In *Hutchinson*, the petitioner had not been registered in North Carolina for ten years at the time he petitioned to terminate his sex offender registration requirement. *In re Hutchinson*, ___ N.C. App. at ___, 723 S.E.2d at 133. The petition in *Hutchinson* made clear on its face that the petitioner had not been registered for ten years or more.⁵ We held that the mere fact that the petitioner had not been on the registry for ten years did not deprive the trial court of subject matter jurisdiction. *Id.* We further held that because the district attorney did not raise any objection at the hearing or specifically object that the petitioner had not been registered for ten years, the State had not preserved that argument for appeal. *Id.* Indeed, the district attorney in that case consented to the termination of the petitioner's registration requirement. *Id.*

Here, when asked by the trial court whether he had anything to add, the district attorney simply responded, "No, sir." The State did not argue before the trial court that petitioner was ineligible for the relief sought either because he had not been registered for ten years or for any other reason. We fail to see a material distinction between *Hutchinson* and the present case. If the trial court was not deprived of jurisdiction by the petitioner's failure to meet the statutory ten year requirement in *Hutchinson*, it also was not so deprived here. Moreover, the relief granted was not beyond that authorized by the statute – the trial court merely terminated petitioner's sex offender registration requirement. The State's argument that the trial court erroneously determined that petitioner was eligible for relief under N.C. Gen. Stat. § 14-208.12A was not automatically preserved. Therefore, as in *Hutchinson*, we hold that the State has failed to preserve the argument that petitioner was not eligible for termination under N.C. Gen. Stat. § 14-208.12A. *Id.*; N.C.R. App. P. 10(a)(1). Accordingly, we dismiss the State's appeal. *In re Hutchinson*, ___ N.C. App. at ___, 723 S.E.2d at 133 (dismissing the State's appeal because it failed to preserve its arguments for appeal).

DISMISSED.

Judges ELMORE and STEELMAN concur.

5. Although it was not mentioned in the opinion, we take judicial notice of the *Hutchinson* petition to terminate sex offender registration, which was part of the record on appeal in that case. See *Four Seasons Homeowners Ass'n, Inc. v. Sellers*, 72 N.C. App. 189, 190, 323 S.E.2d 735, 737 (1984) ("[O]ur appellate courts may take judicial notice of their own records . . .").

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[227 N.C. App. 264 (2013)]

IN THE MATTER OF I.K.

No. COA12-1053

Filed 21 May 2013

Child Abuse, Dependency, and Neglect—cessation of reunification efforts—insufficient findings of fact

The trial court abused its discretion in a child neglect and dependency case by ceasing reunification efforts and awarding guardianship of a minor child to her foster parents. The evidence and the findings failed to support a conclusion that reunification efforts would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time. The case was remanded for entry of an order containing proper findings and conclusions.

Appeal by respondent-father from order entered 11 June 2012 by Judge Beverly Scarlett in District Court, Orange County. Heard in the Court of Appeals 17 April 2013.

Northen Blue, LLP, by Carol J. Holcomb and Samantha H. Cabe, for Orange County Department of Social Services, petitioner-appellee.

Cranfill Sumner & Hartzog LLP, by Laura E. Dean, for guardian ad litem.

Richard Croutharmel for appellant, respondent-father.

STROUD, Judge.

Respondent-father appeals from the trial court's permanency planning order ceasing reunification efforts and awarding guardianship of I.K. ("Ilka")¹ to her foster parents.

In July 2010, Ilka was living with her mother and six-year old brother, N.K. ("Nick"), in a motel in Hillsborough, North Carolina. The family came to the attention of Orange County Department of Social Services ("OCDSS") after the mother attempted suicide. On 10 September 2010,

1. The parties all referred to the minor child by the pseudonym Ilka in their briefs. We will refer to her and the other referenced minor children by pseudonym to protect their identities and for ease of reading.

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OCDSS filed a juvenile petition alleging Ilka was a neglected and dependent juvenile. The petition alleged, in part, that: the mother had two older children who were no longer in her care, and one of the older children alleged respondent-father physically and sexually abused him; the mother had a restraining order against respondent-father due to domestic violence, which expired in July 2010; respondent-father has limited financial resources and lacks an appropriate residence for the children; and the mother continues to have unmet mental health needs, housing issues, and financial barriers to parenting her children. On 12 November 2010, the trial court adjudicated Ilka dependent.

On 1 September 2011, the trial court conducted a permanency planning hearing. The trial court found respondent-father had complied with some of the requirements of OCDSS, but he had not provided OCDSS with an alternative plan of care for Ilka should he be hospitalized or otherwise unable to care for her. The trial court established a permanent plan of reunification with respondent-father or guardianship with Ilka's foster parents. The trial court ceased reunification efforts with the mother.

On 3 May 2012, the trial court conducted another permanency planning hearing. OCDSS recommended that reunification efforts with respondent-father continue, though the GAL disagreed and recommended that such efforts cease. By permanency planning order entered on 11 June 2012, the trial court ceased reunification efforts with respondent-father and awarded guardianship of Ilka to her foster parents, but also gave respondent-father unsupervised visitation for four hours per month with Ilka, which could be "increased in the discretion of the guardian." Respondent-father appeals from the permanency planning order.

Respondent-father argues the trial court abused its discretion by ceasing reunification efforts with him and ordering a permanent plan of guardianship with Ilka's foster parents where the trial court lacked the evidence to support its findings and the findings failed to support the conclusions of law. OCDSS argues that before even considering whether reunification efforts should have been ceased, "this Court must look first at whether the trial court correctly ordered that the permanent plan for the juvenile be guardianship with the foster parents." OCDSS contends that if we uphold the award of guardianship as a permanent plan, "then respondent's compliance with OCDSS and court demands becomes irrelevant to whether or not reunification efforts would be futile." Respondent-father counters that OCDSS's argument is circular; we believe it is more properly characterized as backwards, probably

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because OCDSS has changed its position in this appeal from its position in the trial court.

On appeal, OCDSS now supports the trial court's decision to cease reunification efforts. At the hearing, OCDSS recommended that reunification efforts continue. In some instances, parties may be judicially estopped from taking inconsistent positions at different points in the same litigation. *See In re Maynard*, 116 N.C. App. 616, 621, 448 S.E.2d 871, 874 (1994) (holding that DSS was estopped to argue that the respondent mother was competent to surrender her children when DSS had previously argued that she was so mentally ill that she could not care for her children), *disc. rev. denied*, 339 N.C. 613, 454 S.E.2d 254 (1995). Further, our Supreme Court has expressly disapproved of a party switching positions without explanation. *State v. Hooper*, 358 N.C. 122, 127, 591 S.E.2d 514, 517 (2004) (“[W]here the same party argues two wholly opposing positions in contemporaneous appeals or switches positions during the course of a single appeal, we believe that party has a responsibility to advise the affected courts and, if asked, to justify its actions. Otherwise, such reversals can frustrate not only the fair disposition of individual cases but also the effective administration of justice. Moreover, failure to notify the court will inevitably diminish judicial confidence in a party’s legal arguments. These factors apply with particular force where the party in question is the State, which has the elevated responsibility to seek justice above all other ends.”). “[T]he law does not permit parties to swap horses between courts in order to get a better mount” *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934).

Here, OCDSS did not merely “swap horses” on appeal, but hopped on a new horse and began riding in the opposite direction without warning or explanation. OCDSS fails even to acknowledge that its position has changed. This is of particular concern because the primary goal of the Juvenile Code, which includes DSS’s duties, is to seek to protect the best interests of abused, neglected, or dependent children. Our Supreme Court has noted that

the fundamental principle underlying North Carolina’s approach to controversies involving child neglect and custody [is] that the best interest of the child is the polar star. The [Juvenile] Code itself reflects this goal in its statement of purpose by requiring that its provisions “be interpreted and construed so as . . . [t]o provide standards . . . for ensuring that the best interests of the juvenile are of paramount consideration by the court.” N.C.G.S. § 7B–100 (2011).

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In re M.I.W., 365 N.C. 374, 381, 722 S.E.2d 469, 474 (2012) (citation and quotation marks omitted). Sometimes it is in the best interest of the child to be removed permanently from a parent; sometimes the best interest will be served by reunification. At the hearing, OCDSS took the position that continuing efforts toward reunification with respondent-father were in Ilka's best interest.² Given OCDSS's statutory duties and its specialized abilities to investigate and assess a child's welfare and situation, and its extensive investigation of this particular case, we must assume that OCDSS based its position upon the evidence and its professional assessment of the case, whether the trial court ultimately agreed with OCDSS's position or not. So we are not sure if OCDSS is still seeking to protect Ilka's best interests by its position in this appeal or if it just wants to win a case. In any event, the GAL did advocate for cessation of reunification efforts at the hearing, and we will address the petitioner's argument.

"The purpose of the permanency planning hearing shall be to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(a) (2011).

At the conclusion of the hearing, if the juvenile is not returned home, the court shall consider the following criteria and make written findings regarding those that are relevant:

(1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home;

(2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents;

(3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued and if so, any barriers to the juvenile's adoption;

2. The Permanency Planning Review court report of 3 May 2012 recommends that Ilka's primary plan "be reunification with her father" and states that "[Father] is the biological parent of [Ilka] and is ready, willing, and able to parent his daughter. After thorough investigation the department can come up with no reason for him not to parent his child. It will be sad and painful for [Ilka] to be removed from her foster home but it is not a reason to deny [father] his constitutional right to parent. Though [father] has room for improvement in his parenting skills, it does not rise to the level to prevent reunification."

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(4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why;

(5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile;

(6) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-907(b) (2011). The trial court may direct the cessation of reunification efforts if it makes written findings of fact that “[s]uch efforts clearly would be futile or would be inconsistent with the juvenile’s health, safety, and need for a safe, permanent home within a reasonable period of time.” N.C. Gen. Stat. § 7B-507(b)(1) (2011). “Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law.” *In re E.K.*, 202 N.C. App. 309, 312, 688 S.E.2d 107, 109 (2010) (citation, quotation marks, and brackets omitted).

Here, the trial court entered findings of fact addressing its areas of concern with regard to respondent-father, including sexual abuse, physical abuse, respondent-father’s medical fragility, and respondent-father’s ability to financially provide for Ilka. Based on its findings, the trial court determined “it is not possible that the juvenile could be unified with either parent.” The trial court also determined “[f]urther efforts to reunify or place the juvenile with . . . Respondent father would be futile or inconsistent with the best interest of the juvenile.”

After careful review of the record, we determine the evidence does not support the trial court’s findings and the findings do not support the trial court’s conclusions. Specifically, there is no evidence to support the trial court’s findings that there is an appreciable risk that respondent father would physically or sexually abuse Ilka. The findings regarding respondent father’s health and financial circumstances alone are insufficient to support the trial court’s cessation of reunification efforts.

Based upon its findings regarding respondent-father’s use of pornography and Granville County Department of Social Services (GCDSS) substantiating sexual abuse by respondent-father against his stepson, “Johnny,” the trial court found “there is an appreciable risk

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of inappropriate sexual behavior to [Ilka] should she be placed with Respondent father.” We conclude that the evidence does not support this finding.

GCDSS substantiated sexual abuse of Johnny by respondent-father based on statements Johnny made during his child abuse medical evaluation (CME).³ The CME was conducted based upon a referral by GCDSS to the Duke Child Abuse and Medical Evaluation Clinic and was a comprehensive evaluation including an extensive diagnostic interview, physical examination, and review of Johnny’s medical, psychological, and educational history. The CME did *not* conclude that respondent-father sexually abused Johnny. Dr. Keith Hersh, respondent-father’s therapist testified that he was “curious about why Social Services substantiated sexual abuse by [respondent-father], when the people from the CME chose not to.” Dr. Hersh proceeded to testify as follows:

And I’m curious because it seems, from my reading of the addendum, that the information from the CME was the basis for Social Services substantiating against him. They don’t seem to, at least, provide other evidence that he sexually abused any child. So I’m – I’m puzzled that the professionals who conducted the CME chose not to. I mean, clearly, they chose not to when they were willing to substantiate sexual abuse against someone else. Their willingness to substantiate physical abuse by him, but they made the decision not to substantiate sexual abuse by him. And that puzzles me.

Moreover, Dr. Hersh testified that he was not concerned about respondent-father sexually abusing a child. He testified that respondent-father had been “thoroughly evaluated for those issues,” and they have “consistently” shown no concern.

In addition, the trial court made no findings about whether respondent-father had sexually abused Johnny. Its findings were at best recitations of evidence of reports which had been made at various times

3. No report from Granville County DSS was in evidence. The only evidence of Granville County’s substantiation was an addendum to OCDSS’s permanency planning review reporting that the OCDSS Social Worker Mitchell called the Granville County Investigative Social Worker to check on the case and she was advised that “the agency made a team decision on May 2, 2012” substantiating sexual abuse as to mother and respondent-father. According to the phone call, this decision was based only “on [Johnny’s] statements to the CME evaluator,” noting several quotes from Johnny in the CME report. However, the CME report itself does *not* conclude that Johnny was sexually abused by respondent-father; it concludes that he was probably sexually abused by his mother.

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to various people, without ever finding any of them to be credible. Recitations of evidence are not findings of fact. See *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 854 (2004).

Neither Johnny nor anyone who evaluated Johnny regarding the alleged sexual abuse testified in this case. The trial court only found that Granville County DSS had substantiated the claim based upon the CME, even though the CME had not. All of the evidence regarding Johnny's reports of sexual abuse showed that Johnny suffered from substantial psychological problems and was clearly a victim of abuse by someone, although probably not respondent-father. In addition, the trial court also granted respondent-father unsupervised visitation with Ilka for four hours per month. Respondent argues, and we agree, that allowing "unsupervised contact with Ilka is irreconcilably inconsistent with its finding that Respondent would exhibit inappropriate sexual behavior around Ilka if she were reunited with him." It appears that the trial court attempted to use the old allegations of abuse against Johnny, which it appears not to have believed, to support its order for cessation of reunification efforts, while still allowing respondent-father unsupervised visitation.

As to respondent-father's use of pornography, a 2011 Parental Competency Evaluation referred to his use of pornography as an "addiction," though Dr. Hersh testified that he believed respondent-father was never actually addicted to pornography and, in any event, no longer used pornography. The trial court made findings about what the evaluation and Dr. Hersh said about this issue, but did not find that respondent-father was addicted to pornography, that he continued to use pornography, or that such use, if any, negatively impacts his children.

There was no evidence that respondent-father had ever acted inappropriately with Ilka in any way, and certainly no evidence of any sexual misconduct toward her. Respondent-father had been in court-ordered therapy and had taken a battery of tests to evaluate the likelihood that he would sexually abuse a child. None of the tests and none of the professionals who had examined him indicated such a likelihood. No other evidence was presented that supports the trial court's finding that there is "an appreciable risk of inappropriate sexual behavior to [Ilka]."

The trial court next addressed respondent-father's physical abuse of Johnny using a bullwhip, again an isolated event which occurred in 2009, three years prior to the hearing. Unlike the allegations of sexual abuse, respondent-father acknowledged that he had disciplined Johnny with a bull whip because "he was troubled and was always in

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therapy and he and [mother] did not know how to handle [him].” The trial court found:

Whether Respondent father hit [Johnny] intentionally or unintentionally, this court finds that using a bull whip as a method of discipline is physically abusive and such form of discipline puts [Ilka] at risk of harm if placed in Respondent father’s home. There is a reasonable probability that this is the method of discipline that Respondent father would employ in the future. There is no evidence before the court for this court to find otherwise.

Although the evidence clearly indicates respondent-father used a bullwhip as a method of disciplining Johnny, a teenage boy, we can discern no evidence in the record to support the trial court’s conclusion that there is a reasonable probability the method of discipline would be used on Ilka. Again, just as with the claims of sexual abuse of Johnny, it seems irrational that OCDSS has no objection to and the trial court ordered unsupervised visitation between father and Ilka if they believed that there was any reasonable probability that he would be physically abusive to her.

The evidence showed and the trial court found that respondent-father has attended all treatment, parenting classes, and mental health assessments ordered by the court. He has regularly visited with his children. He attended one parenting class specifically to learn appropriate discipline techniques. The record evidence shows that although respondent-father still has “room for improvement” and still needs guidance, he has no problems with anger or impulse control. The areas noted by OCDSS in which he “needed improvement” were that “he does not like to see [Ilka] get upset;” he let her watch cartoons too long at times and “liked to indulge [Ilka] in sweets;” and once Ilka wanted to go outside to play on a cold, rainy day without shoes, whereupon the social worker asked respondent-father “to stop her and put her socks and shoes on.” These are very common parenting issues and do not even hint at inappropriate discipline or abuse.

All of respondent-father’s many visitation sessions were reported to have gone smoothly and the supervising social workers reported that respondent-father was patient and properly played with Ilka during their visits. The evidence with regard to respondent-father’s appreciation of his past conduct was that he now recognizes using a bullwhip is not an appropriate form of discipline. There was no evidence that respondent-father has failed to learn how to properly discipline his child, that

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he had otherwise failed to learn the lessons taught through the parenting classes, or that further classes and guidance would not continue to improve his parenting skills. Indeed, neither the GAL nor OCDSS expressed any safety concerns with regard to respondent-father.⁴

The trial court next addressed respondent-father's medical condition, finding he had suffered "numerous potentially life-threatening illnesses, yet has managed to survive, against all odds." The trial court did not make any findings indicating respondent-father's current medical condition precluded him from reunification with Ilka. The only evidence concerning that issue was the opinion of respondent-father's physicians that his medical conditions do not impede his ability to care for his children. At the hearing, neither OCDSS nor the GAL contended that respondent-father was unable to care for Ilka because of his medical condition.

The trial court's remaining concern was respondent-father's financial ability to provide for Ilka. The trial court found:

25. Respondent father receives disability which is his only income. He testified that he was unable to pay a nominal fee to a visitation center in order to have supervised visits with his son [Nick].

26. Respondent father further testified that he and his significant other and her two children live on a budget that minimally meets their needs. Respondent father does not think that introducing [Ilka] into the home would create a financial hardship and that her needs could be met on the budget that now barely meets the needs of the current household of two adults and two teenagers.

27. Respondent father does not appear to have a realistic view of the financial responsibility of caring for [Ilka].

4. The only reference to the issue of abuse in the GAL's report is speculation about what the GAL describes as "an attempt to tell [Ilka's] story. . . . Telling [her] story requires reflecting on the people and events she had experienced in her short life . . . [Ilka] didn't have a healthy relationship with either parent. In [her mother's] care, she shared a bed with her mother and [respondent-father], and later, Junior. What intimacies did she observe? What did it mean to her that when Junior left, another man came in the door? By all accounts, [respondent-father] spent time with her — in bed, playing violent-themed video games or watching movies with sexual content. What did those experiences mean to her? Did [Ilka] observe [Johnny's] being abused with a bull whip, or smashing a window in winter because he was being punished, and it was cold outside, as he reports?" These are interesting speculations, but there is no evidence that Ilka actually observed the bull whip incident, which occurred when she was no more than a year old.

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28. Respondent Father entered into his current relationship during the course of this case. He resided with his significant other for less than one year. At the September 1, 2011 hearing, SW Juanita Hill testified that Respondent Father lived with his mother and has never lived on his own. At the September 1, 2011 hearing, Respondent Father testified that it was financially impossible for him to get housing. Respondent Father moved into the residence of his significant other since September 1, 2011. This court has not received any evidence that Respondent Father has the ability to financially provide for himself and his daughter independent of his significant other.

Respondent-father testified that he could not afford the visitation fee at the center in Raleigh, but would be able to afford to visit Nick in Pittsboro, though it would be a financial strain.⁵ When asked how he would afford to care for Ilka, respondent-father testified that he and his partner had “thoroughly discussed and tried to plan and prepare for anything that – that may happen.” Respondent-father testified that all of the household expenses were covered, there was food in the house, and Ilka would benefit from what was already being provided in the home. Again, neither OCDSS nor the GAL disputed father’s representation of his financial situation.

But even if respondent-father’s financial situation is meager, this fact alone would not support cessation of reunification under the facts of this case. Although there were valid concerns regarding Ilka’s safety which led to her adjudication as dependent, respondent-father did everything he was asked to do to improve his circumstances and ability to care for her, based upon the trial court’s findings. In this regard, this case is similar to *In re Eckard*, 148 N.C. App. 541, 559 S.E.2d 233, *disc. rev. denied*, 356 N.C. 163, 568 S.E.2d 192 (2002). In *Eckard*, we held that the evidence was insufficient to support the trial court’s findings in a permanency planning order where

(1) the injuries to [the juvenile] occurred while she was in the custody and care of another; (2) respondent mother terminated her relationship with the other person and has established and maintained her own dwelling; (3) despite respondent mother’s low I.Q., she has no severe mental

5. The permanency planning order at issue here only concerned Ilka, not Nick, who had been placed separately. The present appeal only concerns the order as to Ilka. As a result, we do not address any of the evidence regarding Nick.

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health issues that would interfere with her ability to parent; (4) respondent mother understands that her poor choices led to the abuse of the child and that the solution is to proceed more slowly before advancing to a live-in relationship; (5) respondent mother has grown and matured to a level as to not be a danger to Patricia; (6) respondent mother continues to remain employed, pay child support, and visit her child regularly; (7) respondent mother has done everything requested by DSS, is following her case plan, and is exceeding minimal standards of care; (8) respondent mother accepts responsibility on her own part for not protecting [the juvenile]; and (9) DSS recommends that the permanent plan for [the juvenile] be reunification with respondent mother.

Eckard, 148 N.C. App. at 545, 559 S.E.2d at 235.

This case also resembles *Eckard* in that the trial court considered the benefits of the foster parents before determining that the biological parent would be unable to parent the child:

[t]he trial court's findings and conclusions were based solely on the report submitted by the Guardian ad Litem and testimony by the foster parents that they had established a close relationship with Patricia, that she calls them "momma" and "daddy," and that they expected to adopt Patricia despite the stated goal of reunification with her natural mother. The uncontradicted testimony and evidence from the court-ordered psychologist, DSS referred psychologist, DSS nurturing program coordinator, DSS social worker, and respondent mother does not support the findings and conclusions of the trial court.

Id. at 545-46, 559 S.E.2d at 235-36.

Although the trial court made findings of fact addressing its areas of concern regarding respondent-father, we conclude the evidence and the findings fail to support a conclusion that reunification efforts "clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." See *In re T.R.M.*, 208 N.C. App. 160, 162, 702 S.E.2d 108, 109-10 (2010) ("A trial court may order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts." (citation and quotation marks omitted)).

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Furthermore, the trial court found that Ilka could not be unified with respondent-father under N.C. Gen. Stat. § 7B-907(b); the trial court's findings fail to explain, however, why Ilka could not be returned home immediately or within the next six months, and why it is not in her best interests to return home. *See In re Everett*, 161 N.C. App. 475, 480, 588 S.E.2d 579, 583 (2003) (when a child is not returned home, section 7B-907(b)(1) requires the court to find whether it is possible to return a child to her home immediately or within the next six months, and if not possible, the court must explain why.). The trial court made no findings that respondent-father has failed to progress according to the reunification plan, that he has refused to do what the court required of him, or that his current housing situation would be harmful to Ilka. *Cf. In re R.A.H.*, 182 N.C. App. 52, 58, 641 S.E.2d 404, 408 (2007) (holding that an order ceasing reunification efforts and awarding foster parents guardianship was supported where the child was being harmed by the lack of permanency, the mother had not made progress toward reunification despite reasonable efforts from DSS, and the mother had failed to remedy the risks associated with returning the child to her home).

Although the trial court's findings that Ilka was doing well in her current placement and that her guardians are good parents were clearly supported by the evidence, there was no evidence to support the court's findings crucial to its decision to cease reunification efforts under N.C. Gen. Stat. § 7B-507(b) and to support its permanent plan under N.C. Gen. Stat. § 7B-907(b).⁶

6. OCDSS argues that if the trial court's best interest determination as to guardianship is supported by the evidence, we need not consider whether reunification efforts would be futile because of N.C. Gen. Stat. § 7B-600(b) (2011). Although we have held that a court may order the cessation of reunification efforts if it makes sufficient findings under N.C. Gen. Stat. § 7B-907(d), the court must still make the findings required by N.C. Gen. Stat. § 7B-907(b). *See In re Dula*, 143 N.C. App. 16, 19, 544 S.E.2d 591, 593 ("The department of social services can also be relieved of the obligation of making reasonable efforts if a child has been in placement outside the home for the period of time and under the conditions referenced in section 7B-907(d)."), *aff'd*, 354 N.C. 356, 554 S.E.2d 336 (2001); *In re M.R.D.C.*, 166 N.C. App. 693, 702, 603 S.E.2d 890, 895 (2004) (holding that "without a valid permanency planning order, the trial court was necessarily unable to make a valid G.S. § 7B-907(d)(1) finding regarding the nature of the permanent plan." (emphasis omitted)), *disc. rev. denied*, 359 N.C. 321, 611 S.E.2d 413 (2005). Therefore, we are unconvinced by the argument that we need only look to whether the court properly concluded that guardianship is in the child's best interest without considering the adequacy of the court's findings under §§ 7B-507 and 7B-907. Although such a system might make judicial review simpler, that is not the law as established by our legislature, nor would it take into account the constitutionally protected interests of a natural parent.

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Accordingly, we reverse the trial court's order and remand for entry of an order containing proper findings and conclusions. "Whether on remand for additional findings a trial court receives new evidence or relies on previous evidence submitted is a matter within the discretion of the trial court." *In re J.M.D.*, 210 N.C. App. 420, 428, 708 S.E.2d 167, 173 (2011) (citation and quotation marks omitted).

REVERSED and REMANDED.

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

PAMELA JOHNSON, TERRY J. COX, AND DEENA HEAD, PLAINTIFFS
v.
FORSYTH COUNTY, FORSYTH COUNTY BOARD OF ELECTIONS AND ROBERT
COFFMAN, (INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF FORSYTH COUNTY
BOARD OF ELECTIONS), DEFENDANTS

No. COA12-1339

Filed 21 May 2013

Public Officers and Employees—Whistleblower Act—county board of elections employees

The language of the North Carolina Whistleblower Act and statutes concerning the State Personnel System are clear and unambiguous: county board of elections employees are not covered by the Whistleblower Act. The trial court did not err by dismissing plaintiffs' Whistleblower claims for failure to state a claim upon which relief could be granted.

Appeal by plaintiffs from order entered 17 July 2012 by Judge Lindsay R. Davis, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 11 April 2013.

Hairston Lane Brannon, PA, by James E. Hairston, Jr., M. Brad Hill, and Jeremy R. Leonard, for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, LLP, by James R. Morgan, Jr., Mary Craven Adams, and Sonny S. Haynes, for defendant-appellees.

STEELMAN, Judge.

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[227 N.C. App. 276 (2013)]

Where plaintiffs were not state employees, they were not entitled to protection under the provisions of the North Carolina Whistleblower Act.

I. Factual and Procedural Background

On or about 21 June 2001, Pamela Johnson (Johnson) was hired by the Forsyth County Board of Elections (BOE) as an administrative assistant. In October of 2001, Terry Cox (Cox) was hired by BOE, and served as interim Director of BOE until 10 July 2006, at which time Robert Coffman (Coffman) was hired as the Director of BOE.

In August 2007, Johnson reported to the Forsyth County Finance Department that Coffman had violated Forsyth County policy on the use of a County credit card. Also in August of 2007, Johnson and Cox met with a member of the BOE to present alleged violations of North Carolina election law under Coffman's supervision. These allegations were investigated by the State Board of Elections. In spring of 2008, Johnson met with the Chairman of BOE to inform him that Coffman had hired a consultant for BOE without bidding the position as required by law.

In August 2008, Deena Head (Head) was hired by BOE as a seasonal employee for the 2008 election. Subsequently, she contended that she was subjected to harassment and harsh language by Coffman. She was not asked to work on the 2009 elections, and later discovered that other temporary employees had been hired.

On or about 1 May 2009, Johnson was terminated for cause. In November 2009, Cox elected early retirement upon the advice of his physician.

On 13 October 2011, Johnson, Cox, and Head (collectively, plaintiffs) filed this action in Forsyth County Superior Court alleging claims for: (1) negligent hiring of Coffman; (2) negligent retention of Coffman; (3) wrongful termination of Johnson; (4) negligent infliction of emotional distress by Coffman; and (5) adverse action by BOE in violation of the North Carolina Whistleblower Act. On 17 July 2012, the trial court dismissed plaintiffs' claims under the Whistleblower Act pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted.¹

Plaintiffs appeal.

1. Subsequent to the dismissal of the Whistleblower claim, all other claims were dismissed by the trial court at summary judgment. Thus, although this appeal was originally interlocutory, it is an appeal of a final judgment or order pursuant to N.C. Gen. Stat. § 7A-27(b).

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II. Grant of Motion to Dismiss

In their sole argument on appeal, plaintiffs contend that the trial court erred in granting defendants' motion to dismiss their Whistleblower Act claims. We disagree.

A. Standard of Review

"The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted).

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

B. Analysis

Plaintiffs contend that they are entitled to pursue a claim under the North Carolina Whistleblower Act. This statute provides that:

(a) It is the policy of this State that State employees shall be encouraged to report verbally or in writing to their supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting:

- (1) A violation of State or federal law, rule or regulation;
- (2) Fraud;
- (3) Misappropriation of State resources;
- (4) Substantial and specific danger to the public health and safety; or
- (5) Gross mismanagement, a gross waste of monies, or gross abuse of authority.

(b) Further, it is the policy of this State that State employees be free of intimidation or harassment when reporting to public bodies about matters of public concern, including offering testimony to or testifying before appropriate legislative panels.

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N.C. Gen. Stat. § 126-84 (2011). The Act further provides that:

(a) No head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the State employee's compensation, terms, conditions, location, or privileges of employment because the State employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, any activity described in G.S. 126-84, unless the State employee knows or has reason to believe that the report is inaccurate.

(a1) No State employee shall retaliate against another State employee because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, any activity described in G.S. 126-84.

(b) No head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the State employee has refused to carry out a directive which in fact constitutes a violation of State or federal law, rule or regulation or poses a substantial and specific danger to the public health and safety.

(b1) No State employee shall retaliate against another State employee because the employee has refused to carry out a directive which may constitute a violation of State or federal law, rule or regulation, or poses a substantial and specific danger to the public health and safety.

(c) The protections of this Article shall include State employees who report any activity described in G.S. 126-84 to the State Auditor as authorized by G.S. 147-64.6B or to the Program Evaluation Division as authorized by G.S. 120-36.12(10).

N.C. Gen. Stat. § 126-85 (2011).

We note that these statutes apply specifically to "State employees." Chapter 126 of the General Statutes, entitled "State Personnel System," contains a provision that:

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(a) The provisions of this Chapter shall apply to:

....

(2) All employees of the following local entities:

- a. Area mental health, developmental disabilities, and substance abuse authorities, except as otherwise provided in Chapter 122C of the General Statutes.
- b. Local social services departments.
- c. County health departments and district health departments.
- d. Local emergency management agencies that receive federal grant-in-aid funds.

N.C. Gen. Stat. § 126-5 (2012). Article 14 of Chapter 126, entitled “Protection for Reporting Improper Government Activities” (the Whistleblower Act) is governed by the definitions contained in N.C. Gen. Stat. § 126-5.

“A statute that provides a clear enumeration of its inclusion is read to exclude what the General Assembly did not enumerate.” *Univ. of N.C. v. Feinstein*, 161 N.C. App. 700, 704, 590 S.E.2d 401, 403 (2003); *see also Dunn v. N.C. Dep’t of Human Res.*, 124 N.C. App. 158, 161, 476 S.E.2d 383, 385 (1996); *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987). Only the employees of certain local entities fall within the purview of Chapter 126; any local entities absent from that list are excluded from the provisions of Chapter 126, including the Whistleblower Act.

Plaintiffs cite to our decision in *Graham Cty. Bd. of Elections v. Graham Cty. Bd. of Comm’rs*, ___ N.C. App. ___, 712 S.E.2d 372 (2011), for the proposition that the Whistleblower Act applies to employees of County Boards of Elections because the County Board members and director are appointed by the State Board of Elections. However, this ignores our explicit holding in *Graham Cty.* that “[w]hile a county director of elections is appointed and terminated by the State Board of Elections, he is a ‘county employee.’” *Id.* at ___, 712 S.E.2d at 377 (citing N.C. Gen. Stat. § 163–32(c) (2009)). The opinion went on to hold that County Board of Elections employees are county employees, paid by the county. Thus *Graham Cty.*, rather than buttressing plaintiffs’ contentions, undermines their position.

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As noted above, the language of Chapter 126 is clear and unambiguous. County Board of Elections employees are not covered by the Whistleblower Act. We affirm the decision of the trial court.

AFFIRMED.

Judges ELMORE and STROUD concur.

COREY BRETT JOHNSON, PETITIONER

v.

MIKE ROBERTSON, COMMISSIONER OF N.C. DIVISION OF MOTOR VEHICLES
AND N.C. DIVISION OF MOTOR VEHICLES, RESPONDENT

No. COA12-959

Filed 21 May 2013

1. Appeal and Error—issue abandoned—failure to argue issue in appellate brief

The issue of collateral estoppel was deemed abandoned pursuant to N.C. R. App. P. 28(b)(6) where petitioner failed to discuss the issue in his brief.

2. Motor Vehicles—driver’s license revocation—admission of evidence—Rules of Evidence not applicable

The Division of Motor Vehicles (DMV) did not err in a driver’s license revocation hearing by allowing into evidence reports from two police officers and an affidavit from one officer. The North Carolina Rules of Evidence do not apply to proceedings before the DMV pursuant to N.C. Gen. Stat. § 20-16.2. Furthermore, even if the Rules of Evidence did apply, the exhibits were properly admitted as substantive evidence.

3. Motor Vehicles—driver’s license revocation—standard of review correct—determination correct

The superior court applied the correct standard of review to a driver’s license revocation hearing and the superior court correctly determined that there was sufficient evidence in the record to support the Division of Motor Vehicle’s findings of fact and that its conclusions of law were supported by the findings of fact.

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[227 N.C. App. 281 (2013)]

Appeal by petitioner from order entered 20 December 2011 by Judge Shannon R. Joseph in Wake County Superior Court. Heard in the Court of Appeals 27 February 2013.

Currin & Currin by George B. Currin for petitioner-appellant

Attorney General Roy Cooper, by Assistant Attorneys General Christopher W. Brooks and Carrie D. Randa, for the State, respondent-appellee.

STEELMAN, Judge.

The Rules of Evidence do not apply to Division of Motor Vehicle license revocation hearings pursuant to N.C. Gen. Stat. § 20-16.2, and the hearing officer properly admitted the police reports of the arresting officer. Where the trial court exercised and applied the appropriate standard of review pursuant to N.C. Gen. Stat. § 20-16.2(e), the revocation of petitioner's license is affirmed.

I. Factual and Procedural History

During a traffic stop of a motor vehicle on 3 December 2009, Officer R.T. Pereira of the Raleigh Police Department (Officer Pereira) noticed a strong odor of alcohol coming from Corey Brett Johnson (petitioner). He observed that petitioner had red, glassy eyes and was very unsteady on his feet. Petitioner admitted that he had consumed eight or nine beers. Sergeant W. Vaughn (Sergeant Vaughn), the officer who had made the traffic stop, informed Officer Pereira that petitioner was the driver of the vehicle. Officer Pereira placed petitioner under arrest for driving while impaired and transported him to the Wake County Jail. Petitioner refused to submit to a chemical analysis of his breath. Pursuant to N.C. Gen. Stat. § 20-16.2(d), the Division of Motor Vehicles (DMV) notified petitioner that his license would be revoked for one year for refusal to submit to a chemical analysis of his breath. Petitioner was charged with driving while impaired.

Petitioner requested an administrative hearing before the DMV contesting the revocation of his license for refusal to submit to a chemical analysis. Officer Pereira and the chemical analyst testified at the hearing and were subject to cross-examination by petitioner. On 26 May 2010, the hearing officer upheld the revocation of petitioner's driver's license. On 11 June 2010, petitioner filed a petition for review of the hearing officer's decision in Wake County Superior Court.

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In the criminal proceeding, petitioner filed a motion to suppress all evidence resulting from Sergeant Vaughn's stop of his vehicle and to dismiss the charge of driving while impaired. On 22 September 2010, the Wake County District Court granted petitioner's motion to suppress all evidence resulting from Sergeant Vaughn's stop and dismissed the charge of driving while impaired.

On 20 December 2011, the trial court affirmed the hearing officer's revocation of petitioner's driver's license. On 18 January 2012, the trial court entered an order staying the 20 December 2011 order pending appeal.

Petitioner appeals.

II. Collateral Estoppel

[1] "Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C.R. App. P. 28(b)(6).

On appeal, petitioner does not discuss the issue of collateral estoppel in his brief even though it was the principal issue before the trial court and was the primary focus of the trial court's order. This issue is deemed abandoned, and we do not address it.

III. Applicability of Rules of Evidence

[2] In his first argument, petitioner contends that the hearing officer committed an error of law in allowing the reports of Officer Pereira and Sergeant Vaughn, and the affidavit of Officer Pereira to be admitted as substantive evidence. We disagree.

A. Standard of Review

"Questions of statutory interpretation of a provision of the Motor Vehicle Laws of North Carolina are questions of law and are reviewed *de novo* by this Court." *Hoots v. Robertson*, __ N.C. App. __, __, 715 S.E.2d 199, 200 (2011).

B. Analysis

In support of his contention that the North Carolina Rules of Evidence apply to proceedings before the DMV pursuant to § 20-16.2, petitioner cites the 1971 North Carolina Supreme Court case of *Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553 (1971), as authority. Petitioner's reliance on *Joyner* is misplaced. The issue in *Joyner* was whether or not the sworn report could be *prima facie* evidence that the arrested person

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willfully refused to submit to the Breathalyzer test when the petitioner did not have the opportunity to cross-examine the arresting officer at the administrative hearing. *Id.* at 234, 182 S.E.2d at 559.

Of more significance is the fact that the North Carolina Rules of Evidence had not been enacted at the time *Joyner* was decided and did not become effective until 1 July 1984, thirteen years after the decision. 1983 N.C. Sess. Laws, ch. 701, § 3. Under Rule 1101, the Rules of Evidence apply “to all actions and proceedings in the courts of this State” and if otherwise provided by statute. N.C. Gen. Stat. § 8C-1, Rule 1101 (2011). Rule 1101 further provides that the Rules of Evidence do not apply in certain proceedings, including preliminary questions of fact, grand jury proceedings, sentencing hearings, probation revocation hearings, and probable cause hearings. *Id.* Petitioner has cited no other statute that otherwise provides for the application of the Rules of Evidence to hearings pursuant to N.C. Gen. Stat. § 20-16.2. *See* N.C. Gen. Stat. § 8C-1, Rule 1101 (2011) (“Except as otherwise provided in subdivision (b) or by statute, these rules apply to all actions and proceedings in the courts of this State.”). After reviewing applicable statutes, we are not persuaded that the Rules of Evidence apply to these types of hearings. *See generally* N.C. Gen. Stat. § 8C-1, Rule 1101 (2011); N.C. Gen. Stat. § 20-16.2 (2011); N.C. Gen. Stat. § 150B-1(e)(8) (2011) (exempting the Department of Transportation from the contested case provisions of the Administrative Procedure Act); 19A N.C.A.C. 3A.0100 to 3J.0907 (2012) (outlining regulations concerning the DMV). N.C. Gen. Stat. § 16.2(d) only requires that the hearing officer subpoena witnesses or documents “that the hearing officer deems necessary.” N.C. Gen. Stat. § 20-16.2(d) (2011). We hold the Rules of Evidence do not apply to DMV hearings held pursuant to § 20-16.2. Petitioner’s argument is without merit.

Even assuming *arguendo* that the Rules of Evidence did apply, the hearing officer did not commit an error in admitting the police report and the affidavit and revocation report of Officer Pereira as substantive evidence. Petitioner contends these documents were “incompetent hearsay statements.” Rule 803(6) of the North Carolina Rules of Evidence provides an exception to the hearsay rule, allowing “records of regularly conducted activity” to be admissible. N.C. Gen. Stat. § 8C-1, Rule 803(6) (2011). *See also* *Wentz v. Unifi, Inc.*, 89 N.C. App. 33, 39-40, 365 S.E.2d 198, 201 (1988) (holding a trooper’s accident reports were admissible in a civil case as either business or public records); *Keith v. Polier*, 109 N.C. App. 94, 97, 425 S.E.2d 723, 725 (1993) (holding a police accident report admissible under either Rule 803(6) or Rule 803(8) as an exception to the hearsay rule).

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To be admissible such reports must be authenticated by their writer, prepared at or near the time of the act(s) reported, by or from information transmitted by a person with knowledge of the act(s), kept in the course of a regularly conducted business activity, with such being a regular practice of that business activity unless the circumstances surrounding the report indicate a lack of trustworthiness.

Wentz, 89 N.C. App. at 39, 365 S.E.2d at 201.

In the instant case, petitioner contends that there is “nothing in the Record which indicates there was a proper foundation laid for the admission of these hearsay statements” The record before us is incomplete since it only contains the exhibits admitted at the hearing and the testimony of the chemical analyst. The transcript of Officer Pereira’s testimony, which would have presumably laid the foundation for the admission of his reports, was inadvertently deleted and is not in the record. Petitioner noted in his closing statement to the hearing officer that he “previously objected to the introduction of the notes of the officers for several reasons[,] [i]ncluding that there was . . . not a proper foundation for the introduction of the officer’s notes.” However, before the trial court petitioner did not allege any specific errors that occurred in Officer Pereira’s testimony, instead stating only that the reports could not have been past recollection recorded because no foundation had been laid. His contentions that the exhibits could not be admitted under any Rule 803 exception because the hearing officer did not make a finding that they possessed sufficient guarantees of trustworthiness, or that the documents were authenticated in any way were raised for the first time on appeal in his reply brief. A party “may not swap horses after trial in order to obtain a thoroughbred upon appeal.” *State v. Hester*, 343 N.C. 266, 271, 470 S.E.2d 25, 28 (1996) (quotation omitted). Accordingly, we follow a presumption in favor of the regularity and correctness of the hearing in front of the DMV, with the burden resting upon the appellant to show error. *C.f. L. Harvey & Son Co. v. Jarman*, 76 N.C. App. 191, 195-96, 333 S.E.2d 47, 50 (1985) (“The longstanding rule is that there is a presumption in favor of regularity and correctness in proceedings in the trial court, with the burden on the appellant to show error.”). In the absence of a complete record and petitioner’s failure to assert specific errors that were committed during the DMV hearing before the trial court, we presume a proper foundation was laid with respect to Officer Pereira’s police report and revocation report. We do not address petitioner’s arguments with respect to Sergeant Vaughn’s police report because Officer Pereira’s police report and revocation report provide

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sufficient factual basis for the challenged conclusion of law. The exhibits were properly admitted into evidence.

This argument is without merit.

IV. Sufficiency of the Evidence

[3] In his second and third arguments, petitioner contends that the hearing officer's findings of fact were not supported by competent evidence, and the findings of fact do not support the conclusion of law that Officer Pereira had reasonable grounds to believe petitioner had committed an impaired driving offense. We disagree.

A. Standard of Review

Several cases from this Court have cited to *Gibson v. Faulkner*, 132 N.C. App. 728, 732-33, 515 S.E.2d 452, 455 (1999), for support of the following standard of review: on appeal to this Court, the trial court's findings of fact are conclusive if supported by competent evidence, even though there may be evidence to the contrary, and we review whether the trial court's findings of fact support its conclusions of law *de novo*. See, e.g., *Hartman v. Robertson*, 208 N.C. App. 692, 694, 703 S.E.2d 811, 813 (2010); *Steinkrause v. Tatum*, 201 N.C. App. 289, 291-92, 689 S.E.2d 379, 381 (2009), *aff'd per curiam* 364 N.C. 419, 700 S.E.2d 222 (2010) (*per curiam*). This standard of review was appropriate "where the trial judge sits as the trier of fact." *Gibson*, 132 N.C. App. at 732, 515 S.E.2d at 455.

However, effective 1 December 2006, the legislature amended N.C. Gen. Stat. § 20-16.2(e) deleting the provision allowing for *de novo* review in the superior court. 2006 N.C. Sess. Laws, ch. 253, § 15. Section 16.2(e) now provides that:

The superior court review shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license.

N.C. Gen. Stat. § 20-16.2(e) (2011). Thus, on appeal from a DMV hearing, the superior court sits as an appellate court, and no longer sits as the trier of fact. Accordingly, our review of the decision of the superior court is to be conducted as in other cases where the superior court sits as an appellate court. Under this standard we conduct the following inquiry: "(1) determining whether the trial court exercised the appropriate scope

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of review and, if appropriate, (2) deciding whether the court did so properly.” *ACT-UP Triangle v. Comm’n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). We previously rejected a standard of review that was the same standard as that the superior court employed, stating “the statutory provisions for judicial review of agency action at the trial court level would appear to lack purpose if that court’s determination is to be given no consideration at the appellate level.” *Amanini v. N.C. Dep’t of Human Res.*, 114 N.C. App. 668, 676, 443 S.E.2d 114, 119 (1994). We hold that these cases provide the appropriate standard of review for this Court under the amended provisions of N.C. Gen. Stat. § 20-16.2.

B. Analysis

In the instant case, the record indicates that the superior court employed the correct standard of review since the order affirming the decision of the hearing officer cites N.C. Gen. Stat. § 20-16.2(e) and states the proper standard: “[t]his Court does not conduct a *de novo* review of the facts and instead reviews the record to determine whether there is sufficient evidence in the record to support the Commissioner’s findings of fact. . . .” We must now determine whether the trial court properly conducted this review.

After reviewing the record, we conclude that the trial court correctly determined that there was sufficient evidence in the record to support the Commissioner’s findings of fact and that its conclusions of law are supported by the findings of fact. We affirm the revocation of petitioner’s driver’s license.

This argument is without merit.

AFFIRMED.

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

N.C. FARM BUREAU MUT. INS. CO. v. SMITH

[227 N.C. App. 288 (2013)]

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF
 v.
 PHILLIP E. SMITH, CLAUDE SAVAGE, JR., MARCELLA R. SAVAGE, CHARLOTTE
 BLAIR SAVAGE, A MINOR, AND STATE FARM MUTUAL AUTOMOBILE INSURANCE
 COMPANY, DEFENDANTS

No. COA12-1442

Filed 21 May 2013

1. Compromise and Settlement—execution on judgment precluded—summary judgment

The trial court correctly granted summary judgment in Farm Bureau's favor in an action involving an automobile accident and a settlement agreement where the settlement agreement precluded the individuals who were injured in the accident from executing on any judgment obtained against the driver who crashed into them.

2. Compromise and Settlement—settlement language—bar to insurance coverage—settlement payments statute—not applicable

N.C.G.S. § 1-540.3 did not apply to an automobile accident case where the issue was whether the language in a settlement agreement operated to bar coverage under the Farm Bureau policy as a matter of law rather than whether settlement payments bared further recovery.

3. Appeal and Error—preservation of issues—contention not supported by authority or explanation of merit—abandoned

An issue was deemed abandoned where summary judgment had been granted for the insurance company in a declaratory judgment action arising from an automobile crash and the victims did not cite controlling authority in support of their contention or otherwise explain why it had merit.

Appeal by Defendants from order entered 25 April 2012 by Judge H. William Constangy in Gaston County Superior Court. Heard in the Court of Appeals 27 March 2013.

Caudle & Spears, P.A., by Harold C. Spears and Christopher P. Raab, for Plaintiff.

Lewis Law Firm, LLC, by Bryan Sanchez, Esq., for Defendants Claude Savage, Jr., Marcella R. Savage, and Charlotte Blair Savage.

N.C. FARM BUREAU MUT. INS. CO. v. SMITH

[227 N.C. App. 288 (2013)]

DILLON, Judge.

Defendants Claude and Marcella Savage, and their minor daughter, Charlotte Savage (collectively, the Savages), appeal from the trial court's order granting summary judgment in favor of North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau). We affirm.

I. Factual & Procedural Background

On 14 April 2007, Phillip Smith (Phillip) was operating a motor vehicle owned by his then-wife, Samantha Smith (Samantha), and insured by Allstate Insurance Company (Allstate), near Clover, South Carolina, when the vehicle crashed into a second vehicle occupied by the Savages. Claude and Marcella Savage each brought an action against both Phillip and Samantha in the Court of Common Pleas of York County, South Carolina, on 15 July 2008 and 17 February 2010, respectively, seeking to recover for bodily injuries sustained as a result of the accident. In their lawsuits, Claude and Marcella Savage alleged that Phillip resided with his parents in Gaston County, North Carolina, at the time of the accident and that he was, therefore, covered as an insured under a Farm Bureau automobile insurance policy held by his father, Michael Smith.

On 7 October 2008, Marcella Savage entered into an agreement with Allstate, Phillip, and Samantha entitled "Release, Covenant Not To Execute and Settlement Agreement[.]" which provides, in part, as follows:

Marcella Savage, in consideration of the sum of [\$50,000.00] . . . specifically agrees and covenants never to attempt to collect any sum from [Phillip Smith] except to the extent allowed herein and agrees and covenants never to seek to execute except to the extent allowed herein any judgment obtained against [Phillip Smith] and will not seek to collect any such judgment out of the personal or real assets of [Phillip Smith]"

On 9 December 2009, Claude Savage entered into a similar agreement entitled "Covenant Not To Execute and Policy Release[.]" which provides, in part, as follows:

[Claude Savage] does hereby promise and covenant . . . not to execute against Phillip Smith . . . on any judgment that may be obtained by [Claude Savage] on account of any and all claims . . . resulting or to result from the . . . automobile accident. . . . [F]urthermore, [Claude Savage]

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does further covenant and promise that if he should attain a judgment against [] Phillip Smith . . . he will not execute on any judgment against Phillip Smith

Also on 9 December 2009, Marcella and Claude Savage executed an additional agreement with Allstate, Phillip, and Samantha on behalf of Charlotte Savage, which sets forth the same pertinent language as that set forth in Claude Savage's settlement agreement.

On 25 May 2011, Farm Bureau filed a complaint in Gaston County Superior Court seeking a declaratory judgment that it would not be held liable under Michael Smith's policy for any damages incurred by the Savages in connection with the 14 April 2007 accident. Farm Bureau also moved for summary judgment, arguing (1) that Phillip was not a resident of his parents' house at the time of the accident and, therefore, he was not covered under the Farm Bureau policy; (2) that even if Phillip was covered under the Farm Bureau policy, coverage was barred in this case because the settlement agreements executed by the Savages included covenants not to execute in favor of Phillip (hereinafter, the Covenants); and (3) that even if Phillip was covered under the Farm Bureau policy, Phillip's failure to timely notify Farm Bureau of the accident had materially prejudiced Farm Bureau, thereby absolving it of any liability. By order entered 25 April 2012, the trial court granted summary judgment in Farm Bureau's favor. The summary judgment order includes the following determinations:

- A. The Release/Covenants executed and delivered by [the Savages] bar their claims for coverage under [the policy] issued by [Farm Bureau] to its named insured, [Michael Smith].
- B. Defendant [Phillip] failed to carry his burden of showing that he acted in good faith with respect to his delay in notifying [Farm Bureau] of the Savage[s] claims.
- C. [Farm Bureau] has been prejudiced by the late notice.

The summary judgment order further provides that each of the foregoing determinations "is independent of the others and bars coverage under [the Farm Bureau] Policy as it relates to the claims asserted by the Savage[s]." From this order, the Savages appeal.

II. Analysis

[1] A motion for summary judgment is appropriately granted where "the pleadings, depositions, answers to interrogatories, and admissions

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on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011). We review the trial court’s order granting summary judgment *de novo*. *Foster v. Crandell*, 181 N.C. App. 152, 164, 638 S.E.2d 526, 535 (2007).

“A defendant insurance company’s liability is ‘derivative in nature’; therefore, its liability depends on whether or not its insured is liable to the plaintiff.” *Lida Mfg. Co., Inc. v. U.S. Fire Ins. Co.*, 116 N.C. App. 592, 595, 448 S.E.2d 854, 856 (1994) (citation omitted). “To be ‘legally entitled to recover damages’ a plaintiff must not only have a cause of action but a remedy by which he can reduce his right to damages to judgment.” *Brown v. Lumbermens Mut. Cas. Co.*, 285 N.C. 313, 319, 204 S.E.2d 829, 833 (1974).

The Farm Bureau policy at issue provides that “[Farm Bureau] will pay damages for bodily injury or property damage for which any insured becomes *legally responsible* because of an auto accident.” (Emphasis added). Thus, assuming *arguendo* that Phillip is an insured under his father’s Farm Bureau policy, the critical issue becomes whether Phillip can be held “legally responsible” for the Savages’ damages arising out of the 14 April 2007 accident in light of the Covenants executed by the Savages.

Our careful examination of the Covenants reveals that the Savages are precluded from executing on any judgment obtained against Phillip. This Court has previously held that when an insurer’s obligation under a policy is to pay “all sums which [the] insured shall become *legally obligated to pay*” and when the insured under that policy is given a release by the injured parties of the nature set forth in the Covenants, i.e., where the parties covenant that no judgment shall be executed against the insured, the insurer’s “obligations under the policy [are] extinguished by the execution of the [covenant].” *Terrell v. Lawyers Mut. Liab. Ins. Co. of N.C.*, 131 N.C. App. 655, 661, 507 S.E.2d 923, 927 (1998) (emphasis added); see *U.S. Fid. & Guar. Co. v. Scott*, 124 N.C. App. 224, 476 S.E.2d 404 (1996); *Lida*, 116 N.C. App. 592, 448 S.E.2d 854; *Huffman v. Peerless Ins. Co.*, 17 N.C. App. 292, 193 S.E.2d 773 (1973). We discern no meaningful distinction between the phrase “legally obligated to pay” found in the policy at issue in *Terrell* and the phrase “legally responsible” found in the policy at issue in the case *sub judice*. See *Lida*, 116 N.C. App. at 595, 448 S.E.2d at 856 (construing the phrases “legally obligated to pay” and “legally entitled to recover” as equivalent for purposes of determining liability). As such, for purposes of the Farm Bureau policy, Phillip can no longer be held “legally responsible” by the Savages. Accordingly, even

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assuming *arguendo* that Phillip is an insured under his father's Farm Bureau policy, the Savages are barred from recovering against Farm Bureau; and the trial court correctly granted summary judgment in Farm Bureau's favor on this basis.

[2] We note the Savages' contention that N.C. Gen. Stat. § 1-540.3 (2011) provides "guidance" on this issue. N.C. Gen. Stat. § 1-540.3 governs "advance payments" made to persons claiming bodily injuries, and, as the Savages correctly point out, provides that partial payments to a complainant in this context do not constitute a release or bar to future claims unless the terms of the settlement agreement specify otherwise. *See id.* The issue at hand, however, is not whether the settlement payments made by Allstate bar further recovery by the Savages, but, rather, whether the language set forth in the Covenants operates to bar coverage under the Farm Bureau policy as a matter of law. N.C. Gen. Stat. § 1-540.3 simply does not apply in the present case.

[3] We also note the Savages' contention that even if the Covenants bar coverage under the Farm Bureau policy, the fact that the parties have entered into a mediation agreement in connection with the South Carolina lawsuits "should revive any such obligations to pay." The Savages fail to cite any controlling authority in support of this contention or otherwise explain why it has merit, and we accordingly deem the issue abandoned. *See* N.C. R. App. P. 28(b)(6) (2013) (providing that an appellant's argument "shall contain citations of the authorities upon which the appellant relies").

We have carefully reviewed the Savages' remaining contentions on this issue, and we conclude that they are without merit. Moreover, because we affirm the trial court's ruling on grounds that the Covenants bar the Savages from recovering against Farm Bureau, we do not reach the additional, alternative bases for the trial court's order granting summary judgment. For the foregoing reasons, the trial court's 25 April 2012 order is hereby

AFFIRMED.

Judges CALABRIA and ERVIN concur.

REDD v. WILCOHESS, L.L.C.

[227 N.C. App. 293 (2013)]

BRENDA HANES REDD, PLAINTIFF

v.

WILCOHESS, L.L.C., AND A.T. WILLIAMS OIL CO., DEFENDANTS

No. COA12-639-2

Filed 21 May 2013

**Evidence—use by jury—during deliberations—statutory analysis
—no prejudice**

The trial court's failure to submit a surveillance video to the jury during deliberations should have been analyzed under N.C.G.S. § 1-181.2 (2011), rather than under *Nunnery v. Baucom*, 135 N.C. App. 556. However, plaintiff's substantive argument was without merit because the jury withdrew its request to review the videotape and had otherwise reached a verdict.

Appeal by Plaintiff from judgment entered 9 September 2011 by Judge Richard W. Stone in Forsyth County Superior Court. Heard in the Court of Appeals 7 January 2013. Opinion filed 5 March 2013. Plaintiff's petition for rehearing granted 8 April 2013. The following opinion supersedes and replaces Part II.B. of the opinion filed 5 March 2013 but otherwise adopts the remainder of the opinion filed 5 March 2013.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harold L. Kennedy, III, and Harvey L. Kennedy, for Plaintiff.

McAngus, Goudelock & Courie, PLLC, by Garry T. Davis and Jeffrey B. Kuykendal, for Defendants.

DILLON, Judge.

The facts in this matter are set forth in this Court's previous opinion, *Redd v. WilcoHess, L.L.C.*, __ N.C. App. __, __ S.E.2d __ (2013), filed 5 March 2013. Plaintiff contends in her motion for reconsideration that her argument pertaining to the trial court's failure to submit the surveillance video to the jury during deliberations should have appropriately been analyzed under N.C. Gen. Stat. § 1-181.2 (2011), rather than *Nunnery v. Baucom*, 135 N.C. App. 556, 559, 521 S.E.2d 479, 482 (1999). We agree. However, we adopt our previous opinion in this matter in full, with the exception of our resolution of Plaintiff's argument pertaining to the trial

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court's failure to submit the surveillance video to the jury as contained in Part II.B. of the previous opinion.¹

B: Jury Request

Plaintiff contends it was prejudicial error for the trial court not to submit the surveillance video to the jury during deliberations. In our previous opinion, we held that the trial court did not commit error, relying, in part, on the analysis in our opinion *Baucom*, 135 N.C. App. 556, 521 S.E.2d 479, in which we stated that “[i]t is well settled that trial exhibits introduced into evidence may not be present in the jury room during deliberations unless both parties consent.” *Id.* at 559, 521 S.E.2d at 482 (citation omitted). In Plaintiff’s motion for reconsideration, she contends that the Legislature “overruled the [*Baucom*, 135 N.C. App. 556, 521 S.E.2d 479] legal analysis when it enacted N.C.G.S. § 1-181[.]2 in 2007[.]” The effect of N.C. Gen. Stat. § 1-181.2 (2011) on *Baucom*, 135 N.C. App. 556, 521 S.E.2d 479, appears to be an issue of first impression for this Court, as Plaintiff does not cite, nor have we found, any case law on point. We believe Plaintiff is correct in stating that N.C. Gen. Stat. § 1-181.2 (2007), applies to this case, and that N.C. Gen. Stat. § 1-181.2 supersedes *Baucom* on this point. The foregoing notwithstanding, after considering Plaintiff’s argument under N.C. Gen. Stat. § 1-181.2, we nonetheless conclude that Plaintiff’s substantive argument is without merit.

In 2007, eight years after *Baucom*, our Legislature enacted N.C. Gen. Stat. § 1-181.2, which states the following:

(a) If the jury in a civil action after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The court in its discretion, after notice to the parties and giving the parties an opportunity to be heard, 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. The court in its discretion 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.

(b) Upon request by the jury, the court may in its discretion and after permitting the parties an opportunity to be heard permit the jury to take into the jury room admitted

1. We have reviewed Plaintiff’s remaining arguments in her petition for reconsideration and find them to be without merit.

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exhibits which have been passed to the jury, photographs admitted into evidence and shown to the jury and used by any witnesses in their testimony before the jury, and any illustrative exhibits admitted into evidence and used by any witnesses in their testimony before the jury. Summaries of testimony prepared in the courtroom by any party, lists made by any party in the courtroom and such similar documents shall not be sent to the jury room with the jury, even if admitted into evidence and requested by the jury. Depositions may be taken into the jury room upon request of the jury only with consent of the parties.

(c) Upon request by the jury, the court may permit the jury to take into the jury room any exhibit that all parties stipulate and agree may be taken into the jury room.

Id. We believe the plain language of N.C. Gen. Stat. § 1-181.2 indicates that the Legislature intended to supersede the rule of *Baucom*, 135 N.C. App. 556, 521 S.E.2d 479, which heretofore *required* that both parties must consent in order for exhibits to be present in the jury room during deliberations. Although subsection (c) of N.C. Gen. Stat. §1-181.2 is consistent with our analysis in *Baucom* in that it provides for a trial judge to allow a jury, upon a jury's request, to take exhibits into the jury room "that all parties stipulate and agree may be taken into the jury room," subsections (a) and (b) give the trial court the sole discretion to permit the jury to reexamine evidence admitted at trial in open court or to take evidence admitted at trial into the jury room, regardless of whether the parties consent, provided that the parties are permitted to be heard before the trial court makes its decision. *Id.*²

In the case *sub judice*, near the end of the first day of jury deliberations, the foreperson requested that the surveillance video showing Plaintiff's slip and fall, which was admitted into evidence and published to the jury during the trial in this case, be shown to the jury, to which the court responded, "Okay. We'll do that first thing in the morning and then go from there."

2. N.C. Gen. Stat. § 1-181.2(b) does list two exceptions to this general rule: (1) "[s]ummaries of testimony prepared in the courtroom by any party, lists made by any party in the courtroom and such similar documents shall not be sent to the jury room with the jury, even if admitted into evidence and requested by the jury[;] and (2) "Depositions may be taken into the jury room upon request of the jury only with consent of the parties." *Id.* However, neither exception has application in the case *sub judice*.

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The next morning, counsel for Defendants was not present in the courtroom at 9:30 A.M. The trial court sent the jury back to deliberate while counsel for Plaintiff and the court waited for the arrival of counsel for Defendant. The jury sent a second question to the trial judge: “Can the courtroom be cleared while we view the video, so that we may discuss while viewing?” After counsel for Defendants arrived, the trial court allowed the attorneys to be heard regarding the method by which the jury might view the surveillance videos. The colloquy that transpired was lengthy. The trial court and the attorneys discussed a variety of issues, including, among other things, such questions as whether “the jury should come out and look at the video and then go back and deliberate,” whether the jury should view the video in the jury room and deliberate while viewing it, or whether the courtroom could “serve as the jury room[.]” Before the trial court had concluded its hearing with the attorneys, the jury informed the deputy that they no longer wanted to see the video and had reached a verdict. Counsel for Plaintiff and Defendants then approached the bench, after which the trial court said the following:

THE COURT: Mr. Foreperson, before you hear the verdict read by the clerk, you had this morning sent out a request to see the video and examine it. Are you withdrawing that request? Is the jury –

MR. FOREPERSON: Yes, sir. . . . On further deliberation, we didn’t really need to see it.

THE COURT: Do all the jurors agree to this?

JURORS: Yes.

THE COURT: Please indicate so by raising hands. Let the record reflect that all jurors raised their hand, indicating they agree with the statement of the foreperson that they were withdrawing their request to see the video. Madam Clerk, would you take the verdict, please?

Subsection (c) of N.C. Gen. Stat. §1-181.2 does not apply to our analysis since the parties never came to any agreement regarding the method by which the jury might reexamine the videotape evidence. Notwithstanding, as previously stated, subsections (a) and (b) provide that the trial court has discretion to permit the jury to reexamine evidence admitted at trial in open court or to take evidence admitted at trial into the jury room, regardless of whether the parties consent. *Id.* Whether the trial court permits the evidence, in an exercise of its discretion, either to be taken

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into the jury room during deliberations or to be reviewed in open court by the jury, N.C. Gen. Stat. § 1-181.2(a) requires that the trial court *must* first give the parties “an opportunity to be heard[.]” *Id.* In this particular case, the record reflects that the parties had a lengthy discussion about how they would prefer that the jury view the surveillance videotapes. The trial court was following the mandate of N.C. Gen. Stat. § 1-181.2(a) and giving the parties “an opportunity to be heard[.]” *Id.* During the time the parties discussed the various methods of viewing the surveillance videotapes, the jury reached a verdict without the videotapes. The jurors indicated that their request for the videotapes was withdrawn because, “[o]n further deliberation, . . . [we] didn’t really need to see it.” Since the jury withdrew its request to review the videotapes and had otherwise reached a verdict, there became no basis under N.C. Gen. Stat. § 1-181.2 for the trial court to exercise discretion regarding whether and how the videotapes would be viewed by the jury. Accordingly, we conclude there was no prejudicial error in this case.³

NO ERROR.

Chief Judge MARTIN and Judge Ervin concur.

3. Although not pertinent to our analysis under N.C. Gen. Stat. § 1-181.2, we also note that the trial court polled the jury and established that the verdict was not affected by the jury not reviewing the videotapes.

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REO PROPERTIES CORPORATION, GRADY I. INGLE AND ELIZABETH B. ELLS,
SOLELY IN THEIR CAPACITIES AS SUBSTITUTE TRUSTEES UNDER CERTAIN DEED OF TRUST
RECORDED IN BOOK 1370 AT PAGE 1522 OF THE DAVIDSON COUNTY REGISTER OF DEEDS, PLAINTIFFS
v.
RONDAL RALPH SMITH, WIFE, ROBIN M. SMITH A/K/A ROBIN R. SMITH; HIGH
POINT REGIONAL HEALTH SYSTEM F/K/A HIGH POINT REGIONAL HOSPITAL
DEFENDANTS; AND ALAN C. BURTON AND WIFE, JULIE BERRIER BURTON,
INTERVENING DEFENDANTS, DEFENDANTS

No. COA12-860

Filed 21 May 2013

1. Mortgages and Deeds of Trust—reformation of deed of trust—*lis pendens* properly cross-indexed

The trial court erred in a reformation of a deed of trust case by granting intervening defendants' motion for summary judgment and dismissing the action. Intervening defendants should not have been permitted to raise defenses to plaintiffs' claims because plaintiffs filed a notice of *lis pendens* that was properly cross-indexed in the records of the Clerk of Court in Davidson County.

2. Attorney Fees—no longer prevailing party—cross-appeal dismissed

Since it was determined that the trial court erred in a reformation of a deed of trust case by granting intervening defendants' motion for summary judgment, and thus they were no longer the prevailing party, there was no need to address the merits of their cross-appeal regarding attorney fees and expenses under N.C.G.S. § 6-21.5, and it was dismissed.

Appeal by plaintiffs from order entered 22 February 2012 and cross-appeal by intervening defendants from order entered 21 March 2012 by Judge Mark E. Klass in Davidson County Superior Court. Heard in the Court of Appeals 9 January 2013.

Roberson Haworth & Reese, PLLC by Alan B. Powell and Christopher C. Finan, for plaintiff-appellants.

No briefs were filed for defendants Rondal Ralph Smith, Robin M. Smith a/k/a Robin R. Smith, or High Point Regional Health System.

Wyatt Early Harris Wheeler LLP, by William E. Wheeler, for intervening defendant-appellees.

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CALABRIA, Judge.

Servertis REO Pass-Through Trust I (“SRT”), REO Properties Corporation (“REO”), Grady I. Ingle and Elizabeth B. Ells, solely in their capacities as Substitute Trustees, (collectively “plaintiffs”) appeal from an order granting intervening defendants Alan C. Burton and Julie Berrier Burton’s (“the Burtons”) motion for summary judgment and dismissing the action. We reverse and remand.

I. Background

On 5 August 1986, Rondal Ralph Smith and Robin M. Smith (“the Smiths”) acquired title to Lot #184 of Crestview Subdivision, 106 Crestview Terrace, in Davidson County, Thomasville, North Carolina (“the property”) and recorded the Deed. The Smiths executed and delivered a promissory note in the principal amount of \$96,000 (“the Note”) to New Century Mortgage Corporation (“New Century”) secured by a Deed of Trust on the property that was recorded on 16 December 2002. The Deed of Trust included the correct address of the property as 106 Crestview Terrace, Thomasville, North Carolina. However, the legal description attached as exhibit A to the Deed of Trust did not fully and completely describe the property.

Subsequently, plaintiffs discovered the mistake in the legal description of the Deed of Trust and on 26 June 2008, plaintiffs filed a complaint in Davidson County Superior Court, seeking to reform the Deed of Trust on the property. The complaint alleged that REO currently held the Note secured by the Deed of Trust and since the description of the property in the Deed of Trust was inaccurate, it should be reformed to include the full and correct legal description and relate back to the date of the original recording. Plaintiffs also sought a resulting or constructive trust and other equitable remedies. On this same date, plaintiffs also filed a Notice of *Lis Pendens* (“*lis pendens*”) in Davidson County. According to plaintiffs, the *lis pendens* was properly indexed in the Davidson County Clerk’s office under file number “08 M 343.” On 4 September 2008, the Smiths filed a letter responding to plaintiffs’ complaint.

On 13 April 2009, the Smiths filed a petition for bankruptcy. The petition included, *inter alia*, Schedules with a Notice to Creditors and a Proposed Plan regarding plaintiffs’ secured claim in the amount of \$92,077.90 on the property. The trial court ordered the case regarding the reformation of the Deed of Trust (“the reformation case”) to remain inactive during the pendency of the Smiths’ bankruptcy case. After a public auction was conducted, Judge Thomas W. Waldrep, Jr. (“Judge

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Waldrep”), United States Bankruptcy Judge for the Middle District of North Carolina determined that the bid of \$10,000 would not benefit the estate. Judge Waldrep entered an Order on 9 November 2010 abandoning the Smiths’ estate’s interest in the property located at 106 Crestview Terrace. The property was returned to the Smiths. Plaintiffs filed a motion for an order to remove the reformation case from inactive status and re-open it. Since the bankruptcy case was converted from Chapter 13 to Chapter 7, Judge Waldrep’s order abandoning the Smiths’ interest in the property, in effect, lifted the automatic stay. The motion to re-open the reformation case was granted by the trial court on 23 December 2010. After the property was condemned by the City of Thomasville, the Smiths conveyed the property to the Burtons by General Warranty Deed (“the Burton Deed”) and executed a lien waiver. The Burton Deed was recorded on 12 April 2011.

When plaintiffs discovered that the Burtons owned the property, they informed the Burtons’ attorneys about the *lis pendens*. Subsequently, on 16 May 2011, the Burtons filed a motion to intervene in the reformation case and the trial court granted the motion. On 24 May 2011, the Burtons filed an answer alleging, *inter alia*, that prior to purchasing the property a “due, proper, diligent and prudent title search” was conducted which “did not reveal the existence of The Deed of Trust with a legal description of The Property.” The Burtons also alleged that the Judgment Index in the office of the Clerk of Superior Court of Davidson County reflected that a *lis pendens* had been filed which was indexed as file number 08 M 343 concerning the Smiths and the Judgment Index with file number 08 M 343 was attached. According to the Burtons, the *lis pendens* “index entry was not cross indexed to disclose the pendency of the” reformation case. The Burtons further alleged that plaintiffs’ claim was not brought within the applicable statute of limitations, and should be dismissed.

The Burtons filed a motion for Judgment on the pleadings. After it was denied, the Burtons amended their answer and filed a motion for Summary Judgment, alleging, *inter alia*, their status as bonafide purchasers for value of the property without notice of any claim by plaintiffs and that the statute of limitations on plaintiffs’ claim for reformation of the Deed of Trust expired before the filing of the action.

On 26 January 2012, plaintiffs filed a motion for summary judgment, claiming that the error in the Deed of Trust was a result of a mutual mistake of fact and thus should be reformed by the court. In addition, plaintiffs argued, under the doctrine of *lis pendens*, that the Deed of Trust in the reformation case should have been located by “a reasonably

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prudent and careful examination of title” and that the Burtons were not bona fide purchasers without notice of the Deed of Trust.

On 22 February 2012, the trial court granted the Burtons’ motion for summary judgment, denied plaintiffs’ motion for summary judgment and dismissed the action. On 21 March 2012, the trial court also denied the Burtons’ motion for attorneys’ fees. Plaintiffs appeal and the Burtons cross-appeal.

II. Standard of Review

“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) (citation omitted). Summary judgment shall be allowed “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011). When the parties have filed cross-motions for summary judgment, the parties have conceded that there are no disputed issues of material fact. *Kessler v. Shimp*, 181 N.C. App. 753, 756, 640 S.E.2d 822, 824 (2007). If there are no disputed issues of material fact, we only need to determine whether summary judgment was entered properly or whether the trial court should have entered summary judgment in favor of the other party. *Self-Help Ventures Fund v. Custom Finish, LLC*, 199 N.C. App. 743, 745, 682 S.E.2d 746, 748 (2009).

The dispositive legal issue the court determined was the issue regarding the statute of limitations. The Burtons claimed that the statute of limitations had expired prior to plaintiffs’ initiation of the reformation case. The trial court granted the Burtons’ motion for summary judgment “in particular with regard to the expiration of the statute of limitations applicable to [p]laintiffs’ claim for reformation...” However, prior to addressing the Burtons’ defenses it was necessary for the trial court to determine whether the Burtons were bonafide purchasers for value, as they claimed, or merely subsequent purchasers for value. In order to determine the Burtons’ status, it was necessary to first determine whether the Burtons had constructive notice of the *lis pendens*. The trial court’s order denying plaintiffs’ summary judgment motion did not address the *lis pendens* issue, even though the affidavits plaintiffs presented at the summary judgment hearing addressed the filing and cross-indexing of the *lis pendens* and the Burtons’ attorneys’ title search

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found the *lis pendens* file number in the judgment index and attached it as an exhibit to their answer. Therefore, on appeal we must first determine whether the Burtons' had constructive notice of the *lis pendens*, and thus were merely subsequent purchasers for value.

III. Lis Pendens

[1] Plaintiffs argue that the trial court erred by permitting the intervening defendants to raise defenses to plaintiffs' claims because plaintiffs filed a Notice of *Lis Pendens* that was properly cross-indexed in the records of the Clerk of Court in Davidson County. We agree.

A party "desiring the benefit of constructive notice of pending litigation must file a separate, independent notice" referred to as a Notice of *Lis Pendens* that "shall be cross-indexed ... in ... actions affecting title to real property." N.C. Gen. Stat. § 1-116(a)(2011). Actions that "fall within the *lis pendens* statute include actions to ... correct a deed for mutual mistake..." *George v. Administrative Office of the Courts*, 142 N.C. App. 479, 483, 542 S.E.2d 699, 702 (2001).

The purpose of filing and cross-indexing a Notice of *Lis Pendens* is to give a subsequent purchaser of the affected property constructive notice of the pendency of an action. N.C. Gen. Stat. § 1-118 (2011). "[E]very person whose conveyance or incumbrance is subsequently executed or subsequently registered is a subsequent purchaser ... and is bound by all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action." *Id.*

When a person buys property pending an action of which he has notice, actual or presumed, in which the title to it is in issue, from one of the parties to the action, he is bound by the judgment in the action, just as the party from whom he bought would have been.

Hill v. Memorial Park, 304 N.C. 159, 164, 282 S.E.2d 779, 782 (1981) (citation omitted). *Lis pendens* does not "protect intermeddlers." *Whitehurst v. Abbott*, 225 N.C. 1, 6, 33 S.E.2d 129, 133 (1945). If the subsequent purchaser was not bound by the judgment, "a party could always defeat the judgment by conveying in anticipation of it to some stranger and the claimant would be compelled to commence a new action against him." *Id.* Where a party prosecutes a suit "with proper diligence the *lis pendens* continues until the final judgment, or until it has been canceled under the directions of the court. The mere loss or destruction of the notice will not affect its efficiency, if the statute has been fully complied

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with.” *Arrington v. Arrington*, 114 N.C. 151, 159, 19 S.E. 351, 353 (1894) (citations omitted).

In the instant case, on 26 June 2008, plaintiffs filed a notice of *lis pendens* contemporaneously with the complaint seeking reformation of the Smiths’ deed of trust. Since it is appropriate to file a *lis pendens* when seeking a reformation of a deed of trust, we find that plaintiffs’ filing of the *lis pendens* was proper. *George*, 142 N.C. App. at 483, 542 S.E.2d at 702. In February 2011, the Burtons offered to purchase the property and retained an attorney to perform a title search of the property. During the title search, the Judgment Index in the office of the Clerk of Superior Court of Davidson County reflected, *inter alia*, a judgment lien and a *lis pendens*, file number 08 M 343, against the Smiths. Although the judgment lien was settled, the Burtons’ attorney was unable to locate the *lis pendens*, file number 08 M 343, in the public records division of Davidson County. An inquiry was made to the Assistant or Deputy Clerk of Superior Court who informed the Burtons’ attorneys that the file had been destroyed. The Assistant or Deputy Clerk indicated the file had been “sent to Raleigh.” According to the Burtons’ attorneys, the Assistant or Deputy Clerk informed the Burtons’ attorneys that if the *lis pendens* was sent to Raleigh, it was “probably because the case was over.” The Burtons’ attorneys advised the Burtons accordingly.

The Smiths conveyed the property to the Burtons and the Burton Deed was recorded on 12 April 2011. When plaintiffs discovered the Burton Deed, they informed the Burtons’ attorneys about the instant case. The Burtons intervened in the present action. As intervenors, the Burtons claimed they were innocent purchasers for value. According to *Hill*, a purchaser claiming protection under North Carolina registration laws as an innocent purchaser for value will depend on whether they had notice of the *lis pendens*. 304 N.C. at 165, 282 S.E.2d at 783.

The affidavits submitted by the Burtons’ attorney indicated that “no reasonably prudent title searcher would have located a copy of the Lis Pendens in this matter” because when they originally searched the title they were informed that the file had been “sent to Raleigh ... probably because the case was over.” Furthermore, “[n]o mention was made by anyone in the office of the Clerk of Superior Court of Davidson County at that time concerning the destruction of the Lis Penden[s] or the existence of any microfilm....” However, once plaintiffs’ attorneys informed the Burtons’ attorneys about the existence of the *lis pendens*, the Burtons’ attorney spoke with the Clerk of Superior Court of Davidson County and discovered that files are microfilmed prior to destruction

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and the microfilm is located in the office of the Clerk of Superior Court in Davidson County.

To support their position, the Burtons' attorney referenced a letter from Paul Rush Mitchell, PA ("Mitchell"), an attorney who performed a title search on the property for the City of Thomasville, prior to the condemnation. In the letter he indicated that he "found no outstanding Deeds of Trust against the property..." However, Mitchell also completed an affidavit for the summary judgment hearing, indicating that he was asked to perform a "limited title search from the current owner forward" and that when he was checking the file he noticed the *lis pendens*, but neglected to follow up on it by checking the courthouse records. Mitchell further indicated that he was aware that files are microfilmed and kept by the Clerk of Superior Court of Davidson County, that in the past when he had been told files were "sent to Raleigh" he was able to request them from the Clerk and typically received copies of the files within a half-day or a day. In his opinion, the record of the *lis pendens* remains a public record, despite its physical destruction and that a prudent title searcher would conduct further investigation.

Plaintiffs submitted an affidavit from Brian L. Shipwash ("Shipwash"), the Clerk of Superior Court of Davidson County. Shipwash confirmed that the *lis pendens* was properly docketed and cross-indexed, that the physical copy was destroyed, a microfilm copy was made, kept on record and that the record was "available to any party requesting a copy of the same." Plaintiffs also submitted an affidavit from Irvin Sink ("Sink"), an attorney who performed title searches in Davidson County. Sink performed a title search on the property and noticed the mistake in the legal description of the Deed of Trust. In addition, he saw that a *lis pendens* had been filed. When Sink requested a copy at the Clerk's office, he was told that the copy "had been physically destroyed but that an electronic or microfilm image of the same was available for review and inspection." Furthermore, Sink indicated that he was aware of the procedure of destroying files in Davidson County and that the files were maintained either electronically or on microfilm by the Clerk's office and were also located in the State Archives in Raleigh.

The Burtons claim that the fact that the Davidson County Clerk of Superior Court destroyed the record means that the *lis pendens* was no longer a public record. Therefore, they claim they were bonafide purchasers for value because they had no notice of the *lis pendens*. In support of their argument, the Burtons cite N.C. Gen. Stat. §§ 121-5 and 132-3 which state that a person may not destroy a public record

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“without the consent of the Department of Cultural Resources[.]” N.C. Gen. Stat. §§ 121-5(b); 132-3(a) (2011) (emphasis added). N.C. Gen. Stat. § 121-5(b) further indicates, however, that the records may be destroyed “[w]hen the custodian of any official records of any county, city, municipality, or other subdivision of government certifies to the Department that such records have no further use or value for official business” and the Department certifies this fact. *Id.* In addition, the statute specifically requires the Department of Cultural Resources to set up a program to help microfilm official county records with permanent value. N.C. Gen. Stat. § 121-5 (c) (2011). Furthermore, public records with permanent value are kept “in the custody of the agency in which the records are normally kept or of the North Carolina State Archives” and may be accessed by the public. N.C. Gen. Stat. § 121-5 (d) (2011).

Despite the Burtons’ contention, nothing in the statute indicates that destruction of the records, with approval, makes that record no longer a public record. The Burtons claim that “[m]icrofilms of destroyed records ... kept by the Clerk of Superior Court in a private cache, not generally available and open for inspection by the general public, are not public records.” However, Shipwash stated that the *lis pendens* “was and is a public record of Davidson County, North Carolina and has at all times since its filing been available to any party requesting a copy of the same from my office.” In addition, Sink indicated that he knew about the microfilm and was able to access it. Furthermore, the Assistant or Deputy Clerk’s statement to the Burtons’ attorneys that the documents “had been sent to Raleigh” suggests that the files were maintained by the North Carolina State Archives. There is no support for the Burtons’ contention that the microfilm was unavailable to the public or that the *lis pendens* was not a public record.

The Burtons were subsequent purchasers for value, not innocent purchasers for value, since they should have discovered the notice of *lis pendens*. Thus, they are “intermeddlers,” and a Notice of *Lis Pendens* is not “designed to protect intermeddlers.” *Whitehurst*, 225 N.C. at 6, 33 S.E.2d at 133. Therefore, the Burtons cannot assert their own defenses to plaintiffs’ action, but rather shall be subject to the judgment in the reformation case. Since we have determined that the Burtons cannot assert defenses to plaintiffs’ action, there is no need to address whether plaintiffs were the holders of the Note or whether plaintiffs filed the action outside of the statute of limitations. The trial court erred by dismissing the action, granting the Burtons’ motion for summary judgment and denying plaintiffs’ motion for summary judgment on the subject of *lis pendens*, the real issue in the case.

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[2] On cross-appeal, the Burtons appealed the trial court's order denying their motion for attorneys' fees and expenses pursuant to N.C. Gen. Stat. § 6-21.5. Their cross-appeal brief addresses attorneys' fees and costs pursuant to N.C. Gen. Stat. § 6-21.5 and § 6-19, however those statutes only allow an award of attorneys' fees to the prevailing party. N.C. Gen. Stat. §§ 6-21.5; 6-19 (2011); *see also Morgan v. Steiner*, 173 N.C. App. 577, 580, 619 S.E.2d 516, 518 (2005). As we have determined that the trial court erred in granting the Burtons' motion for summary judgment, and thus they are no longer the prevailing party, there is no need to address the merits of their cross-appeal and it is dismissed.

Reversed and Remanded.

Judges BRYANT and GEER concur.

JOHN C. RUSSELL AND WIFE, DAWN RUSSELL, PLAINTIFFS

v.

N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DEFENDANT

No. COA12-801

Filed 21 May 2013

1. Negligence—common knowledge—standard of care—breach of standard—no expert testimony required

The Industrial Commission did not err in a Tort Claims Act case by concluding that plaintiff's employee was negligent, even though plaintiff failed to offer expert testimony establishing breach of duty and causation. The common knowledge and experience of the finder of fact, the Industrial Commission in this case, was sufficient to establish the standard of care and that the employee breached the standard of care; no expert testimony was required.

2. Damages and Remedies—property damage—replacement cost—fair market value

The Industrial Commission erred in a Tort Claims Act case by erroneously basing fair market value of the replacement property, as a component of the total award, on a finding not supported by the evidence. The matter was remanded to the Commission. The Commission erroneously did not 1) consider "out-of-pocket expenses," 2) measure damages according to a replacement cost

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analysis, rather than a diminished value or repair cost analysis, or 3) calculate damages based on “replacement costs” rather than “repair costs.”

Appeal by Defendant from decision and order entered 3 April 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 January 2013.

Attorney General Roy Cooper, by Assistant Attorney General Olga Vysotskaya, for Defendant.

Harvell and Collins, P.A., by Wesley A. Collins and Russell C. Alexander, for Plaintiffs.

DILLON, Judge.

The North Carolina Department of Environment and Natural Resources (Defendant) appeals from a decision and order of the Full Commission concluding that Defendant was negligent pursuant to the Tort Claims Act. The Full Commission awarded John C. Russell and Dawn Russell (Plaintiffs) \$106,674.66 in damages, plus \$1,108.75 for reasonable costs associated with the action. We affirm the decision and order of the Full Commission in part and reverse and remand in part.

The evidence of record tends to show the following: In August 1998, Robert McCabe of the Carteret County Health Department issued two separate permits authorizing the construction of a wastewater system on Lot 9 and on Lot 10 (hereinafter, the Property) of the Sportsman Village subdivision located in Carteret County to the record owner, Inez Hammer. Shortly thereafter, Ms. Hammer posted signs on the Property indicating that Lot 9 and Lot 10 were each “septic approved.”

On 8 April 2002, Plaintiffs contracted with Ms. Hammer to purchase the Property for \$17,500.00. Plaintiffs’ intent was to combine Lot 9 and Lot 10 and construct a single residence on the Property. Accordingly, prior to closing, Plaintiffs filed an application with the County to revoke the two 1998 permits issued for Lot 9 and Lot 10 and to issue a single permit for the entire Property. Before issuing the new permit, Mr. McCabe reinspected the Property. He testified that he remembered revisiting the Property in 2003; that the Property looked essentially the same as it did in 1998; and that, therefore, he did not think it was necessary to perform additional soil borings before issuing the new permit. Accordingly, on

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25 February 2003, Mr. McCabe issued a new permit authorizing the construction of a single wastewater system on the Property.¹

On 13 March 2003, Plaintiffs closed on their purchase of the Property from Ms. Hammer. Also that month, Plaintiff contracted to purchase a modular home. Over the next several months, this modular home and a septic system were installed on the Property. Plaintiffs moved into their new residence in September 2003.

Within a week after Plaintiffs moved in, the septic system began to fail. Mr. Russell testified that a “giant mud puddle began building” and that sewage “rose to the surface of the front yard[.]” Plaintiffs first contacted the septic installation contractor, Eric Pake, about the problem; and on Mr. Pake’s recommendation, Plaintiffs added five truckloads of dirt to the Property. However, sewage continued to rise to the surface in the yard.

On 3 May 2005, Plaintiffs advised the County that their septic system was malfunctioning and submitted an application for repair. Later that month, Wendy Kelly, an inspector for the County, evaluated the Property on two separate occasions and discovered that the soil conditions were inconsistent with those recorded at the time of the Mr. McCabe’s initial 1998 inspection. Mr. McCabe accompanied Ms. Kelly on her second visit. The Property failed a percolation test, which determines whether the soil is suitable for a septic system by measuring the rate at which soil absorbs water. Between May 2005 and January 2006, Plaintiffs met and discussed the problem with County personnel in an attempt to correct the failing septic system.

On 9 February 2006, Defendant’s Regional Soil Specialist, Tim Crissman, evaluated the Property and confirmed that the soil on the Property was not the same as that shown on the issued permits which were based on Mr. McCabe’s 1998 inspection, and that the soil was not suitable for the standard septic system that had been approved and installed in 2003. On 6 March 2006, Mr. Crissman issued a letter to Plaintiffs discussing the Property’s soil limitations and recommending that Plaintiffs attempt to acquire rights to land adjacent to their Property that had suitable soil. Plaintiffs did subsequently attempt to acquire rights to land adjacent to their Property from the owner. However, the adjacent landowner was not interested in selling.

1. Defendant stipulates that McCabe, as a registered sanitarian of the Carteret County Health Department, was an agent of Defendant when he issued the 1998 and the 2003 permits.

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In June 2007, Mr. Crissman recommended the installation of an above ground drip irrigation system with a “fill/mound field encompassing a 122’ x 46’ area in the front yard of the Property.” Mr. Crissman testified that he thought that an above-ground system could provide an adequate septic system, but he could not guarantee Plaintiffs that his recommendation would resolve the issue.

On 20 July 2007, Plaintiffs filed an action against Defendant pursuant to the North Carolina Tort Claims Act, alleging negligence, gross negligence, and negligent misrepresentation. Plaintiffs also alleged that Defendant had a duty of care to Plaintiffs under the special duty exception to the public duty doctrine and that Defendant had waived sovereign immunity.

On 16 September 2011, a deputy commissioner for the Industrial Commission entered a decision concluding that Defendant was negligent under the special duty exception of the public duty doctrine and awarding Plaintiff \$113,900.00 in damages and \$613.75 in costs. Defendant appealed to the Full Commission. By decision and order dated 3 April 2012, the Full Commission affirmed the decision of the deputy commissioner, but modified the award to Plaintiffs to \$106,674.66 in damages, plus \$1,108.75 for reasonable costs. Defendant appeals from the decision and order of the Full Commission.

I: Standard of Review

“The Tort Claims Act was enacted in order to enlarge the rights and remedies of a person who is injured by the negligence of a State employee who was acting within the course of his employment. Pursuant to the statute, the Commission has exclusive jurisdiction to hear claims falling under this Act.” *Simmons v. N. Carolina Dept. of Transp.*, 128 N.C. App. 402, 405, 496 S.E.2d 790, 792-93 (1998) (citing N.C. Gen. Stat. § 143-291(a)). “Decisions of the Commission awarding damages to a plaintiff under the Tort Claims Act can only be appealed to this Court ‘for errors of law . . . under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them.’ ” *Id.* at 405, 496 S.E.2d at 793 (quoting N.C. Gen. Stat. § 143-293). However, “[t]his Court’s review of the Industrial Commission’s conclusions of law is *de novo*.” *Phillips v. N.C. State Univ.*, 206 N.C. App. 258, 261, 697 S.E.2d 433, 435 (2010).

II: Expert Testimony

Defendant first contends that the Full Commission erred in concluding that Mr. McCabe was negligent given that the Plaintiff failed to

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offer any expert testimony establishing breach of duty and causation. Specifically, Defendant challenges the Commission's finding of fact number 38, which states the following:

38. While the evidence does not disclose how the error in soil sampling occurred in 1998, the preponderance of evidence establishes that Mr. McCabe either performed the soil site evaluation procedure incorrectly or he incorrectly identified the property for evaluation in 1998, during his initial evaluation. In 2003, Mr. McCabe did not perform a soil evaluation prior to reissuing the septic permit for the combined property.

Plaintiff argues the foregoing finding of fact demonstrates that the Commission was "uncertain as to what negligent act, if any, took place" and that "[t]here is no evidence in the record and no finding of fact to support an allegation that McCabe performed [the] soil evaluation in 1998 incorrectly." Defendant maintains that only testimony from a witness tendered as an expert in the field of sanitation can establish whether Defendant breached its standard of care to Plaintiffs. We disagree.

It is well established that "[o]rdinarily, expert testimony is required to establish the standard of care" in professional negligence cases. *Michael v. Huffman Oil Co., Inc.*, 190 N.C. App. 256, 271, 661 S.E.2d 1, 11 (2008), *disc. review denied*, 363 N.C. 129, 673 S.E.2d 360 (2009) (internal citation and quotation marks omitted). This Court has further held that "[t]he only exception to the requirement of establishing the professional standard of care by way of expert testimony is where the common knowledge and experience of the jury is sufficient to evaluate compliance with a standard of care[.]" *Handex of the Carolinas, Inc. v. County of Haywood*, 168 N.C. App. 1, 11, 607 S.E.2d 25, 31 (2005) (citation and quotation marks omitted). "The application of this 'common knowledge' exception to the requirement of expert testimony . . . has been reserved for those situations in which [the negligent act] . . . is of such a nature that the common knowledge of laypersons is sufficient to find the standard of care required, a departure therefrom, or proximate causation." *Bailey v. Jones*, 112 N.C. App. 380, 387, 435 S.E.2d 787, 792 (1993) (citation omitted); *see also Associated Indus. Contractors, Inc. v. Fleming Eng'g, Inc.*, 162 N.C. App. 405, 411, 590 S.E.2d 866, 871 (2004), *aff'd*, 359 N.C. 296, 608 S.E.2d 757 (2005).

On appeal, we must determine, based on the evidence presented, whether the common knowledge and experience of the finder of fact, which in this case was the Full Commission, was sufficient to establish

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the standard of care and that Mr. McCabe breached the standard of care, or whether expert testimony was required.

During the hearing, Plaintiff offered the testimony of Mr. Crissman, who inspected the property in 2006, and Troy Dees, the environmental health supervisor for the Carteret County Health Department. Mr. Crissman testified that he did not find “any . . . soil” on the Property “that was suitable or provisionally suitable” for a septic system nor did he find any soil “matching [Mr.] McCabe’s findings.” The soil Mr. Crissman encountered on the Property “[b]ased on profile descriptions alone” was “significantly different” from that described during the 1998 evaluation.

Mr. Dees testified at the hearing that “there’s a possibility” Mr. McCabe “analyzed the wrong property when he took his soil borings[.]” He believed Mr. McCabe may have analyzed part of the adjacent property because “[t]he soil profiles” or “soil descriptions” from Mr. McCabe’s 1998 evaluation of Plaintiffs’ property and the soil profiles from the [adjacent] property “match up[.]” Moreover, he testified that the soil profiles from Mr. McCabe’s 1998 evaluation of Plaintiffs’ property and Mr. Crissman’s 2006 evaluation of Plaintiffs’ property are not consistent.

Defendant posited that a material alteration to the Property by Plaintiffs could explain the inconsistent 1998 and 2006 evaluations. Mr. Crissman testified at the hearing that “[i]f you go back and look at the evaluation conducted by the Carteret County Health Department in ’98, based on profile number one, you would have to remove more than twelve inches for it to be classified unsuitable based on the wetness condition found at twenty-four inches below the natural soil surface.” Put plainly, in order to explain the inconsistency between the 1998 evaluation and the 2006 evaluation by a material alteration to the site, a foot or more of soil must have been removed from the area being evaluated. However, the evidence does not show that this sort of material alteration ever happened. On the contrary, the testimony of Eric Pake, Josh Cahoon, and Jason Hill, all of whom were familiar with the property in 1998 and at all relevant times thereafter, tends to show that the site underwent no such material alteration. Moreover, the testimony of Plaintiffs, Mr. Cahoon, and Mr. Hill tend to show that the Property was easily distinguishable from the adjacent property.

The uncontradicted testimony at the hearing showed that there is virtually no provisionally suitable soil present on the Property. Only Mr. McCabe reported that the soil on the Property was provisionally suitable in his 1998 evaluation, which contained a soil description matching the soil of the adjacent property. In his 2003 report, which was based

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on a visual inspection or “walk through evaluation” of the Property, Mr. McCabe concluded the Property had not been significantly altered since his visit in 1998.² Mr. McCabe also admitted the following:

The soil profiles on what we thought – well, what we know now is lot 9, were not matching up. The ones for lot 10, the closer you got over to the property line where [the lot adjacent to the Property] is, the closer they became to my evaluation. Mr. Crissman decided to walk over to the [lot adjacent to the Property]. He did a couple of borings, and they matched up very well with my previous evaluations.

We believe that the common knowledge and experience of the finder of fact was sufficient to permit a determination of whether Mr. McCabe acted negligently based on the testimony and evidence of record and that expert testimony was not required on the issue of whether Mr. McCabe breached the standard of care. We believe that “understanding” the task in this case – the procedure by which Mr. McCabe should have evaluated the Property for purposes of determining whether the Property was suitable for a septic system – “does not involve esoteric knowledge or uncertainty that calls for the professional’s judgment nor is it beyond the knowledge of the trier of fact[.]” *Associated Indus. Contractors, Inc.*, 162 N.C. App. at 412, 590 S.E.2d at 871 (concluding that “the nature of [the surveyor]’s actions fell within the ‘common knowledge’ exception to the requirement that experts testify as to the requisite standard of care[;] [i]t is within the common knowledge of a trier of fact that a surveyor hired to pinpoint columns for a rectangular building site that must be precisely square must accurately mark column locations so as to result in two sets of parallel lines connected by four 90° angles”). The evidence in this case shows that “[t]he soil profiles” or “soil descriptions” from Mr. McCabe’s 1998 evaluation did not match the soil on the Property but rather matched the soil on an adjacent lot. We conclude that the trier of fact could determine, based on the evidence in this case and the common knowledge exception to the expert testimony requirement, whether Mr. McCabe breached the standard of care by performing soil tests on the wrong lot, and we further conclude that the evidence presented at the hearing was sufficient to support finding of fact number 38.

2. Mr. McCabe was unable to produce “any [official] documentation in the file indicating that [he] did in fact visit the property in 2003.” However, during an earlier deposition when asked if he, in fact, visited the Property in 2003, Mr. McCabe responded, “Yes, sir, most likely.”

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II: Measure of Damages

The Full Commission awarded Plaintiffs damages in the amount of \$106,674.66, noting that “[t]his amount is a calculation of plaintiff’s (sic) replacement costs less the remaining fair market value of their current property.” In calculating its award, the Full Commission expressly relied on *Feierstein v. NCDENR*, 202 N.C. App. 147, 690 S.E.2d 588 (2010) (unpublished), which involved a similar fact pattern as the case *sub judice* and in which DENR was also the defendant.

Defendant contends that the Full Commission erred as a matter of law by applying the incorrect measure of damages. Specifically, Defendant argues that the Full Commission erroneously (1) considered “out-of-pocket expenses,” but “inexplicably labeled these expenses as ‘replacement costs,’ ” (2) based its decision regarding the replacement value of the Lots on MLS listing prices of various lots; (3) measured damages according to a replacement cost analysis, rather than a diminished value or repair cost analysis; and (4) failed to consider that Plaintiffs did not mitigate their damages in the award. We address each argument in turn.

First, Defendant argues that the Full Commission inappropriately considered “out-of-pocket expenses,” but “inexplicably labeled these expenses as ‘replacement costs,’ ” in its damages award. Defendant relies on the *Feierstein* decision for this proposition. As an initial matter, we note that *Feierstein* is an unpublished opinion and, therefore, not authoritative on this point. N.C.R. App. P. 30(e)(3). Moreover, the Full Commission did not award Plaintiff any out-of-pocket expenses in this case that the analysis in *Feierstein* would prohibit. In *Feierstein*, this Court held that a determination of damages based on “out-of-pocket” expenditures was erroneous: The Court stated that “the effect of the Commission’s decision was to award the Feiersteins what appears to be an amount equal to all of their out-of-pocket expenditures associated with the Hyco Lake lot, including the cost of purchasing it[;] [i]n other words, the Commission appears to have used an ‘out-of-pocket expenditures’ measure of damages.” *Id.* The Court further stated that the decision of the Full Commission in *Feierstein* was “clearly not based on any evidence tending to show the amount that would be necessary to purchase a replacement lot or to modify the Feiersteins’ lot so that it would support some sort of sewage disposal system.” *Id.* We believe *Feierstein* is distinguishable from this case because the decision of the Full Commission in this case was based on the “amount that would be necessary to purchase a replacement lot[.]” *Id.*; see also *Huberth v. Holly*, 120 N.C. App. 348, 354, 462 S.E.2d 239, 243 (1995) (stating that

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“[w]hen, however, the land is used for a purpose that is personal to the owner, the replacement cost is an acceptable measure of damages”) (citing *Plow v. Bug Man Exterminators, Inc.*, 57 N.C. App. 159, 162-63, 290 S.E.2d 787, 789, *disc. rev. denied*, 306 N.C. 558, 294 S.E.2d 224 (1982) (stating, in a case involving an allegedly negligent failure to detect the presence of termites in a house prior to purchase by the plaintiff, that, “[w]hile the difference in market value before and after the injury is one permissible measure of damages, it is by no means the only one” and that “[d]amages based on cost of repair are equally acceptable”). Specifically, the Full Commission found that it would “cost [Plaintiffs] a total of \$113,674.66 to purchase a replacement lot, move their modular home to the new lot, and prepare the new lot for the placement of the home.” The Full Commission then deducted “[t]he market value of their existing lot[,]” which the Full Commission determined was \$7,000, “from plaintiffs’ replacement costs,” so that the Full Commission awarded damages in the amount of \$106,674.66. We note that the Full Commission made findings of fact detailing out-of-pocket expenditures Plaintiffs made in purchasing, improving, and resolving the problems associated with the Property; however, the Full Commission did not base any part of its damages award on the foregoing expenditures. Therefore, we find Defendant’s first argument without merit.³

Second, Defendant argues that in Findings of Fact numbers 41 and 42, the Full Commission erroneously based its decision regarding the replacement value of the lots on the testimony of Ed Daughety, a real estate broker who was tendered as an expert on the Multiple Listing Service (MLS). Specifically, the Full Commission’s award included a component for the cost to purchase comparable lots. The Full Commission concluded that this component was \$55,000 based on its Findings of Fact numbers 41 and 42, which state the following:

41. Ed Daughety, a North Carolina licensed real estate agent, testified before the Deputy Commissioner and provided reports that similar property available for sale in the same general area as plaintiffs’ property, with septic

3. Because of the nature of the Full Commission’s award in this case, it is not necessary for us to reach the question of whether certain “out-of-pocket” costs would ever be allowed where they are incurred in reliance on the negligent issuance of a septic permit. See *Watts v. NCDENR*, 182 N.C. App. 178, 185-86, 641 S.E.2d 811, 819 (2007), *aff’d and modified*, 362 N.C. 497, 666 S.E.2d 752 (2008) (stating that, in a case involving the negligent issuance of a septic permit, a tortfeasor, generally, “is responsible for all damages directly caused by the misconduct and for all indirect or consequential damages which are the natural and probable effect of the wrong”).

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permits issued, is listed for sale from \$27,500.00 per lot to \$35,000.00 per lot. Mr. Daughety testified that two adjacent lots would be required to make up the similar acreage of plaintiffs' property *and such properties would likely sell for approximately 88% of the list price*. Mr. Daughety's report stated that plaintiffs' current property is .853 acres. Mr. Daughety identified several side by side lots with septic permits that are of similar size to plaintiffs' property if combined into one lot.

42. The average cost of two lots of similar acreage to plaintiffs property, in a similar location, and with suitable septic permits is \$55,000 ($\$35,000 \times 2 \text{ lots} = \$70,000$ and $\$70,000 \times .88 = \$61,600$. $\$27,500 \times 2 \text{ lots} = \$55,000$ and $\$55,000 \times .88 = \$48,400$. $\$61,600 + \$48,400 = \$110,000$ and $\$110,000/2 = \$55,000$.)

(Emphasis added.) We believe the portion of Finding of Fact 42 stating that "Mr. Daughety testified that [the replacement lots] would likely sell for approximately 88% of the list price" is not supported by any evidence in the record. Before the Deputy Commissioner, Mr. Daughety gave the following testimony on direct examination:

Q. Okay. Have you done any type of investigation to determine what comparable properties to the Russell's property sell for as percentage of list price?

A. I didn't do it that way, but what I did do, I went back and pulled properties that have sold in his area from twelve of '05 through eleven of '07. It was fourteen properties, and it averaged out eighty-eight percent of list price.

Q. Okay. Meaning the – the closing price –

A. The closed price was eighty-eight percent average of the listed price.

Q. Okay. And that's for period of time from '05 to current?

A. Uh-huh. Well, the last property there was eleven of '07.

Q. Just haven't been many sales.

A. That's right.

Q. You said there were fourteen total.

A. Fourteen from '05 to '07.

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On cross-examination when asked why there was an approximate ten thousand dollar discrepancy between the list price of a .34 acre lot with a septic permit, which was listed at \$25,000.00, and a .35 acre lot without a septic permit, which was listed at \$36,900.00, Mr. Daughety stated, "I don't have a clue." Mr. Daughety continued:

Q. So do you have a clue what these lots will sell for?

A. Kind of, ma'am. I can give you history.

Q. But you have no clue why there is a more than ten – almost fifteen – hold on. Let me see with my math – more than \$10,000.00 difference in price for the lots of the comparable –

A. They were listed by two different agents, and two different owners.

Q. Well, doesn't the market dictate the prices usually?

A. I've been preaching that a long time. They don't listen.

Q. But – so you have no clue – you have no clue at all, right?

A. No, I don't.

Q. Okay.

A. I know we've been averaging eighty-eight percent of a list price, but now this is side-by-side, and I see where you're coming from. One owner wants a price, another owner wants a price.

Q. Yeah, you see where I'm coming from, right?

A. I do. I do.

Q. There is – there is clearly a mismatch between prices of these two lots.

A. All over the county is a mismatch.

Q. And you don't know what it would sell for.

A. . . . No.

Although on direct examination Mr. Daughety provided evidence that between the years of 2005 and 2007, fourteen properties sold for a purchase price that "averaged out [to] eighty-eight percent of list price" and

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on cross-examination, he testified that “we’ve been averaging eighty-eight percent of the list price[.]” Daughety never testified that similar “properties would *likely* sell for approximately 88% of the list price[.]” as found by the Full Commission⁴ In fact, Mr. Daughety never testified that any particular property ever sold for 88% of the list price. He was never asked nor did he ever state specifically his opinion as to the value of the replacement lots or what he thought they might sell for. Therefore, we conclude that the portion of Finding of Fact number 42, stating that Mr. “Daughety testified that . . . such properties would likely sell for approximately 88% of the list price[.]” is not supported by any evidence. We therefore reverse this portion of the Full Commission’s decision and order and remand to the Full Commission. The Full Commission may, if necessary, take additional evidence on the question of the value of replacement property with suitable soil that is otherwise comparable to the Property.

Third, Defendant argues the Full Commission erroneously measured damages according to a replacement cost analysis, rather than a diminished value or repair cost analysis. We find this argument meritless. This Court has held that a replacement cost analysis is appropriate where a property owner relies on an inspection that was performed negligently. *Plow*, 57 N.C. App. at 162-63, 290 S.E.2d at 789. In *Plow*, this Court addressed the question of the appropriate measure of damages in a case involving an allegedly negligent failure to detect the presence of termites in a house prior to purchase by the plaintiff. The defendant in *Plow* was “an extermination company engaged for the sole purpose of providing the buyer with assurance that the house he planned to purchase was free of termites.” *Id.* at 162, 290 S.E.2d at 789. The Court reasoned that “the buyer has relied to his detriment on representations made by an independent pest-control inspector who was paid for his inspection report and unquestionably could foresee the buyer’s reliance upon the accuracy of the report[.]” *Id.* The Court in *Plow* stated that, “[w]hile the difference in market value before and after the injury is one permissible measure of damages, it is by no means the only one[.]” and that “[d]amages based on cost of repair are equally acceptable.” *Id.*

4. The record contains two letters written by Daughety which were introduced as exhibits during his testimony. However, the letters only contain information regarding possible replacement properties that were on the market, but did not contain any information suggesting what they might sell for as a percentage of their respective list price. An investigation conducted by Mr. Daughety was discussed during his testimony which set forth information about the fourteen properties which sold between 2005 and 2007 which he testified sold for an average of 88% of list price. However, a written report about this investigation is not part of the record.

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at 162-63, 290 S.E.2d at 789. Moreover, “replacement and repair costs are relevant on the question of diminution in value[.] . . .” *Huberth*, 120 N.C. App. at 353, 462 S.E.2d at 243 (citations omitted). Notwithstanding, the award may not, however, be “so large as to shock the conscience.” *Jackson v. N.C. Dept. of Crime Control*, 97 N.C. App. 425, 432, 388 S.E.2d 770, 774, *disc. review denied*, 326 N.C. 596, 393 S.E.2d 878 (1990). We believe the award in this case is not so large as to shock the conscience, and we therefore reject this aspect of Defendant’s challenge to the Full Commission’s decision with respect to the issue of damages.

Fourth, Defendant argues the Full Commission failed to consider that Plaintiffs did not mitigate their damages by installing an onsite replacement wastewater system, which Defendant argues would have been a less expensive alternative. This argument, though couched as a “mitigation of damages” argument, is actually an argument that the Full Commission did not use the proper “measure of damages.” Specifically, Plaintiff argues that the Full Commission should have calculated damages based on “repair costs” rather than “replacement costs.” The Full Commission made the following findings of fact with regard to the repair option:

47. . . . The low pressure pipe mound system or the drip irrigation system represented the best professional judgment of Mr. Crissman that might correct the septic system; however, these alternatives were not guaranteed to provide an adequate septic system for the property.

. . .

49. The Full Commission finds that it was reasonable for plaintiffs to decline to attempt to install a replacement septic system based on the high price of the replacement system and the fact that plaintiffs were warned by agents of defendant that there was no guarantee that the replacement would be effective.

Our review of the record reveals that the foregoing findings of fact are supported by competent evidence.

For the foregoing reasons we affirm the decision and order of the Full Commission, in part; however, we reverse the portion of the decision and order erroneously basing fair market value of the replacement property, as a component of the total award, on a finding not supported by the evidence, and we remand this case to the Full Commission, at which time the Full Commission may, in its discretion, take additional

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evidence on this component. To avoid a result that might unjustly enrich Plaintiffs, this component of the replacement cost damages should be based on a determination of the fair market value of the Property had it had suitable soil.

AFFIRMED, in part; REVERSED and REMANDED, in part.

Chief Judge MARTIN and Judge ERVIN concur.

SHERRY CRENSHAW SMALLWOOD, PLAINTIFF
v.
JAMES STEVEN SMALLWOOD, DEFENDANT

No. COA12-1229

Filed 21 May 2013

1. Divorce—alimony—cohabitation—conclusion

Although the trial court in an alimony claim did not include a conclusion of law specifically stating that plaintiff was not engaged in cohabitation, the order contained a finding that plaintiff and her boyfriend did not voluntarily assume the marital rights, duties and obligations that are usually manifested by married people. The presence of competent evidence in the record supporting the trial court's determination of non-cohabitation compelled the affirmation of its decision.

2. Divorce—alimony—cohabitation—findings

Challenged findings concerning cohabitation in an alimony action were supported by the evidence except for a finding concerning where plaintiff's boyfriend did his laundry. However, defendant did not demonstrate how he has been prejudiced by that erroneous finding. The Court of Appeals declined defendant's invitation to categorically hold that the mere presence of certain isolated factors automatically mandated a finding of cohabitation.

3. Divorce—alimony—cohabitation—findings—subjective intent

There was no error in an alimony claim involving cohabitation where the trial court did not make findings on subjective intent. It was clear that the trial court was able to rule on the cohabitation issue based on the objective facts introduced into evidence by the

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parties and plaintiff nowhere contended that the objective evidence was conflicting.

4. Appeal and Error—preservation of issues—argument not raised at trial—grounds for exclusion of evidence

Defendant in an alimony and cohabitation claim did not raise at trial the grounds on which he argued that the trial court erred by excluding the testimony of his detective. It is well-established that a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court.

5. Appeal and Error—argument—reference to prior contention

The trial court did not err by denying defendant's motion to amend an alimony order where his argument amounted to a one-sentence reference to his previous contention that the trial court erred in determining that plaintiff did not engage in cohabitation. Defendant did not present any additional argument regarding his motion to amend.

6. Divorce—alimony—date of separation to filing of claim

The trial court is authorized by longstanding precedent and N.C.G.S. § 50-16.3A to award alimony for the period between the parties' date of separation and the filing of the claim for alimony in appropriate circumstances.

7. Divorce—alimony order—correction of order—additional order issued—findings sufficient for both

The trial court's order contained sufficient findings to support its award of retroactive alimony where the original order, through an apparent oversight, omitted a period of time. Rather than amending the order, the trial court entered another order awarding the retroactive alimony and the two orders, read together, were sufficient to support the entirety of the award.

Appeal by defendant from orders entered 8 February 2012 and 30 April 2012 by Judge Kathryn Whitaker Overby in Alamance County District Court. Heard in the Court of Appeals 12 February 2013.

Walker & Bullard, P.A., by Daniel S. Bullard, for plaintiff-appellee.

Wishart, Norris, Henninger & Pittman, PA, by J. Wade Harrison, Hillary D. Whitaker, and Pamela S. Duffy, for defendant-appellant.

DAVIS, Judge.

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James Steven Smallwood (“defendant”) appeals from orders awarding Sherry Crenshaw Smallwood (“plaintiff”) alimony and retroactive alimony. After careful review, we affirm both orders.

Factual Background

Plaintiff and defendant were married on 6 December 1991. During their marriage, the couple had one child. The parties separated on 3 April 2009, and plaintiff filed a complaint on 17 November 2009 for child custody and support, postseparation support, alimony, equitable distribution, divorce, and attorney’s fees. Defendant filed an answer, counterclaiming for child custody, child support, equitable distribution, and divorce.

The trial court entered a consent order on 16 February 2010 in which it ordered defendant to pay postseparation support and child support. The trial court subsequently approved the parties’ parenting agreement, resolving outstanding issues regarding child custody. In a separate action, the parties were divorced by judgment entered 9 September 2010. The court issued an equitable distribution order on 16 December 2011.

The trial court conducted an evidentiary hearing on the alimony claim on 29 November 2011. During the proceedings, defendant moved to amend his answer to add the defense of cohabitation, and the motion was allowed. In an order entered 8 February 2012, the trial court concluded that plaintiff and the man she was dating, Ronald Robinson (“Robinson”), were not cohabitating and that plaintiff was entitled to alimony in the amount of \$4,000 per month.

Plaintiff subsequently moved to have the trial court hear her claims for retroactive alimony, retroactive child support, prospective child support, and attorney’s fees. Defendant also filed a motion requesting that the court amend its alimony order to include additional findings. After holding a hearing on the parties’ motions, the trial court entered an order on 30 April 2012 in which it ordered defendant to pay retroactive alimony and child support. The court denied defendant’s motion to amend and ruled that the parties were responsible for their own attorney’s fees. Defendant timely appealed to this Court from the trial court’s 8 February 2012 and 30 April 2012 orders.

Analysis**I. 8 February 2012 Order****A. Challenge to Finding of Non-Cohabitation**

[1] Defendant’s primary argument on appeal is that the trial court erred in determining that plaintiff and Robinson were not cohabitating

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“[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.” *Oakley v. Oakley*, 165 N.C. App. 859, 861, 599 S.E.2d 925, 927 (2004) (citation and quotation marks omitted). Evidentiary issues concerning credibility, contradictions, and discrepancies are for the trial court – as the fact-finder – to resolve and, therefore, the trial court’s findings of fact are conclusive on appeal if there is competent evidence to support them despite the existence of evidence that might support a contrary finding. *Hand v. Hand*, 46 N.C. App. 82, 87, 264 S.E.2d 597, 599-600, *disc. review denied*, 300 N.C. 556, 270 S.E.2d 107 (1980). The trial court’s conclusions of law, however, are reviewed *de novo* on appeal. *Casella v. Alden*, 200 N.C. App. 24, 28, 682 S.E.2d 455, 459 (2009).

Section 50–16.9(b) of the General Statutes provides in pertinent part that “[i]f a dependent spouse who is receiving postseparation support or alimony from a supporting spouse under a judgment or order of a court of this State remarries or engages in cohabitation, the postseparation support or alimony shall terminate.” N.C. Gen. Stat. § 50–16.9(b) (2011). The statute defines “cohabitation” as

the act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage, or a private homosexual relationship. Cohabitation is evidenced by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations. . . .

N.C. Gen. Stat. § 50-16.9(b).

This Court has stated the following with regard to the legislative policy underlying § 50-16.9(b):

“The statute reflects several of the goals of the ‘live-in lover statutes,’ terminating alimony in relationships that probably have an economic impact, preventing a recipient from avoiding in bad faith the termination that would occur at remarriage, but not the goal of imposing some kind of sexual fidelity on the recipient as the condition of continued alimony. The first sentence reflects the goal of terminating alimony in a relationship that probably has an economic impact. ‘Continuous and habitual’ connotes a relationship of some duration and suggests that the relationship must

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be exclusive and monogamous as well. All of these factors increase the likelihood that the relationship has an economic impact on the recipient spouse.”

Craddock v. Craddock, 188 N.C. App. 806, 810, 656 S.E.2d 716, 719 (2008) (quoting 2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 9.85, at 493-94 (5th ed. 1999)) [hereinafter *Lee's Family Law*].

Professor Reynolds goes on to explain:

The second sentence also tries to terminate postseparation support and alimony when the relationship has an economic effect and when someone is acting in bad faith to avoid termination. The more “rights, duties, and obligations” that characterize the relationship, the more likely it is that the relationship has economic repercussions. At least for the heterosexual relationship, the more indicia of “marital rights, duties, and obligations,” the more chance that the decision not to marry is motivated only by a desire to continue receiving alimony.

Lee's Family Law § 9.85, at 494.

Our Supreme Court has held that, in light of the wording of § 50-16.9(b), in order to “find cohabitation, there must be evidence of: (1) a ‘dwelling together continuously and habitually’ of two adults and (2) a ‘voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people.’ ” *Bird v. Bird*, 363 N.C. 774, 779-80, 688 S.E.2d 420, 423 (2010) (quoting N.C. Gen. Stat. § 50-16.9(b)).

Here, the trial court made the following findings on the issue of cohabitation:

15. The plaintiff is dating Ronald Robinson. The plaintiff started dating Mr. Robinson after the date of separation. The plaintiff and Mr. Robinson started a sexual relationship in February 2011. Mr. Robinson has his own residence at 100 Rosemont Street, which is within walking distance to the plaintiff's residence.

16. Mr. Robinson spends the night with the plaintiff five to seven times each week. He does not keep clothes at the plaintiff's residence. Mr. Robinson does not keep a toothbrush at the plaintiff's residence. Mr. Robinson does not keep medicine at the plaintiff's residence.

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17. The plaintiff has given Mr. Robinson, her mother and her friend Karen keys to her residence. The Plaintiff has let Mr. Robinson use her garage door opener on occasion, but not on a regular basis and Mr. Robinson does not keep the garage door opener.

18. Mr. Robinson does not pay any expenses for the plaintiff's residence. Mr. Robinson and the plaintiff do not exchange gifts with each other. Mr. Robinson and the plaintiff are not engaged to be married.

19. Mr. Robinson does not shower or bathe at the plaintiff's residence.

20. Mr. Robinson has helped the plaintiff fix meals at her residence. Mr. Robinson eats meals at the plaintiff's residence. Mr. Robinson often brings his own food to the plaintiff's residence; he has to have gluten free groceries. He has helped the plaintiff with the dishes and cleaning the kitchen after meals that he participated in.

21. Mr. Robinson and the plaintiff go out to eat several times a week. Sometimes Mr. Robinson will pay for the meal.

22. Mr. Robinson has fed the plaintiff's dogs and let the dogs out into the back yard. Mr. Robinson has helped the plaintiff fix her broken fence in the back yard one time. Mr. Robinson has mowed the grass at the plaintiff's residence, if the plaintiff does not have time to mow. Mr. Robinson has brought in the mail for the plaintiff a few times. Mr. Robinson has taken out the plaintiff's trash and recycling a few times.

23. Mr. Robinson does not do his or the plaintiff's laundry at the plaintiff's residence.

24. Mr. Robinson does not vacuum at the plaintiff's residence. The plaintiff vacuums her residence.

25. Mr. Robinson does visit the plaintiff at her place of employment.

26. Mr. Robinson and the plaintiff do attend church together.

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27. Mr. Robinson and the plaintiff have been on one over night [sic] trip together, for the minor child's participation in a skate boarding [sic] event in the North Carolina Mountains, which was with a larger group that was also participating in the skate boarding [sic] event.

28. Mr. Robinson and the plaintiff do not refer to each other as husband and wife. Mr. Robinson and the plaintiff do kiss each other goodbye when they leave each other.

In its order, the trial court did not include a conclusion of law specifically stating that, based on its findings, plaintiff was not engaged in cohabitation. The order does, however, contain a finding that "[p]laintiff and Mr. Robinson have not both voluntarily assumed marital rights, duties and obligations that are usually manifested by married people." Although denominated as a finding of fact, this determination is more appropriately considered a conclusion of law as it provides the legal basis for the denial of defendant's defense to plaintiff's claim for alimony. *See Long v. Long*, 160 N.C. App. 664, 667, 588 S.E.2d 1, 3 (2003) (treating determination regarding cohabitation as conclusion of law).

On the issue of whether plaintiff and Robinson voluntarily assumed those marital rights, duties, and obligations that are usually manifested by married people, *Bird*, 363 N.C. at 779-80, 688 S.E.2d at 423, the trial court was required to consider the totality of the circumstances. *Oakley*, 165 N.C. App. at 862, 599 S.E.2d at 928. Under the "totality of the circumstances" test, a court must evaluate all the circumstances of the particular case, with no single factor controlling. *Fletcher v. Fletcher*, 123 N.C. App. 744, 750, 474 S.E.2d 802, 806 (1996), *disc. review denied*, 345 N.C. 640, 483 S.E.2d 706 (1997).

In this case, the trial court found, on the one hand, that: (1) plaintiff and Robinson have been in a sexual relationship since February 2011, and Robinson spends the night at her house five to seven nights a week; (2) Robinson has a key to plaintiff's house and has occasionally used her garage door opener; (3) Robinson has helped plaintiff prepare meals, eaten at her house, and helped clean up after the meals in which he "participated"; (4) Robinson and plaintiff go out to eat several times a week, and Robinson sometimes pays for the meal; (5) Robinson has helped take care of plaintiff's dogs; (6) Robinson, on one occasion, helped fix the fence in plaintiff's backyard; (7) Robinson has mowed plaintiff's lawn on occasions when she has not had the time to do so; (8) Robinson has collected plaintiff's mail and taken out the trash and recycling on occasion; (9) Robinson occasionally visits plaintiff at her place of work; (10)

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Robinson and plaintiff attend church together; (11) Robinson, plaintiff, and her son went on one trip together; and (12) Robinson and plaintiff kiss each other goodbye when they leave each other's company.

On the other hand, the court found that: (1) Robinson maintains his own residence; (2) Robinson does not keep clothes, a toothbrush, or medicine at plaintiff's residence; (3) although Robinson has a key to plaintiff's house, she has also given keys to her mother and a female friend; (4) although plaintiff allows Robinson to use her garage door opener on occasion, he does not keep one and does not use one on a regular basis; (5) Robinson does not pay any expenses for plaintiff's residence; (6) plaintiff and Robinson do not exchange gifts with each other; (7) Robinson does not shower or bathe at plaintiff's residence; (8) he often brings his own food to plaintiff's house due to dietary restrictions; (9) plaintiff does her own laundry; (10) plaintiff, not Robinson, vacuums her house; (11) although Robinson went with plaintiff and her son on a trip, it was with a "larger group" participating in a sporting event; and (12) Robinson and plaintiff are not engaged to be married and do not refer to each other as husband and wife.

We conclude that these findings are sufficient to support the trial court's conclusion that plaintiff and Robinson have not voluntarily assumed those rights, duties, and obligations which are usually manifested by married people. While the court did determine that plaintiff and Robinson have engaged in some domestic activities, it did not find an assumption of marital rights and duties extending beyond those found in an intimate friendship – such as, for example, joint financial obligations, sharing of a home, combining of finances, pooling of resources, or consistent merging of families. *See Oakley*, 165 N.C. App. at 863, 599 S.E.2d at 928 ("As defendant in the instant case presented no evidence of activities beyond plaintiff's and Smith's sexual relationship and their occasional trips and dates, we see no assumption of any marital rights, duties, and obligations which are usually manifested by married people" (citation and quotation marks omitted)).

Defendant nonetheless contends that those isolated facts found by the trial court militating in favor of cohabitation should, *as a matter of law*, compel a conclusion of cohabitation, relying primarily on this Court's decision in *Rehm v. Rehm*, 104 N.C. App. 490, 409 S.E.2d 723 (1991).¹ In *Rehm*, this Court upheld the trial court's conclusion of

1. Defendant also cites to several cases from other jurisdictions in support of his position. Such cases, while potentially instructive, "are not binding on the courts of this State." *Morton Bldgs., Inc. v. Tolson*, 172 N.C. App. 119, 127, 615 S.E.2d 906, 912 (2005).

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cohabitation based on findings that (1) the wife and the man she was dating maintained an “exclusive, monogamous relationship for both sexual and regular domestic purposes”; (2) while the man maintained a separate residence, he spent the night at the wife’s house as many as five nights a week; (3) the man was seen leaving the wife’s home dressed in clothes different from those he had been wearing the previous day; (4) the couple was seen kissing each other goodbye; and (5) the couple had taken overnight trips together, which often included the wife’s child. *Id.* at 492-93, 409 S.E.2d at 724.

However, defendant’s argument fails to take into account the standard of review employed by this Court in reviewing orders entered by trial courts in non-jury proceedings. We do not engage in a *de novo* review of the evidence and substitute our judgment for that of the trial court. *See Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189 (1980) (“[I]t is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal.”). Instead, our review is “strictly limited” to determining whether the record contains competent evidence to support the trial court’s findings of fact and whether those findings, in turn, support the trial court’s conclusions of law. *Holloway v. Holloway*, ___ N.C. App. ___, ___, 726 S.E.2d 198, 204 (2012).

Contrary to defendant’s suggestion, *Rehm* does not stand for the proposition that the presence of those specific facts found by the trial court in that case will necessarily mandate a finding of cohabitation. Instead, our ruling was based on the fact that competent evidence existed in the record to support the trial court’s findings, and ultimate determination, on the cohabitation issue in that case. This Court has emphasized that “isolated factors” do not control the determination of whether a former spouse and another person have assumed the marital rights, duties, and obligations which are usually manifested by married people. *See Fletcher*, 123 N.C. App. at 750, 474 S.E.2d at 806. Just as the existence of competent evidence in the record supporting the trial court’s finding of cohabitation in *Rehm* dictated that we affirm its ruling in that case, so too the presence of competent evidence in the record supporting the trial court’s determination of non-cohabitation in the present case likewise compels us to affirm its decision.

Defendant’s argument invites this Court to categorically hold that the mere presence of certain, isolated factors – such as those found to exist in *Rehm* – automatically mandates a finding of cohabitation. We decline the invitation to do so as such a ruling would conflict with the dual tenets that (1) courts must consider the totality of the circumstances in

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determining whether there has been an assumption of the marital rights, duties, and obligations that are usually manifested by married people; and (2) a trial court's ultimate conclusion on the issue of cohabitation must be affirmed on appeal when supported by competent evidence and adequate findings.

Here, we cannot conclude that there was no competent evidence to support the trial court's findings of fact regarding cohabitation or that those factual determinations were insufficient to support the trial court's ultimate legal conclusion that plaintiff was not cohabitating with Robinson. Consequently, defendant's argument is overruled.

B. Challenge to Specific Findings of Fact

[2] Defendant also argues that several specific findings of fact by the trial court, weighing in favor of non-cohabitation, are not supported by the evidence in the record. In particular, defendant challenges the sufficiency of the evidence with respect to the trial court's findings that (1) Robinson maintains his "own residence"; (2) he does not keep clothes or medicine at plaintiff's residence; (3) he does not do his laundry at plaintiff's residence; and (4) he has collected plaintiff's mail "a few times."

Having carefully reviewed the extensive record in this case, we conclude that these findings are, in fact, supported by competent evidence with the exception of the finding that Robinson does not do his laundry at plaintiff's house. Although plaintiff testified at trial that she did her own laundry, there is no indication in the record as to who does Robinson's laundry or where it is done.

Defendant, however, has failed to demonstrate how he has been prejudiced by this erroneous finding. As this Court has stated, "the appellant has the burden not only to show error, but also to show that the alleged error was prejudicial and amounted to the denial of some substantial right." *Brown v. Boney*, 41 N.C. App. 636, 647, 255 S.E.2d 784, 790, *disc. review denied*, 298 N.C. 294, 259 S.E.2d 910 (1979); *accord Crenshaw v. Williams*, 211 N.C. App. 136, 144, 710 S.E.2d 227, 233 (2011) (declining to overturn custody order where appellant "fail[ed] to provide any explanation" as to how allegedly erroneous findings were material or prejudicial).

Despite the lack of evidentiary support for this particular finding, we believe that the trial court's remaining findings – set out above – were based on competent evidence and supported the trial court's conclusion of non-cohabitation. *See In re Estate of Mullins*, 182 N.C. App. 667, 670-71, 643 S.E.2d 599, 601 ("In a non-jury trial, where there are sufficient

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findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions." (citation and quotation marks omitted)), *disc. review denied*, 361 N.C. 693, 652 S.E.2d 262 (2007).

C. Subjective Intent Regarding Cohabitation

[3] Defendant next argues that the trial court should have made additional findings on the issue of cohabitation addressing plaintiff's and Robinson's subjective intent. Defendant's argument on this issue refers to this Court's discussion in *Oakley* where we found the standards used in determining whether separated spouses have reconciled "instructive in determining what constitutes marital rights, duties and obligations under N.C. Gen. Stat. § 50-16.9." *Oakley*, 165 N.C. App. at 862, 599 S.E.2d at 928.

The *Oakley* Court summarized the law as follows:

Our courts use one of two methods to determine whether the parties have resumed their marital relationship, depending on whether the parties present conflicting evidence about the relationship. In the first test, . . . where there is objective evidence, that is not conflicting, that the parties have held themselves out as man and wife, the court does not consider the subjective intent of the parties. The other test . . . addresses cases where the objective evidence of cohabitation is conflicting and thus allows for an evaluation of the parties' subjective intent.

Id. at 863, 599 S.E.2d at 928 (internal citations omitted).

Defendant contends that the trial court erred by failing to make any findings regarding plaintiff's and Robinson's subjective intent under the methodology articulated in *Oakley*. Defendant, however, misinterprets *Oakley*. As we explained in the reconciliation context, these are *alternative* methods of proof. *See Schultz v. Schultz*, 107 N.C. App. 366, 369, 420 S.E.2d 186, 188 (1992) ("[T]hese two lines of cases establish two alternative methods by which a trial court may find that separated spouses have reconciled."), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993)). Here, it is clear that the trial court was able to rule on the cohabitation issue based on the objective facts introduced into evidence by the parties without the need to consider plaintiff's and Robinson's subjective intent regarding the nature of their relationship.

Notably, neither in his brief nor at oral argument before this Court did defendant contend that the objective evidence in this case was

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conflicting. To the contrary, defendant repeatedly asserts in his brief that the objective evidence is “overwhelming” and “not conflicting.” Moreover, a review of the trial transcript fails to reveal a single instance where defendant argued to the trial court that the evidence was conflicting.

Similarly, at the hearing on defendant’s motion to amend the alimony order, defendant made no argument that the evidence was in conflict or that the trial court should amend its order to include findings on the issue of subjective intent. Tellingly, the exhibit of proposed additional findings offered by defendant in support of his motion to amend does not include a single finding concerning subjective intent.

Defendant cannot claim that he was prejudiced by the trial court’s failure to make findings on the issue of subjective intent when the record fails to show that he ever requested that the court do so. *See Griffin v. Griffin*, 237 N.C. 404, 410, 75 S.E.2d 133, 137 (1953) (“It is too late for the plaintiff on appeal to complain of failure of the court to find specific facts, when no specific request therefor was made at the hearing.”).

Finally, it is well established that when the facts found by the trial court are “sufficient to determine the entire controversy,” the court’s “failure to find other facts is not error.” *Graybar Elec. Co. v. Shook*, 283 N.C. 213, 217, 195 S.E.2d 514, 516 (1973). Because the trial court’s findings addressing the “objective evidence” are sufficient to support its conclusion that cohabitation did not occur, it did not err by failing to make findings regarding subjective intent.

D. Exclusion of Testimony of Private Investigator

[4] Defendant also argues that the trial court erred in excluding the testimony of his private investigator, Sandy Russell. At trial, Robinson was asked on cross-examination whether he remembered having a conversation outside of plaintiff’s residence with Russell, who was posing as a woman looking for her lost dog. Robinson testified that he remembered having such a conversation but, when asked, denied having told Russell that he lived at plaintiff’s house with his “wife” and “son.”

When defendant subsequently called Russell to testify about the conversation, plaintiff objected, arguing that Russell’s testimony was hearsay and was admissible only to the extent it corroborated Robinson’s testimony. The trial court ruled that Russell could testify to the extent her testimony “corroborate[d] Mr. Robinson’s testimony,” but stated that any non-corroborative testimony would not be considered. Russell then testified that during her conversation with Robinson, he told her that he lived in plaintiff’s home and that he lived there with his wife and son.

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On appeal, defendant argues that Russell's testimony was admissible both as (1) substantive evidence of Robinson's state of mind under N.C. R. Evid. 803(3); and (2) evidence of a prior inconsistent statement for impeachment purposes. Defendant, however, did not argue before the trial court that Russell's testimony was admissible under Rule 803(3)'s hearsay exception. When plaintiff objected to the admission of Russell's testimony at trial, defendant stated: "My only argument would be that it's admissible for purposes of impeachment."

It is well-established that "a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court." *Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003), *disc. review denied*, 358 N.C. 550, 600 S.E.2d 469 (2004). Consequently, the admissibility of Russell's testimony under one of the exceptions to the hearsay rule is not properly before this Court. *See State v. Hester*, 343 N.C. 266, 271, 470 S.E.2d 25, 28 (1996) (holding defendant was precluded from arguing on appeal that excluded testimony was admissible under hearsay exception when he did not raise argument at trial).

As to defendant's argument that Russell's testimony was admissible for impeachment purposes, we need not address this contention because even assuming *arguendo* that the trial court erred in excluding the evidence for any purpose other than corroboration of Robinson's testimony, defendant has failed to demonstrate on appeal that he was prejudiced as a result of the alleged error. As this Court has emphasized, "[t]he exclusion of evidence constitutes reversible error only if the appellant shows that a different result would have likely ensued had the error not occurred." *Forsyth County v. Shelton*, 74 N.C. App. 674, 678, 329 S.E.2d 730, 734, *appeal dismissed and disc. review denied*, 314 N.C. 328, 333 S.E.2d 484 (1985).

In his brief, defendant does not raise the issue of prejudice, instead limiting his argument to the assertion that Russell's testimony was "admissible" and thus "[i]t was error for the court to strike [her] testimony . . ." Accordingly, defendant has failed to establish that he is entitled to a new alimony hearing. *See Nunn v. Allen*, 154 N.C. App. 523, 531, 574 S.E.2d 35, 41 (2002) (holding appellant was not entitled to new trial where he "neither argued nor demonstrated that he was prejudiced by" trial court's evidentiary ruling), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 630 (2003). For these reasons, this argument is overruled.

E. Motion to Amend Order

[5] Defendant further argues that the trial court erred in denying his motion, filed pursuant to N.C. R. Civ. P. 52 and N.C. R. Civ. P. 59, to

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amend the alimony order. Defendant's argument amounts to a one-sentence reference to his previous contention that the trial court erred in determining that plaintiff did not engage in cohabitation. As defendant fails to present any additional argument regarding his motion to amend, we conclude that the trial court did not err in denying his motion. *See Everhart v. O'Charley's Inc.*, 200 N.C. App. 142, 161, 683 S.E.2d 728, 742 (2009) ("[Defendant's] arguments . . . repeat the contentions we found unpersuasive regarding its JNOV motion. As [defendant] fails to make any separate and distinct arguments in support of its motion for a new trial, we hold that the trial court did not err in denying [defendant's] motion for a new trial."). The trial court's 8 February 2012 alimony order is, therefore, affirmed.

II. 30 April 2012 Order**A. Availability of Retroactive Alimony under N.C. Gen. Stat. § 50-16.3A**

[6] Defendant also appeals from the trial court's 30 April 2012 order in which the court ordered, among other things, that defendant pay retroactive alimony for the period 3 April 2009 to 25 January 2010. Defendant contends that the current statute governing the award of alimony, N.C. Gen. Stat. § 50-16.3A (2011), does not permit the trial court to award alimony for the period between the date of separation and the date the alimony claim is filed. We disagree.

In construing the prior version of the statute governing alimony, N.C. Gen. Stat. § 50-16.3 (repealed by 1995 N.C. Sess. Laws ch. 319, § 1, effective 1 October 1995), this Court held that a dependent spouse may be entitled to alimony not merely from the date the claim for alimony is filed but rather from the date of the parties' separation. *Austin v. Austin*, 12 N.C. App. 390, 393, 183 S.E.2d 428, 430 (1971); *accord Stickel v. Stickel*, 58 N.C. App. 645, 648, 294 S.E.2d 321, 323 (1982) (relying on *Austin* for this proposition); *Gardner v. Gardner*, 40 N.C. App. 334, 341, 252 S.E.2d 867, 871-72 (same), *disc. review denied*, 297 N.C. 299, 254 S.E.2d 917 (1979); *Guy v. Guy*, 27 N.C. App. 343, 346, 219 S.E.2d 291, 293-94 (1975) (same).

In 1995, the General Assembly "effect[ed] a 'wholesale revision' in North Carolina alimony law" by repealing § 50-16.3 and replacing it with § 50-16.3A. *Brannock v. Brannock*, 135 N.C. App. 635, 641, 523 S.E.2d 110, 114 (1999) (quoting Sally B. Sharp, *Step by Step: The Development of the Distributive Consequences of Divorce in North Carolina*, 76 N.C. L. Rev. 2018, 2018 (1998)), *disc. review denied*, 351 N.C. 351, 543 S.E.2d 123 (2000). In *Brannock*, this Court held that the 1995 changes

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to the alimony statute were so extensive that a claim for alimony under the current statute is “fundamentally different” than a claim under the prior, now repealed, statute. *Id.* at 646, 523 S.E.2d at 117 (holding alimony claim filed under prior alimony statute and voluntarily dismissed under N.C. R. Civ. P. 41 could not be re-filed within one year under current statute because second claim “constituted a new and distinct claim for alimony”).

Defendant relies on our holding in Brannock to argue that under the current statute – § 50-16.3A – alimony may not be awarded “retroactively.” However, while Brannock does discuss the changes in North Carolina law regarding alimony, nothing in the opinion references any intent by the General Assembly to eliminate retroactive alimony or to abrogate our rulings in Austin and its progeny. *See State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763 (1992) (explaining that courts may, in interpreting statutes, “presume that the legislature acted with full knowledge of prior and existing law and its construction by the courts”).

Defendant cites no other authority in support of his position. We agree with Professor Reynolds’ statement in her treatise that “[t]he 1995 legislation did not change the law on the period for which the court may order alimony. The court may order the award *effective* from the date of separation if the facts so warrant.” *Lee’s Family Law* § 9.50, at 405 (emphasis added). Accordingly, we conclude, consistent with longstanding precedent, that § 50-16.3A authorizes the trial court, in appropriate circumstances, to award alimony for the period between the parties’ date of separation and the filing of the claim for alimony.

B. Sufficiency of Findings Regarding Retroactive Alimony

[7] Defendant’s final argument on appeal is that the trial court’s findings are insufficient to support its award of retroactive alimony. In light of the circumstances in this case, we are not persuaded.

By consent order entered 16 February 2010, defendant agreed to pay \$5,000 per month in postseparation support for 24 months, beginning on 25 January 2010. The trial court entered on 8 February 2012 its order in which it rejected defendant’s defense of cohabitation and determined that plaintiff was entitled to alimony, with payment beginning on 1 February 2012 – corresponding to the termination of post-separation support payments. Due to an apparent oversight, although the parties presented evidence relating to the period from 3 April 2009 to 25 January 2010, the trial court did not include this period within its alimony award in the 8 February 2012 order. After plaintiff filed a

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motion requesting that the trial court amend its 8 February 2012 order to include the retroactive alimony, the trial court, rather than amending the order, simply entered another order in which it awarded plaintiff the requested retroactive alimony.

Reading the two orders together, we believe that the trial court's findings are sufficient to support the entirety of the award. *See Bailey v. State*, 352 N.C. 127, 135, 529 S.E.2d 448, 453-54 (2000) (construing multiple orders together to clarify what had been determined by trial court). The trial court's findings regarding plaintiff's entitlement to alimony as well as its findings on the amount, duration, and manner of payment are set out in its 8 February 2012 order. *See* N.C. Gen. Stat. § 50-16.3A(c) ("The court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment."). The 30 April 2012 order simply awards plaintiff alimony for a period of time that was apparently omitted through inadvertence from the 8 February 2012 order.

Notably, defendant does not contend – beyond his argument regarding cohabitation – that the trial court's findings in either of its orders lack an adequate evidentiary basis or are insufficient to support the entire alimony award. Rather, defendant simply argues that, in isolation, the court's 30 April 2012 order does not contain adequate findings to support the award of retroactive alimony. The two orders, however, when read in conjunction, do just that. As such, we overrule defendant's argument and affirm the trial court's 30 April 2012 order.

Conclusion

For the reasons stated above, we affirm both the trial court's 8 February 2012 and 30 April 2012 orders.

AFFIRMED.

Judges HUNTER and McCULLOUGH concur.

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STATE OF NORTH CAROLINA

v.

TAMARA MCDANIEL BEAN

No. COA12-697-2

Filed 21 May 2013

1. Constitutional Law—right to silence—no probable impact on jury verdict

The trial court did not err in a first-degree murder case by concluding that the State did not use defendant's constitutional right to silence against her. A review of the totality of the evidence revealed that the challenged instances did not have a substantial or probable impact on the jury's verdict.

2. Criminal Law—prosecutor's argument—defendant's right to plead not guilty

The trial court did not err in a first-degree murder case by concluding that the State did not violate defendant's right to plead not guilty by commenting during closing arguments that despite the mounting evidence against her, defendant could still say she did not do it. The jury was properly instructed regarding the State's burden of proof and defendant's right to plead not guilty.

Appeal by defendant from judgment entered 2 September 2011 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 14 November 2012.

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

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

ELMORE, Judge.

Tamara McDaniel Bean (defendant) appeals from a judgment entered upon a jury conviction of first-degree murder, sentencing her to life imprisonment without parole. This court initially heard the appeal on 14 November 2012, and we concluded that defendant received a trial

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free from prejudicial error.¹ Our Supreme Court then granted defendant's petition for discretionary review for the limited purpose of remanding the case to this Court for reconsideration of 1) the instruction and evidentiary issues in light of both *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012) and the Rules of Appellate Procedure, Rule 10(a)(4), and 2) the closing argument issue in light of *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1 (2005). After careful consideration, we again conclude that defendant received a trial free from prejudicial error.

I. Background

Defendant and Randy Charles (the victim) were involved in a long-term romantic relationship. Although they never married, defendant often referred to the victim as her husband, and in 1984 they began living together. They lived together continuously from that time until the victim's death in 2008. Towards the end of their time together, the couple resided in Randolph County. Defendant's grandson, Thomas Simons, lived with them.

By all accounts, defendant and the victim had a tumultuous relationship, marked by regular fights and threats to leave each other. Their fights were, at times, violent, but neither defendant nor the victim ever reported domestic violence. The couple's final fight occurred on 30 September 2008, and resulted in defendant fatally shooting the victim. She was arrested and charged with first-degree murder. The case came on for trial on 22 August 2011. Defendant pled not guilty and testified on her own behalf, asserting that she killed the victim in self-defense.

On 2 September 2011, defendant was convicted by a jury of first-degree murder. The trial court then entered judgment, sentencing defendant to life imprisonment without parole.

II. Analysis

On remand from our Supreme Court, we will address two constitutional arguments advanced by defendant. She argues 1) that the State used her constitutional right to silence against her as impeachment evidence and as substantive evidence of her guilt and 2) that during closing arguments for the State, the prosecutor commented on her right to plead not guilty, in violation of her constitutional rights.

We begin our review by first noting that in our initial review of these arguments we concluded that defendant failed to raise them at

1. *State v. Bean*, No. COA 12-697, 2012 N.C. App. LEXIS 1423 (filed 18 December 2012) (unpublished).

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trial. Thus, we declined to address these arguments as this Court held in *State v. Jones* that “constitutional arguments not raised at trial are not preserved for appellate review” and they “will not be considered for the first time on appeal, not even for plain error[.]” ___ N.C. App. ___, ___, 715 S.E.2d 896, 900-01 (2011) (quotations and citations omitted). Indeed, it is clear from the record that defendant made no objection or argument with regards to these issues at trial. Thus, we maintain that our holding in *State v. Jones* is controlling in this instance, and that customarily we are barred from addressing these constitutional issues for the first time on appeal, even for plain error. However, given that our Supreme Court has specifically requested that we review these unpreserved constitutional arguments, we will now do so. We concede that these arguments, while framed by defendant under her own words as constitutional issues, do address evidentiary matters which could lend themselves to plain error review.

A. Right to silence

[1] Defendant first argues that the State used her constitutional right to silence against her in several specific instances: 1) when during direct examination of Nurse Barber, who treated defendant, the State elicited testimony from the nurse that defendant didn’t say anything to her about self-defense; 2) when during cross-examination of defendant the State asked her a series of questions attempting to show that she was uncooperative with the EMT and police because she gave them a wrong name and refused to answer their questions in their attempt to aid her; 3) when during cross-examination of Dr. Helsabeck, who treated defendant at the hospital, the State asked Dr. Helsabeck if defendant mentioned self-defense; 4) when during closing arguments the prosecutor mentioned that immediately after the shooting and while still at the scene of the crime, defendant refused to give her version of the events which led to the shooting.

Turning to *State v. Lawrence*, we note that under a plain error review “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.” 365 N.C. at 518, 723 S.E.2d at 334 (quotations and citations omitted). Here, upon review of the totality of the evidence, we are unable to conclude that the challenged instances had a substantial or probable impact on the jury’s verdict. At trial, evidence was admitted tending to prove that in two instances defendant admitted her guilt. Specifically, she told a nurse soon after the shooting and before she was charged with murder that “I killed my husband just because I finally had enough of him.” She also told the nurse “I’m guilty.” Evidence

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was also admitted by the State tending to prove that in the months leading up to his death, the victim was frightened by defendant and fearful that she would kill him. Thus, in light of this evidence we conclude that the prosecutor's comments and questions regarding whether defendant mentioned self-defense prior to trial had little bearing on the jury finding defendant guilty.

B. Right to plead not guilty

[2] Defendant next argues that the State violated her right to plead not guilty by commenting during closing arguments that despite the mounting evidence against her, defendant could "still say I didn't do it. And that's what we've got here." We have been instructed to review the prosecutor's comments in light of our Supreme Court's holding in *State v. Campbell*.

In *Campbell*, the defendant was convicted of first-degree murder and sentenced to death after officers discovered a rifle, an axe, and the wallets of two deceased men in the trunk of the vehicle in which the defendant was driving. 359 N.C. at 656-57, 617 S.E.2d at 9-10. On appeal to our Supreme Court, the defendant challenged, in part, the prosecutor's comments during the State's closing arguments. *Id.* at 675, 617 S.E.2d at 21. There, our Supreme Court noted that the defendant "did not object" to the comments at trial and thus must show that the comments were "so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*." *Id.* at 676, 617 S.E.2d at 21. Further, "[t]o make this showing, defendant must demonstrate that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *Id.* Our Supreme Court then noted that the jury in *Campbell* received proper instructions from the trial court and when "viewed as a whole, and in light of the wide latitude afforded the prosecution in closing argument, the prosecutor's challenged arguments did not so infuse the proceeding with impropriety as to impede defendant's right to a fair trial." *Id.* at 679, 617 S.E.2d at 23.

Turning to the case at issue, it is clear from the record that the jury was properly instructed regarding the State's burden of proof and defendant's right to plead not guilty. Specifically, the trial court told the jury that "the State must prove to you that Ms. Bean is guilty beyond a reasonable doubt" and that Ms. Bean "has entered a plea of not guilty" and "she is not required to prove her innocence." Given these proper instructions and the amount of evidence presented against defendant tending to prove her guilt, we are unable to agree that the prosecutor's comments entitle defendant to a new trial.

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III. Conclusion

In sum, upon limited remand from our Supreme Court, we again conclude that defendant received a fair trial, free from prejudicial error.

No prejudicial error.

Judges STROUD and DAVIS concur.

STATE OF NORTH CAROLINA

v.

MARIO BELL, DEFENDANT

No. COA12-1514

Filed 21 May 2013

1. Robbery—dangerous weapon—evidence—gun dangerous weapon

The trial court properly denied defendant’s motion to dismiss the charge of robbery with a dangerous weapon. Although there was evidence that the gun used by defendant was unloaded, there was evidence that defendant used a dangerous weapon to take money from the victim.

2. Robbery—dangerous weapon—jury instruction—weapon displayed

The trial court did not err in a robbery with a dangerous weapon case by failing to instruct the jury on footnote six of element seven of the jury instructions. The evidence showed that defendant did display and threaten to use the weapon by pointing it at the victim; thus, the “mere possession of the firearm” was not an issue in the case.

3. Robbery—dangerous weapon—jury instructions—not misleading

The trial court’s instructions in a robbery with a dangerous weapon case were not erroneous as there was no reasonable cause to believe the jury was misled or misinformed by them.

4. Evidence—victim impact testimony—not prejudicial

The trial court did not commit prejudicial error in a robbery with a dangerous weapon case by allowing the State to present victim

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impact testimony at trial. Even assuming *arguendo* that the testimony was inadmissible as victim impact testimony, the evidence did not prejudice defendant.

Appeal by defendant from judgment entered on or about 25 July 2012 by Judge James U. Downs in Superior Court, Rutherford County. Heard in the Court of Appeals 11 April 2013.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender John F. Carella, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgment convicting him of robbery with a dangerous weapon. For the following reasons, we find no error.

I. Background

During defendant's trial, defendant testified that on 13 October 2011 he took a gun from his grandfather's house and unloaded it, leaving the bullets in his car. Defendant then took the gun and walked into Bostic Insurance. Ms. Christine Yount, owner of Bostic Insurance, testified that defendant came into her office, pointed a gun at her, and demanded money; Ms. Yount gave defendant the money she had in her cash drawer and defendant left. Defendant further testified that upon leaving Bostic Insurance he saw the police and ran into the woods where he left his hoodie and gun and jumped off of an embankment. The police caught defendant and arrested him. A jury found defendant guilty of robbery with a dangerous weapon. The trial court sentenced defendant to 60 to 81 months imprisonment. Defendant appeals.

II. Motion to Dismiss

Defendant first contends that "the trial court erred by denying . . . [his] motion to dismiss the charge of armed robbery with a firearm when all of the evidence showed that the firearm in question was not loaded." (Original in all caps.)

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

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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. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted).

The elements of robbery with a dangerous weapon are: (1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened.

State v. Gettys, ___ N.C. App. ___, ___, 724 S.E.2d 579, 584 (2012) (citation and quotation marks omitted).

In *State v. Joyner*, the defendant made similar arguments to the one before us. 312 N.C. 779, 781-84, 324 S.E.2d 841, 843-45 (1985). Wearing a mask and carrying a rifle, the defendant in *Joyner* approached a man and demanded money; the man complied and defendant ran. *Id.* at 780-81, 324 S.E.2d at 843. The defendant later confessed to the robbery and showed the police where he had hidden the rifle. *Id.* at 781, 324 S.E.2d at 843. The police determined that because the rifle had a missing firing pin it would not fire. *Id.* The defendant was convicted of armed robbery and on appeal argued

that the State's evidence conclusively showed that the rifle he used was not loaded and did not have a firing pin at the time of the robbery. The defendant argue[d] that, this being the case, the State's evidence conclusively showed that the robbery was not committed in such manner as to endanger or threaten the life of any person.

Id. at 781, 324 S.E.2d at 843. The defendant further contended that due to the evidence regarding the inability of the rifle to fire the jury should only have been instructed on the crime of common law robbery. *Id.* at 784, 324 S.E.2d at 845.

Our Supreme Court explained,

In determining whether a robbery with a particular implement constitutes a violation of this section, the

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determinative question is whether the evidence was sufficient to support a jury finding that a person's life was in fact endangered or threatened.

When a person commits a robbery by the use or threatened use of an implement which appears to be a firearm or other dangerous weapon, the law presumes, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be—an implement endangering or threatening the life of the person being robbed. Thus, where there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon and nothing to the contrary appears in evidence, the presumption that the victim's life was endangered or threatened is mandatory. If the jury in such cases finds the basic fact (that the robbery was accomplished with what appeared to the victim to be a firearm or other dangerous weapon), the jury must find the elemental fact (that a life was endangered or threatened). This is so because, when no evidence is introduced tending to show that a life was not endangered or threatened, no issue is raised as to the nonexistence of the elemental facts and the jury may be directed to find the elemental facts if it finds the basic facts to exist beyond a reasonable doubt.

When considering the validity of a mandatory presumption, courts generally examine the presumption on its face and without regard for the facts of the particular case to determine the extent to which the basic and elemental facts coincide. Viewing the mandatory presumption under consideration here in such light, we conclude that, when no evidence to the contrary is introduced, it will be unerringly accurate in the run of cases to which it may be applied and, standing alone, will support a jury's finding that a person's life was endangered or threatened beyond a reasonable doubt. Therefore, the presumption is valid. In such cases, the trial court correctly permits the jury to consider possible verdicts of guilty of armed robbery or not guilty.

The mandatory presumption under consideration here, however, is of the type which merely requires the defendant to come forward with some evidence (or take advantage of evidence already offered by the prosecution)

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to rebut the connection between the basic and elemental facts. Therefore, when any evidence is introduced tending to show that the life of the victim was not endangered or threatened, the mandatory presumption disappears, leaving only a mere permissive inference. The permissive inference which survives permits but does not require the jury to infer the elemental fact (danger or threat to life) from the basic fact proven (robbery with what appeared to the victim to be a firearm or other dangerous weapon).

The inference remaining being permissive, the trial court must analyze its application to the case at hand and permit the jury to make the inference only if, in light of all the evidence, there continues to be a rational connection between the basic fact proved and the elemental fact to be inferred, and the latter is more likely than not to flow from the former. Although the burden of proof beyond a reasonable doubt always remains upon a State, the defendant has the burden of demonstrating to the court the invalidity of the permissive inference as applied in his case. If the defendant makes such a showing, the trial court may not allow the inference to be made by the jury.

Id. at 782-84, 324 S.E.2d at 843-45 (citations, quotation marks, and ellipses omitted).

In *Joyner*, our Supreme Court went on to conclude that in that case the trial court had properly instructed on both armed robbery and common law robbery because while there was some evidence that the rifle could not fire at the time of the robbery due to the missing firing pin, the evidence also showed that the rifle was not found until six hours after the incident when defendant led the police to it and as such the defendant could have removed the firing pin after the robbery. *Id.* at 781-86, 324 S.E.2d at 843-46.

Defendant directs this Court's attention to the evidence showing that once defendant left Bostic Insurance he was almost immediately seen by the police, chased down, and quickly apprehended; the police recovered his hoodie and gun without any bullets in or around the gun; and defendant's father's girlfriend, father, and grandfather testified that they recovered bullets from defendant's car where defendant had left them after unloading the gun. Nonetheless, when "consider[ing] the evidence in the light most favorable to the State and [giving] the State . . . every reasonable inference to be drawn from that evidence[.]" *Johnson*, 203

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N.C. App. at 724, 693 S.E.2d at 148, the evidence also demonstrates that defendant was aware from almost the moment he left Bostic Insurance that the police were watching him; defendant chose to flee the police; and furthermore defendant attempted to hide evidence by disposing of it in the woods. Based upon this evidence, we agree with *Joyner* that

[a]ll of the evidence to which the defendant directs our attention, when taken together, amounted to some evidence from which the jury could but was not required to infer that the [gun] was unloaded . . . at the time of the robbery and that no life was endangered or threatened. As a result, the mandatory presumption of danger or threat to life arising from the defendant's use of what appeared to the victim to be a firearm or other dangerous weapon disappeared leaving a mere permissive inference to that effect. The result was that the jury was free to infer either that the disputed element of the offense of armed robbery did or did not exist. The trial court correctly provided for both possibilities when it properly instructed the jury that they were to consider possible verdicts of guilty of armed robbery, guilty of the lesser included offense of common law robbery and not guilty. The evidence relied upon by the defendant, however, was not so compelling as to make the use of the permissive inference of danger or threat to life inappropriate in the present case or to require the trial court to enter a directed verdict in the defendant's favor on the charge of armed robbery.

Joyner, 312 N.C. at 786, 324 S.E.2d at 846. Accordingly, the trial court properly denied defendant's motion to dismiss the charge of armed robbery as there was evidence defendant used a dangerous weapon to take money from Ms. Yount. *See Gettys*, ___ N.C. App. at ___, 724 S.E.2d at 584.

III. Jury Instructions

Defendant next challenges the jury instructions. "Arguments challenging the trial court's decisions regarding jury instructions are reviewed de novo by this Court." *State v. Davis*, ___ N.C. App. ___, 738 S.E.2d 417, 419 (2013) (citation, quotation marks, and brackets omitted). We consider jury instructions

contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review,

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it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. Ballard, 193 N.C. App. 551, 559, 668 S.E.2d 78, 83 (2008) (citation omitted).

A. North Carolina Pattern Instructions

[2] Defendant contends that the trial court erred in failing to instruct the jury on footnote six of element seven of the jury instructions for robbery with a dangerous weapon. Element seven reads, “that the defendant obtained the property by endangering or threatening the life of [that person] [another person] with the firearm.” N.C.P.I.-Crim. 217.20. Footnote six to element seven reads, “Where use of a firearm is in issue, give the following charge: ‘Mere possession of the firearm does not, in itself, constitute endangering or threatening the life of the victim.’ *State v. Gibbons*, 303 N.C. 484 (1981).” N.C.P.I.-Crim. 217.20 n. 6. As it relates to footnote six, *State v. Gibbons* discusses whether “mere possession” of a firearm without displaying or using it during the course of a robbery will support a charge of armed robbery. *See Gibbons*, 303 N.C. 484, 488-91, 279 S.E.2d 574, 577-79 (1981). But here the evidence shows defendant did display and threaten to use the weapon by pointing it at Ms. Yount; thus, the “mere possession of the firearm” is not an issue in this case. N.C.P.I.-Crim. 217.20 n.6. Accordingly, this argument is overruled.

B. Additional Instructions

[3] Defendant also contends the trial court erred when it instructed the jury,

Now, members of the jury, a robbery victim; that is, one who is a victim of a robbery – more particularly an armed robbery – should not have to force the issue of whether the instrument being used actually is loaded and can shoot a bullet. In an armed robbery case, the jury may conclude that the weapon is what it appeared to the victim to be – a loaded gun. In the absence of any evidence to the contrary if, however, there is any evidence that weapon was, in fact, not what it appeared to be; that is, a loaded gun to the victim, the jury must determine what, in fact, the instrument was. It is for the jury to determine the nature of the weapon and how it was used, and that you could, but you are not required, to infer

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from the appearance of the instrument to the victim or alleged victim that it was a firearm or otherwise dangerous weapon[.]

and erred by adding the word “otherwise” to the instructions when the trial court stated,

or that it reasonably appeared to the alleged victim in this case – Ms. Yount – that a dangerous weapon was being used, in which case you may infer – you are not required to do but you may infer that the instrument was what the defendant’s conduct represented it to be, otherwise, the dangerous weapon is a weapon that is likely to cause death or serious bodily injury[.]

Defendant contends that “[t]he court’s instructions here . . . allowed the jury to ignore the overwhelming evidence that the gun was unloaded” and “the court presented the definition of dangerous weapon as if it were optional.” We disagree. The trial court plainly stated that it was “for the jury to determine” whether the firearm was or was not a dangerous weapon. We have viewed the jury instructions in their entirety and conclude that there is “no reasonable cause to believe the jury was misled or misinformed.” *Ballard*, 193 N.C. App. at 559, 668 S.E.2d at 83.

IV. Victim Impact Testimony

[4] Defendant also argues that “the trial court erred by allowing the State to present victim impact testimony at trial.” (Original in all caps.) Defendant contends that “the prosecutor unabashedly pursued irrelevant evidence of the emotional, psychological, and financial impact the crime had on [the victims]” and that the “jury instructions emphasiz[ed] the victims’ perspective[.]” Defendant contends the errors “prejudiced . . . [him] and had a probable impact on the jury’s verdict of guilty[.]” Even if we assume *arguendo* that the testimony of the victims went beyond what would be required to describe their experience when defendant entered Bostic Insurance with a gun and therefore would be inadmissible as victim impact testimony, we do not believe that this evidence prejudiced defendant. Considering the overwhelming evidence of the crime, including testimony from eyewitnesses and defendant’s own testimony, we do not conclude that defendant was prejudiced by any statements regarding the victims’ emotions. This argument is overruled.

V. Conclusion

For the foregoing reasons, we find no error.

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NO ERROR.

Judges ELMORE and STEELMAN concur.

STATE OF NORTH CAROLINA
v.
JOHN G. CATHCART, DEFENDANT

No. COA12-1478

Filed 21 May 2013

1. Motor Vehicles—impaired driving—sequential test results

The trial court erred in an impaired driving prosecution by concluding that Intoximeter test results were not sequential for the purposes of N.C.G.S. § 20-139.1(b3). The fact that the machine timed out and was restarted was not material to the determination of whether the tests were sequential; the only reason the tests were not immediately consecutive was because defendant gave an insufficient breath sample. Neither the trial court nor defendant cited any statute, regulation, or other authority that required that the sequential tests actually appear on the same test result ticket.

2. Motor Vehicles—impaired driving—testing—observational period

The trial court erred in an impaired driving prosecution by concluding that the trooper failed to follow the proper procedure by not conducting another observational period after the test machine timed out. Defendant was under constant observation by the trooper prior to the second test and there was no evidence that defendant ate, drank, smoked, vomited, or did anything that might require a break before the subsequent test.

Appeal by State from Order entered 5 November 2012 by Judge Patrice A. Hinnant in Superior Court, Forsyth County. Heard in the Court of Appeals 24 April 2013.

Attorney General Roy A. Cooper, III by Assistant Attorney General Carrie D. Randa, for the State.

Law Offices of J. Darren Byers, P.A. by J. Darren Byers, for defendant-appellee.

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STROUD, Judge.

The State appeals from an order entered 5 November 2012 by the Superior Court, Forsyth County, granting a motion to suppress breath test results from an Intoximeter EC/IR II on the grounds that the analyst failed to follow the testing procedure outlined in N.C. Gen. Stat. § 20-139.1 and N.C. Admin. Code tit. 10A, r. 41B.0322. For the following reasons, we reverse.

I. Background

On 14 October 2010, John Cathcart (“defendant”) was arrested and charged with one count of driving while impaired by Trooper T.V. Trollinger of the North Carolina State Highway Patrol. Trooper Trollinger took defendant to the Winston-Salem police department for breath alcohol testing using the Intoximeter EC/IR II. Trooper Trollinger, a certified chemical analyst, had been trained to operate the Intoximeter EC/IR II machine. The Intoximeter measures the concentration of alcohol in the breath.

The trooper read defendant his rights and advised him that he could wash his mouth out and remove his dentures prior to the breath test. After being advised of his rights, defendant told the trooper that he wanted a witness present. Defendant called his witness at 10:47 p.m., but after forty-one minutes no witness had arrived. While waiting for defendant’s witness to arrive, Trooper Trollinger observed defendant to make sure he did not eat, drink, smoke, or vomit before providing a breath sample.

At 11:27 p.m., Trooper Trollinger administered the first breath test, which returned a result of .10 grams of alcohol per 210 liters of breath. When the trooper asked for a second breath sample, defendant did not blow hard enough and the Intoximeter returned an “insufficient sample” result. At that point, the Intoximeter timed out and printed out the first test result ticket, which showed one valid result and one insufficient sample result. Trooper Trollinger reset the machine, re-entered defendant’s information, and asked defendant to provide another breath sample. He did not wait for any period of time before starting the second test. The next sample was enough for the Intoximeter to measure and it returned a concentration of .09. Because this second test was within .02 of the first test, Trooper Trollinger did not conduct a third test. The second valid sample was taken at 11:38 p.m. and printed on a second test result ticket.

Defendant filed a motion to suppress the test results on 1 May 2012. On 12 June 2012, the Superior Court, Forsyth County, held a hearing on defendant’s motion and took testimony from Trooper Trollinger and Paul

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Glover, head of Forensic Tests for Alcohol Branch in the Department of Health and Human Services. Defendant argued that the trooper failed to follow proper procedures in administering the test, especially in that Trooper Trollinger failed to conduct another observational period before starting the second test. The State, supported by the testimony of Trooper Trollinger and Mr. Glover, argued that there was no need for a second observational period because the first period fulfilled the observational requirement.

At the end of the hearing, the trial court announced that it would grant defendant's motion to suppress. The State immediately gave oral notice of appeal in open court and then filed written notice of appeal on 5 July 2012. The trial court entered its written order, containing its findings of fact and conclusions of law, on 5 November 2012.

II. Order Suppressing Breath Tests

The trial court ordered the suppression of defendant's breath test results because it concluded that Trooper Trollinger did not follow the procedures outlined in N.C. Admin. Code tit. 10A, r. 41B.0322 (2009) and because he did not acquire two sequential breath samples on the same test record ticket. The State does not contest any of the trial court's findings of fact, but argues that the trial court erred in concluding that the breath samples were not sequential and that the Trooper failed to follow the proper procedure. We agree.

A. Standard of Review

Our review of an order granting a defendant's 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) (citations omitted).

However, when, as here, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed *de novo* and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

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State v. Biber, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

B. Analysis

[1] The trial court found the facts as summarized above and made the following conclusions of law:

1) Based on the foregoing findings of fact, the Court finds that the Intoximeter results for the Defendant are not admissible due to a subject refusal.

2) Further, the breath test results are not admissible as there are not 2 sequential breath test result[s] on either test record ticket introduced by the State. Before beginning the new testing of the defendant on the second test record ticket the defendant [sic] did not advise the defendant of his rights or conduct an observation period. As a result, the Trooper did not comply with 10A NCAC 41B .0322 for the operation procedures to be followed in using Intoximeters, Model Intox EC/IR II from the Department of Health and Human Services. Pursuant to 10A NCAC 41B .0322 and *State v. Shockley*, 210 NC App 431 (2009), since the proper operational procedures were not followed in using the Intox EC/IR II the breath test results of the Defendant are not admissible.

3) Accordingly, the Court must suppress any evidence of the breath test results from Defendant, John G. Cathcart.

The trial court concluded that neither of the two test results was admissible because neither was the lower of at least two sequential tests within a range of .02 grams and there was no evidence that defendant had refused a subsequent test. *See* N.C. Gen. Stat. § 20-139.1(b3) (2009). The State does not contest the court's findings on refusal. Therefore, the only question before us is whether the trial court correctly concluded that the two tests that returned results were not sequential for purposes of N.C. Gen. Stat. § 20-139.1(b3) and whether the trooper complied with the observation requirement.

N.C. Gen. Stat. § 20-139.1(b3) requires

the testing of at least duplicate sequential breath samples. The results of the chemical analysis of all breath samples are admissible if the test results from any two consecutively collected breath samples do not differ from each

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other by an alcohol concentration greater than 0.02. Only the lower of the two test results of the consecutively administered tests can be used to prove a particular alcohol concentration.

N.C. Gen. Stat. § 20-139.1(b3).

We hold that the trial court erred in concluding that the two test results were not sequential for purposes of this section. The trial court found that at 11:27 p.m., the Trooper asked defendant to submit a breath sample, which registered an alcohol concentration of .10 on the Intoximeter. The Trooper asked defendant to provide another breath sample, which was insufficient for the machine to measure. The Intoximeter timed out, so the Trooper restarted it and reentered defendant's information. At 11:38 p.m., the Trooper had defendant provide another breath sample, which registered as .09. After this second valid sample, Trooper Trollinger did not take any more breath samples.

We confronted a similar situation in *State v. White*. In that case, “the time of the first reading was 11:15 a.m., and the time of the second reading was 11:26 a.m. The first reading showed an alcohol concentration of .20 and the second showed a concentration of .19.” *State v. White*, 84 N.C. App. 111, 114, 351 S.E.2d 828, 830, *app. dismissed*, 319 N.C. 409, 354 S.E.2d 887 (1987). We concluded that “[b]ecause these readings were taken from ‘consecutively administered tests’ on adequate breath samples given within eleven minutes of one another, and because the readings are within .01 of one another, the statute requiring sequential testing was . . . complied with in this case.” *Id.* These tests were “sequential” despite the fact that there were two insufficient samples taken between the two sufficient samples. *Id.* at 113, 351 S.E.2d at 829.

We see no way to distinguish *White* from the present case. The fact that the machine here timed out and was restarted is not material to the determination of whether the tests were sequential. *See State v. Shockley*, 201 N.C. App. 431, 436, 689 S.E.2d 455, 458 (2009) (holding that the fact that the trooper started the testing process over did not prevent the breath samples from being sequential). The tests occurred within eleven minutes of each other—the same amount of time, to the minute, we considered in *White*. The only reason the tests were not immediately consecutive was because defendant gave an insufficient breath sample.

Additionally, neither the trial court nor defendant cites any statute, regulation, or other authority that requires that the sequential tests actually appear on the same test result ticket. The fact that the test results were printed on separate tickets does not change their sequential

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character when they were taken within an eleven minute period and the only intervening event was the resetting of the machine for the second test. Therefore, we hold that the trial court erred in concluding that the test results were not sequential for the purposes of N.C. Gen. Stat. § 20-139.1(b3).

[2] Finally, the State argues that the trial court erred in concluding that the Trooper failed to properly follow the procedure outlined in N.C. Admin. Code tit. 10A, r. 41B.0322. Defendant argues and the trial court concluded that when the Intoximeter timed out, Trooper Trollinger had to conduct another observational period, which he did not do. We hold that the trial court erred in concluding that the trooper failed to follow the proper procedure.

N.C. Admin. Code tit. 10A, r. 41B.0322 lays out an eight step process governing the administration of a breath test using the Intoximeter EC/IR II:

- (1) Insure instrument displays time and date;
- (2) Insure observation period requirements have been met;
- (3) Initiate breath test sequence;
- (4) Enter information as prompted;
- (5) Verify instrument accuracy;
- (6) When “PLEASE BLOW” appears, collect breath sample;
- (7) When “PLEASE BLOW” appears, collect breath sample; and
- (8) Print test record.

If the alcohol concentrations differ by more than .02, a third or fourth breath sample shall be collected when “PLEASE BLOW” appears. Subsequent tests shall be administered as soon as feasible by repeating steps (1) through (8), *as applicable*.

N.C. Admin. Code, tit. 10A, r. 41B.0322 (emphasis added).

In *State v. Moore*, we held that a breath test was admissible despite the fact that the testing officer did not repeat all eight steps in N.C. Admin. Code tit. 10A, r. 41B.0322. 132 N.C. App. 802, 806, 513 S.E.2d 346,

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348 (1999). We observed that “[t]he key phrase in the regulations governing a third or subsequent test is ‘as applicable.’” *Id.* at 805, 513 S.E.2d at 348. Under the facts of that case, we concluded that the only step that the testing officer had to repeat was step (6) or (7). *Id.* at 806, 513 S.E.2d at 348. The defendant in *Moore* conceded that it was not necessary to repeat the observational period when restarting a breath test. *Id.* at 805, 513 S.E.2d at 347.

“As applicable” means that a testing officer is not required to repeat those steps that are not necessary for an accurate test. In *Moore*, it was not necessary for the testing officer to reenter the defendant’s information. *Id.* at 806, 513 S.E.2d at 348. Here, because the machine timed out and had to be reset, the Trooper had to reenter the defendant’s information in order to proceed with a subsequent test. It was not necessary, however, to have another observational period.

The observational period is

a period during which a chemical analyst observes the person or persons to be tested to determine that the person or persons has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen. The chemical analyst may observe while conducting the operational procedures in using a breath-testing instrument.

N.C. Admin. Code tit. 10A, r. 41B.0101(6) (2009).

Defendant was under constant observation by the trooper for approximately fifty-one minutes prior to the second test. The “observation period requirements” as to time are only 15 minutes at a minimum and the regulations do not prevent a longer observation period. *Id.* There was no evidence that defendant ate, drank, smoked, vomited, or did anything that might require a break before the subsequent test.¹ We see no reason that another, separate observation period would be required. We hold that the trial court erred in concluding otherwise.

1. Mr. Glover, the State’s alcohol testing expert, wrote the state’s training manual for the Intoximeter. He testified that “As long as [the test subject does not] violate that observation period by eating, drinking, smoking, regurgitating, or by the analyst being out of the presence of the person, an observation period, once it’s started, could continue for hours, so long as nothing occurs during that period. Normally, we wouldn’t have observation periods that long. But once you start it, if you don’t observe any violations, the observation period continues until you complete whatever tests you’re doing and are finished.”

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III. Conclusion

The trial court erred in concluding that Trooper Trollinger failed to follow the proper procedures in administering the Intoximeter breath test to defendant and that the breath test results were therefore inadmissible. Accordingly, we reverse the trial court's order and remand with instructions for the trial court to enter an order denying defendant's motion to suppress the breath test results.

REVERSED and REMANDED.

Judges HUNTER, Robert C. and ERVIN concur.

STATE OF NORTH CAROLINA
v.
ANTHONY COLEMAN

No. COA12-946

Filed 21 May 2013

Drugs—trafficking heroin—jury instruction—guilty knowledge—plain error

The trial court committed plain error in a trafficking in heroin by possession and trafficking in heroin by transportation by failing to adequately instruct the jury on the law of guilty knowledge. The trial court should have instructed the jury in accordance with the pattern jury instructions regarding circumstances where a defendant contends he did not know the true identity of what he possessed.

Appeal by defendant from judgments entered 10 December 2010 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 January 2013.

Attorney General Roy Cooper, by Assistant Attorney General J. Joy Strickland, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

BRYANT, Judge.

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Where the trial court failed to adequately instruct the jury on the law as it applied to the material facts of this case, we hold the failure amounts to plain error. Defendant is entitled to a new trial.

On 25 November 2009, defendant was stopped by officers with the Charlotte-Mecklenburg Police Department for a traffic violation. When questioned as to whether he had any drugs or weapons in the vehicle, defendant acknowledged carrying marijuana. The officers recovered a baggie containing approximately 28 grams of marijuana from the front passenger compartment and then proceeded to search the vehicle. In the trunk, the officers recovered a box containing six similarly sized bags of marijuana and approximately 45 grams of heroin. Defendant was arrested and later indicted on charges of trafficking in twenty-eight grams or more of heroin, by possession and trafficking in twenty-eight grams or more of heroin, by transportation.¹

A jury trial was conducted during the 6 December 2010 Criminal Session of Mecklenburg County Superior Court, the Honorable Timothy S. Kincaid, Judge presiding. During the prosecution's case-in-chief, an audio recording of defendant's interview with police detectives made the day of his arrest was admitted into evidence and played for the jury. Defendant presented no evidence at trial.

At the conclusion of the evidence, the jury returned guilty verdicts on the charges of trafficking in heroin by possession and trafficking in heroin by transportation. The trial court entered judgment in accordance with the jury verdicts and sentenced defendant to concurrent terms of 225 months to 279 months.² Defendant appeals.

On appeal, defendant raises two issues: whether the trial court erred by (I) failing to instruct the jury on the law of guilty knowledge; and (II) failing to intervene *ex mero motu* during the State's closing argument.

1. Although the record indicates defendant had more than twenty-eight grams of marijuana in his possession at the time of his arrest, there is no indication that defendant was ever charged with offenses related to possession of the marijuana.

2. We note that the sentence for trafficking in heroin is quite severe, an active term of 225 to 282 months and a fine of not less than \$500,000.00 is imposed for possessing 28 grams or more, compared to trafficking in cocaine – where an active term of 175 to 219 months and a fine of not less than \$250,000.00 is imposed for possessing quantities of 400 grams or more, and trafficking in marijuana – where a term of 175 to 219 months and a fine of not less than \$200,000.00 is imposed for possession of quantities of 10,000 lbs. or more. N.C. Gen. Stat. § 90-95(h) (1)(d.), (3)(c.), and (4)(c.) (2011).

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Because the first issue is dispositive of this case, we need not review the second issue.

I

Defendant argues that the trial court erred by failing to instruct the jury on the law of guilty knowledge. Specifically, defendant contends that the trial court erred in failing to instruct the jury in accordance with the pattern jury instructions regarding circumstances where a defendant contends he did not know the true identity of what he possessed. We agree.

Preservation of issue for appeal

During the charge conference, the trial court stated that on the charges of trafficking by possession and trafficking by transportation, it would instruct the jury in accordance with North Carolina pattern instructions – N.C.P.I. criminal 260.17 and 260.30. Defendant asked if the trial court would “give the usual instruction about knowing.” During the subsequent exchange, the trial court gave no indication that it would include the language contained in footnote 4 of both N.C.P.I. criminal 260.17 and 260.30, addressing scenarios where a defendant contends that he did not know the true identity of what he possessed. Defendant made no motion to amend the instruction, and following the trial court’s jury charge, when offered an opportunity to request corrections to the instructions given, defendant made no requests or objections.

On appeal, defendant argues that the trial court erred by failing to give an instruction in accordance with footnote 4 of N.C.P.I.—Crim. 260.17 and Crim. 260.30. Footnote 4 of Crim. 260.17 provides that “[i]f the defendant contends that he did not know the true identity of what he possessed, [the State must prove beyond a reasonable doubt that] ‘the defendant knew that what he possessed was [heroin].’” N.C.P.I.—Crim. 260.17 n.4 (2012). The language set out in Crim. 260.30 n.4 is nearly identical.³ Defendant requests that in the event we do not find that his argument has been preserved as a matter of law, we review the trial court’s instructions for plain error.

Generally “[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless

3. Footnote 4 of Crim. 260.30 provides that “[i]f the defendant contends that he did not know the true identity of what he transported, [the State must prove beyond a reasonable doubt that] ‘the defendant knew what he transported was [heroin].’” N.C.P.I.—Crim. 260.30 n.4 (2012).

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the party objects thereto before the jury retires to consider its verdict” R. App. P. 10(a)(2) (2012); *compare State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988) (“[Holding that] a request for an instruction at the charge conference [was] sufficient compliance with the rule[, now N.C. R. App. P. 10(a)(2),] to warrant our full review on appeal where the requested instruction [was] subsequently promised but not given” (citation omitted)); and *State v. LePage*, 204 N.C. App. 37, 45-46, 693 S.E.2d 157, 163 (2010) (reviewing for prejudicial error a jury instruction inconsistent with the pattern instruction agreed upon during the charge conference).

“In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C. R. App. P. 10(a)(4).

Standard of Review

“[P]lain error review is limited to errors in a trial court’s jury instructions or a trial court’s rulings on admissibility of evidence.” *State v. Roache*, 358 N.C. 243, 275, 595 S.E.2d 381, 403 (2004) (citation omitted).

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

State v. Lawrence, 356 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citation omitted) (original emphasis and brackets). Assuming without deciding that defendant failed to properly preserve this issue for appellate review, we review this issue for plain error.

Analysis

In accordance with North Carolina General Statutes, section 15A-1231 (2011), the trial court conducted a conference on the jury

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instructions after the close of the evidence and before the closing arguments of the parties. During this conference, the trial court identified by name and pattern jury instruction number the instructions that it intended to give during the jury charge including “260.17 and 260.30, trafficking in heroin by possession and by transportation, respectively”

North Carolina Pattern Jury Instruction, Criminal 260.17 – Drug Trafficking by Possession, in pertinent part, reads as follows:

For you to find the defendant guilty of this offense the State must prove two things beyond a reasonable doubt:

First, that the defendant knowingly possessed [heroin]. A person possesses [heroin] if he is aware of its presence and has . . . both the power and intent to control the disposition or use of that substance.

N.C.P.I.—Crim. 260.17 (2012). N.C. Pattern Instruction – Criminal 260.30 – Drug Trafficking by Transportation, states, in pertinent part, “[f]or you to find the defendant guilty of this offense the State must prove two things beyond a reasonable doubt: First, that the defendant knowingly transported [heroin].” N.C.P.I.—Crim. 260.30 (2012).

Footnote 4 of pattern instructions – criminal 260.17 and 260.30⁴ advises the trial judge to further instruct the jury where defendant *contends* he did not know the identity of the substance. Footnote 4 of pattern instruction – criminal 260.17 reads, as follows: “If the defendant contends that he did not know the true identity of what he possessed, add this language to the first sentence: ‘and the defendant knew that what he possessed was [heroin].’ ” N.C.P.I.—Crim. 260.17 n.4 (emphasis added). Therefore, if given as proposed by defendant, the first sentence of pattern instruction – Crim. 260.17 would read as follows: “First, that defendant knowingly possessed heroin and defendant knew that what he possessed was heroin.” N.C.P.I. –Crim. 260.17 n.4.⁵

Knowledge that one possesses contraband is presumed by the act of possession unless the defendant denies knowledge of possession and

4. Footnote 4 of pattern instruction 260.30 advises the trial judge as follows: “[i]f the defendant *contends* that he did not know the true identity of what he transported, add this language to the first sentence: ‘and the defendant knew what he transported was [heroin].’ ” N.C.P.I.—Crim. 260.30 n.4 (emphasis added).

5. If given as proposed by defendant, the first sentence of pattern instruction – Crim. 260.30 would read as follows: “First, that defendant knowingly transported heroin and defendant knew what he transported was heroin.” N.C.P.I.—Crim. 260.30 n.4.

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contests knowledge as disputed fact. *See State v. Tellez*, No. 09-1010, 2010 N.C. App. LEXIS 576, at *14 (N.C. App., 6 April 2010) (unpublished opinion).

The State argues that defendant is not entitled to the instruction set out in footnote 4 because “defendant did not testify nor did he present any evidence to raise the issue of knowledge as a disputed fact.”

However, during the State’s case-in-chief, a detective in the Vice Narcotics Unit of the Charlotte Police Department testified that he interviewed defendant the day he was arrested. The detective gave the following summary of defendant’s statements during the interview: Defendant said he had been asked to hold a box until later in the week, at which time he would be contacted about where to deliver the box. Defendant stated he was expecting to be paid \$200.00 for holding the box. “He said he thought the box contained marijuana and cocaine and he took some marijuana out of it and put it under the seat of his car.” The interview had been audio recorded. The recording was admitted into evidence and played for the jury. Multiple times during the interview, defendant stated that when he was in possession of the box, he believed that it contained only marijuana and cocaine. We note that the trial court stated that the audio recording of defendant’s interview was admitted into evidence as “an admission of the defendant.” Accordingly, defendant’s statement and the officer’s testimony were admitted as substantive evidence. *See* N.C. Evid. R. 801(d) (“A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement”); *see also State v. Black*, ___ N.C. App. ___, ___, 735 S.E.2d 195, 203 (2012) (holding that the defendant’s out of court statements were an admission by a party-opponent and admissible as substantive evidence pursuant to Rules of Evidence, Rule 801(d)); *e.g., State v. Smith*, 157 N.C. App. 493, 581 S.E.2d 448 (2003) (holding the defendant’s statement to medical personnel that he was the driver and that he had been drinking was an admission by a party-opponent and admissible pursuant to Rule 801(d)). It is axiomatic that in a criminal trial when substantive evidence is admitted, it bears directly upon the question of the defendant’s guilt or innocence.

A preliminary but significant point at issue before this Court is whether the assertion made by defendant in his interview with, and recounted in subsequent trial testimony by, law enforcement officers amounts to a *contention* that defendant did not know the true identity of what he possessed within the meaning of N.C.P.I. 260.17 and 260.30. We believe that it does. Consequently, we must consider whether such

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contention amounts to defendant raising lack of knowledge as a “determinative issue of fact.”

“Regardless of requests by the parties, a judge has an obligation to fully instruct the jury on all substantial and essential features of the case embraced within the issue and arising on the evidence.” *State v. Harris*, 306 N.C. 724, 727, 295 S.E.2d 391, 393 (1982) (citation omitted); *see also, State v. Reid*, ___ N.C. App. ___, ___, 735 S.E.2d 389, 398 (2012) (“[W]here the trial court adequately instructs the jury as to the law on every material aspect of the case arising from the evidence and applies the law fairly to variant factual situations presented by the evidence, the charge is sufficient.” (citation omitted)); *e.g., State v. Murray*, 21 N.C. App. 573, 578, 205 S.E.2d 587, 590 (1974) (“Defendant contends that the court erred in failing to instruct the jury on . . . a lesser included offense If [the victim’s] original statement . . . had been admissible as substantive evidence, this contention would be correct.”).

The record reflects consistent assertions by defendant, admitted as substantive evidence, that he thought he was carrying marijuana and cocaine. This evidence made it necessary for the trial court to recognize the evidence as amounting to a contention that defendant did not know the true identity of what he possessed. Therefore, the trial court’s failure to instruct the jury that it must find that defendant knew what he possessed or transported was heroin before finding defendant guilty of trafficking in heroin by possession or trafficking in heroin by transportation was error. *Harris*, 306 N.C. at 727, 295 S.E.2d at 393 (“[A] judge has an obligation to fully instruct the jury on all substantial and essential features of the case embraced within the issue and arising on the evidence.”).

We must now consider whether this amounts to plain error. “[I]t 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.” *Lawrence*, 365 N.C. at 517, 723 S.E.2d at 333 (citations and quotations omitted).

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.

Id. at ___, 723 S.E.2d at 334 (citations and quotations omitted).

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The record reflects that defendant's sole defense to the charges of trafficking in heroin by possession and by transportation was that he did not know the box in his possession contained heroin. Further, evidence in the form of a detective's testimony and an audio recording of defendant's statements denying knowledge that what he possessed was heroin make defendant's knowledge that what he possessed was heroin a question of fact for the jury. The closing arguments before the jury reveal that the most significant issue presented to the jury was whether defendant knew that what he possessed was heroin.⁶ Indeed, the closing arguments by both the prosecution and defense were in apparent agreement that this was the most contested issue; and, to quote the prosecution, "This is really what you are here to decide."

Following the arguments of counsel, the trial court gave the following jury instruction:

For you to find the Defendant guilty of trafficking in heroin by possession, the State must prove to you two things beyond a reasonable doubt:

First, that the Defendant knowingly possessed heroin, which is a controlled substance.

A person possesses a controlled substance, such as heroin, if that person is aware of its presence and has both the power and the intent to control the disposition or use of that substance.

Second, that the amount of the heroin which the Defendant possessed was more than 28 grams.

...

The Defendant has also been charged with trafficking in heroin by transportation, which is unlawfully transporting more than 28 grams of heroin. For you to find the Defendant guilty of trafficking in heroin by transportation, the State must prove two things beyond a reasonable doubt:

First, that the Defendant knowingly transported heroin; and,

6. During closing arguments, the prosecutor contended, "You heard the Detective ask the Defendant why did you suspect that it was heroin and the Defendant said, 'I wasn't sure. The way it shook and rattled.' . . . Even if he suspected it to be heroin, ladies and gentlemen, that is enough." [T. Vol. 3, 582-84].

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Second, that the amount of heroin which the Defendant transported was 28 grams or more.

The trial court failed to give the additional instruction that the jury must determine beyond a reasonable doubt that “defendant knew that what he possessed was [heroin][,]” N.C.P.I.—Crim. 260.17 n.4, and that “defendant knew what he transported was [heroin][,]” N.C.P.I.—Crim. 260.30 n.4.

This Court found prejudicial error where a defendant testified that he had no knowledge of the contents of a package he was paid to receive and the trial court failed to instruct the jury that it must determine whether the defendant knew what he possessed was heroin. *See State v. Lopez*, 176 N.C. App. 538, 626 S.E.2d 736 (2006) (While defendant Lopez was granted a new trial, no error was found in the conviction of co-defendant Sanchez who presented no evidence that he was unaware of the heroin contained in the package received.).

The facts in the instant case fall between the facts as to the defendant Lopez, who not only testified that he was unaware the package he possessed contained heroin but properly requested an instruction based on footnote 4, and the defendant Sanchez, who neither contended that he lacked knowledge of what it was that he possessed nor requested the additional instruction. *Id.*

In *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984), *superceded by statute on separate issue as recognized in State v. Oakes*, ___ N.C. ___, 732 S.E.2d 571 (2012); *State v. Elliott*, 232 N.C. 377, 61 S.E.2d 93 (1950); and *State v. Stacy*, 19 N.C. App. 35, 197 S.E.2d 881 (1973)), cases upon which the *Lopez* Court relied in reaching its decision to order a new trial for the defendant Lopez, the defendant in each case testified to a lack of knowledge of the contraband. In doing so they offered direct evidence in support of their contention as to lack of knowledge and thereby raised a determinative issue of fact.

In the instant case, while defendant did not testify to a lack of knowledge, his entire defense was predicated upon a lack of knowledge that the substance he possessed was heroin. And while defendant did not personally testify to a lack of knowledge, whether defendant had the requisite knowledge was indeed the only controverted issue at trial. Further, as stated earlier herein, substantive evidence that defendant did not know that the substance he possessed was heroin was sufficient to amount to a contention that would trigger the necessity to give the required additional instruction on guilty knowledge contained within footnote 4.

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We are mindful that it is (and always should be) the rare case in which a defendant on plain error review is able to show that an unreserved instructional error such as the one at issue here would justify reversal. However, as our Supreme Court has recently reminded us in *State v. Lawrence*, in conducting plain error review we examine the entire record in determining whether the error “had a probable impact on the jury’s finding that the defendant was guilty.” 365 N.C. 506, 517, 723 S.E.2d 326, 333 (2012) (citation omitted). In many cases, including *Lawrence*, an examination of the entire record reveals overwhelming and uncontroverted evidence of guilt such that a defendant is unable to show the probability of a different outcome. In the instant case, the only controverted issue was defendant’s knowledge that what he possessed was heroin. None of the other facts were controverted. Therefore, this case falls within the rare category of cases in which, based on plain error review the trial court’s failure to give an additional instruction regarding the only controverted issue at trial – guilty knowledge – had a probable impact on the jury verdict.

Further, a portion of the State’s closing argument – “[e]ven if [defendant] suspected it to be heroin, ladies and gentlemen, that is enough” – is a misstatement of law as applied to this case. Therefore, the negative effect of the trial court’s failure to give the additional instruction is emphasized.

Certainly the evidence presented and arguments of counsel put the jury on notice that a critical issue in this case was whether defendant knew that what he possessed was heroin; however, the trial court’s failure to instruct the jury that in order to find defendant guilty it must find that he knew what he possessed was heroin, when viewed after examining the whole record meets the standard for plain error. Accordingly, we reverse defendant’s convictions and remand this matter for a new trial.

Reversed and remanded.

Judges ELMORE and ERVIN concur.

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STATE OF NORTH CAROLINA
v.
EDWARD JOSEPH GARDNER, IV

No. COA12-969

Filed 21 May 2013

1. Constitutional Law—right to counsel—motion for postconviction DNA testing—failure to show materiality

The trial court did not err in a multiple statutory rape case by failing to appoint counsel to represent defendant on his motion for postconviction DNA testing. Defendant failed to make the requisite showing of materiality.

2. Evidence—postconviction DNA testing—sufficiency of findings of fact

The trial court did not err in a multiple statutory rape case by failing to make sufficient findings of fact and conclusions of law demonstrating that it analyzed the requirements set forth in N.C.G.S. § 15A-269 regarding postconviction DNA testing of evidence because the statute does not contain any requirement that the trial court make specific findings of facts.

Appeal by defendant from orders entered 7 and 12 March 2012 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 26 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for defendant.

HUNTER, Robert C., Judge.

Edward Joseph Gardner, IV (“defendant”) appeals from orders denying his motions to locate and preserve evidence and for postconviction DNA testing. On appeal, defendant argues that the trial court erred by: (1) failing to appoint counsel to represent defendant on his motion for postconviction DNA testing; and (2) making insufficient findings of fact and conclusions of law in denying defendant’s motion for postconviction DNA testing. After careful review, we find no error.

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Background

Defendant was indicted on 19 July 1999 for twenty-eight charges of statutory rape against a 13, 14, or 15-year-old child and one count of resisting, delaying, and obstructing a public officer. Defendant was appointed counsel and pled guilty to fifteen counts of statutory rape. In exchange for the plea, the State dismissed thirteen counts of statutory rape and the resisting, delaying, and obstructing a public officer charge. The trial court consolidated judgment and sentenced defendant to 173 to 217 months imprisonment.

On 14 February 2012, defendant filed *pro se* a motion to locate and preserve evidence, a motion for postconviction DNA testing, and an affidavit of innocence in Pitt County Superior Court. In the motion for postconviction DNA testing, defendant asserted, *inter alia*, that he was incarcerated and indigent. The trial court did not appoint counsel to represent defendant. Without conducting hearings, the trial court denied defendant's motion for postconviction DNA testing in an order entered 7 March 2012 and decided defendant's motion to locate and preserve evidence in an order entered 12 March 2012. Defendant appeals.¹

Discussion**I. Appointment of Counsel**

[1] Defendant's first argument on appeal is that the trial court erred by failing to appoint counsel to represent defendant on the motion for postconviction DNA testing. We disagree.

The standard of review for denial of a motion for postconviction DNA testing has not been expressly stated in a published decision of this Court. We adopt the standard utilized in *State v. Patton*, __ N.C. App. __, __ S.E.2d __, 2012 WL 6590534, at *2, 2012 N.C. App. LEXIS 1406, at *3-5 (No. COA12-507) (Dec. 18, 2012) (unpublished) (internal citation omitted):

Our standard of review of a denial of a motion for postconviction DNA testing is analogous to the standard of review for a motion for appropriate relief. Findings of fact are binding on this Court if they are supported by competent

1. Although defendant gave notice of appeal from the order denying his motion to locate and preserve evidence, defendant's arguments on appeal address only the denial of his motion seeking postconviction DNA testing. We therefore deem that he has abandoned his appeal from the order denying his motion to locate and preserve evidence. N.C. R. App. P. 28(b)(6) (2012).

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evidence and may not be disturbed absent an abuse of discretion. The lower court's conclusions of law are reviewed *de novo*.

N.C. Gen. Stat. § 15A-269 (2012) provides that a defendant may request postconviction DNA testing of evidence and states in pertinent part:

(a) A defendant *may make a motion* before the trial court . . . if the biological evidence meets *all of the following conditions*:

- (1) *Is material to the defendant's defense.*
- (2) Is related to the investigation or prosecution that resulted in the judgment.
- (3) Meets either of the following conditions:
 - a. It was not DNA tested previously.
 - b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

(Emphasis added). Pursuant to subsection (c) of the statute:

[T]he court shall appoint counsel for the person who brings a motion under this section if that person is indigent. If the petitioner has filed pro se, the court shall appoint counsel for the petitioner in accordance with the rules adopted by the Office of Indigent Defense Services *upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction.*

N.C. Gen. Stat. § 15A-269(c) (emphasis added).

Defendant offers two arguments for why the trial court erred in failing to appoint counsel. First, defendant asserts that subsection (c) of the statute is inherently contradictory in that the first sentence mandates that counsel shall be appointed to all indigent defendants filing postconviction DNA motions while the second sentence requires a defendant to show that the DNA testing may be material to his claim of wrongful conviction before being appointed counsel. Defendant argues that this inconsistency in subsection (c) creates ambiguity and that the rule of

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lenity requires the ambiguity to be resolved in favor of defendant—that is, that the statute requires appointment of counsel for indigent defendants regardless of a showing of materiality. *See State v. Cates*, 154 N.C. App. 737, 740, 573 S.E.2d 208, 209-10 (2002) (stating that the rule of lenity, which only applies when the wording of a criminal statute is ambiguous, forbids the Court from imposing a penalty on a defendant that was not intended by the Legislature).

However, this Court has already concluded that there is no ambiguity in the statute:

[A]ccording to the plain language of the statute, a trial court is required to appoint counsel for a defendant bringing a motion under this section only if the defendant makes a showing (1) of indigence and (2) that the DNA testing is material to defendant's claim that he or she was wrongfully convicted.

State v. Barts, 204 N.C. App. 596, 696 S.E.2d 923, 2010 WL 2367302, at *1, 2010 N.C. App. LEXIS 979, at *3 (2010) (unpublished) (hereinafter "*Barts I*"). Because there is no ambiguity, the rule of lenity does not apply.

In *Barts I*, the defendant appealed the denial of his motion for post-conviction DNA testing, arguing that N.C. Gen. Stat. § 15A-269, as it existed as the time he filed his motion, required merely that his motion allege that he was indigent in order to require the court to appoint him counsel. At the time the defendant in *Barts I* filed his motion, subsection (c) read as follows: "The court shall appoint counsel for the person who brings a motion under this section if that person is indigent." 2010 WL 2367302, at *1, 2010 N.C. App. LEXIS 979, at *2; N.C. Gen. Stat. § 15A-269(c) (2007). It was not until 2009 that the General Assembly added the second sentence stating that the trial court must appoint counsel for a *pro se* petitioner "upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction." 2009 N.C. Sess. Laws ch. 203, § 5.

In *Barts I*, we concluded that the addition of the second sentence to subsection (c) in 2009 "only made explicit that which was already implied by the language of the statute when read in its entirety"—that a motion is properly brought under subsection (a) only when the defendant sufficiently alleges each condition set forth in subsection (a), which includes the condition that the defendant show the materiality of the DNA testing to his defense. *Barts I*, 2010 WL 2367302, at *2, 2010 N.C. App. LEXIS 979, at *5. We therefore rejected the defendant's argument

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that the trial court was required to appoint counsel for an indigent defendant without regard to whether the defendant had any basis for bringing the motion. *Id.* Although *Barts I* is an unpublished opinion and is not controlling legal authority, N.C. R. App. P. 30(e)(3), we find its reasoning persuasive and we hereby adopt it. Accordingly, defendant's argument that N.C. Gen. Stat. § 15A-269A requires the appointment of counsel for all indigent defendants regardless of whether they have made a showing that the DNA testing is material to their claim of wrongful conviction is overruled.

Next, defendant contends that if this Court were to conclude that the statute requires a showing of materiality, the materiality threshold to appoint counsel under subsection (c) (that the testing "may be material" to his claim) is less than the materiality threshold to bring a motion under subsection (a)(1) (that the testing "is material" to his claim). This argument has also been considered and rejected by this Court in *State v. Barts*, __ N.C. App. __, 722 S.E.2d 797, 2012 WL 946438, 2012 N.C. App. LEXIS 370 (2012) (unpublished) (hereinafter "*Barts II*"). There, we cited our reasoning in *Barts I* and we rejected the defendant's argument:

[W]e reject [d]efendant's contention that the threshold materiality requirement for the appointment of counsel for purposes of N.C. Gen. Stat. § 15A-269(c) is less demanding than that required for actually ordering DNA testing pursuant to N.C. Gen. Stat. § 15A-269(a)(1) and hold that, in order to support the appointment of counsel pursuant to N.C. Gen. Stat. § 15A-269(c), a convicted criminal defendant must make an allegation addressing the materiality issue that would, if accepted, satisfy N.C. Gen. Stat. § 15A-269(a)(1).

Id., 2012 WL 946438, at *5, 2012 N.C. App. LEXIS 370, at *12-13. Although, *Barts II* is also an unpublished opinion and not controlling legal authority, N.C. R. App. P. 30(e)(3), we find its reasoning persuasive, and we hereby adopt it.

Furthermore, we note that while defendant argues that this conclusion renders the appointment of counsel for pro se petitioners regarding postconviction DNA testing motions superfluous, this argument was also addressed and rejected in *Barts II*:

We are not persuaded by [d]efendant's claim that the adoption of the position that we have deemed appropriate in the text renders the appointment of counsel in DNA testing proceedings superfluous given that, once a defendant

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has made a sufficient materiality allegation in his motion and counsel has been appointed to represent him, the defendant's appointed counsel will have responsibility for persuading the trial court to actually order the testing by, among other things, demonstrating that the defendant's allegation of materiality is factually and legally valid; ensuring that any testing ultimately ordered by the trial court is performed in an appropriate manner; and litigating any claim for relief that the defendant elects to assert after receiving the test results.

Id., 2012 WL 946438 at *5 n.3, 2012 N.C. App. LEXIS 370 at *13 n.3.

Next, we must determine if defendant made a sufficient showing of materiality that the court was obligated to appoint him counsel. Pursuant to our holding in *State v. Foster*, __ N.C. App. __, 729 S.E.2d 116 (2012), we must conclude that defendant failed to meet his burden.

In *Foster*, we adopted the conclusion reached in *Barts I*, that the conditions of N.C. Gen. Stat. § 15A-269(a)(1) are "a condition precedent to a trial court's statutory authority to grant" a motion for postconviction DNA testing brought under the statute. __ N.C. App. at __, 729 S.E.2d at 120. We also adopted the reasoning of *State v. Moore*, __ N.C. App. __, 714 S.E.2d 529, 2011 WL 3276748, at *3, 2011 N.C. App. LEXIS 1651, at *7-9 (2011) (unpublished), that where a motion brought under section 15A-269 provided no indication of how or why the requested DNA testing would be material to the petitioner's defense, the motion was deficient and it was not error to deny the request for the DNA testing. *Foster*, __ N.C. App. at __, 729 S.E.2d at 120. According to the reasoning of *Barts I* and *Moore*, we concluded that a defendant carries the burden to make the showing of materiality required by N.C. Gen. Stat. § 15A-269(a)(1) and that this burden requires more than the conclusory statement that "[t]he ability to conduct the requested DNA testing is material to the [d]efendant's defense." *Foster*, __ N.C. App. at __, 729 S.E.2d at 120.

Here, defendant used the identical conclusory statement regarding the materiality of the requested DNA testing as was used by the defendant in *Foster*; he provided no explanation as to why the testing would be material to his defense.² In light of our holding in *Foster*, we must

2. The recurrence of this conclusory language appears to stem from a standardized form for requesting postconviction DNA testing under section 15A-269A. The form used by defendant contains the pre-printed conclusory language and provides no space to suggest a need to explain the alleged materiality of the testing.

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conclude that he has failed to establish a condition precedent to the trial court's authority to grant his motion. We therefore need not address the State's alternative argument that because defendant pled guilty to the charges of which he claims he was wrongfully convicted, defendant presented no "defense" to which the testing could be material.

II. Findings of Fact and Conclusions of Law

[2] Defendant's final argument is that the trial court erred by failing to make sufficient findings of fact and conclusions of law demonstrating that it analyzed the requirements set forth in section 15A-269. We disagree.

The general rule is that a trial court need only make specific findings of facts and conclusions of law when a party requests the trial court do so in a civil case. *See Couch v. Bradley*, 179 N.C. App. 852, 855, 635 S.E.2d 492, 494 (2006). N.C. Gen. Stat. § 15A-269 contains no requirement that the trial court make specific findings of facts, and we decline to impose such a requirement.

In its order denying defendant's motion, the trial court stated that it reviewed the allegations in defendant's motion and cited N.C. Gen. Stat. § 15A-269(b), which requires that the trial court grant the motion if the conditions in subsection (a) are met. N.C. Gen. Stat. § 15A-269(b) ("The court shall grant the motion . . . upon its determination that . . . the conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of this section have been met[.]"). Based on this, and other findings, the trial court concluded that defendant failed to show the existence of any grounds for relief. We conclude the order is sufficient.

According to defendant, the trial court's findings of fact and conclusions of law were based on an incorrect interpretation of section 15A-269 which precludes all defendants who pled guilty to the crimes for which they were convicted from seeking postconviction DNA testing under this statute. We decline to reach this issue here. As explained above, we conclude defendant did not meet the materiality requirement of subsection (a) and that the trial court properly denied defendant's motion.

Conclusion

After careful review, we find no error in the trial court's decision not to appoint counsel for defendant on his motion for postconviction DNA testing. The motion was properly denied because defendant failed to make the requisite showing of materiality.

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NO ERROR.

Judges McCULLOUGH and DAVIS concur.

STATE OF NORTH CAROLINA
v.
JAMES SAMUEL HILL, JR., DEFENDANT

No. COA12-1502

Filed 21 May 2013

1. Appeal and Error—preservation of issues—unanimity of jury verdict—not raised at trial—plain error review not argued

Defendant-prisoner waived appellate review of whether the jury verdict was unanimous in a prosecution for communicating threats where he did not raise the issue at trial and did not argue for plain error review. There was no disjunctive instruction concerning which deputy the threats were communicated to and defendant had ample opportunity during the charge conference and again following the charge to the jury to request that the judge specify the deputy.

2. Prisons and Prisoners—communicating threats to deputy—ability to carry out threats—deputy's belief

The trial court did not err by denying defendant-prisoner's motion to dismiss the charge of communicating threats where defendant asserted that there was insufficient evidence that a deputy believed defendant would carry out his threats against her. Even though the deputy thought that she and the other officers could contain an attempt by defendant to carry out his threats, she also believed that defendant was capable of carrying out his threats and would do so if he had the opportunity.

3. Prisons and Prisoners—carrying a concealed weapon—razor blade under table

The trial court did not err when it denied defendant-prisoner's motion to dismiss the charge of carrying a concealed weapon where the razor blades from a pencil sharpener were found beneath a table in the day room and on a window ledge. There was such relevant evidence as a reasonable mind might accept as adequate to support the conclusion that defendant had the ability to and did conceal the

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razor blade underneath the table. There was no need to address the remaining argument on this issue.

Appeal by defendant from judgment entered 22 August 2012 by Judge W. Robert Bell in Catawba County Superior Court. Heard in the Court of Appeals 22 April 2013.

Roy Cooper, Attorney General, by Thomas H. Moore, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Jon H. Hunt and Benjamin Dowling-Sendor, Assistant Appellate Defenders, for defendant-appellant.

MARTIN, Chief Judge.

Defendant James Samuel Hill, Jr. was indicted for felonious possession of a dangerous weapon by a prisoner, communicating threats, carrying a concealed weapon, willful and wanton injury to personal property, willful and wanton injury to real property, and of being a habitual felon. The evidence presented at trial tended to show that, just before 11:00 a.m. on 16 July 2011, Deputy Sheriff Johnny Stiles, Deputy Sheriff Linda Anne Rogers, and a third deputy sheriff began to conduct routine cell searches in the “older section” of the Catawba County Detention Facility (“the jail”). When they arrived at defendant’s cell, which was located in that section, Deputy Sheriff Stiles removed defendant from the cell in order to allow Deputy Sheriff Rogers and the other officer to conduct the search. Deputy Sheriff Stiles then sat defendant at the table in the adjoining “day room”; a small room adjoining defendant’s personal cell to which defendant had regular access which included a table and chair, an additional toilet, and a shower. As a result of their search of defendant’s personal cell, the officers found a thermal or knit shirt from which the sleeves had been removed. Because the officers were trained that any such alteration to an authorized item rendered the item contraband, the officers informed defendant that they would have to confiscate the item, at which point defendant “got upset, irate, and started using profanity.” Defendant then told Deputy Sheriff Rogers “that he was going to kick [her] f–king ass bitch,” and repeated this threat “[t]wo or three times at least.” According to Deputy Sheriff Rogers, she both “believe[d] [defendant] was capable of doing it,” and believed that defendant would carry out his threat if he had the opportunity to do so.

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Deputy Sheriff Rogers then prepared a written report documenting the contraband that was removed from defendant's personal cell. About two hours after the contraband had been seized, and at Deputy Sheriff Rogers's request, Deputy Sheriff Stiles brought the report to defendant in order to request defendant's signature on the report, in accordance with jail policy. When the officer arrived at the door to defendant's personal cell, he saw through the twelve-inch-square viewing window in the cell door that defendant "had a type of webbing or cotton or whatever around his hands, which [they] found later came out [sic] was [defendant's] mattress." When Deputy Sheriff Stiles informed defendant that Deputy Sheriff Rogers had written him up and asked defendant if he would sign the report, defendant looked at the officer and said, "[I]f you come in here, I'll kick your ass." Deputy Sheriff Stiles then testified that he told defendant, "[W]ell, I guess that means you don't want to sign [the report,]" and walked away with the unsigned report in hand.

Later that same day, around 4:00 p.m., Deputy Sheriff Stiles was making his regular rounds in the jail when he got to defendant's cell and "noticed some sharp looking objects or metal looking objects between [defendant's] fingers" that the officer thought defendant "could use as weapons." Deputy Sheriff Stiles went back to the control room to inform Deputy Sheriff Rogers about what he observed. When the two officers returned to defendant's cell shortly thereafter, they discovered that defendant had attempted to cover the windows and lights with paper in order to obscure the view into his cell. After Deputy Sheriff Rogers encouraged defendant to remove the paper from the cell door window, the officers observed that defendant had wrapped himself in his bed sheet so that he was "totally covered" and "all you could see was [defendant's] little eyes," making him "look[] like a ninja" "ready for combat." When Deputy Sheriff Rogers started talking to defendant through the door, defendant "raised his hands" and she observed that "it looked like [defendant] had some like nail clippers, partial nail clippers, in one hand and what looked to [her] to be a razor blade in the other." Defendant then looked at Deputy Sheriff Rogers and said, "I should have slit your throat when I had the chance," and made "a slicing motion against his throat." Deputy Sheriff Rogers then called for assistance. Because defendant was directing his aggression towards Deputy Sheriff Rogers, when the sergeant and the other responding officers arrived at the scene, Deputy Sheriff Rogers was instructed to leave the area.

When the officers opened defendant's cell door, they saw "a mess of cotton, pieces of mattress, pieces of sheets and blankets" inside the cell, and found defendant wearing the sheet wrapped around his head and

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holding the tattered mattress against his body and wrapped around his hands. Once the officers were able to restrain defendant and removed him to the booking area of the jail, the officers conducted a search of defendant's personal cell and the adjoining day room. In defendant's cell, the officers found a razor blade taken from a pencil sharpener on the window ledge, as well as pieces of nail clippers. In the adjoining day room to which defendant had regular access, the officers found a hollowed out pencil sharpener and the other part of the nail clippers underneath the sink and toilet unit, and found a razor blade stuck to the underside of the table where defendant had been seated during the search of his personal cell earlier in the day.

At the close of the State's evidence, defendant's motion to dismiss the charges of injury to personal property and real property was allowed; the motion was denied with respect to the remaining charges. Defendant offered no evidence and his renewed motion to dismiss was denied. The jury found him guilty of felonious possession of a dangerous weapon by a prisoner, communicating threats, carrying a concealed weapon, and of being a habitual felon. He purports to appeal from a judgment consolidating the offenses and sentencing him to a term of 120 months to 153 months imprisonment to begin at the expiration of all sentences defendant is presently obligated to serve.

Defendant sought to enter a *pro se* written notice of appeal from the judgment entered against him by completing a form made available to him in the jail, which form was filed with the trial court the day following the entry of judgment. However, the form that defendant used to appeal to this Court was a form indicating only that the signing inmate intended to give notice of appeal from district court to superior court. Additionally, although he indicated his intent to appeal from convictions for "possess weapon [sic] by prisoner, concealed weapon, habitual felon," defendant correctly identified only one of the two file numbers indicated on the judgment from which he purportedly seeks to appeal. Moreover, the record does not reflect that defendant's purported notice of appeal was served upon the district attorney's office. Because defendant concedes that, for these reasons, his written notice of appeal does not conform to the requirements for giving notice of appeal from a judgment in a criminal action, *see* N.C.R. App. P. 4, he petitions this Court to issue a writ of certiorari to allow review of his appeal. *See* N.C.R. App. P. 21(a)(1) ("The writ of certiorari may be issued . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . ."). In our discretion, we allow defendant's petition for writ of certiorari.

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I.

[1] Defendant first contends the trial court violated his constitutional right to a unanimous jury verdict on the charge of communicating threats.

As a threshold matter, we first note that defendant did not raise this issue at trial. Although, “[a]s a general rule, 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), “where the error violates the right to a unanimous jury verdict under Article I, Section 24, it is preserved for appeal without any action by counsel.” *State v. Wilson*, 363 N.C. 478, 484, 681 S.E.2d 325, 330 (2009); see also N.C.R. App. P. 10(a)(1) (“Any such issue . . . which by rule or law was deemed preserved or taken without any such action . . . may be made the basis of an issue presented on appeal.”). Such “[i]ssues of unanimity have usually arisen in the appellate courts when the trial court gave a disjunctive jury instruction.” *State v. Davis*, 188 N.C. App. 735, 740, 656 S.E.2d 632, 635, cert. denied, 362 N.C. 364, 664 S.E.2d 313 (2008); see also *State v. Sargeant*, 206 N.C. App. 1, 26, 696 S.E.2d 786, 802 (2010) (Ervin, J., dissenting) (“The issues that have been addressed by the Supreme Court and this Court in cases involving alleged violations of Article I, section 24 of the North Carolina Constitution have included claims such as those involving the use of disjunctive jury instructions; the delivery of instructions to a single juror instead of to the entire jury; issues arising from questions posed by the trial court to the jury during deliberations in which the trial court allegedly coerced the jury into reaching a verdict; issues involving jury misconduct; and issues involving jury polling.” (citations omitted)), *aff’d as modified on other grounds*, 365 N.C. 58, 707 S.E.2d 192 (2011).

However, “[a]lthough defendant relies upon disjunctive jury instruction cases” in order to assert his right to harmless error review of this unpreserved issue, there was no disjunctive instruction in this case. See *Davis*, 188 N.C. App. at 740, 656 S.E.2d at 635; see also *State v. Lawrence*, 360 N.C. 368, 374, 627 S.E.2d 609, 612 (describing “disjunctive jury instructions” as “instructions containing mutually exclusive alternative elements joined by the conjunction ‘or’”), *disc. review denied after remand on other grounds*, 361 N.C. 175, 640 S.E.2d 58 (2006). Instead, defendant’s challenge to this instruction is similar to that of the defendant in *State v. Walker*, 167 N.C. App. 110, 605 S.E.2d 647 (2004), *vacated in part and remanded on other grounds*, 361 N.C. 160,

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695 S.E.2d 750 (2006), in which this Court considered the defendant's unpreserved challenge to the trial court's jury instruction on a charge of armed robbery where: the court failed to specify the type of weapon used in the commission of the crime; defendant argued that evidence was presented that both a bat and a gun were used in connection with the crime; and the indictment identified that the only dangerous weapon used in the commission of the crime was a bat. *See Walker*, 167 N.C. App. at 125, 605 S.E.2d at 657. In *Walker*, the defendant argued that, "since evidence was presented that a bat and guns were used in connection with the robbery, it cannot be determined which weapon the jury determined was dangerous, and thus the jury verdict is ambiguous, requiring that he receive a new trial." *Id.* However, the defendant failed to object to this "possibly 'ambiguous'" instruction at trial, even though he "was afforded ample opportunity to request that the judge specify the bat as the dangerous weapon during the charge conference and again following the trial court's charge to the jury." *Id.* at 125, 605 S.E.2d at 658. Then, on appeal, defendant urged that, because the court's error was one that violated his right to a trial by a jury of twelve, his failure to object "did not waive his right to raise the matter on appeal." *Id.* Nevertheless, this Court determined that, "[i]f we were to take [the defendant's] argument to its logical conclusion, anytime counsel contends an instruction is 'ambiguous,' then defendant would be entitled to have the matter reviewed under an 'error' standard rather than a 'plain error standard.'" *Id.* at 126, 605 S.E.2d at 658. Consequently, because "[t]his is clearly contrary to Rule 21 of the General Rules of Practice, [former] Rule 10(b)(2) of the Rules of Appellate Procedure, and a long line of cases requiring 'plain error' review in the absence of an objection to a jury instruction," we concluded that our review of this unpreserved error was "limited to plain error." *Id.* at 125–26, 605 S.E.2d at 658.

We are unable to distinguish the present case from *Walker* with respect to this issue. Here, defendant was indicted for communicating threats to Deputy Sheriff Rogers, but the court did not specifically name Deputy Sheriff Rogers as the victim of the offense when it instructed the jury with respect to this charge. Instead, the court charged the jury as follows:

And finally the defendant has been charged with willfully communicating threats. For you to find the defendant guilty of this offense, the State must prove five things beyond a reasonable doubt. First, that the defendant willfully threatened or physically injured *the victim*. . . .

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Second, that the threat was communicated to *the victim* orally.

....

Fourth, that *the victim* believed that the threat would be carried out.

....

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant willfully and without lawful authority threatened to physically injure *the victim*, that this threat was communicated to *the victim* orally in a manner and under such circumstances which would cause a reasonable person to believe the threat was likely to be carried out, and that *the victim* believed that the threat would be carried out, it would be your duty to return a verdict of guilty. . . .

(Emphases added.) However, because defendant asserts that the State presented evidence that he made verbal threats to three different officers, he argues that the court's failure to specifically name Deputy Sheriff Rogers as "the victim" to whom threats were communicated erroneously permitted the jury to unanimously find him guilty of one count of communicating threats "even if [the jurors] did not unanimously agree that [defendant] was guilty for [communicating] a particular threat to a particular person." Nevertheless, like the defendant in *Walker*, this defendant "was afforded ample opportunity" "during the charge conference and again following the trial court's charge to the jury" "to request that the judge specify" that Deputy Sheriff Rogers was the person to whom he allegedly communicated his threats. *See Walker*, 167 N.C. App. at 125, 605 S.E.2d at 658. Yet, when the court asked defense counsel if he had "any requests for changes, deletions, corrections, alterations to the instructions," counsel said, "No. No, sir."

Moreover, here, during the charge conference, the State specifically raised the issue of jury unanimity with respect to the charge of possession of a dangerous weapon by a prisoner, and asked the trial court "to describe the weapon." After considering the "potential difficulty" regarding "the unanimity of verdict requirement" with respect to this offense, and after reasoning that "arguably you can have [the jurors] find that a toe nail clipper was not a weapon capable of inflicting serious bodily injury, half of them, and half of them find that the razor blade is," at the request of the State and with the assent of defense counsel, the court agreed to

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specifically instruct the jury that the only weapon defendant possessed for the purpose of the instruction was a “razor blade from a pencil sharpener.” Nonetheless, although the parties raised the issue of whether the court should specifically instruct the jury regarding the weapon used in its jury charge on the offense of possession of a dangerous weapon by a prisoner, defense counsel failed to raise the same issue with respect to the offense of communicating threats. Because we cannot distinguish the present case from *Walker* and consequently are bound by its holding, see *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36–37 (1989), we must conclude that we may only review the court’s purported error in instructing the jury for plain error. Since defendant does not argue that the trial court’s purported error should be reviewed for plain error, we conclude he has waived appellate review of this issue on appeal. See *State v. Nobles*, 350 N.C. 483, 514–15, 515 S.E.2d 885, 904 (1999), *appeal after remand*, 357 N.C. 433, 584 S.E.2d 765 (2003).

II.

[2] Defendant next contends the trial court erred by denying his motion to dismiss the charge of communicating threats. Defendant asserts there was insufficient evidence that Deputy Sheriff Rogers believed defendant would carry out his threats against her. We disagree.

“Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). “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). “[A]ll of the evidence, whether competent or incompetent, must be considered in the light most favorable to the [S]tate, and the [S]tate is entitled to every reasonable inference therefrom.” *Id.* at 78, 265 S.E.2d at 169.

Under N.C.G.S. § 14-277.1, a person is guilty of communicating threats if:

- (1) He willfully threatens to physically injure the person or that person’s child, sibling, spouse, or dependent or willfully threatens to damage the property of another;
- (2) The threat is communicated to the other person, orally, in writing, or by any other means;

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- (3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
- (4) The person threatened believes that the threat will be carried out.

N.C. Gen. Stat. § 14-277.1(a) (2011). Because “the gravamen of communicating threats is the making and communicating of a threat, . . . there is no requirement in section 14-277.1 that the threat actually be carried out.” *State v. Thompson*, 157 N.C. App. 638, 645, 580 S.E.2d 9, 14, *supersedeas and disc. review denied*, 357 N.C. 469, 587 S.E.2d 72 (2003). Instead, “[t]hreatening language can amount to an offer to injure a person even though it is a conditional offer,” particularly when the condition “can have a reasonable likelihood of occurring and does not negate an intention to carry out the threat.” *State v. Roberson*, 37 N.C. App. 714, 716, 247 S.E.2d 8, 9 (1978). Thus, “[e]ven conditional threats,” “if made and communicated by a defendant in a manner and under circumstances which would cause a reasonable person to believe that the threat was likely to be carried out, can constitute a violation of section 14-277.1, if the victim in fact believed the threat would be carried out.” *Thompson*, 157 N.C. App. at 645, 580 S.E.2d at 14.

In the present case, defendant asserts only that the State failed to present sufficient evidence of the fourth element of this offense, arguing that the State failed to show that Deputy Sheriff Rogers subjectively believed defendant would carry out his threats “to kick [her] f–king ass bitch.” Defendant first asserts that the evidence was insufficient to establish this element because defendant “did not attempt to carry out his threat; that is, he did not try to assault her.” However, since this Court has already determined that “[t]he conduct proscribed by [N.C.G.S. §]14-277.1 . . . is the making and communicating of the threat in the manner described in the statute, with no requirement that the threat be carried out,” *Roberson*, 37 N.C. App. at 715, 247 S.E.2d at 9, we find this argument to be meritless.

Defendant next asserts that the evidence was insufficient to establish this element because, when asked whether she believed defendant’s threat “was something that [defendant] was going to try to do,” Deputy Sheriff Rogers answered, “I believe he was capable of doing it, but since I had two other officers with me I was confident that we could put [defendant] back in his cell without incident.” In other words, defendant suggests, without authority, that his confinement in the jail necessarily renders it impossible for him to have committed the offense of

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communicating threats against Deputy Sheriff Rogers in the jail because she believed an attempted assault on her person could be contained with the help of her fellow officers. However, we find defendant's suggestion to be unpersuasive. *See, e.g., State v. Edmisten*, No. COA11 46, ___ N.C. App. ___, 714 S.E.2d 211, slip op. at 2–3, 6–7 (2011) (unpublished) (holding there was sufficient evidence to submit the offense of communicating threats to a jury where a defendant threatened to kill or harm an officer while the defendant rode in the back of the officer's patrol vehicle and the officer "believed the threats were real and that defendant was capable of carrying them out"); *In re V.E.B.*, No. COA06 933, 182 N.C. App. 529, 642 S.E.2d 549, slip. op. at 8 (2007) (unpublished) (holding there was sufficient evidence to withstand a motion to dismiss on the offense of communicating threats where a juvenile threatened to assault an officer after the officer pepper-sprayed her and the threatened officer "believed [the juvenile] would have attempted to carry out her threat immediately *but for the presence of other law enforcement officers*" (emphasis added)). Here, Deputy Sheriff Rogers believed defendant would carry out the threat against her if he had the opportunity to do so—a belief that was later buttressed by defendant's avowal to her, "I should have slit your throat when I had the chance," which defendant said while making "a slicing motion against his throat" with pieces of nail clippers and a razor blade woven between his fingers. Thus, even though Deputy Sheriff Rogers thought that she and the other officers present could contain an attempt by defendant to carry out his threat, she also testified that she believed defendant was capable of carrying out his threat and would do so on the condition that he had the opportunity to do so. Accordingly, after viewing the evidence in the light most favorable to the State, we conclude that the court did not err by denying defendant's motion to dismiss the charge of communicating threats.

III.

[3] Finally, defendant contends the trial court erred by denying his motion to dismiss the charge of carrying a concealed weapon, because, he asserts, there was insufficient evidence that the weapon was "concealed about his person." We disagree.

The essential elements of carrying a concealed weapon in violation of N.C.G.S. § 14-269(a) are: "(1) The accused must be off his own premises; (2) he must carry a deadly weapon; [and] (3) the weapon must be concealed about his person." *State v. Williamson*, 238 N.C. 652, 654, 78 S.E.2d 763, 765 (1953). "The purpose of the statute is to reduce the likelihood a concealed weapon may be resorted to in a fit of anger." *State v. Gainey*, 273 N.C. 620, 622, 160 S.E.2d 685, 686 (1968). While the weapon

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must be “concealed,” see *State v. Mangum*, 187 N.C. 477, 479, 121 S.E. 765, 766 (1924) (“Manifestly no person could be convicted of carrying a weapon concealed when that weapon was not concealed.”), the weapon need “not necessarily [be concealed] on the person of the accused, but in such position as gives him ready access to it,” *Gainey*, 273 N.C. at 622, 160 S.E.2d at 686; “that is, concealed near, in close proximity to him, and within his convenient control and easy reach, so that he could promptly use it, if prompted to do so by any violent motive. . . .” *Id.* at 623, 160 S.E.2d at 687 (omission in original) (quoting *State v. McManus*, 89 N.C. 555, 559 (1883)). Thus, “[i]t makes no difference how [the weapon] is concealed, so it is on or near to and within the reach and control of the person charged.” *Id.* (quoting *McManus*, 89 N.C. at 559).

In the present case, the evidence presented at trial tended to show that officers found one razor blade from a pencil sharpener stuck to the underside of the top of the table in the day room adjoining defendant’s personal cell, where defendant had been seated earlier in the day, and found another on the ledge below the window in defendant’s cell after defendant had made the cell “completely dark inside” by covering the windows and lights of the cell with paper. Defendant challenges the sufficiency of the evidence presented for this offense with two alternative arguments. First, defendant argues that the razor blade discovered on the underside of the table in the day room cannot support his conviction for carrying a concealed weapon because the blade was not “about his person” at the time that the officers discovered it. Alternatively, defendant argues that the blade discovered on the ledge below the window in his darkened cell cannot support his conviction for carrying a concealed weapon because the blade was not “hidden, secreted, or covered” at the time of its discovery.

We first consider whether the evidence was sufficient to establish that the razor blade discovered on the underside of the table in the adjoining day room had been “about his person.” Defendant asserts that, because he was in the booking area of the jail at the time the razor blade was found underneath the table in the day room, the State failed to establish that the blade was within his reach and control and, thereby, failed to establish that the blade was “about his person,” as required by the statute. Defendant also asserts that the blade could not be said to have been under his “convenient control” or within his “easy reach” because his access to the day room was non exclusive and because he could not control when he went into the day room. Nevertheless, defendant does not dispute that, on the same day the razor blade was found, he was seated at the table under which the blade was discovered; defendant

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was capable of reaching the blade under the table from where he had been seated by Deputy Sheriff Stiles earlier in the day; and defendant had regularly scheduled access to the day room in which the blade was found. Additionally, at trial, State's Exhibit 1, which was admitted into evidence without objection, included two razor blades from a pencil sharpener, one of which had black caulking on it, which was used to adhere it to the underside of the table in the day room. According to three of the testifying officers at trial, the items in State's Exhibit 1 were the same items as those recovered from defendant's personal cell and from the adjoining day room. In other words, one of the two razor blades from the hollowed out pencil sharpener was found in the day room, while the other razor blade from that sharpener—which was likely the blade that Deputy Sheriff Rogers observed protruding from defendant's fingers and which defendant used to emphasize the slicing motion he made across his throat just moments before the blade's discovery on the window ledge—was found in his personal cell. Because, when viewed in the light most favorable to the State, and because this was "such relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion" that defendant had the ability to and did conceal the razor blade underneath the table when such blade was within his reach and control at the time he was seated at the table earlier in the day, *see Smith*, 300 N.C. at 78–79, 265 S.E.2d at 169, we conclude the trial court did not err when it denied defendant's motion to dismiss the charge of carrying a concealed weapon. Our disposition on this issue renders it unnecessary to address defendant's remaining argument on this issue.

No error.

Judges BRYANT and DAVIS concur.

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STATE OF NORTH CAROLINA

v.

WINDSOR DEVONE INGRAM

No. COA12-1327

Filed 21 May 2013

1. Homicide—first-degree murder—motion to dismiss—sufficiency of evidence—shooter—motive not required

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder because the State presented substantial evidence that defendant was the shooter. Further, the State had no burden to show that defendant had a motive.

2. Homicide—first-degree murder—failure to instruct on lesser-included offense of second-degree murder

The trial court did not err in a first-degree murder case by declining to instruct the jury on the lesser-included offense of second-degree murder. Assuming *arguendo* that defendant properly preserved this issue for appellate review, all of the evidence tended to show that defendant had the intent to kill the victim with premeditation and deliberation.

Appeal by defendant from judgment entered 18 November 2011 by Judge Robert F. Floyd, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 11 April 2013.

Roy Cooper, Attorney General, by Marc Bernstein, Special Deputy Attorney General, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

STEELMAN, Judge.

Where the State presented substantial evidence that it was defendant who committed the crime charged, the trial court did not err in denying defendant's motions to dismiss. In determining whether the State presented substantial evidence, it is not the role of the appellate courts to assess the credibility of witnesses. Where all of the evidence suggested that defendant committed murder with intent, premeditation and

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deliberation, the trial court did not err in declining to instruct the jury on the lesser included offense of second-degree murder.

I. Factual and Procedural Background

On the afternoon of 10 September 2007, T.K., then ten years old, returned home from school. She observed her cousin, Tamorris Raynor (Raynor), emerging from the home. A man in a white t-shirt, whom T.K. had seen before, exited a gray automobile and spoke with Raynor. The man and Raynor went behind the house. After the man met with Raynor, he departed in his vehicle, parked it around the corner by a funeral home, and returned to the property via a concealed, wooded path.

When T.K. returned, she heard gunfire and saw Raynor come around the house. The other man came around the house and shot Raynor. T.K. gave a statement to the police. She identified the photograph of Windsor Ingram (defendant) from a photographic lineup as the man who shot Raynor.

Ernest Raynor (Ernest), Raynor's uncle, ran outside after hearing shots and found Raynor on the ground. He saw a man flee down a path and get into a gray Lincoln LS automobile. Ernest described the man as being 5'8" or 5'9", wearing a white t-shirt, white cap, and jeans.

Telephone records revealed that Raynor had used Ernest's telephone to call two different phone numbers that day, one of which was that of defendant's cellphone.

Defendant was charged with first-degree murder based on premeditation and deliberation. His first trial ended in a mistrial when the jury could not reach a unanimous verdict. The case was tried a second time before a jury at the 14 November 2011 Criminal Session of the Superior Court for Wayne County. The jury found defendant guilty of first-degree murder. The trial court sentenced defendant to life imprisonment without the possibility of parole.

Defendant appeals.

II. Denial of Motion to Dismiss

[1] In his first argument, defendant contends that the trial court erred in denying his motion to dismiss the charge of first-degree murder. We disagree.

A. Standard of Review

"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).

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“Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.’ ” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (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, 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).

B. Analysis

In the instant case, the issue presented to the trial court upon defendant’s motion to dismiss was whether there was substantial evidence that it was defendant who shot and killed Raynor. Defendant contends that the State’s evidence that defendant was the shooter was unreliable.

T.K. testified that defendant shot Raynor. T.K. identified defendant from a photographic line-up. Defendant’s contention that this identification was questionable goes to the credibility of the evidence, not its sufficiency for purposes of withstanding a motion to dismiss. The credibility of witnesses is not for this Court to determine. *State v. Buckom*, 126 N.C. App. 368, 375, 485 S.E.2d 319, 323 (1997) (quoting *State v. Hanes*, 268 N.C. 335, 339, 150 S.E.2d 489, 492 (1966)).

Defendant also contends that the State’s evidence of motive was insufficient. However, “[m]otive is not an element of first-degree murder, nor is its absence a defense[.]” *State v. Carver*, ___ N.C. App. ___, ___, 725 S.E.2d 902, 905 (2012) *aff’d*, ___ N.C. ___, 736 S.E.2d 172 (2013) (quoting *State v. Elliott*, 344 N.C. 242, 273, 475 S.E.2d 202, 216 (1996), *cert. denied*, 520 U.S. 1106, 137 L.Ed.2d 312 (1997)). The State had no burden to show that defendant had a motive; it merely had to show that defendant unlawfully killed Raynor with premeditation and deliberation. We note further that the trial court correctly instructed the jury:

Proof of motive for the crime is permissible and often valuable, but never essential for conviction. If you are

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convinced beyond a reasonable doubt that the Defendant committed the crime, the presence or absence of motive is immaterial. Motive may be shown by facts surrounding the act if they support a reasonable inference of motive. When thus proved, motive becomes a circumstance to be considered by you. The absence of motive is equally a circumstance to be considered on the side of innocence.

This argument is without merit.

III. Instruction on Lesser Included Offense

[2] In his second argument, defendant contends that the trial court erred in declining to instruct the jury on the lesser included offense of second-degree murder. We disagree.

A. Standard of Review

“[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).

“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

The jury was instructed on the charge of first-degree murder based upon premeditation and deliberation. During the jury charge conference, the following discussion took place:

THE COURT: Addressing the proposed verdict sheet, my ah ... I would suggest the verdict be guilty of first degree murder or not guilty.

MR. GURLEY: Yes, sir.

MS. BEDFORD: Yes, sir.

THE COURT: Does anyone want to be heard or request any other verdict?

MR. GURLEY: Um ... your Honor, I ... I – I guess the Court could consider a lesser included, but again, it’s up to the Court.

THE COURT: State?

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MS. BEDFORD: Your Honor, the State has considered that ... it is possible that the evidence might have shown second degree. That would be up to your judgment.

THE COURT: As I recall the evidence is – evidence in the light most favorable to the State, which the Defendant denies, but is not negating the evidence except to the extent he's not the one that committed the crime.

MR. GURLEY: Right.

THE COURT: Is that a shooter came around behind the victim and the victim fell dead with crack cocaine apparently in his hand, nothing else being shown.

There were multiple shots, and the Medical Examiner, Examiner Dr. Butts indicated that most of the shots, if not all of the shots, were entry wounds in the back. No weapon being found on the ah – the victim. I mean to me it's either – I'll hear from you, but it looks like it's either first or nothing.

MS. BEDFORD: Okay. Your Honor, that sounds good.

MR. GURLEY: I ask the Court to consider to reconsider the motion, but yeah, I understand what the Court is thinking.

THE COURT: All right. First degree – guilty of first degree – by unanimous verdict guilty of first degree murder or not guilty.

Later, the following discussion occurred between the trial court and defense counsel:

THE COURT: . . . And then my intention would be to give the substantive offense instruction, 206.13. It's titled first degree murder where a deadly weapon is used not involving self-defense covering all lesser included homicide offenses. *Of course I will not be instructing as to any lessers.*

MR. GURLEY: Yes, sir.

(Emphasis added) The trial court did not charge on any lesser offenses to first-degree murder.

Based upon the transcript of the jury charge conference, it is unclear that defendant requested a jury instruction on the lesser included

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offense of second-degree murder, and if so, whether that request was later waived by his acquiescence to the court's proposed charge. If defendant did not request the jury instruction, then any alleged error is not properly preserved for appeal, and we would only examine the issue under plain error review. *See State v. Lawrence*, ___ N.C. ___, ___, 723 S.E.2d 326, 334 (2012). On appeal, defendant has not argued that the trial court committed plain error, however, and any such argument is deemed abandoned. N.C. R. App. P. 28(b)(6).

Assuming *arguendo* that defendant properly preserved this matter for appellate review, the trial court did not err in failing to instruct the jury on second-degree murder.

First-degree murder is an unlawful killing based upon premeditation and deliberation, whereas second-degree murder is an unlawful killing that lacks these elements. Our Supreme Court has held that:

If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

State v. Locklear, 363 N.C. 438, 454-55, 681 S.E.2d 293, 306 (2009) (quoting *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 203-04, 344 S.E.2d 775, 781-82 (1986)).

The State had the burden of presenting substantial evidence of premeditation and deliberation. Defendant contends that there was no direct evidence of intent to kill.

Our Supreme Court has held that "specific intent to kill is a necessary element of first-degree murder,' and proof of premeditation and deliberation is also proof of intent to kill." *State v. Hamilton*, 338 N.C. 193, 209, 449 S.E.2d 402, 411-12 (1994) (quoting *State v. Holder*, 331 N.C. 462, 474, 418 S.E.2d 197, 203 (1992)). In the absence of direct evidence, premeditation is generally proven by circumstantial evidence. *See State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005) (holding that premeditation and deliberation are "generally proved by circumstantial evidence.").

At trial, the evidence presented by the State was that defendant drove from Goldsboro to Raynor's home, met with Raynor, concealed

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his vehicle nearby, returned to the Raynors' home, shot Raynor six times in the back while Raynor fled, ran away while Raynor lay dying, and then hid his motor vehicle. Our Supreme Court has held that the fact that a defendant drove a long way to the victim's house, that the victim was shot repeatedly in the back, and that the defendant left his victim to die, are all evidence of premeditation and deliberation. *State v. Hunt*, 330 N.C. 425, 428-29, 410 S.E.2d 478, 481 (1991); *see also State v. Keel*, 337 N.C. 469, 489, 447 S.E.2d 748, 759 (1994) (holding that evidence that a murder was committed in a particularly brutal fashion, as well as the number of the victim's wounds, supports a finding of premeditation and deliberation).

Defendant contends that there was evidence before the trial court to suggest a lack of premeditation and deliberation. Defendant contends on appeal that defendant was provoked, and that Raynor possessed drugs. We acknowledge that testimony was offered at trial that crack cocaine was found in Raynor's hand. However, any provocation by Raynor is completely speculative, and not supported by evidence. On appeal, it is the appellant who must point to some evidence in the record to support his argument. *State v. Griffin*, 5 N.C. App. 226, 227, 167 S.E.2d 824, 825 (1969).

For a jury to have found defendant guilty of second-degree murder while acquitting him of first-degree murder, there must have been some evidence in the record which might suggest a lack of premeditation or deliberation. All of the evidence tends to show that defendant had the intent to kill Raynor, along with premeditation and deliberation. Defendant does not point to any evidence to suggest that his conduct lacked premeditation or deliberation. We hold that the trial court's first-degree murder instruction was proper.

This argument is without merit.

NO ERROR.

Judges ELMORE and STROUD concur.

STATE v. KING

[227 N.C. App. 390 (2013)]

STATE OF NORTH CAROLINA
v.
MICHAEL LEON KING, DEFENDANT

No. COA12-1275

Filed 21 May 2013

1. Pretrial Proceedings—continuance to procure expert—denied—defendant’s inactivity

The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant’s motion to continue to permit him to procure a DNA expert. Defendant had sufficient time to review the evidence against him and to procure the assistance of an expert, but simply failed to do so in time.

2. Constitutional Law—effective assistance of counsel—record not sufficient

Defendant’s assertion that he received ineffective assistance of counsel was dismissed without prejudice to his ability to raise the challenge through a motion for appropriate relief where the record was not adequate to address the issue.

3. Criminal Law—requested instruction denied—credibility of witness

There was no error in a first-degree murder prosecution where the trial court refused to instruct the jury using defendant’s proposed special instruction concerning the effect of drug use on a witness’s credibility. The trial court properly instructed the jury using the general witness credibility instruction, defendant made it clear on cross-examination that the witness had been smoking marijuana before the masked perpetrators entered the apartment, and defendant argued in closing that the witness could not be believed.

Appeal by defendant from judgment entered 17 April 2012 by Judge Yvonne Mims Evans in Superior Court, Mecklenburg County. Heard in the Court of Appeals 24 April 2013.

Attorney General Roy A. Cooper, III by Special Deputy Attorney General Jill Ledford Cheek, for the State.

Appellate Defender Staples S. Hughes by Assistant Appellate Defender Paul M. Green, for defendant-appellant.

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STROUD, Judge.

Michael King (“defendant”) appeals from a judgment entered 17 April 2012 in Superior Court, Mecklenburg County, after a jury found him guilty of one count of first-degree murder. Defendant argues on appeal that the trial court abused its discretion and violated his constitutional right to the effective assistance of counsel by denying his motion to continue. Defendant further contends that the trial court erred in refusing to instruct the jury using a special instruction concerning the credibility of drug abusers. For the following reasons, we find no error.

I. Introduction

Defendant was indicted in Mecklenburg County for murder in the first degree on 8 March 2010. Defendant pled not guilty and proceeded to jury trial. At trial, the State’s evidence tended to show the following:

On 24 January 2010, defendant and several others, including Jamal Pittman and Jacob Case, agreed to rob Jared Bolli, who Mr. Case knew would have marijuana and cash in a safe in his apartment. Defendant, Mr. Case, Mr. Pittman, and either two or three others, met at an apartment complex and all got into Mr. Pittman’s red minivan. Two of them brought weapons, one a .22 caliber rifle and the other a revolver. Defendant was carrying the rifle. All of them rode together to Mr. Bolli’s apartment complex.

When they arrived at Mr. Bolli’s apartment, Mr. Case went to the door, knocked, and was let in, as Mr. Bolli knew him. At the time, several people were in Mr. Bolli’s apartment smoking marijuana, including Amanda Driver. Defendant and three others hid out of sight of the doorway and put ski masks on. One kept a lookout on the breezeway. After a couple minutes, the four masked individuals burst into the apartment. The two with weapons brandished them at the apartment’s occupants and separated them into different groups. The one with the rifle, who Ms. Driver testified had a tattoo of the word “King” on his arm, took Mr. Bolli and demanded to know where the marijuana and money were. After showing the gunman the safe where he kept the marijuana and money, Mr. Bolli leaned over and reached for a weight near his exercise bench. The man with the rifle saw him leaning over to get the weight, said “Hell, no,” and shot Mr. Bolli in the head at close range. All of the robbers fled after Mr. Bolli was shot and ran back to Mr. Pittman’s minivan. Mr. Bolli was pronounced dead when emergency medical personnel arrived on the scene.

Although the State mostly relied on the testimony of defendant’s co-conspirators and the witnesses in Mr. Bolli’s apartment, it also

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introduced physical evidence. Specifically, it introduced the testimony and report of a State Bureau of Investigation (SBI) analyst who found mixtures of DNA on the steering wheel of the red minivan, as well as in several gloves, a ski mask, and the black safe stolen from Mr. Bolli's apartment, all of which were found either in Mr. Pittman's red minivan or in his apartment. In some of the mixtures, defendant could not be excluded as a contributor, and in others, the SBI analyst concluded his DNA matched. Defendant presented alibi evidence in his defense, but did not present any expert testimony to counter the DNA evidence.

After the close of all evidence, the jury returned a verdict of guilty as to first-degree murder. The trial court sentenced defendant to life imprisonment. After sentencing, defendant gave notice of appeal in open court.

II. Motion to Continue

[1] Defendant argues that the trial court abused its discretion in denying his motion to continue to permit him to procure an expert witness to evaluate and testify in regard to the State's DNA evidence. He further argues that in denying his motion to continue, the trial court violated his right to the effective assistance of counsel.

The State provided discovery, including all of the reports and data generated by the SBI around 9 June 2011. The State produced one of the reports concerning the DNA analysis in hard copy and included a second report on a CD containing voluminous other material. Defense counsel did not carefully examine the material on the CD until around 5 March 2012, when he e-mailed the prosecutor and asked if he had missed anything. The prosecutor informed him that there was a second DNA report on the CD.

The parties had agreed to a trial date of 9 April 2012. After conferring with Dr. Ronald Ostrowski, a DNA expert, defendant filed a motion to continue on 16 March 2012. The trial court held a hearing on the motion. At the hearing, defense counsel explained his oversight and Dr. Ostrowski stated that he would need approximately three to four months to review the material and prepare for trial. The trial court denied defendant's motion to continue.

"A motion for a continuance is ordinarily addressed to the sound discretion of the trial court, and the ruling will not be disturbed absent a showing of abuse of discretion." *State v. Williams*, 355 N.C. 501, 540, 565 S.E.2d 609, 632 (2002) (citation and quotation marks omitted), *cert. denied*, 537 U.S. 1125, 154 L.Ed. 2d 808 (2003). "An abuse of discretion occurs only upon a showing that the judge's ruling was so arbitrary

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that it could not have been the result of a reasoned decision.” *State v. McCallum*, 187 N.C. App. 628, 633, 653 S.E.2d 915, 919 (2007) (citation and quotation marks omitted).

When a motion to continue raises a constitutional issue, however, the trial court’s ruling thereon involves a question of law that is fully reviewable on appeal by examination of the particular circumstances presented in the record. Even when the motion raises a constitutional issue, denial of the motion is grounds for a new trial only upon a showing that the denial was erroneous and also that defendant was prejudiced as a result of the error.

Williams, 355 N.C. at 540, 565 S.E.2d at 632 (citation, quotation marks, and brackets omitted).

Here, defendant’s written motion specifically cited Article I, §§ 19 and 23 of the North Carolina Constitution and expressed concern that defendant would not receive effective assistance of counsel if the motion were not granted. Ineffective assistance of counsel will be presumed “without inquiry into the actual conduct of the trial when the likelihood that any lawyer, even a fully competent one, could provide effective assistance is remote.” *State v. Morgan*, 359 N.C. 131, 143-44, 604 S.E.2d 886, 894 (2004), *cert. denied*, 546 U.S. 830, 163 L.Ed. 2d 79 (2005).

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.

Williams, 355 N.C. at 540-41, 565 S.E.2d at 632 (citations and quotation marks omitted).

In determining whether a trial court erred in denying a motion to continue, we have considered the following factors: (1) the diligence of the defendant in preparing for trial and requesting the continuance, (2) the detail and effort with which the defendant communicates to the court the expected evidence or testimony, (3) the materiality of the expected evidence to the defendant’s case, and (4) the gravity of the harm defendant might suffer as a result of a denial of the continuance.

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State v. Wright, 210 N.C. App. 52, 60, 708 S.E.2d 112, 119 (citation and quotation marks omitted), *disc. rev. denied*, 365 N.C. 200, 710 S.E.2d 9 (2011). Where such factors are present, our appellate courts have “found either an abuse of discretion or constitutional error in denying a continuance.” *State v. Roper*, 328 N.C. 337, 352, 402 S.E.2d at 600, 609, *cert. denied*, 502 U.S. 902, 116 L.Ed. 2d 232 (1991).

Here, defendant informed the trial court specifically why Dr. Ostrowski was needed and how much time he would need to review the evidence. Nevertheless, the first factor—the diligence of defendant’s preparation—weighs heavily in favor of the State’s position. This case is not one in which no competent lawyer could have provided effective assistance or where defendant had inadequate time to prepare – defendant’s trial counsel admitted he had simply overlooked the previously disclosed DNA report as it was on a CD with voluminous data from the SBI received during the summer of 2011.¹ It appears that the same attorney represented him for over a year before trial. There was no evidence that the State had violated discovery rules. Had trial counsel properly examined the CD and found the report sometime in the months between summer 2011 and March 2012, he likely could have procured the assistance of Dr. Ostrowski or another DNA expert in time for trial in April. Thus, defendant had sufficient time to review the evidence against him and to procure the assistance of an expert, but simply failed to do so in time.

Defendant cites our opinion in *State v. Barlowe*, 157 N.C. App. 249, 578 S.E.2d 660, *disc. rev. denied*, 357 N.C. 462, 586 S.E.2d 100 (2003), to support his argument. In *Barlowe*, we concluded that “the denial of defendant’s motion to continue in this case was error and violated her constitutional rights to confront her accusers, to effective assistance of counsel, and to due process of law.” *Barlowe*, 157 N.C. App. at 257, 578 S.E.2d at 665. In that case, the State delivered to the defense counsel an analyst’s draft report relating to evidence of blood stained pants approximately three weeks before trial and the final report nine days before trial. *Id.* at 255-57, 578 S.E.2d at 664-65. The defendant’s trial counsel contacted various experts, but “none of the experts contacted by her counsel would have been available for trial even if they had been

1. Defendant argues that the State violated a local practice by providing the report in a digital format, rather than having printed the full report. There was no evidence of such a local practice. At the hearing on the motion to continue, Defendant’s trial counsel merely stated that in the few cases he had handled where DNA evidence was involved, the crime lab gave him the reports in a hard copy, not that there was an established local practice to that effect.

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contacted immediately upon defendant's receipt of the [draft] report." *Id.* at 257, 578 S.E.2d at 665.

Barlowe is distinguishable from the present case. Unlike in *Barlowe*, defendant had over nine months after he received the SBI lab report in which to examine the evidence and procure an expert witness. Had the trial counsel been aware of the report and contacted Dr. Ostrowski before January 2012, he likely could have procured Dr. Ostrowski's help at trial.

The question in this context is whether defendant had "ample time to confer with counsel and to investigate, prepare and present his defense," *Williams*, 355 N.C. at 540, 565 S.E.2d at 632 (citation and quotation marks omitted), not whether the trial counsel properly used the time given to adequately investigate and prepare—that question is considered under the normal test for ineffective assistance of counsel. Although the trial court might have justifiably granted defendant's motion and could have avoided a potential question of ineffective assistance of counsel by doing so, we cannot say that where defendant had been provided the DNA report nearly a year before trial the trial court erred or violated defendant's constitutional rights in denying his motion to continue in order to secure an expert witness for trial.

[2] Defendant also asserts that he received ineffective assistance of counsel, but we dismiss this argument without prejudice to his ability to raise this challenge through a motion for appropriate relief. The record presently before us is inadequate to assess whether defendant suffered prejudice from his trial counsel's failure to timely review the evidence. *See State v. Thompson*, 359 N.C. 77, 123, 604 S.E.2d 850, 881 (2004) ("[W]hen 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." (citation omitted)). Specifically, we cannot say that defendant was prejudiced when we do not know whether Dr. Ostrowski or any other expert would have had a materially different opinion concerning the DNA evidence than the State's experts. At a hearing on a motion for appropriate relief, defendant would have the opportunity to show what testimony or evidence another DNA expert would have added to the proceedings had trial counsel reviewed the discovery in time.

III. Drug User Witness Instruction

[3] Defendant next argues that the trial court erred in denying his request for a special instruction concerning the effect of drug use on a

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witness's credibility. He argues that the facts supported such an instruction because Ms. Driver identified defendant as the one with the rifle based upon the "King" tattoo on his arm, she had been smoking marijuana when the robbery and murder occurred, and she was the only witness who was not a co-conspirator who identified defendant.

Properly preserved challenges to "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) (citations omitted). But jury instructions are not reviewed in isolation.

This Court reviews jury instructions contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by the instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. Blizzard, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (citation, quotation marks, ellipses, and brackets omitted).

"[A]ll substantive and material features of the crime with which a defendant is charged must be addressed in the trial court's instructions to the jury." *State v. Bogle*, 324 N.C. 190, 196, 376 S.E.2d 745, 748 (1989). "[T]he trial court is not[, however,] required to instruct on a subordinate feature of the case absent a special request." *State v. Ward*, 338 N.C. 64, 93, 449 S.E.2d 709, 725 (1994) (citation and quotation marks omitted), *cert. denied*, 514 U.S. 1134, 131 L.Ed. 2d 1013 (1995). "Evidence relating to the credibility of a witness is a subordinate, rather than a substantive, feature of the case." *State v. Edwards*, 37 N.C. App. 47, 50, 245 S.E.2d 527, 529 (1978) (citation omitted).

Where an instruction concerning the credibility of a witness is requested, "the trial court must give the instructions requested, at least in substance, if they are proper and supported by the evidence." *State v. Craig*, 167 N.C. App. 793, 795, 606 S.E.2d 387, 388 (2005). Nevertheless,

[t]he trial court is not required to give a requested instruction in the exact language of the request; however, when the request is correct in law and supported by the evidence

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in the case, the court must give the instructions in substance. It is error for the court to change the sense or to so qualify the requested instruction as to weaken its force.

State v. Puckett, 54 N.C. App. 576, 581, 284 S.E.2d 326, 329 (1981) (citations omitted). Defendant cannot show error, however, if that instruction is “implicit in the entire charge.” *State v. Howard*, 274 N.C. 186, 200, 162 S.E.2d 495, 504 (1968); *State v. Harris*, 47 N.C. App. 121, 124, 266 S.E.2d 735, 737 (1980) (finding no error where the trial court “charged [the jury] in substance on the matters as requested by defendant.”), *cert. denied*, 305 N.C. 762, 292 S.E.2d 577 (1982).

Defendant proposed two alternate instructions concerning a witness’s use of a controlled substance. The first proposed instruction read:

The testimony of someone who is shown to have used a controlled substance during the period of time about which the witness testified must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses.

You should never convict any defendant upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt.

The second proposed instruction read as follows:

There has been evidence introduced at the trial that the government (or defendant) called as a witness a person who was using (or addicted to) drugs when the events he observed took place or who is now using drugs. I instruct you that there is nothing improper about calling such a witness to testify about events within his personal knowledge.

On the other hand, his testimony must be examined with greater scrutiny than the testimony of any other witness. The testimony of a witness who was using drugs at the time of the events he is testifying about, or who is using drugs (or an addict) at the time of his testimony may be less believable because of the effect the drugs may have on his ability to perceive or relate the events in question.

If you decide to accept his testimony, after considering it in light of all the evidence in this case, then you may give it whatever weight, if any, you find it deserves.

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Defendant cites no case holding that it is error for a trial judge to refuse to instruct the jury concerning a particular witness's ability to accurately perceive the relevant events based on her use of an intoxicating substance.² Here, the trial court instructed the jury concerning the credibility of witnesses as follows:

You are the sole judges of the believability of witnesses. You must decide for yourself whether to believe the testimony of any witness. You may believe all, any part, or none of a witness's testimony. In deciding whether to believe a witness, you should use the same tests of truthfulness that you use in your everyday lives. Among other things, these tests may include: The opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified; the manner and appearance of the witness; any interest, bias, prejudice, or partiality the witness may have; the apparent understanding and fairnesses [sic] of the witness; whether the testimony is reasonable and whether the testimony is consistent with other believable evidence in the case.

Taking into account the effect of an intoxicating substance on a witness's ability to accurately perceive what is going on around her is one of those "tests of truthfulness that [jurors] use in [their] everyday lives." Evidence of a witness's intoxication at the relevant time is more similar to evidence of a witness's limited eyesight, and other factors jurors normally take into account in assessing the credibility of an eyewitness, than it is to evidence that the witness is a paid informer or otherwise interested in the outcome of the case. *Cf. State v. Puckett*, 54 N.C. App. 576, 582, 284 S.E.2d 326, 330 (1981) (holding that it was prejudicial error to refuse to give a requested instruction about the credibility of an interested witness).

Here, the trial court properly instructed the jury using the general witness credibility instruction. Defendant made clear through cross-examination that the witness had been smoking marijuana before the masked

2. Defendant does cite *State v. Edwards*, in which we held that it was not error for the trial court to refrain from instructing the jury concerning the credibility of a witness who had consumed drugs before witnessing the events in question where the defendant had not specifically requested such an instruction. *Edwards*, 37 N.C. App. at 50, 245 S.E.2d at 529. Defendant implies from this holding that had the defendant in *Edwards* requested the instruction, it would have been error for the trial court to refuse to so instruct the jury. We did not address that question in *Edwards*, however, and therefore it is not dispositive of the question before us in the present case.

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perpetrators entered the apartment and argued in closing that Ms. Driver could not be believed given her use of marijuana and prior statement that did not mention the “King” tattoo. There was no evidence that Ms. Driver was a co-conspirator, paid informant, or an otherwise interested witness. Therefore, we hold that it was not error for the court to refuse to instruct the jury using defendant’s proposed special instruction.

IV. Conclusion

The trial court did not err or violate defendant’s constitutional rights in denying defendant’s motion to continue. Further, it was not error for the trial court to refuse to give the requested special instruction on a witness’s use of drugs under the facts of this case.

NO ERROR.

Judges HUNTER, Robert C. and ERVIN concur.

STATE OF NORTH CAROLINA
v.
REGINALD TERRELL LEACH

No. COA12-962

Filed 21 May 2013

Prisons and Prisoners—writ of habeas corpus—denial of request for release on parole—failure to show entitlement to discharge

The trial court did not err by denying defendant’s petition for the issuance of a writ of *habeas corpus* regarding the denial of his request for release on parole pursuant to a petition for the issuance of a writ of *certiorari* that was allowed by the Court of Appeals on 8 February 2012. Defendant failed to establish that he had a colorable claim to be entitled to be discharged from custody based on an alleged deprivation of a constitutionally protected liberty interest without due process of law.

Appeal stemming from the allowance of a request for *certiorari* by defendant from order entered 5 May 2011 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 30 January 2013.

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[227 N.C. App. 399 (2013)]

Attorney General Roy Cooper, by Assistant Attorney General Jodi Harrison, for the State.

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

ERVIN, Judge.

Defendant Reginald Terrell Leach challenges the trial court's order denying his petition for the issuance of a writ of habeas corpus pursuant to a petition for the issuance of a writ of *certiorari* that was allowed by this Court on 8 February 2012. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

A. Substantive Facts

On 14 December 1992, the Cabarrus County grand jury returned bills of indictment charging Defendant with trafficking in between 28 and 200 grams of cocaine by manufacturing, trafficking in between 28 and 200 grams of cocaine by transportation, and trafficking in between 28 and 200 grams of cocaine by possession. On 24 May 1993, the Cabarrus County grand jury returned a bill of indictment charging Defendant with the murder of John Thomas Ford. On 12 October 1993, Defendant entered a plea of guilty to three counts of trafficking in cocaine on the condition that the State would voluntarily dismiss the indictments that had been returned against Defendant in two additional cases, that the three counts to which Defendant had entered guilty pleas would be consolidated for judgment, and that Defendant would not be sentenced to more than seven years imprisonment in these cocaine trafficking cases. On the same date, Defendant entered a plea of guilty to second degree murder. On 13 October 1993, Judge W. Douglas Albright found that Defendant had murdered Mr. Ford "while on pretrial release on another felony charge," that Defendant had "a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement," and that Defendant had "killed the deceased with malice, after premeditation and deliberation;" that there were no mitigating factors; that an aggravated sentence should be imposed; and that Defendant should be imprisoned for the term of his natural life. On the same date, Judge Albright entered a judgment consolidating Defendant's three cocaine trafficking convictions for judgment and sentencing Defendant to seven

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years imprisonment, with this sentence to be served at the expiration of Defendant's sentence for murdering Mr. Ford.

After a review conducted in September 2005, Defendant was denied release on parole. Following another parole review, Defendant was informed in 2006 that he would be paroled through the Mutual Agreement Parole Program. On 28 March 2007, the Division of Prisons, the Parole Commission, and Defendant signed a Parole Agreement Form. According to this MAPP contract, Defendant agreed "to the conditions set forth in this agreement and [that he] ha[d] read and underst[ood] the Statement of Procedures incorporated herein" and the Division of Prisons and the Parole Commission acknowledged that they would "fulfill the Conditions set forth in this agreement" "if the Participant fulfills the conditions" which applied to him. Although the release date specified in the original agreement was 28 September 2009, Defendant received notice on 8 July 2009 that the Parole Commission had recommended extending his release date for twelve months because of Defendant's failure to comply with the work release provisions set out in the MAPP contract. On 23 July 2009, Defendant agreed to the proposed MAPP contract modification. Subsequently, Defendant was assigned to work at Perdue Farms, where he remained actively employed for more than a year, thereby fulfilling his work release obligation. After Defendant returned to the correctional facility to which he was assigned following a 48 hour home leave on 26 September 2010, the Parole Commission, by means of a notice dated 28 September 2010, terminated Defendant's MAPP contract and denied Defendant's release on parole on the grounds that there was "a substantial risk that [Defendant would] not conform to reasonable conditions of parole" and "would engage in further criminal conduct." Although Defendant submitted a grievance challenging the termination of his MAPP contract and the denial of his request for release on parole, that grievance did not prove successful.

B. Procedural History

On 4 March 2011, Defendant filed a petition for the issuance of a writ of habeas corpus in the Moore County Superior Court. As a result of the fact that Defendant's imprisonment arose from judgments entered in Cabarrus County, Judge James M. Webb referred Defendant's petition to the Cabarrus County Superior Court. On 5 May 2011, the trial court entered an order denying Defendant's habeas corpus petition pursuant to N.C. Gen. Stat. § 17-4(2) (providing that a petition for the issuance of a writ of habeas corpus should be denied in the event that the applicant is "committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of

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an execution issued upon such final order, judgment or decree”). On 23 January 2012, Defendant sought the issuance of a writ of *certiorari* for the purpose of obtaining review of the trial court’s order by this Court. On 8 February 2012, we allowed Defendant’s *certiorari* petition.

II. Legal AnalysisA. Standard of Review

According to the statutory provisions governing habeas corpus proceedings as prescribed in North Carolina law, “[e]very person imprisoned or restrained of his liberty within this State, for any criminal or supposed criminal matter, or on any pretense whatsoever, except in the cases specified in [N.C. Gen. Stat. §] 17-4, may prosecute a writ of habeas corpus, according to the provisions of this Chapter, to inquire into the cause of such imprisonment or restraint, and, if illegal, to be delivered therefrom.” N.C. Gen. Stat. § 17-3. An application for the issuance of a writ of habeas corpus “must state, in substance, as follows:

- (1) That the party, in whose behalf the writ is applied for, is imprisoned or restrained of his liberty, the place where, and the officer or person by whom he is imprisoned or restrained, naming both parties, if their names are known, or describing them if they are not known.
- (2) The cause or pretense of such imprisonment or restraint, according to the knowledge or belief of the applicant.
- (3) If the imprisonment is by virtue of any warrant or other process, a copy thereof shall be annexed, or it shall be made to appear that a copy thereof has been demanded and refused, or that for some sufficient reason a demand for such copy could not be made.
- (4) If the imprisonment or restraint is alleged to be illegal, the application must state in what the alleged illegality consists; and that the legality of the imprisonment or restraint has not already been adjudged, upon a prior writ of habeas corpus, to the knowledge or belief of the applicant.
- (5) The facts set forth in the application must be verified by the oath of the applicant, or by that of some other credible witness, which oath may be administered by any person authorized by law to take affidavits.

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N.C. Gen. Stat. § 17-7. An application for the issuance of a writ of habeas corpus “shall” be summarily denied:

- (1) Where the persons are committed or detained by virtue of process issued by a court of the United States, or a judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of suit in such courts.
- (2) Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree.

. . . .

- (4) Where no probable ground for relief is shown in the application.

N.C. Gen. Stat. § 17-4. “Any court or judge empowered to grant the writ, to whom such applications may be presented, shall grant the writ without delay, unless it appear from the application itself or from the documents annexed that the person applying or for whose benefit it is intended is, by this Chapter, prohibited from prosecuting the writ.” N.C. Gen. Stat. § 17-9. As a result, a trial judge presented with an application for the issuance of a writ of habeas corpus must issue the requested writ, thereby triggering the necessity for further proceedings, unless one of the grounds for denial specified in N.C. Gen. Stat. § 17-4 exists. *In re Boyett*, 136 N.C. 415, 424, 48 S.E. 789, 793 (1904) (stating that “[t]here can be no doubt of the duty and power of the Court to issue the writ of *habeas corpus* when applied for in accordance with statutory provisions”).

After the issuance of the requested writ, it must be served upon the person to whom it is directed or the facility in which the applicant is being detained. N.C. Gen. Stat. § 17-12. Upon service of the writ, “[t]he person or officer on whom the writ is served must make a return thereto in writing, and, except where such person is a sworn public officer and makes his return in his official capacity, it must be verified by his oath.” N.C. Gen. Stat. § 17-14. According to N.C. Gen. Stat. § 17-14, the person making the return must “plainly and unequivocally” state:

- (1) Whether he has or has not the party in his custody or under his power or restraint.

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- (2) If he has the party in his custody or power, or under his restraint, the authority and the cause of such imprisonment or restraint, setting forth the same at large.
- (3) If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return; and the original shall be produced and exhibited on the return of the writ to the court or judge before whom the same is returnable.
- (4) If the person or officer upon whom such writ is served has had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause and by what authority such transfer took place.

After the making of the required return, “[t]he court or judge before whom the party is brought on a writ of habeas corpus shall . . . examine into the facts contained in such return, and into the cause of the confinement or restraint of such party.” N.C. Gen. Stat. § 17-32. If the applicant takes issue with “the material facts in the return, or other facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge, the court or judge shall proceed, in a summary way, to hear the allegations and proofs on both sides, and to do what to justice appertains in delivering, bailing, or remanding such party.” N.C. Gen. Stat. § 17-32. The summary nature of the proceedings to be conducted following the return of a writ of habeas corpus reflects the fact that “their principal object [is] a release of a party from illegal restraint” and that such proceedings would “lose many of their most beneficial results” if they were not “summary and prompt.” *State v. Miller*, 97 N.C. 451, 454, 1 S.E. 776, 778 (1887). However, the resulting proceedings should not be “perfunctory and merely formal;” instead, relevant facts, “ ‘when controverted, may be established by evidence like any other disputed fact.’ ” *In re Bailey*, 203 N.C. 362, 365-66, 166 S.E. 165, 166 (1932) (quoting *In re Veasey*, 196 N.C. 662, 665, 146 S.E. 599, 601 (1929)). “If no legal cause is shown for such imprisonment or restraint, or for the continuance thereof, the court or judge shall discharge the party from the custody or restraint under which he is held.” N.C. Gen. Stat. § 17-33. On the other hand, the trial judge must “remand the party” to custody in the event that he or she is being held:

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- (1) By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction.
- (2) By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree.
- (3) For any contempt specially and plainly charged in the commitment by some court, officer or body having authority to commit for the contempt so charged.
- (4) That the time during which such party may be legally detained has not yet expired.

N.C. Gen. Stat. § 17-34.

Thus, a trial judge to whom an application for the issuance of a writ of habeas corpus is presented must initially determine, based upon an examination of the application and any attached materials, whether the application satisfies the formal requirements specified in N.C. Gen. Stat. § 17-7 and whether the application is subject to summary denial pursuant to N.C. Gen. Stat. § 17-4. In other words, the reviewing judge must determine if the application, on its face, provides a basis for believing that the applicant is, in fact, entitled to be discharged from imprisonment or restraint and must, if it does, issue a writ of habeas corpus. After the writ has been served and the custodial officer makes the required return, the trial court must make the factual and legal decisions necessary to determine whether the applicant is, in fact, lawfully imprisoned or restrained utilizing such procedures as suffice to adequately resolve any relevant issues of law or fact.

As the record clearly reflects, the trial court summarily denied Defendant's application for the issuance of the requested writ rather than denying it after holding a hearing for the purpose of addressing the merits of Defendant's claim.¹ The statutory provisions governing

1. The Court has not specified the standard of review which should be utilized in evaluating the validity of Defendant's challenge to the validity of the trial court's order. According to Defendant, our review of the trial court's order should be "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence," *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982), with this proposed standard of review having been derived from a decision evaluating the appropriateness of a trial judge's decision to deny a suppression motion lodged pursuant to N.C. Gen. Stat. § 15A-974. In view of the differences between the nature of the inquiry which a trial judge must conduct in deciding whether to grant or deny a suppression motion and

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habeas corpus proceedings contain no indication that a trial judge must make findings of fact and conclusions of law in the course of determining whether an application for the issuance of a writ of habeas corpus should be summarily denied. The general purpose sought to be achieved by requiring a trial court to make specific findings of fact and conclusions of law is to enable a reviewing court to determine the legal and factual basis for the trial court's decision. *State ex rel. v. Williams*, 179 N.C. App. 838, 839, 635 S.E.2d 495, 497 (2006) (stating that the purpose of findings of fact is "to enable this Court to determine whether the trial court's conclusions of law are supported by the evidence"). As a result, findings of fact are only necessary when the trial court is required to resolve disputed factual issues. *Mrozek v. Mrozek*, 129 N.C. App. 43, 49-50, 496 S.E.2d 836, 840-41 (1998) (remanding an equitable distribution order for further proceedings because the trial court's findings of fact failed to indicate that it had properly considered the relevant distributional factors set out in N.C. Gen. Stat. § 50-20(c)). A trial judge need not, however, make findings of fact when the question before the court is purely legal in nature. *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 261, 400 S.E.2d 435, 440 (1991) (noting that findings of facts and conclusions of law are not required in connection with the resolution of a summary judgment motion and "are disregarded on appeal" if made). For that reason, the extent to which a trial court is required to make findings of fact and conclusions of law generally hinges upon the nature of the issues that the judge in question is called upon to resolve.

As we have already noted, the issue before a trial judge required to conduct the initial review of an application for the issuance of a writ of habeas corpus is whether the application is in proper form and whether the applicant has established a valid basis for believing that he or she is being unlawfully detained and entitled to be discharged. In making this determination, the trial court is simply required to examine the face of the applicant's application, including any supporting documentation, and decide whether the necessary preliminary showing has been made. The making of findings and conclusions would not contribute to a proper appellate review of the decision that the trial judge is required to make at that stage of a habeas corpus proceeding. In an analogous situation involving the summary denial of a motion for appropriate relief in which the motion and supporting affidavits failed to establish the existence of a viable claim for relief, findings and conclusions have been

the issues which must be addressed in connection with the initial review of an application for the issuance of a writ of habeas corpus, we do not believe that Defendant has correctly stated the standard of review which should be utilized in this case.

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deemed unnecessary. *State v. Harris*, 338 N.C. 129, 143, 449 S.E.2d 371, 377 (1994) (holding that the trial court did not err by summarily denying the defendant's motion for appropriate relief given that "[t]here were no specific contentions that required an evidentiary hearing to resolve questions of fact"), *cert. denied*, 514 U.S. 1100, 115 S. Ct. 1833, 131 L. Ed. 2d 752 (1995). As a result, given the nature of the required inquiry, there is no reason to require the making of findings of fact and conclusions of law at the initial review stage of a habeas corpus proceeding.

The decision concerning whether an application for a writ of habeas corpus should be summarily denied or whether additional proceedings should be conducted based upon the issuance of the requested writ is, in fact, a pure question of law. For that reason, we conclude that Defendant's challenge to the trial court's order should be evaluated using a *de novo* standard of review. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (stating that "[c]onclusions of law are reviewed *de novo* and are subject to full review"). Such a standard of review has been utilized in similar circumstances, such as in determining whether a trial judge correctly dismissed a complaint in a civil action for failure to state a claim upon which relief can be granted pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (stating that, in reviewing an order granting or denying a motion to dismiss for failure to state a claim for which relief can be granted, "[t]his Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct"), *affirmed*, 357 N.C. 567, 597 S.E.2d 673 (2003), and whether a motion for appropriate relief should have been summarily denied, *State v. Jackson*, __ N.C. App. __, __, 727 S.E.2d 322, 329 (2012) (stating that, "[i]f 'the issues raised by Defendant's challenge to [the trial court's] decision to deny his motion for appropriate relief are primarily legal rather than factual in nature, we will essentially use a *de novo* standard of review in evaluating Defendant's challenge to [the trial court's] order' ") (quoting *State v. Taylor*, __ N.C. App. __, __, 713 S.E.2d 82, 86, *disc. review denied*, 365 N.C. 342, 717 S.E.2d 558 (2011)) (second alteration in original).² As

2. The Supreme Court has held that, in reviewing a trial court's refusal to conduct an evidentiary hearing in the course of reviewing a motion for appropriate relief, an abuse of discretion standard of review should be utilized. *State v. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748, *cert. denied*, 549 U.S. 1000, 127 S. Ct. 505, 166 L. Ed. 2d 378 (2006). However, the necessity for conducting an evidentiary hearing and the extent to which a motion for appropriate relief should be summarily denied are not analytically identical decisions, so that the standard of review set out in *Elliott* is not inconsistent with the

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a result, a proper consideration of Defendant's challenge to the validity of the trial court's order requires us to " 'consider[] the matter anew and freely substitute[] [our] own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

B. Validity of Trial Court's Order

In his brief, Defendant argues that this Court should reverse the trial court's order because it "failed to include any findings addressing the content of his petition." In other words, Defendant's principal challenge to the validity of the trial court's order is predicated on the contention that "the court's findings are insufficient . . . because they fail to address, or even acknowledge, the central 'evidence' before it" and "offer[] no hint that its substance was considered." As a result, Defendant requests us to remand the case "for a hearing on the merits of his constitutional claim," at which the findings and conclusions that he believes to be necessary would be made. We do not find Defendant's argument persuasive.

As we have previously indicated, the trial court summarily denied Defendant's application prior to holding a hearing on the merits. For the reasons that we have already noted, the trial court had no obligation to make findings of fact or conclusions of law at this stage of a habeas corpus proceeding. In light of that fact, the trial court's failure to make findings of fact and conclusions of law in the course of summarily denying Defendant's habeas corpus petition simply does not provide a valid basis for overturning that order on appeal. Any argument in support of a contrary conclusion rests upon a misapprehension of the nature of the decision that the trial court was required to make at this stage of a habeas corpus proceeding. Thus, Defendant's specific challenge to the trial court's order is without merit.

Although this deficiency in Defendant's challenge to the trial court's order might, standing alone, justify an affirmance of the trial court's order, *Viar v. N.C. Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (stating that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant"), the argument advanced in Defendant's brief, when read expansively, can also be understood as a contention that the trial court should have refrained from summarily denying Defendant's habeas corpus petition and required that further

standard of review utilized in reviewing decisions to summarily deny a motion for appropriate relief cited in the text.

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proceedings, including an evidentiary hearing to address the merits of Defendant's petition, be conducted instead. Any such argument necessarily fails.

In his initial application for the issuance of a writ of habeas corpus, Defendant asserted that he was entitled to relief on the basis of three separate legal theories. More specifically, Defendant asserted (1) that the language of his MAPP contract provided him with a liberty interest in obtaining release on parole and that the Parole Commission's decision to terminate his MAPP contract and decline to authorize his release constituted a deprivation of liberty without due process of law; (2) that the Parole Commission, by failing to release Defendant in accordance with the terms of his MAPP contract, violated its own rules and regulations in contravention of the due process provisions of the state and federal constitutions; and (3) that the Parole Commission, by declining to release Defendant on discretionary grounds, violated the state and federal constitutional prohibition against the enactment of *ex post facto* laws. As a result, each of the legal theories asserted in Defendant's application and carried forward into Defendant's brief assume that he has fully complied with the conditions of his MAPP contract, that the relevant provisions of his MAPP contract deprived the Parole Commission of the authority to refrain from releasing him given his compliance with all relevant contractual conditions, and that his compliance with those conditions entitled him to immediate discharge.³

As a result of the fact that habeas corpus is available in instances in which, "though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged," N.C. Gen. Stat. § 17-33(2), the extent to which an imprisoned individual is entitled to challenge parole-related decisions by means of an application for the issuance of a writ of habeas corpus has been the subject of litigation before this Court on a number of occasions. In *In re Stevens*, 28 N.C. App. 471, 472, 221 S.E.2d 839, 839-40 (1976), an incarcerated individual sought habeas corpus relief after a Department of Correction disciplinary hearing committee found him "guilty" of "involvement in a[n] . . . altercation in which a fellow inmate

3. In his brief, Defendant concedes that each of these three claims, reduced to their essence, amount to an assertion that the Parole Commission's decision to terminate his MAPP contract and deny his request for release on parole worked an unconstitutional deprivation of liberty without due process of law. As a result, we will focus the discussion in the remainder of this opinion on the legal claim that Defendant has actually advanced on appeal rather than separately analyzing each of the theories enunciated in his initial habeas corpus petition.

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was burned, purportedly deliberately,” and sanctioned him by imposing “disciplinary segregation for seven to fifteen days, suspended for six months, and by recalculation of his correctional status from honor grade to ‘A’ grade.” In holding that the trial court lacked the authority to issue the requested writ, this Court noted that the “defendant was [dis]satisfied with an essentially administrative determination whereby his correctional status was affected adversely” and held that “the difficult problems of when a person should be released and under what circumstances turn on analysis of internal correctional policy,” “lie within the sole administrative jurisdiction of our State governmental departments,” and “are not, barring a clear instance of constitutional infirmity, subjects appropriate for judicial scrutiny.” *Id.* at 474, 221 S.E.2d 840-41 (citing *Goble v. Bounds*, 281 N.C. 307, 312, 188 S.E.2d 347, 350 (1972) (stating that “[w]hether the prisoner in this case is entitled to honor grade status, work release, or parole involves policy decisions which should be decided by the Department of Correction and the Board of Paroles,” which “are charged with the duty and are properly given [the] means of discharging it not available to the courts”). In *Hoffman v. Edwards*, 48 N.C. App. 559, 560, 269 S.E.2d 311, 312 (1980), an inmate who had been “charged with [and convicted of] assault, failure to obey an order, and possession of funds in excess of the authorized amount” and “demoted to closed custody and placed in intensive management by a reclassification subcommittee of the Division of Prisons” sought habeas corpus relief. In rejecting the inmate’s request, we pointed out that his “grievance falls within the jurisdiction of the Inmate Grievance Commission” and that “the record does not show that he filed a complaint with the Inmate Grievance Commission.” *Id.* at 563, 269 S.E.2d at 313. As a result, we held “that the trial court did not have jurisdiction to issue a writ of habeas corpus prior to [the inmate’s] exhaustion of his administrative remedies.” *Id.* at 564, 269 S.E.2d at 314.⁴ Finally, in *Freeman v. Johnson*, this Court addressed a situation in which, following a change in the membership of the Parole Commission, an inmate “was notified . . . that the Commission had rescinded his [MAPP] contract” and sought habeas corpus relief. 92 N.C. App. 109, 110, 373 S.E.2d 565,

4. Although the State implies that we should decline to follow *Hoffman*, in which we noted that N.C. Gen. Stat. § 17-33(2) allowed an incarcerated individual to obtain discharge despite having originally been imprisoned pursuant to a valid judgment, we lack the authority to act on this suggestion even if we were inclined to do so. *In re Appeal of Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (stating that, “[w]here 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”).

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565 (1988). In rejecting the inmate's claim, we noted that "[t]he difficulty with [the inmate's] position lies in the fact that the [MAPP] program is entirely an administrative function" and that "the revocation of his contract was an administrative decision" and held that the inmate's "relief for rescission of his [MAPP] contract must come through administrative procedures before the Division of Prisons and the Parole Commission" given that "[h]abeas corpus is not an appropriate vehicle for obtaining judicial review of the Parole Commission's decision, absent a clear violation of constitutional rights." *Id.* at 110-11, 373 S.E.2d at 566.⁵ As a result, habeas corpus relief is not available in connection with an incarcerated individual's challenge to an administrative decision, such as the denial of parole or the rescission of a MAPP contract, unless the inmate has exhausted any available administrative remedies and unless some clear constitutional violation has occurred.⁶

Although Defendant appears to have exhausted any available administrative remedies and asserts that his continued detention results from a "clear violation of constitutional rights," the trial court properly denied Defendant's application because "no probable ground for relief [was] shown in [his] application." N.C. Gen. Stat. § 17-4(4).⁷ N.C. Gen. Stat. § 17-7 clearly places the burden on the applicant to make an evidentiary forecast establishing that he or she is entitled to habeas corpus relief. In this case, the required evidentiary forecast must, of necessity, provide

5. The fact that the applicant in *Freeman* did not challenge the constitutionality of his continued incarceration precludes us from accepting the State's contention that this case is indistinguishable from and controlled by *Freeman*.

6. Although the State argues that habeas corpus is only available for the purpose of challenging the trial court's jurisdiction to enter the underlying judgment upon which his or her detention is predicated, that contention is undercut by N.C. Gen. Stat. § 17-33(2), which clearly allows the prosecution of an application for the issuance of a writ of habeas corpus when the applicant, although originally incarcerated in a lawful manner, has become entitled to relief as the result of subsequent developments. Similarly, although the State argues that the only relief available in a habeas corpus proceeding is discharge from incarceration and that Defendant is seeking to have further proceedings conducted rather than to be discharged, the clear purpose for which Defendant has sought to have further proceedings conducted is to establish his entitlement to discharge. As a result, neither of these arguments have merit.

7. Admittedly, the trial court summarily denied Defendant's application pursuant to N.C. Gen. Stat. § 17-4(2) rather than N.C. Gen. Stat. § 17-4(4). However, "[a] correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned," since "[t]he question for review is whether the ruling of the trial court was correct and not whether the reason given therefor was sound or tenable." *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (citing *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957)), *cert. denied*, 484 U.S. 916, 108 S. Ct. 267, 98 L. Ed. 2d 224 (1987).

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a colorable basis for concluding that Defendant's claim to have a protected liberty interest in his release from confinement in accordance with the provisions of his MAPP contract has merit. Defendant has not made the required showing.

"While no State may 'deprive any person of life, liberty, or property, without due process of law,' " "only a limited range of interests fall within this provision," with there being two sources from which such interests can arise – "the Due Process Clause itself and the laws of the States." *Hewitt v. Helms*, 459 U.S. 460, 466, 103 S. Ct. 864, 868-69, 74 L. Ed. 2d 675, 685 (1983) (citing *Meachum v. Fano*, 427 U.S. 215, 223-27, 96 S. Ct. 2532, 2538-40, 49 L. Ed. 2d 451, 458-61 (1976)). In view of the fact that "[t]here is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence," "[w]hatever liberty interest exists is . . . a state interest created by [state] law." *Swarthout v. Cooke*, ___ U.S. ___, ___, 131 S. Ct. 859, 862, 178 L. Ed. 2d 732, 736 (2011). Thus, the fundamental question that must be resolved in evaluating the sufficiency of Defendant's initial application for the issuance of a writ of habeas corpus is the extent, if any, to which Defendant adequately demonstrated the ability to establish the existence of a protected liberty interest arising from the provisions of his MAPP contract.

A protected liberty interest must rest upon something more than " 'an abstract need or desire' " and must, for that reason, stem from " 'a legitimate claim of entitlement' " rather than " 'a unilateral expectation.' " *Greenholtz v. Chairman, Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1, 7, 99 S. Ct. 2100, 2103-04, 60 L. Ed. 2d 668, 675 (1979) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548, 561 (1972)). The United States Supreme Court has determined that a protected liberty interest in obtaining release on parole existed under state statutes providing that, "[s]ubject to the following restrictions, the board shall release on parole . . . any person confined in the Montana state prison or the women's correction center . . . when in its opinion there is [a] reasonable probability that the prisoner can be released without detriment to the prisoner or to the community," *Board of Pardons v. Allen*, 482 U.S. 369, 376, 107 S. Ct. 2415, 2420, 96 L. Ed. 2d 303, 311-12 (1987) (quoting Mont. Code Ann. § 46-23-201 (1985)) (omissions in original), and that the Board of Parole " 'shall order [a committed offender's] release unless it is of the opinion that his release should be deferred because . . . (a) [t]here is a substantial risk that he will not conform to the conditions of parole; (b) [h]is release would depreciate the seriousness of his crime or promote disrespect for law; (c) [h]is release would have a substantially adverse

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effect on institutional discipline; or (d) [h]is continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.’” *Greenholtz*, 442 U.S. at 11, 99 S. Ct. at 2106, 60 L. Ed. 2d at 678 (quoting Neb. Rev. Stat. § 83-1, 114(1) (1976)). Thus, an individual has a protected liberty interest in obtaining release on parole in the event that he or she can establish an entitlement to be released after satisfying certain criteria.⁸

Although Defendant alleged that his MAPP contract required his release in the event that he complied with the terms and conditions set out in that document⁹ and argues that this fact provided him with a liberty interest in being released on parole which could not be invalidated without due process, we conclude that he has failed to present adequate factual support for this contention. Admittedly, Defendant did attach a portion of his MAPP agreement to his application. However, the document attached to Defendant’s application is clearly incomplete. More specifically, the first page states that “the Undersigned Participant agrees to the conditions set forth in this agreement and has read and understands the Statement of Procedures incorporated herein.” In addition, the same document states that “[t]he Undersigned officials of the Division of Prisons and the Parole Commission with lawful authority to fulfill the Conditions set forth in this agreement shall do so if the Participant fulfills the conditions in Sections I and IV.” However, neither the Statement of Procedures nor the conditions contained in Section IV are attached to Defendant’s application. For that reason, Defendant

8. Although Defendant argues that this “mandatory language” approach utilized in *Allen* and *Greenholtz* was rejected in *Sandin v. Conner*, 515 U.S. 472, 480-85, 115 S. Ct. 2293, 2298-2300, 132 L. Ed. 2d 418, 427-30 (1995), the United States Supreme Court has described the method of analysis adopted in *Sandin* as applicable in evaluating “the existence of a protected state-created liberty interest in avoiding restrictive conditions of confinement,” *Wilkinson v. Austin*, 545 U.S. 209, 223, 125 S. Ct. 2384, 2394, 162 L. Ed. 2d 174, 190 (2005), and has cited *Allen* and *Greenholtz* in discussing whether a particular circuit court decision constituted “a reasonable application of our cases.” *Swarthout*, ___ U.S. at ___, 131 S. Ct. at 861, 178 L. Ed. 2d at 736. As a result, we believe that the approach discussed in the text does, in fact, describe the appropriate approach for use in ascertaining whether a protected liberty interest arising from state law exists in the parole-related context.

9. In his brief, Defendant argues that his constitutionally protected liberty interest arose from the fact that the Division of Prisons and the Parole Commission solicited individuals for the MAPP program and granted them a fixed release date. However, in the absence of adequate support for the contention that Defendant’s “fixed release date” was not subject to alteration in the unlimited discretion of the Parole Commission, we do not believe that the factors upon which Defendant relies suffice to afford him a constitutionally protected liberty interest in obtaining release on parole.

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has failed to forecast the existence of evidence tending to show that the Division of Prisons and the Parole Commission were, as Defendant alleges,¹⁰ required to release him in the event that he complied with the terms and conditions of his MAPP contract. As a result, the information contained in Defendant's petition does not suffice to show that the Parole Commission acted inconsistently with Defendant's MAPP contract when it revoked that contract and declined to release Defendant on parole.¹¹

As we have already noted, the validity of Defendant's challenge to the lawfulness of the trial court's order rests on the assumption that the Parole Commission violated Defendant's MAPP contract when it terminated that agreement and declined to release Defendant on parole.¹² In view of the fact that Defendant failed to provide us with sufficient information to establish the accuracy of the factual predicate underlying his challenge to the trial court's order, he has failed to make the preliminary showing needed to preclude summary denial of his application. *State v. Rollins*, __ N.C. App. __, __, 734 S.E.2d 634, 636 (2012) (holding that the trial court did not err by summarily denying defendant's motion for appropriate relief given that "[t]here is insufficient evidence to determine

10. Admittedly, Defendant has asserted in the text of his habeas corpus petition that his MAPP contract required that he be released on parole in the event that he complied with its provisions. However, given that N.C. Gen. Stat. § 17-7(3) requires an applicant to attach a copy of any "warrant or other process" by virtue of which the applicant is detained or provide an adequate explanation for failing to attach such a document and given that, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording or photograph is required," N.C. Gen. Stat. § 8C-1, Rule 1002, we do not believe that a mere generalized description of the MAPP contract like that contained in Defendant's application is sufficient to preclude summary denial of an application for the issuance of a writ of habeas corpus.

11. As an aside, we note that the applicant in *Freeman*, 92 N.C. App. at 109, 373 S.E.2d at 565, which is the only other appellate decision in this jurisdiction addressing the extent to which an individual denied release after allegedly complying with a MAPP contract was entitled to relief in a habeas corpus proceeding, attached the applicable policy and procedures manual to his petition, thereby providing the judicial system with an opportunity to review the validity of his description of the nature and contents of the relevant MAPP contract.

12. In his principal and reply brief, Defendant argues in reliance upon the Supreme Court's decision in *Jones v. Keller*, 364 N.C. 249, 254, 698 S.E.2d 49, 54 (2010), *cert. denied*, __ U.S. __, 131 S. Ct. 2150, 179 L. E.2d 935 (2011), that the Parole Commission has not been given "carte blanche" to determine when incarcerated individuals are entitled to release and that the judicial branch has a constitutional obligation to determine when the Parole Commission's actions exceed applicable constitutional limitations. Although these assertions are certainly true, they shed little light upon the extent to which the judicial power to rein in allegedly unconstitutional administrative actions should be exercised in any particular case, including this one.

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whether juror misconduct occurred as defendant's motion and Bossard's affidavit merely contained general allegations and speculation"); *State v. Yonce*, 207 N.C. App. 658, 669, 701 S.E.2d 264, 271 (2010) (holding that the trial court did not err by summarily denying Defendant's motion for appropriate relief because the affidavits provided in support of his ineffective assistance of counsel claim "fail[ed] to demonstrate that the documentation upon which he now relies could have been produced" at trial), *disc. review denied*, 365 N.C. 80, 706 S.E.2d 233 (2011); *State v. Aiken*, 73 N.C. App. 487, 501, 326 S.E.2d 919, 927 (holding that the trial court did not err by summarily denying the defendant's motion for appropriate relief given that the "[d]efendant filed no supporting affidavit and offered no evidence beyond the bare allegations" in his motion), *disc. review denied*, 313 N.C. 604, 332 S.E.2d 180 (1985). As a result, given that Defendant failed to establish that he had a colorable claim to be entitled to be discharged from custody based on an alleged deprivation of a constitutionally protected liberty interest without due process of law, the trial court did not err by summarily denying Defendant's application for the issuance of a writ of habeas corpus.¹³

III. Conclusion

Thus, for the reasons set forth above, the trial court did not err by summarily denying Defendant's habeas corpus petition. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Judges BRYANT and ELMORE concur.

13. Although the State did attach a version of the relevant policies and procedures document to its response to Defendant's *certiorari* petition, the document in question was not before the trial court at the time that it summarily denied Defendant's application and cannot, for that reason, be utilized in evaluating the validity of Defendant's challenge to the lawfulness of the trial court's order. We do, however, note that the document in the record specifically states that "[t]he Parole Commission or the Division of Prisons has the option of terminating the MAPP at any time" upon notice to "all parties to the agreement" accompanied by a statement of "the reasons for such action." Dep't of Correction Policy & Procedures § E.1705(a) (2012). In the event that the quoted language was, in fact, applicable to Defendant's MAPP contract, the Parole Commission appears to have had the authority to unilaterally revoke Defendant's MAPP contract as a matter of North Carolina law at any time prior to Defendant's release.

STATE v. PHILLIPS

[227 N.C. App. 416 (2013)]

STATE OF NORTH CAROLINA

v.

ANACIN WILLIAM PHILLIPS

No. COA12-852

Filed 21 May 2013

1. Appeal and Error—preservation of issues—jury instructions—failure to object

Defendant's argument that the trial court erred in its jury instructions by referring to the prosecuting witness as "the victim" was reviewed for plain error where defendant failed to object and properly preserve the issue for review.

2. Assault—jury instructions—reference to witness as victim—not expression of trial court's opinion

The trial court's use of the term "victim" to refer to the prosecuting witness in the jury instructions for assault with a deadly weapon with intent to kill was not an expression of the trial court's opinion and defendant's argument to the contrary was overruled.

3. Sentencing—prior record level—foreign conviction—not substantially similar to NC offense

The trial court erred in an assault with a deadly weapon with intent to kill case by calculating defendant's prior record level and sentencing him as having obtained a prior record level of IV for felony sentencing purposes. The trial court erroneously determined that the Ohio offense "Shoot with Intent to Kill" was substantially similar to the North Carolina offense assault with a deadly weapon with intent to kill.

4. Costs—notice and opportunity to be heard—statutory requirements met

The trial court did not err in an assault with a deadly weapon inflicting serious injury case by failing to provide defendant notice and an opportunity to be heard before imposing court costs upon him. Considering statutory requirements that, absent a waiver, court costs be assessed when an active sentence is imposed, the trial court's order that court costs be assessed following the pronouncement that defendant would serve an active sentence satisfied the requirements that defendant be provided notice and an opportunity to be heard on the imposition of those costs.

STATE v. PHILLIPS

[227 N.C. App. 416 (2013)]

Appeal by defendant from judgment entered 29 September 2011 by Judge Arnold O. Jones, II, in Craven County Superior Court. Heard in the Court of Appeals 13 November 2012.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Kevin P. Bradley for defendant-appellant.

BRYANT, Judge.

Where the trial court's use of the term "victim" during the jury instructions did not prejudice defendant by improperly expressing an opinion before the jury, we find no error. Where the trial court erred by concluding that defendant's prior conviction in violation of a Ohio revised code section prohibiting "Intentional shooting, cutting, or stabbing," was substantially similar to the North Carolina offense "Felonious assault with deadly weapon with intent to kill or inflicting serious injury," and as a result attributing to defendant a prior record level IV for felony sentencing purposes, we reverse and remand. Where the record shows that defendant was afforded notice and an opportunity to be heard on the imposition of court costs, we find no error.

On 20 July 2009, defendant was indicted on charges of assault with a deadly weapon with intent to kill inflicting serious injury and kidnapping. Defendant was also indicted as both a violent habitual felon and habitual felon. A trial commenced during the 26 September 2011 session of Craven County Superior Court, the Honorable Arnold Jones, Judge presiding.

The State's evidence tended to show that in May 2009 defendant, sixty-four years old at the time of trial, and Diane¹, fifty-one years old, had been dating for almost a year. Diane spent as many as five nights a week with defendant at his residence located at 1031 Queen Street in New Bern. Emagene Broy and Albert Brown also lived at the residence.

On the evening of 6 May 2009, at approximately 8:00 p.m., Diane entered defendant's residence and then his bedroom. Diane testified that defendant usually returned home around 9:00 p.m., but on this night, he did not come home until close to midnight. When he entered the bedroom, Diane smelled a strong odor of alcohol and believed that

1. A pseudonym has been used to protect the identity of the victim.

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[227 N.C. App. 416 (2013)]

defendant was impaired. Defendant sat near the foot of the bed and used a knife to cut a piece of cheese. Diane described the knife as a “hunting knife” having a black handle and a three to four inch blade. Defendant was muttering to himself. Diane testified that she said, “let me go to sleep. I don’t want to hear that drunk BS.”

Q. . . . [W]hat did he say back to you at that time?

. . .

A. He [] said “shut the hell up.”

. . .

He was calling me a b**ch and he got up and walked towards me with the knife in his hand

Diane testified that defendant sat down next to her, pinned her with his elbow, and proceeded to “beat me in my face. Just beat me and beat me. I was bleeding and bleeding, and he kept just beating me.” Diane testified that before he released her, defendant used his knife to cut her clothes and rip them away from her body. When defendant moved to the far side of the bed, Diane jumped and ran to the bedroom door and out into the living room.

In the living room, Emagene Broy and Albert Brown were laying on separate couches watching television. Diane ran into the room without any clothes on; defendant followed her holding a knife. Diane begged defendant to “please stop. . . . [P]lease just let me get my clothes and go.” Defendant told Broy and Brown that no one was to move or call the police. Brown noticed that Diane was bleeding from her hands. As Broy started to get up to retrieve a towel, defendant, while holding a knife and standing over Brown who was on the couch, said, “don’t get the b-i-t-c (sic) nothing. She doesn’t need nothing on. . . . I’m going to kill the b-i-t-c-h.” “I’m going to kill you.”

Diane ran from the house, but defendant caught her and pulled her back onto the front porch. There, defendant stabbed Diane in the chest. Diane ran off of the porch and through a nearby field until she collapsed. Brown called law enforcement officers, and a police officer found Diane lying naked in a pool of blood near a service drive to Craven Terrace apartments near Miller Street at 4:40 a.m.

Diane was admitted to the emergency department at Craven Regional Medical Center at 5:04 a.m. on 7 May 2009. Her blood pressure was “73 over 47.” An emergency room nurse who treated Diane testified

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that based on her blood pressure, Diane was “crashing” and “[had] a tendency to die at that particular time.” An x-ray revealed that Diane suffered from a collapsed lung. A chest tube was inserted and approximately 510 milliliters of blood returned through the tube prompting hospital staff to give Diane approximately “320 cc’s of blood” by transfusion. Once stabilized, Diane was transferred to the trauma unit at Pitt Memorial Hospital. At Pitt Memorial Hospital, Diane presented with multiple lacerations to her face, hand, and left chest, and a collapsed lung. She was treated and released four days later.

Defendant did not present any evidence.

The jury returned a guilty verdict on the charge of assault with a deadly weapon with intent to kill inflicting serious injury and not guilty on the charge of kidnapping. The State dismissed the charge of attaining habitual felon status, and the trial court dismissed the charge of attaining violent habitual felon status. Defendant was sentenced to a term of 133 to 169 months and ordered to pay court costs of \$9,094.50. Defendant appeals.

On appeal, defendant raises the following issues: whether the trial court erred in (I) expressing an opinion about the evidence in front of the jury; (II) calculating defendant’s prior record level; and (III) imposing court costs.

I

Defendant argues that the trial court violated N.C. Gen. Stat. § 15A-1232 by expressing an opinion as to an issue of fact while instructing the jury. Specifically, defendant contends that the trial court committed error by referring to Diane as “the victim” when instructing the jury on the charge of assault with a deadly weapon with intent to kill inflicting serious injury. We disagree.

Standard of Review

[1] We note that defendant failed to raise an objection to the jury instructions before the trial court but on appeal argues that the issue is preserved as a matter of law. Defendant cites *State v. Young*, 324 N.C. 489, 380 S.E.2d 94 (1989), and *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11 (2005), for the proposition that this issue is properly preserved. However, both *Young* and *Duke* involve the trial court’s comment regarding a defendant’s confession, not a reference to the prosecuting witness as a victim. Further, defendant argues that our Supreme Court’s opinion in

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[227 N.C. App. 416 (2013)]

State v. McCarroll, 336 N.C. 559, 445 S.E.2d 18 (1994) (holding no error in trial court's reference to the prosecuting witness as the victim), was reviewed for plain error only "because of concession by the defendant-appellant in that case." We disagree.

On many occasions, our Court has applied plain error review to the issue defendant raises. See e.g., *State v. Carter*, ___ N.C. App. ___, 718 S.E.2d 687 (2011), *rev'd on other grounds*, ___ N.C. ___, 739 S.E.2d 548 (2013); *State v. Cabe*, 136 N.C. App. 510, 524 S.E.2d 828 (2000); *State v. Anthony*, 133 N.C. App. 573, 516 S.E.2d 195 (1999); and *State v. Richardson*, 112 N.C. App. 58, 434 S.E.2d 657 (1993). See also, *State v. Jackson*, 202 N.C. App. 564, 688 S.E.2d 766 (2010) (finding no plain error in the trial court's failure to intervene ex mero motu upon prosecutor's reference to the prosecuting witness as a "victim"). We are unable to find and defendant fails to point us to any cases in which this Court has reviewed this precise issue regarding the trial court's reference to the prosecuting witness as "the victim" for anything other than plain error where defendant failed to object and properly preserve the issue for review. Therefore, where our courts have repeatedly stated that the use of the word "victim" in jury instructions is not an expression of opinion, we will not allow defendant, after failing to object at trial, to bring forth this objection on appeal, couched as a statutory violation, and thereby obtain review as if the issue was preserved. Therefore, we review this issue for plain error.

Analysis

[2] Pursuant to our General Statutes, section 15A-1232, "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C. Gen. Stat. § 15A-1232 (2011).

Whether a trial court's comment constitutes an improper expression of opinion is determined by its probable meaning to the jury, not by the judge's motive. Furthermore, a totality of the circumstances test is utilized under which defendant has the burden of showing prejudice. Unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless.

State v. Mucci, 163 N.C. App. 615, 620, 594 S.E.2d 411, 415 (2004) (citations and quotations omitted).

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Defendant cites *Richardson*, 112 N.C. App. 58, 434 S.E.2d 657, where the defendant was charged with first degree sexual offense, first degree rape, taking indecent liberties with a minor, and crime against nature. *Id.* at 60, 434 S.E.2d at 659. In instructing the jury, the trial court referred to the prosecuting witnesses as “victims” only in discussing the rape and sexual offense charges but not in respect to the charges of taking indecent liberties with a minor and crime against nature *Id.* at 67, 434 S.E.2d at 663. The jury returned guilty verdicts only on the charges of taking indecent liberties with a minor and crime against nature. The defendant argued on appeal that the trial court erred by referring to the prosecuting witnesses as “victims” during the jury charge. In overruling the defendant’s argument, the *Richardson* Court noted that the jury found the defendant not guilty of those offenses for which the trial court referred to prosecuting witnesses as victims; therefore, the defendant could not establish prejudice.

In contrast to *Richardson*, defendant points to the trial court’s use of the term “victim” repeatedly in the assault instruction – a crime for which he was convicted – and “person” in the kidnapping instruction — a charge of which he was acquitted. Defendant asserts that the trial court “effectively intimidated judicial opinion [that he] was guilty of assault if not kidnapping.” However, use of the term “victim” standing alone is not enough to warrant a new trial. Defendant has the burden of showing prejudice based on a totality of the circumstances. *Mucci*, 163 N.C. App. at 620, 594 S.E.2d at 415.

At trial, the State presented evidence that defendant was intoxicated when he returned to his residence. Defendant’s girlfriend, Diane testified that in response to her statement “let me go to sleep. I don’t want to hear that drunk BS[.]” defendant beat her about her face with the handle of a knife and then cut away all of the clothes from her body. Diane ran to a living room where Emagene Broy and Albert Brown were watching television. Broy and Brown testified that Diane ran into the room without clothes on, pleading for help and asking that someone call the police. Defendant came into the living room carrying a knife. Diane had no weapon, and she was bleeding from her hands. Defendant refused to let Brown or Broy get a towel for Diane or call the police. Instead, while standing over Brown holding a knife, defendant said, “don’t get the b-i-t-c (sic) nothing. She doesn’t need nothing on. . . . I’m going to kill the b-i-t-c-h.” Diane attempted to talk to defendant but again, “He said, I’m going to kill you.” Diane ran for the front door, onto the front porch, and down the steps. Defendant caught Diane at the base of the steps, pulled her back toward the house, and then stabbed her in the chest before

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Diane could run away. Diane was found lying outdoors, naked, in a pool of blood. As a result of the beating and stabbing by defendant, Diane suffered lacerations to her face and hand, and suffered a puncture wound in her left chest which caused a collapsed lung. Because of the severity of her medical condition – Diane was “crashing” and “[had] a tendency to die at that particular time,” Diane was transferred to Pitt Memorial Hospital where they offered “a higher level of care.” There, she received treatment and was released four days later.

Considering the fact that our courts have on many occasions stated that the use of the term “victim” in jury instructions is not an expression of opinion, and considering the horrifying facts of the assault in the instant case, we can discern no prejudicial error as a result of the trial court’s use of the word “victim” to identify the State’s prosecuting witness during its jury instructions. *See id.* Accordingly, we overrule defendant’s argument.

II

[3] Defendant argues that the trial court erred in calculating his prior record level and sentencing him as a having obtained a prior record level of IV for felony sentencing purposes. Defendant contends that the trial court erred in concluding that his prior conviction in Ohio for violating Ohio Revised Code § 2901.23 (1969), “Intentional shooting, cutting, or stabbing,” was substantially similar to the North Carolina crime of assault with a deadly weapon with intent to kill. Defendant further contends that because of this conclusion, the trial court erroneously assigned him four prior record level points causing him to be sentenced as having obtained a level IV prior record level rather than a level III. We agree.

Initially, we note the State’s argument that defendant failed to raise this issue before the trial court and thus, may not raise it on appeal. However, “[i]t is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court’s determination of a defendant’s prior record level to be preserved for appellate review.” *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citing N.C. Gen. Stat. § 15A-1446(d)(18) ²)

2. Pursuant to North Carolina General Statutes, section 15A-1446(d)(18), “[e]rrors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division. . . . (18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.” N.C. Gen. Stat. § 15A-1446(d)(18) (2011).

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(citations omitted). “The determination of an offender’s prior record level is a conclusion of law that is subject to de novo review on appeal.” *Id.*

Pursuant to North Carolina General Statutes, section 15A-1340.14(a), “[t]he prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender’s prior convictions” N.C. Gen. Stat. § 15A-1340.14(a) (2011).

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

N.C.G.S. § 15A-1340.14(e). While the statute provides that either the State or the defendant may prove that an offense for which the defendant was convicted in a foreign jurisdiction is substantially similar to a North Carolina offense, the statute does not give guidance as to how a trial court is to make such a determination. *See id.*; *see also, State v. Hanton*, 175 N.C. App. 250, 623 S.E.2d 600 (2006). “In light of such an ambiguity in a criminal statute, the rule of lenity requires us to interpret the statute in favor of defendant.” *Hanton*, 175 N.C. App. at 259, 623 S.E.2d at 606 (citation omitted).

Here, the trial court found that defendant had two prior convictions: “Shoot with Intent to Kill;” and “Rape.” Both convictions occurred

In *State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010), our Supreme Court, in discussing the constitutionality of N.C.G.S. § 15A-1446(d)(18), concluded that “[t]his provision does not conflict with any specific provision in our appellate rules and operates as a ‘rule or law’ under Rule 10(a)(1)” *Id.* at 403, 699 S.E.2d at 917.

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in Ohio. The trial court determined that the Ohio offense “Shoot with Intent to Kill” was substantially similar to that of the North Carolina offense assault with a deadly weapon with intent to kill, a class E felony. This class E felony under North Carolina law accounted for four of defendant’s ten prior record level points. With ten prior record level points, defendant was sentenced as having obtained prior record level IV for felony sentencing purposes.

In making its determination that defendant’s Ohio conviction of “Shoot with Intent to Kill” was substantially similar to the North Carolina offense assault with a deadly weapon with intent to kill, the trial court stated the following:

I have [] reviewed the Ohio code, the definitions contained in that code, felonies. I have compared that to North Carolina statutes, and I do find that by a preponderance of the evidence the State has met their burden that the Ohio crime is substantially similar to our North Carolina Crime Class E classification of assault offered by the State, and therefore I will find prior sentencing points should be calculated as relates to these – this assault with a deadly weapon with intent to kill inflicting serious injury charge as . . . a prior E conviction.

In pertinent part, the record indicates that defendant was convicted of an offense in violation of Ohio R.C. § 2901.23. The State presented copies of section 2901.23 that the trial court accepted as being in effect at the time of defendant’s offense on 24 December 1968. Pursuant to Ohio R.C. § 2901.23, entitled “Intentional shooting, cutting, or stabbing,” “[n]o person shall maliciously shoot, stab, or shoot at another person with intent to kill, wound, or maim such person.”

Pursuant to North Carolina General Statutes, section 14-32, entitled “Felony assault with deadly weapon with intent to kill or inflicting serious injury; punishments[,]”

- (a) Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class C felon.
- (b) Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon.
- (c) Any person who assaults another person with a deadly weapon with intent to kill shall be punished as a Class E felon.

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N.C. Gen. Stat. § 14-32 (2011).

Defendant contends that because an offense in violation of Ohio R.C. § 2901.23 did not require an intent to kill or the infliction of an injury, while an offense in violation of N.C. Gen. Stat. § 14-32 requires either an intent to kill or infliction of serious injury, or both, R.C. § 2901.23 is not substantially similar to N.C.G.S. § 14-32. Considering the ambiguity within R.C. § 2901.23 and in accordance with the rule of lenity, we hold that R.C. § 2901.23 is not substantially similar to N.C.G.S. § 14-32. *See Hanton*, 175 N.C. App. at 259, 623 S.E.2d at 606.

Defendant further contends that, when viewed in the light most favorable to him, R.C. § 2901.23 is substantially similar to the North Carolina offense set out under N.C. Gen. Stat. § 14-33(c)(1), “Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.” Pursuant to N.C.G.S. § 14-33(c)(1), “any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she: (1) Inflicts serious injury upon another person or uses a deadly weapon” N.C. Gen. Stat. § 14-33(c)(1) (2011). We agree.

Because we hold that in, when viewed the light most favorable to defendant, R.C. § 2901.23 is substantially similar to N.C. Gen. Stat. § 14-33(c)(1), an A1 misdemeanor with a prior felony record level value of one point, defendant’s prior record level points for felony sentencing would be reduced from ten to seven points. *See* N.C. Gen. Stat. § 15A-1340.14(b)(5) (2011) (“For each prior misdemeanor conviction as defined in this subsection, 1 point. For purposes of this subsection, misdemeanor is defined as any Class A1 . . . nontraffic misdemeanor offense”). A prior felony record level totaling seven points corresponds to a level III for felony sentencing. *See* N.C.G.S. § 15A-1340.14(c)(3) (“The prior record levels for felony sentencing are . . . (3) Level III – At least 6, but not more than 9 points.). Therefore, in sum, we hold that the trial court erred in concluding that Ohio R.C. § 2901.23 (“Intentional shooting, cutting, or stabbing”), as codified at the time of defendant’s offense, was substantially similar to N.C.G.S. § 14-32 (“Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments”), and assigning defendant the corresponding four prior record level points, and sentencing defendant as having obtained a prior record level IV. Accordingly, we reverse defendant’s sentence and remand for sentencing proceedings in accordance with this opinion.

III

[4] Lastly, defendant argues that the trial court erred in failing to provide

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[227 N.C. App. 416 (2013)]

notice and an opportunity to be heard before imposing upon defendant court costs of \$9,094.50. We disagree.

Pursuant to North Carolina General Statutes, section 7A-304, “[i]n every criminal case in the superior or district court, wherein the defendant is convicted, or enters a plea of guilty or nolo contendere, or when costs are assessed against the prosecuting witness, the [] costs shall be assessed and collected.” N.C. Gen. Stat. § 7A-304 (2011). “[A] defendant who receives an active sentence is [] required to be assessed court costs unless the trial court specifically makes a written finding of just cause to waive these costs.” *State v. Patterson*, ___ N.C. App. ___, ___, 735 S.E.2d 602, 604 (2012) (citing 2011 N.C. Sess. Law 145 § 32.6).

In *State v. Webb*, 358 N.C. 92, 591 S.E.2d 505 (2004), our Supreme Court in discussing the constitutionality of a fee for appointed counsel imposed upon indigent defendants, stated the following:

[a] convicted defendant is entitled to notice and an opportunity to be heard before a valid judgment for costs can be entered. Costs are imposed only at sentencing, so any convicted [] defendant is given notice of the appointment fee at the sentencing hearing and is also given an opportunity to be heard and object to the imposition of this cost.

Id. at 101-02, 591 S.E.2d at 513 (citation omitted).

Here, the trial court gave the following order,

[The Court:] [Defendant], I’m going to sentence you to a minimum term of 133 months, maximum of 169 months in the North Carolina Department of Corrections.

Give you credit for any time that you have served relating to this sentence

. . .

Order that he pay the superior court cost.

While defendant challenges whether he was provided notice and an opportunity to be heard as to the imposition of court costs in the amount of \$9,094.50, the judgment and commitment entered 29 September 2011 also reflects the imposition of attorney fees in the amount of \$9,529.38 and miscellaneous fees of \$60.00 for a total of \$18,683.88. Defendant does not challenge the imposition of these fees. We note that following the trial court’s order imposing court costs, defendant participated in a

STATE v. PHILLIPS

[227 N.C. App. 416 (2013)]

discussion with the trial court regarding attorney fees and the number of hours his attorney had worked on his case.

THE COURT: Lawyer spent about 120 hours on the case. Now, I'm not holding him to that exact amount. This case is over two years old, almost -- it's two-and-a-half years old. Do you want to be heard as to that amount of time, [defendant], or you think that sounds about right? You've been working your lawyer a while I guess.

DEFENDANT: Yes, your Honor. I think little bit more than the hours.

THE COURT: You think he spent more time than that.

DEFENDANT: Yes, sir.

...

THE COURT: I will consider your time and I note for the record the defendant believes that may have actually spent more time than what he's telling me on the record.

And I'm going to award and order that those attorney fees be -- and cost of court be made a civil judgment against [defendant].

Considering statutory requirements that, absent a waiver, court costs be assessed when an active sentence is imposed, the trial court's order that court costs be assessed following the pronouncement that defendant would serve an active sentence satisfies the requirements that defendant be provided notice and an opportunity to be heard on the imposition of those costs. *See* N.C.G.S. § 7A-304; *Webb*, 358 N.C. at 101-02, 591 S.E.2d at 513. Accordingly, defendant's argument is overruled.

No error in part; reversed in part.

Judges McGEE and ERVIN concur.

STATE v. PRIMUS

[227 N.C. App. 428 (2013)]

STATE OF NORTH CAROLINA

v.

MICHAEL ANTHONY PRIMUS

No. COA12-1106

Filed 21 May 2013

1. Larceny—attempted felony larceny—motion to dismiss—sufficiency of evidence—completed commission of crime includes attempt

The trial court did not err by denying defendant's motion to dismiss an attempted felony larceny charge. The completed commission of a crime must necessarily include an attempt to commit the crime and the evidence was sufficient to show a completed larceny.

2. Larceny—attempted felony larceny—injury to personal property—jury instruction—wires and piping connected to air-conditioning unit

The trial court did not err in an attempted felony larceny and injury to personal property case by instructing the jury that wires and piping connected to an air-conditioning unit were personal property. If the statement amounted to error, it was an instructional error that was not preserved for appeal. Further, assuming *arguendo* that the instruction was an opinion as to a factual issue, the error was harmless since it was supported by the evidence.

Appeal by defendant from judgment entered 29 June 2012 by Judge Richard T. Brown in Scotland County Superior Court. Heard in the Court of Appeals 12 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General Donna B. Wojcik, for the State.

Richard J. Costanza for defendant appellant.

McCULLOUGH, Judge.

Michael Anthony Primus (“defendant”) appeals from his convictions for attempted felony larceny and injury to personal property. For the following reasons, we find no error and uphold defendant's convictions.

STATE v. PRIMUS

[227 N.C. App. 428 (2013)]

I. Background

Testimony at trial revealed the following: Wendell Smith (“Mr. Smith”) awoke to the sound of a dog barking around 7:00 a.m. on 11 March 2011. Mr. Smith proceeded outside to investigate, at which time he heard a loud noise coming from the direction of his niece’s (“Ms. McDonald”) mobile home. As Mr. Smith walked towards the direction of the noise, he saw defendant driving away from Ms. McDonald’s mobile home in a red vehicle. Defendant was towing a trailer with an air-conditioning unit (the “A/C unit”) on it.

Mr. Smith stopped defendant as defendant was turning onto the road from Ms. McDonald’s property and asked defendant where he got the A/C unit. Defendant first responded that there were “two or three of them . . . in the woods, and [he] got one of them.” However, after Mr. Smith made further inquiry, defendant admitted that he “got that [A/C unit] from that house right down there[.]” indicating Ms. McDonald’s mobile home. At that point, Mr. Smith informed defendant that the mobile home from which defendant took the A/C unit belonged to his niece. Defendant then apologized and told Mr. Smith that he would put the A/C unit back. Nonetheless, Mr. Smith informed defendant that he was still going to contact the police.

Ms. McDonald returned home after learning of the incident. Upon arrival, Ms. McDonald found the A/C unit sitting behind her mobile home with all of the connections cut. Ms. McDonald further testified that the A/C unit was previously attached to her mobile home.

Following a police investigation, defendant was arrested pursuant to a warrant issued on 15 March 2011. On 19 September 2011, defendant was indicted by a Scotland County Grand Jury on one count of attempted felony larceny pursuant to N.C. Gen. Stat. §§ 14-72(a) and -2.5 and one count of injury to personal property pursuant to N.C. Gen. Stat. § 14-160. Defendant’s case came on for jury trial at the 25 June 2012 Criminal Session of Scotland County Superior Court, the Honorable Richard T. Brown presiding. After hearing testimony from Mr. Smith, Ms. McDonald, the investigating officer, defendant and others, the jury returned verdicts finding defendant guilty of attempted felony larceny and injury to personal property. The trial court consolidated the offenses and entered a judgment on 29 June 2012 sentencing defendant to a term of 10 to 12 months. Defendant gave oral notice of appeal following his sentencing.

II. Analysis

Defendant raises two issues on appeal: whether the trial court erred in (1) denying his motion to dismiss the attempted felony larceny

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[227 N.C. App. 428 (2013)]

charge; and (2) instructing the jury that “[w]ires and piping connected to an air-conditioning unit are personal property.” We address these issues in order.

Motion to Dismiss

[1] Defendant first argues that the trial court erred in denying his motion to dismiss on the ground that there was insufficient evidence to present the charge for attempted felony larceny to the jury. “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) (internal quotation marks and citations omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

At the outset of our analysis, we note that it is the State’s decision to charge and prosecute a defendant as it deems appropriate. In this case, the State charged defendant with attempted felony larceny instead of felony larceny. Although defendant admits in his brief that “[t]he evidence conclusively established that [defendant’s] actions met each and every element of a completed larceny[,]” defendant now appeals his conviction for the more lenient charge of attempted felony larceny.

Where crimes are defined by elements, in accordance with the standard of review set forth above, we review the sufficiency of the evidence in regard to the specific elements of the offense charged: in this case, attempted felony larceny. “The essential elements of a larceny are that the defendant[] (1) took the property of another; (2) carried it away; (3) without the owner’s consent; and (4) with the intent to deprive the owner of [the] property permanently.” *State v. Allen*, 193 N.C. App. 375, 380, 667 S.E.2d 295, 299 (2008) (quoting *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982)). “The two elements of an attempt to commit a crime are: (1) An intent to commit it, and (2) an overt act done for that purpose, going beyond mere preparation, but falling short of the completed offense.” *State v. Powell*, 277 N.C. 672, 678, 178 S.E.2d 417, 421 (1971). Combining the two, this Court has stated that, “[t]he essential elements of attempted larceny are: (1) An intent to take and carry away the property of another; (2) without the owner’s consent; (3) with the intent to deprive the owner of his or her property permanently; (4) an

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overt act done for the purpose of completing the larceny, going beyond mere preparation; and (5) falling short of the completed offense.” *State v. Weaver*, 123 N.C. App. 276, 287, 473 S.E.2d 362, 369 (1996).

In this appeal, defendant only challenges the sufficiency of the evidence in regard to the fifth element.

All of the evidence presented by the State at trial tended to show that defendant cut the A/C unit connections, loaded the A/C unit into a trailer behind his vehicle, and drove away from Ms. McDonald’s mobile home with the A/C unit in tow. When Mr. Smith stopped defendant, defendant was far enough from Ms. McDonald’s mobile home that the mobile home could not be seen. We hold this evidence sufficient to show a completed larceny. *See State v. Carswell*, 296 N.C. 101, 103, 249 S.E.2d 427, 428 (1978) (“A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away.” (internal quotation marks and citation omitted)); *see also State v. Walker*, 6 N.C. App. 740, 743, 171 S.E.2d 91, 93 (1969) (“The least removal of an article, from the actual or constructive possession of the owner, so as to be under the control of the felon, will be a sufficient asportation.” (internal quotation marks and citation omitted)).

This does not end our analysis, however. Attempted larceny is a lesser-included offense of larceny. *State v. Ford*, 195 N.C. App. 321, 323, 672 S.E.2d 689, 690 (2009) (“[I]t is settled that attempted felony larceny is a lesser-included offense of felony larceny.”) While neither party discussed the case of *State v. Canup*, 117 N.C. App. 424, 451 S.E.2d 9 (1994), we believe that the defendant’s conviction should be upheld based on the guidance provided us in *Canup*. In that case, the defendant was charged with and convicted of attempted second-degree rape of the prosecutrix. The evidence at trial showed that the defendant actually inserted his penis in the victim’s vagina, thus completing the offense. On appeal, the defendant in *Canup* contended that there was insufficient evidence to find each and every element of the offense and that there was a fatal variance between the indictment and the evidence at trial.

This Court, in the *Canup* case, rejected that argument saying:

Evidence that this defendant continued to pursue his malevolent purpose and achieved penetration does not decriminalize his prior overt acts. The completed commission of a crime must of necessity include an attempt to commit the crime. As Rollin Perkins states in his treatise on criminal law, “nothing in the philosophy of juridical

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science requires that an attempt must fail in order to receive recognition.” Rollin M. Perkins and Ronald N. Boyce, *Criminal Law*, 612 (3rd ed. 1982). The treatise goes on to say:

A successful attempt to commit a crime will not support two convictions and penalties, one for the attempt and the other for the completed offense. This is for the obvious reason that whatever is deemed the appropriate penalty for the total misconduct can be imposed upon conviction of the offense itself, *but this does not require the unsound conclusion that proof of the completed offense disproves the attempt to commit it.*

Id. at 612 (emphasis supplied).

As in *State v. Wade*, defendant, in the case at bar, contends that the evidence submitted indicated that only the greater charge of second degree rape should have been submitted to the jury. We find that the evidence submitted would have supported the defendant’s being charged with either second degree rape or attempted second degree rape and convicted of either offense. The fact that the State elected to prosecute the defendant for the lesser crime of attempted second degree rape and that the jury found the defendant guilty of attempted second degree rape did not prejudice the defendant. The evidence supported that verdict. Moreover, as in *State v. Wade*, we find that if there were error, it was favorable to the defendant and harmless.

We believe that the rationale provided by *Canup* applies to the case at bar and therefore will uphold defendant’s conviction for the charged offense of attempted felony larceny.

Jury Instruction

[2] Defendant also argues that the trial judge’s instruction to the jury that “[w]ires and piping connected to an air-conditioning unit are personal property[.]” was an improper expression of the trial judge’s opinion as to a factual issue within the province of the jury. Thus, defendant contends he is entitled to a new trial.

Defendant is correct in his assertion that “[t]he judge may not express during any stage of the trial, any opinion in the presence of the

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jury on any question of fact to be decided by the jury.” N.C. Gen. Stat. § 15A-1222 (2011). Furthermore, “[t]he statutory prohibitions against expressions of opinion by the trial court contained in N.C.G.S. § 15A-1222 and N.C.G.S. § 15A-1232 are mandatory.” *State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989). Therefore, “[a] defendant’s failure to object to alleged expressions of opinion by the trial court in violation of those statutes does not preclude his raising the issue on appeal.” *Id.*

In the instant case, the trial judge instructed the jury concerning the injury to personal property charge as follows:

Ladies and gentleman, the defendant has also been charged with willful and wonton injury to personal property. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt:

First, that the defendant injured the personal property of the victim by cutting wires and piping to an air-conditioning unit. *Wires and piping connected to an air-conditioning unit are personal property.*

Second, that the defendant did this willful and wantonly, that is, intentionally and without justification or excuse and without regard for the consequences or rights of others. If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant willful and wantonly injured the victim’s personal property, it would be your duty to return a verdict of guilty of willful and wanton injury to personal property. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty as to that charge.

(Emphasis added.)

Upon review of the trial judge’s instruction, we do not think the statement that “[w]ires and piping connected to an air-conditioning unit are personal property[,]” amounted to the opinion of the trial court. In issuing the jury instruction, the trial judge simply filled in the blanks in the pattern jury instruction for injury to personal property. *See* N.C.P.I.–Crim. 223.15 (“First, that the defendant injured the personal property of the victim by (*describe act*). (*Describe property*) is personal property.”) Therefore, if the statement amounts to error, it was an instructional error that was not preserved for appeal. *See State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) (“In order to preserve a question

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for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent.”¹

Furthermore, assuming *arguendo* that the trial judge’s instruction to the jury was an opinion as to a factual issue, we think the error is harmless. We find that the trial judge’s instruction classifying the wires and piping as personal property was supported by the evidence. *See State v. Merritt*, 120 N.C. App. 732, 463 S.E.2d 590 (1995) (holding an impermissible expression of opinion, or an assumption that a material fact had been proved, was harmless error where it was supported by the evidence).

III. Conclusion

For the reasons set forth above, we uphold defendant’s convictions as his trial was conducted free of any prejudicial error.

No prejudicial error.

Judges HUNTER (Robert C.) and DAVIS concur.

WILLIAM T. USSERY AND WIFE, CAROLYN B. USSERY, PLAINTIFFS
v.
BRANCH BANKING AND TRUST COMPANY, DEFENDANT

No. COA12-940

Filed 21 May 2013

1. Statutes of Limitation and Repose—claims arising from business purchase—outside the longest limitations period

Plaintiffs’ claims arising from representations allegedly made by a bank during a business purchase were barred by the statute of limitations where the claims were filed six and one half years after they accrued, which was after the longest statute of limitations (4 years for unfair trade practices).

1. “In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C.R. App. P. 10(a)(4). Here, however, defendant does not assert plain error.

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2. Estoppel—equitable—representations during business purchase

The trial court erred by granting summary judgment for defendant in an action arising from representations allegedly made by defendant during the financing of a business purchase where the statute of limitations had run, but plaintiffs' allegations raised a permissible inference of equitable estoppel.

3. Loans—enforcement of note—interest and attorney fees—equitable estoppel

The trial court erroneously allowed summary judgment for defendant as to the enforceability of a promissory note, the amount of interest accrued on the note, and attorney fees where plaintiffs' claims were sufficient to allow the jury to determine whether equitable estoppel barred operation of the statute of limitations.

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

Appeal by Plaintiffs from Order entered 16 April 2012 by Judge W. David Lee in Richmond County Superior Court. Heard in the Court of Appeals 14 February 2013.

Anderson, Johnson, Lawrence & Butler, L.L.P., by Steven C. Lawrence and Stacey E. Tally, for Plaintiffs.

Bell, Davis & Pitt, P.A., by Kevin G. Williams and Michael D. Phillips, for Defendant.

STEPHENS, Judge.

Factual Background and Procedural History

This appeal arises from communications involving Branch Banking and Trust Company (“Defendant” or “BB&T”), Mr. William T. Ussery (“Plaintiff”), and Mr. D. Wayne Barker (“Barker”) surrounding events occurring between November of 1999 and January of 2008. Before that time, the owners of a chair manufacturing business located in Rockingham, North Carolina, had approached Barker and Plaintiff to discuss the possibility of selling their struggling company, CAFCO. Barker had spent a number of years managing CAFCO, which manufactured chairs, but lacked Plaintiff’s individual financial ability to start a business.

By November of 1999, Plaintiff and Barker had purchased CAFCO and its manufacturing building (“the original manufacturing building”).

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Their new company was known as “Chair Specialties” and was intended to manufacture specialty furniture. Plaintiff maintained a 60% ownership interest in the company and Barker held a 40% interest. Barker was responsible for the company’s day-to-day operations, and the parties entered into their relationship with the understanding that Barker would eventually seek to purchase Plaintiff’s interest in Chair Specialties with money obtained through a \$450,000 government-backed small business loan (“the government-backed loan”).

In order to purchase equipment to operate their business, Plaintiff and Barker also took out a \$100,000 loan from BB&T. Around that same time, Plaintiff purchased a second building (“the Cheraw Road building”) for \$150,000. The Cheraw Road building was meant to house the Chair Specialties manufacturing operations process. Plaintiff intended to develop the original manufacturing building into a residential condominium complex. He and Barker would then use the Cheraw Road building as collateral for the government-backed loan. However, because the Cheraw Road building suffered from environmental limitations, it could not be used for manufacturing purposes until the parties had completed lead removal and abatement.

During the process of purchasing CAFCO and starting Chair Specialties, Plaintiff and Barker communicated with an employee of BB&T, Mr. Wiley Mabe (“Mabe”), concerning their plan to secure the government-backed loan. Once lead removal and abatement had been accomplished, they approached Mabe about obtaining that loan. Plaintiff alleges that Mabe “assured” them that Chair Specialties would qualify for the loan. In order to cover their expenses in the meantime, however, Plaintiff and Chair Specialties took out two more loans from BB&T over the next two years. In addition to the \$100,000 note mentioned above, Chair Specialties took out a \$50,000 loan in February of 2000, and Plaintiff took out a \$125,000 loan in February of 2001. Plaintiff asserts that these funds were acquired in reliance on Mabe’s “repeated assurances” that they would be approved for the government-backed loan.

In January of 2002, Mabe informed Plaintiff and Barker that, to his surprise, they had not qualified for the government-backed loan. After further research, Plaintiff and Barker learned that, in fact, Mabe had not submitted the loan package on time because “he did not believe that [they] would qualify.” As Plaintiff and Barker had accumulated additional debt in the past two years, Plaintiff alleges they were unable to obtain any money from another source. He further alleges that, as a result, they were forced to close Chair Specialties. Three months later, in an attempt to mitigate their losses, Barker and Plaintiff applied for and received a

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\$425,000 loan from BB&T. The proceeds from that loan were used to pay off their three other loans, with an additional \$99,187.75 going to Plaintiff.

Due in part to the terms of the final, \$425,000 loan from BB&T, Barker was unable to sustain his payments. Accordingly, he brought a civil action against BB&T in May of 2003 for breach of fiduciary duty, negligence, and breach of contract. Plaintiff did not join that action and now alleges that he was dissuaded from doing so by representatives of BB&T, who allegedly assured him that “everything would be worked out in the Barker litigation” and requested that he “hold off on instituting any action[] to allow resolution of the Barker matter [and his own claims against BB&T].” In Plaintiff’s answers to Defendant’s first set of interrogatories, he stated that BB&T

gave assurances . . . that [it] would resolve the matter and the Note would be canceled upon resolution of the Barker/BB&T suit. [Plaintiff] delayed filing any action against BB&T upon the assurances that the loan would be forgiven and he would be reimbursed any expenses incurred related to BB&T’s failure to obtain the [government-backed loan].

Importantly, the action between Barker and BB&T was settled on 20 April 2006 — after the statutes of limitation had already expired as to Plaintiff’s claims. Plaintiff consulted counsel regarding those claims that summer.¹

On 17 October 2006, Plaintiff sent a letter to BB&T demanding both cancellation of the \$425,000 loan and compensatory damages resulting from BB&T’s failure to obtain the government-backed loan. After talking with counsel for BB&T, however, Plaintiff agreed to delay litigation further so that Defendant could perform an environmental inspection of the Cheraw Road building. As consideration for delaying his action, BB&T held the \$425,000 note in abeyance pending completion of its inspection. Plaintiff alleges that, pursuant to that agreement, BB&T then informed him that he could “ignore the computer generated delinquency notices,” which had begun to accumulate in response to his failure to make payments. On 14 August 2007, after BB&T had completed its environmental testing, Plaintiff wrote to BB&T to express his concern that “the only way for [him] to correct this situation and to be compensated

1. It is not clear from the record whether that was the first time Plaintiff had consulted counsel regarding his claims against BB&T. Defendant’s brief indicates, however, that it was.

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for his financial losses [was] through litigation.” On 14 January 2008, Plaintiff received a letter from BB&T officially rejecting his 17 October 2006 demand for cancellation and proposing an alternate resolution.

On 25 June 2008, approximately six years and five months after he first learned that the government-backed loan had been denied, Plaintiff brought this action.² Based on his communications with BB&T, Plaintiff alleged the following independent claims: (1) negligence, (2) negligent misrepresentation, (3) breach of contract, (4) unfair and deceptive trade practices, (5) breach of fiduciary relationship, (6) breach of duty of good faith dealing, and (7) fraud. As a consequence, BB&T filed a compulsory counterclaim to collect the outstanding money, including interest, owed by Plaintiff via the \$425,000 loan. BB&T noted therein its intention to collect attorneys’ fees.

On 15 December 2011, BB&T moved for summary judgment on grounds that Plaintiff’s action was barred by the relevant statutes of limitation. The next year, on 16 April 2012, the trial court granted BB&T’s motion for summary judgment, dismissed Plaintiff’s complaint with prejudice, and entered judgment in favor of BB&T. Plaintiff appeals that judgment.

Standard of Review

“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) (citation and quotation marks omitted). On a motion for summary judgment, the evidence presented must be viewed in a light most favorable to the non-moving party. *Duke Energy Corp. v. Malcolm*, 178 N.C. App. 62, 64–65, 630 S.E.2d 693, 695 (2006). “Summary judgment is a drastic remedy which should be approached with caution. It should be awarded only where the truth is quite clear.” *Bradshaw v. McElroy*, 62 N.C. App. 515, 518, 302 S.E.2d 908, 911 (1983) (citations and quotation marks omitted).

*Discussion**I. Statutes of Limitation*

[1] Plaintiff’s claims against BB&T accrued, at the latest, in January of 2002 when he learned about Mabe’s alleged misrepresentation concerning

2. Though both Mr. Ussery and his wife are listed as “Plaintiffs,” the record reflects that Mr. Ussery — who is frequently referred to in an exclusive manner as “Plaintiff” in the documents presented to this Court — was the primary, if not sole, actor.

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the government-backed loan. *See, e.g., Bruce v. N.C.N.B.*, 62 N.C. App. 724, 727, 303 S.E.2d 561, 563 (1983) (“[T]he cause of action [in a case of breach of fiduciary duty] accrued at the date of the alleged breach or, at the latest, on the date it was discovered.”). Plaintiff filed his complaint on 25 June 2008. As it had been at least six years and five months since Plaintiff’s asserted claims accrued, those causes of action were barred by their respective statutes of limitation. As noted in Defendant’s brief, the following of Plaintiff’s claims are subject to a three-year statute of limitations: (1) negligence under N.C. Gen. Stat. § 1-52(5), (2) negligent misrepresentation under section 1-52(5), (3) breach of contract under section 1-52(1), (4) breach of fiduciary relationship under section 1-52(1), (5) breach of duty of good faith and fair dealing under section 1-52(1), and (6) fraud under section 1-52(9). In addition, Plaintiff’s claim of unfair and deceptive trade practices is subject to a four-year statute of limitations under N.C. Gen. Stat. § 75-16.2. Because Plaintiff did not institute proceedings based on his alleged causes of action within the time allotted, they are time-barred.

II. Equitable Estoppel

[2] Despite this, Plaintiff contends that Defendant should be equitably estopped from asserting the statutes of limitation as a defense because he relied on the alleged assurances of BB&T. We agree.

North Carolina courts have recognized and applied the principle that a defendant may properly rely upon a statute of limitations as a defensive shield against “stale” claims, but may be equitably estopped from using a statute of limitations as a sword, so as to unjustly benefit from his own conduct which induced a plaintiff to delay filing suit.

Friedland v. Gales, 131 N.C. App. 802, 806, 509 S.E.2d 793, 796 (1998). “Equitable estoppel arises when a party has been induced by another’s acts to believe that certain facts exist, and that party rightfully relies and acts upon that belief to his [or her] detriment.” *Jordan v. Crew*, 125 N.C. App. 712, 720, 482 S.E.2d 735, 739 (1997) (citation and quotation marks omitted); *see also Bryant v. Adams*, 116 N.C. App. 448, 459–60, 448 S.E.2d 832, 838 (1994) (“A party may be estopped to plead and rely on a statute of limitations defense when delay has been induced by acts, representations, or conduct which would amount to a breach of good faith.”) (citation omitted), *disc. review denied*, 339 N.C. 736, 454 S.E.2d 647 (1995). “In order for equitable estoppel to bar application of the statute of limitations, a plaintiff must have been induced to delay filing of

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the action by the misrepresentations of the defendant.” *Jordan*, 125 N.C. App. at 720, 482 S.E.2d at 739; *see also McNeely v. Walters*, 211 N.C. 112, 113, 189 S.E. 114, 115 (1937) (comparing the doctrine of equitable estoppel to “the golden rule” — i.e., that “one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed” — and citing to the maxim of “fair play”).

On appeal, Plaintiff asserts that “when a party’s actions or statements convince another not to institute legal action — particularly where promises to remedy the dispute are made — . . . , [equitable estoppel] will not permit the statute of limitations [to bar a claim] when such assurances are broken.” In support of that point, Plaintiff cites three cases: *Duke Univ. v. Stainback*, 320 N.C. 337, 357 S.E.2d 690 (1987); *Cleveland Constr., Inc. v. Ellis-Don Constr., Inc.*, 210 N.C. App. 522, 709 S.E.2d 512 (2011); and *Miller v. Talton*, 112 N.C. App. 484, 435 S.E.2d 793 (1993). Though we disagree with Plaintiff’s articulation of the rule, we find these cases instructive and agree that the doctrine is applicable here.

Our Supreme Court has listed the elements of equitable estoppel as follows:

[A]s related to the party estopped . . . : (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts.

In re Will of Covington, 252 N.C. 546, 549, 114 S.E.2d 257, 260 (1960).

As related to the party claiming estoppel, [the elements] are: (1) lack of knowledge and [lack of] the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Id. (citations omitted); *see also Parker v. Thompson-Arthur Paving Co.*, 100 N.C. App. 367, 370, 396 S.E.2d 626, 628–29 (1990) (listing the elements of equitable estoppel). Importantly, the first element — conduct

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amounting to a false representation or concealment of material facts — has alternatively been articulated as “[c]onduct . . . at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert[.]” *Hawkins v. M & J Finance Corp.*, 238 N.C. 174, 177, 77 S.E.2d 669, 672 (1953). Further, “[a] party may be estopped to deny representations made when he had no knowledge of their falsity, or which he made without any intent to deceive the party now setting up the estoppel. The fraud consists in the inconsistent position subsequently taken, rather than in the original conduct.” *Hamilton v. Hamilton*, 296 N.C. 574, 576, 251 S.E.2d 441, 443 (1979) (citation, quotation marks, ellipsis, and brackets omitted). Under this alternative expression of equitable estoppel, “[i]t is the subsequent inconsistent position, and not the original conduct that operates to the injury of the other party.” *Id.* at 576–77, 251 S.E.2d at 443 (citation omitted). Primarily, the doctrine turns on a consideration of “the balances of equity,” which is dependent on the facts of each case. *Miller*, 112 N.C. App. at 488, 435 S.E.2d at 797 (citation omitted). “*If the evidence in a particular case raises a permissible inference that the elements of equitable estoppel are present, but other inferences may be drawn from contrary evidence, estoppel is a question of fact for the jury.*” *Id.* (citations omitted; emphasis added).

In *Stainback*, our Supreme Court addressed the issue of payment of certain hospital bills owed by the defendant-father to Duke Hospital. *Stainback*, 320 N.C. at 338, 357 S.E.2d at 691. Before the statute had run and after receiving a bill from Duke, the father’s attorney informed the hospital that he was in the process of suing the father’s insurer for payment of the medical bill and “would keep Duke informed of the situation.” *Id.* at 339, 357 S.E.2d at 691. The father maintained contact with Duke throughout the litigation and, based on the father’s representations, Duke did not join the suit against the insurer. *Id.* at 339, 357 S.E.2d at 692. When Duke brought suit for payment of the bill, the father refused to pay and asserted the statute of limitations as a defense. *Id.* at 340, 357 S.E.2d at 692. Under those circumstances, our Supreme Court held that the father was equitably estopped from asserting the statute of limitations as a defense because his “actions and statements . . . lulled Duke into a false sense of security. [He] breached the golden rule and fair play, [which justifies] the entry of equity to prevent injustice.” *Id.* at 341, 357 S.E.2d at 693.

In *Cleveland Construction*, the defendant general contractor notified its subcontractor, the plaintiff, that it intended to submit a generalized claim for compensation to the State. *Cleveland Constr., Inc.*, 210

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N.C. App. at 525, 709 S.E.2d at 517. In order to present all of the claims available, the general contractor solicited all of the plaintiff's claims to be used in its own, aggregated complaint. *Id.* A few months later, the general contractor submitted the aggregated claims and notified the subcontractor of its submission. *Id.* at 533, 709 S.E.2d at 521. The general contractor also sent a letter to the subcontractor discouraging it from filing suit against the general contractor so that both parties could present a "unified front" against the State. *Id.* The subcontractor relied on that letter and delayed suit against the general contractor until after the statute of limitations had run. *Id.* Accordingly, we held that the general contractor was barred from asserting the statute of limitations as a defense, citing the general contractor's "affirmative representations that [(1)] it was pursuing [the subcontractor's] claims against the State and [(2)] initiating a lawsuit would jeopardize 'the success' of recovery[.]" *Id.* Given those representations, we determined that the general contractor had lulled the subcontractor into a false sense of security and induced the delayed filing. *Id.* (noting that the balance of the equities disfavored the general contractor, which had already been paid on the subcontractor's claims against the State).

In *Miller*, the plaintiff property owners brought suit against the defendant neighbors for water that the defendants had allegedly redirected onto the plaintiffs' property. *Miller*, 112 N.C. App. at 485, 435 S.E.2d at 795. The defendants asserted the statute of limitations as a defense, and we denied that protection. *Id.* at 486, 435 S.E.2d at 796. Relying on the doctrine of equitable estoppel, we noted that the defendants had "repeatedly promised to remedy the surface water drainage problems, [the] plaintiffs believed that [the] defendants would keep their word and fix the problems, and[,] in reliance on [the] defendants' promises, [the] plaintiffs delayed instituting legal action." *Id.* at 489, 435 S.E.2d at 797.

For four reasons, Defendant argues that these cases are not applicable and Plaintiff should not be allowed to proceed to trial under a theory of equitable estoppel. First, BB&T asserts that it did not make a false representation of a material fact when it informed Plaintiff that "everything would be worked out in the Barker litigation." In support of that argument, Defendant asserts that, when applying the elements of equitable estoppel, "a promise of future fulfillment does not constitute a misrepresentation of material fact unless such promise is made with no intent to comply." We disagree.

Fraud is generally found when, *inter alia*, there is (1) a false representation or concealment of a material fact, (2) which is reasonably

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calculated to deceive, and (3) made with the intent to deceive. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 569, 374 S.E.2d 385, 391 (1988) (citation omitted). Unlike fraud, equitable estoppel exists when there is simply conduct that *amounts* to a false representation of a material fact. It does not require that the defendant-party intend to misrepresent such a fact. *Hamilton*, 296 N.C. at 576, 251 S.E.2d at 443 (“[N]either bad faith, fraud nor intent to deceive is necessary before the doctrine of equitable estoppel can be applied.”) (citation omitted). Accordingly, to the extent that Defendant’s representations during the Barker litigation were neither “promises” nor direct attempts at deception, they do not negate the applicability of the equitable estoppel doctrine. Rather, as this Court has frequently noted, and as Defendant points out in its brief, the gravamen of equitable estoppel is the subsequent inconsistent position taken by the defendant party. See *Cleveland Constr., Inc.*, 210 N.C. App. at ___, 709 S.E.2d at 521 (where defendant general contractor sent a letter to plaintiff subcontractor discouraging it from filing suit so the parties could present a “unified front,” but subsequently took the inconsistent position that the plaintiff’s suit was barred by the statute of limitations).

Here, Plaintiff alleges that during the pendency of the Barker lawsuit — that crucial period of time just before the statutes of limitation ran on his claims — BB&T (1) informed him that “everything would be worked out in the Barker litigation”; (2) told him to “hold off on instituting any action[] to allow resolution of the Barker matter [and his own claims against BB&T]”; and (3) informed him that “the Note would be canceled upon resolution of the Barker [suit] . . . [,] the loan would be forgiven[,] and [Plaintiff] would be reimbursed any expenses incurred related to BB&T’s failure to obtain the [government-backed loan].” Plaintiff also alleges and provides evidence that, by the end of the Barker litigation and after the statute of limitations had run, BB&T failed to follow through on these assurances. Though BB&T later stated that it was “willing to work with [Plaintiff]” despite the fact that Plaintiff’s claims were “clearly time-barred” and offered to apply the net proceeds from the sale of the Cheraw Road building to the debt already owed by Plaintiff, this offer does not comport with the “assurances” Plaintiff alleges he received.

In addition, we note that the alleged assurances and subsequent inconsistent position taken in this case are, together, significantly more substantial than those in *Stainback*. As noted above, our Supreme Court made clear that equitable estoppel operated to bar application of the statute of limitations in that case when the defendant merely stated that he would “keep Duke informed of the situation” in his pending lawsuit

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and was aware of Duke's continuing interest in receiving payment for its medical services. *Stainback*, 320 N.C. at 339–40, 357 S.E.2d at 691–92. Despite the fact that the defendant made no direct promise regarding what would occur after his lawsuit with the insurance carrier ended, the Supreme Court sustained the trial court's finding that "[the] *representations and conduct of [the defendant]*" justifiably induced Duke to refrain from bringing suit and, thus, held that there was sufficient evidence to estop him from pleading the statute of limitations as a defense. *See id.* at 340–41, 357 S.E.2d at 692–93. Based on *Stainback*, we conclude that the forecast of evidence in this case, considering the evidence in a light most favorable to Plaintiff, as we must, *Best v. Duke Univ.*, 337 N.C. 742, 749, 448 S.E.2d 506, 510 (1994) ("The trial court must examine the evidence in a light most favorable to the nonmoving party, giving that party the benefit of all reasonable inferences that may be drawn therefrom."), is sufficient to raise an inference that BB&T's actions, when taken together, lulled Plaintiff into a false sense of security, induced him to refrain from filing suit within the required limitations periods, and, as such, constituted conduct reasonably calculated to convey the impression that the facts were otherwise than, and inconsistent with, what BB&T later attempted to assert.

Second, BB&T argues that it did not take a subsequent inconsistent position because it "never disavowed [its alleged assurance that 'everything would be worked out'] or commenced action against Plaintiffs to collect on the \$425,000 note until it had no choice but to do so as a compulsory counterclaim." We are unpersuaded.

Defendant's failure to either disavow its alleged assurances or seek payment of the note owed by Plaintiff, while perhaps admirable, does not speak to the question of whether it took a subsequent inconsistent position. A party takes a subsequent inconsistent position when it fails to act in conformity with its prior assurances — not when it merely fails to deny that those assurances were made. *See, e.g., Stainback*, 320 N.C. at 338–42, 357 S.E.2d at 691–93 (holding that equitable estoppel barred operation of the statute of limitations when the defendant's actions lulled the plaintiff into a false sense of security — despite the defendant's failure to later disavow those assurances); *Meacham v. Montgomery Cnty. Bd. of Educ.*, 59 N.C. App. 381, 386, 297 S.E.2d 192, 196 (1982) ("It is undisputed that both [the] plaintiff and [the] defendant acted in good faith, yet this fact alone does not bar [the] plaintiff's claim that [the] defendant be estopped. It is sufficient that [the] defendant's subsequent inconsistent position operated to injure the plaintiff.").

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Third, BB&T argues that Plaintiff failed to exercise reasonable diligence and care to protect his legal rights and, thus, is barred from circumventing the statute of limitations on a theory of equitable estoppel, citing the maxim that “he who claims the benefit of an equitable estoppel on the ground that he has been misled by the representations of another must not have been misled through his own want of reasonable care and circumspection.” *Hawkins*, 238 N.C. at 179, 77 S.E.2d at 673. In support of this argument, Defendant notes that Plaintiff commenced this action (1) more than six years after learning that he did not qualify for the government-backed loan, (2) more than five years after he learned that Barker had brought suit against BB&T, (3) more than two years after the *Barker* action was settled, (4) two years after he first consulted legal counsel, and (5) more than a year after he demanded cancellation of the note. Accordingly, Defendant alleges, Plaintiff refrained from bringing suit despite having the advantage of trial counsel and despite his status as “an intelligent businessman and real estate developer who served on the board of a bank.” We are, again, unpersuaded.

It appears from the record that Plaintiff first consulted legal counsel after the statute of limitations had already run on his claims. Thus, the fact that he later had access to a lawyer does not address his awareness of the legal implications of his failure to bring suit during that crucial time before the various statutes had run. Further, while it is true that Plaintiff is a competent and capable businessman, this does not preclude the operation of equitable estoppel.

As noted in Plaintiff’s brief, equitable estoppel was employed by our Supreme Court in *Stainback* to allow plaintiff’s suit to proceed to trial despite the fact that the statute of limitations had run. *Stainback*, 320 N.C. at 341, 357 S.E.2d at 693. The plaintiff in that case was Duke Hospital, one of the most highly rated hospitals at one of the most highly regarded universities in the nation, which has a plethora of attorneys on hand to respond to its legal disputes. *See id.* Here, while assuredly a competent businessman, Plaintiff had significantly fewer resources at his command than Duke Hospital. *See also Cleveland Constr., Inc.*, 210 N.C. App. at 524, 709 S.E.2d at 516 (where the plaintiff was a subcontractor).

While equitable estoppel does not protect an individual who simply sleeps on her or his rights, the doctrine can be and has been employed to protect parties of all levels of sophistication when those parties have relied on a false representation of material fact to their detriment and lack knowledge or the means of attaining knowledge of the real facts in question. *Parker*, 100 N.C. App. at 370, 396 S.E.2d at 628–29. Importantly,

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when the real fact in question depends on the other party's willingness to cooperate at a later point, as it does here and as it did in *Stainback*, the party asserting equitable estoppel cannot have the means to know that fact at the time of the assurance. In such a circumstance, we look to whether the other party took a subsequent inconsistent position. When that has occurred, as Plaintiff properly alleges that it did here, then equitable estoppel is applicable.

Lastly, Defendant asserts that *Miller* is not applicable in this case because, unlike the plaintiffs in *Miller*, who were individual landowners not represented by legal counsel, the plaintiff in this case is "an admittedly sophisticated real estate developer" and "the 'balances of equity' do not similarly favor [him]." For the reasons discussed above, we disagree. See, e.g., *Stainback*, 320 N.C. at 341, 357 S.E.2d at 693. Accordingly, we hold that the events alleged by Plaintiff raise a permissible inference that the elements of equitable estoppel are present, and we reverse the trial court's grant of Defendant's motion for summary judgment so that the jury may address this question at trial.

III. Attorneys' Fees

[3] Next, Plaintiff asserts that the trial court erred in granting Defendant's motion for summary judgment on BB&T's counterclaim for payment on the \$425,000 loan, arguing that there is an issue of fact concerning the enforceability of the promissory note, the interest accrued on that note, and the right to recover attorneys' fees.

Because we have determined that Plaintiff's claims are sufficient to allow the jury to determine whether equitable estoppel barred operation of the statute of limitations, we hold that the trial court's grant of summary judgment as to the enforceability of the promissory note, the amount of interest accrued on the promissory note, and Defendant's right to recover attorneys' fees was in error. Therefore, we reverse the trial court's grant of Defendant's motion for summary judgment on that issue and remand for further proceedings at trial.

REVERSED AND REMANDED.

Judge STROUD concurs.

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

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

I concur with the majority in its result that there is a genuine issue of material fact on Defendant's counterclaim as to the amount of accrued interest due under the promissory note. However, because I believe that there is no genuine issue of material fact as to Plaintiff's claims¹ or to the remainder of Defendant's counterclaims, I respectfully dissent.

I: Statutes of Limitation

I agree with the majority's holding that "[b]ecause Plaintiff did not institute proceedings based on his alleged causes of action within the time allotted, they are time-barred."

II: Equitable Estoppel

Plaintiff alleges in his complaint that Defendant made certain "assurances" inducing Plaintiff not to file this action before the statute of limitations had run. The majority holds these alleged "assurances" are sufficient to create a genuine issue of material fact as to whether Defendant is equitably estopped from asserting the statute of limitations as an affirmative defense. The majority has grouped these "assurances" allegedly made by Defendant into three categories:

1. Defendant assured Plaintiff that "everything would be worked out in the Barker litigation";
2. Defendant requested Plaintiff "hold off on instituting an action [] to allow resolution of the Barker matter"; and
3. Defendant assured Plaintiff that "the Note would be canceled upon resolution of the Barker [suit][,] . . . the loan would be forgiven[,], and [Plaintiff] would be reimbursed any expenses incurred related to [Defendant's] failure to obtain the [government loan]."

I have thoroughly examined the record on appeal, and I do not believe the evidence before the trial shows that there is a genuine issue of material fact as to Plaintiff's claim.

Regarding the first two "assurances" cited above, there is nothing in them from which a jury could infer that Defendant promised to settle

1. As pointed out by the majority, though there are two plaintiffs, the record consistently refers to Mr. Ussery as "Plaintiff," as he was the primary, if not sole, actor.

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the claim in any particular way. The statements are nothing more than mere “promises” that Defendant would work to resolve Plaintiff’s claims in the future. We have consistently held that a mere promise to negotiate a resolution in the future, as opposed to an assurance that a claim would be resolved in a definitive way, is not the type of promise which would equitably estop a defendant from asserting a statute of limitations defense. *See Duke v. St. Paul*, 95 N.C. App. 663, 384 S.E.2d 36 (1989); *Teague v. Randolph*, 129 N.C. App. 766, 501 S.E.2d 382 (1998); *Blizzard v. Smith*, 77 N.C. App. 594, 335 S.E.2d 762 (1985), *cert. denied*, 315 N.C. 389, 339 S.E.2d 410 (1986).

In *Duke v. St. Paul*, we stated that “[m]ere negotiation with a possible settlement unsuccessfully accomplished is not that type of conduct designed to lull the claimant into a false sense of security so as to constitute an estoppel by conduct thus precluding an assertion of . . . [limitations] by the insured.” *Id.* at 673, 384 S.E.2d at 42.

In *Blizzard*, we held that the plaintiff “fail[ed] to show the essential elements of equitable estoppel” based on the following communication from defendant’s counsel to plaintiff’s counsel: “Please do not institute any lawsuit until we have had a chance to perhaps work this matter out.” *Id.* at 595-596, 335 S.E.2d at 763.

In *Teague*, we held that the elements of equitable estoppel were not present based on the following facts: A representative for the defendant’s liability insurer “indicated to plaintiffs’ counsel his willingness to discuss settlement or, failing that, arbitration as a possible means of resolving the matter[.]” *Id.* at 772, 501 S.E.2d at 376. Additionally, the representative “proposed a time and date to meet with [the plaintiffs’] counsel [to] discuss settlement” but later “cancelled further negotiations . . . citing his belief that [the plaintiffs’] claim was time barred.” *Id.* at 772, 501 S.E.2d at 386-387.

The majority relies on *Duke Univ. v. Stainback*, 320 N.C. 337, 357 S.E.2d 690 (1987), *Cleveland Constr., Inc. v. Ellis-Don Constr.*, 210 N.C. App. 522, 709 S.E.2d 512 (2011), and *Miller v. Talton*, 112 N.C. App. 484, 435 S.E.2d 793 (1993), to support its holding that there is a genuine issue of material fact as to plaintiff’s equitable estoppel claim in this case. I believe each of the foregoing cases are readily distinguishable from this case because each involves statements or conduct which led a plaintiff to believe that the defendant would resolve a claim in a definitive way. In *Stainback* and in *Cleveland Construction*, the defendant’s conduct led the plaintiff to believe that the defendant would pay the plaintiff’s claim if and when the defendant received a recovery from a certain third

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party. However, in both cases, the defendant subsequently received money from the third party, but refused to pay the plaintiff. In *Miller*, the defendant promised his neighbor to fix a water-flow problem which had damaged his neighbor's land, again an "assurance" to resolve a dispute in a particular way. Relying on this promise, the neighbor held off on filing an action. However, after the statute of limitations had run, the defendant refused to fix the problem.

The third "assurance" cited by the majority is an oral statement allegedly made by an officer of the Defendant that Defendant would cancel the promissory note and reimburse Plaintiff his expenses he had incurred. However, I believe this alleged oral assurance by Defendant's officer is inadmissible and incompetent under the parole evidence rule, and therefore cannot be relied upon to create a material factual issue to withstand a summary judgment motion. Here, after Defendant's alleged assured Plaintiff that the note would be forgiven, the record shows that on six occasions over a 44-month period, from April 2003 to November 2006, Plaintiff executed separate "Note Modification Agreement[s]." In each of these six written agreements, Plaintiff acknowledged owing the debt and promised to repay the debt.

The applicability of the parole evidence rule in the context of a promissory note has been dealt with extensively by our Supreme Court, most notably in the case *Borden v. Brower*, 284 N.C. 54, 199 S.E.2d 414 (1973). After stating the basic principles of the parole evidence rule generally, the Court in *Borden* stated the following:

Promissory notes are not generally subject to the parole evidence rule to the same extent as other contracts
[I]t is rather common for a promissory note to be intended as only a partial integration of the agreement in pursuance of which it was given, and parole evidence as between the original parties may well be admissible *so far as it is not inconsistent with the express terms of the note.*

Id. at 61, 199 S.E.2d at 419-20 (1973) (emphasis added); *see also Bank v. Gillespie*, 291 N.C. 303, 308, 230 S.E.2d 375, 378-79 (1976).

The *Borden* Court provided situations where parole evidence may be admissible to show an agreement at variance to the terms of the written promissory note:

"[T]his Court has permitted variance of [the] expressed terms [of a promissory note] by showing that it was to be enforced only on the happening of certain conditions, or

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only to the extent necessary to accomplish a certain purpose, or that it was payable only out of a certain fund, or that it was given as evidence of an advancement, or that it might be discharged by a method of payment or performance different from that stated in the writing.”

Id. at 63, 199 S.E.2d at 421. The Court cited eleven “[o]ther promissory note cases involving the North Carolina method of payment and discharge exception to the parole evidence rule” as follows:

“*Carroll v. Brown*, 228 N.C. 636, 46 S.E.2d 715 (1948) (note to be paid out of profits of a partnership in which maker and payee were engaged); *Ripple v. Stevenson*, 223 N.C. 284, 25 S.E.2d 836 (1943) (note to be paid out of rents and profits from an office building); *Insurance Co. v. Guin*, 215 N.C. 92, 1 S.E.2d 123 (1939) (note to be paid out of commissions); *Bank v. Rosenstein*, 207 N.C. 529, 177 S.E. 643 (1935) (co-maker’s liability on a note limited to the value of land covered by a deed of trust); *Galloway v. Thrash*, 207 N.C. 165, 176 S.E. 303 (1934) (note to be paid by crediting it against payee’s anticipated share of maker’s estate); *Trust Co. v. Wilder*, 206 N.C. 124, 172 S.E. 884 (1934) (note to be paid out of proceeds of land when land was sold); . . . ; *Kerchner v. McRae*, 80 N.C. 219 (1877) (bond to be credited with the proceeds from sale of cotton).”

Id. at 62-63, 199 S.E.2d at 420. In *Borden* and in the eleven cases cited in that decision, a debtor was allowed to introduce parole evidence to show an oral agreement regarding the *means* by which the obligation recited in the written note would be satisfied, because the parole evidence did not contradict the terms of the note. However, there is no exception to the parole evidence rule regarding evidence that a borrower simply and inexplicably does not owe the money he was loaned.

To the contrary, the Supreme Court’s explained *Borden* in its prior ruling in *Vending Co. v. Turner*, 267 N.C. 576, 148 S.E.2d 531 (1966). In *Vending Co.*, our Supreme Court stated that “[t]he promise set forth in [a promissory] note could not be contradicted or destroyed by parole testimony that the makers thereof would not be called upon to pay in accordance with the terms of the note.” *Id.* at 582, 148 S.E.2d at 536. In explaining *Vending Co.*, the *Borden* Court stated:

“Although that opinion does contain a general statement to the effect that a promise set forth in the note could not be contradicted or destroyed by parol testimony, the

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opinion actually affirmed a judgment that embodies *the mode of payment or method of discharge exception to the parole evidence rule.*"

Borden, 284 N.C. at 65, 148 S.E.2d at 422 (emphasis added).

I believe *Borden* and the eleven cases cited therein are distinguishable from the case *sub judice*. In this case, the alleged oral "assurance" made prior to the written modification agreements was that Defendant was simply forgiving the \$425,000 note and all interest expense payable thereunder. The "assurance" was not an oral agreement describing the *means* by which the payment of the note would be paid or the *method* by which Plaintiff's obligation would be discharged or otherwise which would fall under any of the other exceptions recited in *Borden* where parole evidence would be allowed. Rather, the alleged oral "assurance" that the promissory note would not have to be paid back under any circumstance is in *direct contradiction* to the terms of the six written agreements executed by Plaintiff. Therefore, I believe the alleged statement by Plaintiff that Defendant would simply forgive the \$425,000 note and all of Plaintiff's expenses is incompetent, as it violates the parole evidence rule, and therefore, must not be considered in the determination of whether there is a genuine issue of material fact with regard to Plaintiff's claims.²

Even if this alleged "assurance" is not barred by the parole evidence rule, I do not believe the assurance is otherwise sufficient to create a jury question regarding equitable estoppel. Plaintiff admits in his brief and in his affidavit that was offered at the summary judgment hearing that the alleged assurance was merely *part* of an unresolved settlement negotiation. Specifically, on page 8 of his brief, Plaintiff recites the following as his version of the facts:

"[Defendant] continued to assure [Plaintiff] after the Barker settlement was entered that their \$425,000.00 Note, and their expenses related to [Defendant's] failure

2. In *Bank v. Gillespie*, in which the Supreme Court quotes the *Borden* decision extensively, the Court considered "the course of dealings" between the parties to determine whether parole evidence would be admissible. *Id.* at 310, 230 S.E.2d at 379-380. In the case *sub judice*, Plaintiff's course of dealing with regard to the note is in direct contradiction to the alleged "assurance" that he would not be held liable for the principle or interest expense under the note. Specifically, in addition to executing six note modifications where he acknowledged the debt and agreed to pay it back, an attachment to Plaintiff's own affidavit shows that Plaintiff continued to pay interest expenses on the promissory note on a number of occasions, with the last interest payment in the amount of \$11,064.76 being made in April 2006.

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to procure financing for Barker and Chair Specialties, *would be worked out* Although [Defendant] failed to propose a specific plan and improperly refused to provide Plaintiff information regarding [Defendant's settlement with Mr. Barker, Defendant's] issuance of several Note Modification Agreements from 2003 through 2006, as additional consideration for refraining from filing suit, and its agreement on 5 July 2006 to discuss resolution as previously pledged, reassured Plaintiffs that [Defendant] would honor its promise.

(emphasis added.) Also, Plaintiff, in his affidavit, characterizes the assurance in the following way:

I have previously set forth in Plaintiff's responses to Defendant's written discovery, my conversations with Charles Smith, authorized representative of BB&T, at the time of the litigation was filed by Wayne Baker against BB&T . . . and the fact that Charles Smith had advised me that the issues involving the expenses and debt involving Chair Specialties, including the \$425,000.00 Note, *would be resolved*.

(emphasis added.) Since Plaintiff admitted at the summary judgment hearing and in his brief that he interpreted the alleged assurance as part of a settlement that had not yet been resolved, this assurance is essentially the same as the first two assurances, namely a promise to reach a definitive resolution in the future; and, likewise, cannot be relied upon by Plaintiff to establish a genuine issue of material fact regarding equitable estoppel.³ See *St. Paul*, 95 N.C. App. 663, 384 S.E.2d 36; *Randolph*, 129 N.C. App. 766, 501 S.E.2d 382; *Smith*, 77 N.C. App. 594, 335 S.E.2d 762.

III: Defendant's Counterclaims

I believe that Defendant is entitled to judgment as a matter of law on its counterclaims to recover the outstanding principal due on the

3. Additionally, Plaintiff failed to show why it would have been "reasonable" for him to rely on any statement by Defendant that (1) his claims against Defendant regarding the promissory note would somehow be resolved or worked out in an unspecified way without his input or participation and in the course of the legal proceeding with Mr. Barker, who was not a party to the note; or (2) that Defendant would unilaterally forgive the entire \$425,000.00 debt and repay Plaintiff's incurred expenses where Defendant otherwise required Plaintiff to continue paying interest, which Defendant, in fact, continued to pay. *Adkins v. Adkins*, 82 N.C. App. 289, 291, 346 S.E.2d 220, 221 (1986) (stating that "[a]n essential element of [equitable estoppel] is reasonable reliance").

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note of \$425,000.00; pre-judgment interest from December 13, 2011 in the amount of \$97.40 per day; and attorneys' fees in the amount of \$63,750.00. However, I believe the evidence in the record creates a genuine issue of material fact as to the amount of interest owed on the promissory note. There is evidence in the record that Plaintiff would not be responsible for interest payments for at least some period following his last interest payment made in April 2006. This evidence includes a print-out generated by Defendant that \$38,164.14 in interest was waived in 2007. Therefore, I would reverse the portion of the summary judgment order which awards the interest due on the promissory note and remand this cause for a jury trial on this issue only.

IV: Conclusion

For the reasons stated above, I would vote to affirm the trial court's summary judgment order to the extent that it grants summary judgment in favor of Defendant on Plaintiff's claims and to the extent that it grants summary judgment to Defendant on its counterclaims for the principal due on the promissory note, prejudgment interest, and attorneys' fees. I would vote to reverse and remand for a trial on the issue of damages with respect to the amount of interest due on the promissory note.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 MAY 2013)

ANDERSON v. SODEXO No. 12-1575	N.C. Industrial Commission (W33354)	Affirmed
BOOE v. BOOE No. 12-1019	Cabarrus (09CVD4540)	Affirmed in part; reversed and remanded in part.
CONSOLI v. GLOBAL SUPPLY & LOGISTCS, INC. No. 12-1283	Mecklenburg (08CVS10480)	Affirmed
COVINGTON v. SERV. CORP. INT'L No. 12-1149	Forsyth (11CVS7823)	Reversed and Remanded
HPT IHG PROPS.TRUST. v. THE SHAW GRP., INC. No. 12-1223	Mecklenburg (10CVS24451)	Affirmed
IN RE FOSTER No. 12-865	Buncombe (11CRS63033)	Reversed
IN RE K.A.T.B. No. 12-1419	Catawba (06JT126)	Affirmed
IN RE K.C. No. 12-1536	Cumberland (11JA652)	Affirmed
IN RE L.M.W. No. 12-1373	Forsyth (12JT56)	Affirmed
IN RE M.D.M.M. No. 12-1547	Wake (11JT154)	Affirmed
KRUPINSKI v. FORREST No. 12-1225	Durham (10CVD545)	Affirmed
LEAKE v. N.C. DEP'T OF CORR. No. 12-1272	N.C. Industrial Commission (X67191)	Dismissed
MCNEIL v. MCNEIL No. 12-1396	N.C. Industrial Commission (PH-2513) (W61904)	Dismissed

RICHARDSON v. PCS PHOSPHATE CO., INC. No. 12-824	N.C.Industrial Commission (W28174)	Reversed and Remanded
ROBERTS v. HUCKABEE No. 12-1352	Orange (12CVS493)	Affirmed
SASSO v. STATESVILLE FLYING SERV., INC. No. 12-935	Iredell (10CVS1678)	Affirmed
SNIDER v. SNIDER No. 12-1181	Rowan (09CVD674)	Dismissed
STATE v. ELLIS No. 12-861	Harnett (11CRS51869)	No Error
STATE v. FLOYD No. 12-1123	Robeson (07CRS50913)	No Error
STATE v. HODGES No. 12-915	Caldwell (09CRS50992-93)	Affirmed
STATE v. HUNT No. 12-1242	Mecklenburg (11CRS215295) (11CRS38942)	No Error
STATE v. KINSTON No. 12-1119	New Hanover (10CRS50688-9)	Affirmed
STATE v. KIRKMAN No. 12-1288	Lenoir (10CRS50419) (11CRS50508)	Affirmed; remanded for correction of clerical errors
STATE v. LOCKLEAR No. 12-1348	Robeson (08CRS51914)	No Error
STATE v. MCCULLERS No.12-1214	Wake (10CRS204923) (10CRS204924)	No Prejudicial Error
STATE v. RIVAS-BATRES No. 12-645	Union (09CRS4485) (09CRS4488) (09CRS4499) (09CRS4507-08) (09CRS50957) (09CRS50960) (09CRS50962-63) (09CRS50974) (09CRS50976)	Remanded

STATE v. RORIE No. 12-1110	Mecklenburg (11CRS218963-64)	No Error
STATE v. SALGADO No. 12-1178	Wake (10CRS214723) (10CRS214725)	Affirmed
STATE v. SHAW No. 12-1186	Forsyth (11CRS50213) (11CRS9998-99)	No Error
STATE v. WASHINGTON No. 12-1294	NewHanover (11CRS50765-66) (12CRS52666-67)	Affirmed
STATE v. WEEKS No. 12-1388	Wayne (09CRS56933) (10CRS2859)	No Error
STATE v. WILSON No. 12-772	Randolph (10CRS55679) (11CRS52)	No Error
STATE v. WRIGHT No. 12-938	Pamlico (11CRS50220-50223)	Affirmed
WATTS v. BELL No. 12-1553	Iredell (10CVS907)	Affirmed
WILLIAMS v. HAMPTON No. 12-1273	Wake (11CVS4663)	No Error; Affirmed
WILLIAMS v. HUMPHREYS No. 12-814	Buncombe (09CVS4655)	Reversed
YOUNG v. YOUNG No.12-1360	Transylvania (11CVS407)	Affirmed in part; dismissed in part

ADAMS CREEK ASSOCS. v. DAVIS

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ADAMS CREEK ASSOCIATES, A NORTH CAROLINA LIMITED PARTNERSHIP
WITH BILLY DEAN BROWN, GENERAL PARTNER, PLAINTIFF
v.
MELVIN DAVIS AND LICURTIS REELS, DEFENDANTS

No. COA12-1200

Filed 4 June 2013

1. Trespass—lappage—collateral estoppel—color of title—adverse possession

The trial court did not err in a trespass case by entering partial summary judgment in favor of plaintiff. The issue of lappage raised by defendants was barred by the doctrine of collateral estoppel. Further, defendants did not have a claim under color of title, nor did they show adverse possession as of right.

2. Trespass—motion to rescind—Torrens Act—lappage—adverse possession

The trial court did not err in a trespass case by denying defendants' motion to rescind. Regardless of whether plaintiff held a title to the Waterfront Property under the Torrens Act, defendants could not assert a valid claim to the Waterfront Property. Moreover, the law of lappage was of no consequence following the Torrens Proceeding that awarded title of the Waterfront Property to Shedrick by means of adverse possession.

3. Statutes of Limitation and Repose—trespass on real property—not a bar to claim

The trial court did not err by failing to dismiss a trespass action based on the three-year statute of limitations under N.C.G.S. § 1-52(3). To deny plaintiff a right of action would have been to allow defendants a right of eminent domain as private persons, without the payment of just compensation, or grant defendants a permanent prescriptive easement to use plaintiff's land.

4. Contempt—civil—noncompliance with order

The trial court did not err in a trespass case by holding defendants in civil contempt. Plaintiff was the rightful owner of the pertinent Waterfront Property, and defendants remained noncompliant with the 2004 summary judgment order.

5. Pleadings—sanctions—meritless motions

The trial court did not abuse its discretion in a trespass case by

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imposing sanctions of \$11,000 pursuant to N.C.G.S. § 1A-1, Rule 11 in favor of plaintiff to cover fees incurred as a result of defendants' meritless motions.

Appeal by defendants from orders filed 16 September 2004, 9 February 2012, 29 May 2012, and 14 June 2012 by Judge Benjamin G. Alford in Carteret County Superior Court and from an order filed 31 March 2011 by Judge Jack W. Jenkins in Carteret County Superior Court. Heard in the Court of Appeals 12 February 2013.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr.; and Ledolaw, by Michele A. Ledo, for plaintiff appellee.

Terry B. Richardson for defendant appellants.

McCULLOUGH, Judge.

Defendants Melvin Davis ("Melvin") and Licurtis Reels ("Licurtis") appeal from the entry of an order granting plaintiff Adams Creek Associates ("Adams Creek") partial summary judgment and from the entry of subsequent orders holding them in contempt of the partial summary judgment order, denying them relief from the partial summary judgment order, and imposing sanctions. For the following reasons, we affirm.

I. BACKGROUND

This case involves the disputed ownership of 13.25 acres of land along Adams Creek in Carteret County, North Carolina (the "Waterfront Property"). The Waterfront Property is included within, and was a part of, a 65-acre tract of land (the "Land") that has been occupied by the defendants' family for a century.

The relevant history of the Land and this case is summarized as follows: Elijah Reels ("Elijah") purchased the Land in November 1911. In January 1944, as a result of Elijah's nonpayment of taxes, the Land was conveyed to Carteret County. Elijah's son Mitchell Reels ("Mitchell") then purchased the Land from Carteret County in February 1944. Mitchell died intestate in 1971. In June 1976, after qualifying to administer Mitchell's estate, Mitchell's daughter Gertrude Reels ("Gertrude") filed a civil action in Carteret County Superior Court to affirm the property rights of Mitchell's heirs in the Land. In August 1976, the trial court entered a judgment ruling that Mitchell's heirs were the rightful owners of the Land (the "1976 Judgment").

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In January 1978, Mitchell's brother Shedrick Reels ("Shedrick") petitioned to register title to 17.23 acres of the Land, which included the Waterfront Property, pursuant to the North Carolina Torrens Act, N.C. Gen. Stat. § 43-1 *et seq.* (the "Torrens Proceeding"). Shedrick's claim to ownership stemmed from a deed dated 20 September 1950 that was executed by Elijah and recorded in Carteret County. Mitchell's heirs were named as respondents in the Torrens Proceeding and filed an answer in March 1978. In January 1979, following a hearing, the Examiner of Titles filed his report concluding that "Shedrick . . . is the owner of the [13.25 acres that is the Waterfront Property], having established title to the same by his Deed of September 20, 1950, and having adversely possessed the same for a period in excess of twenty-seven (27) years[.]" On 16 March 1979, Attorney C.R. Wheatly, III, filed a certification on behalf of the Mitchell's heirs certifying "that they have received a copy of the Report of the Examiner of Titles . . . and that they have filed no exceptions thereto." Thereafter, on 19 March 1979, the Superior Court of Carteret County filed a decree of registration and the Register of Deeds filed a certificate of registration, declaring Shedrick the owner of the Waterfront Property and certifying that the Waterfront Property was registered in Shedrick's name.

On 25 August 1982, Shedrick filed a trespass action against Melvin and Gertrude. In the complaint, Shedrick sought to remove the cloud on his title caused by Melvin's and Gertrude's claims to an interest in the Waterfront Property, to enjoin Melvin and Gertrude from further acts of trespass, and to recover damages. The trial court's order dated 4 November 1983 was filed on 4 January 1984, granting Shedrick summary judgment. The order explicitly adjudged Shedrick to be the owner of the Waterfront Property and ordered Melvin and Gertrude not to trespass.

Thereafter, on 20 September 1985, Melvin was found to have trespassed on the Waterfront property and was held in willful contempt of the 4 January 1984 order. Melvin, however, purged himself of contempt by signing a statement acknowledging that Shedrick was the owner of the Waterfront Property and pledging not to commit further acts of trespass.

On 27 November 1985, Shedrick and his wife Beatrice Reels executed a release of the Waterfront Property from the Torrens Act and conveyed the Waterfront Property to Monroe Johnson and Charles B. Bissette, Jr., d/b/a Adams Creek Development, by general warranty deed. The release and general warranty deed were recorded 12 December 1985. Monroe Johnson and Charles B. Bissette, Jr., d/b/a Adams Creek

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Development, then conveyed the Waterfront Property to Adams Creek on 8 September 1986.

The present action was initiated on 30 October 2002, by the filing of Adams Creek's complaint against Melvin and Licurtis (together "defendants") in Carteret County Superior Court. The complaint alleged acts of trespass and sought to remove the cloud on Adams Creek's title caused by Licurtis' claim to an interest in the Waterfront Property by way of a deed executed by Gertrude and others on 20 January 1992. Adams Creek also sought punitive and compensatory damages. Answers disputing title to the Waterfront Property were filed on behalf of defendants on 16 December 2002 and 31 December 2002. On 14 May 2004, Adams Creek moved for partial summary judgment. Following a hearing, the Honorable Benjamin G. Alford ("Judge Alford") entered an order on 16 September 2004, granting Adams Creek's motion for partial summary judgment (the "2004 Summary Judgment Order"). The order held that Adams Creek was the owner of the Waterfront Property and that Licurtis' deed to a portion of the Waterfront Property was a nullity. Furthermore, the order instructed defendants to "remove any structures, equipment, sheds, or trailers that they [had] placed upon the [Waterfront Property] . . . and . . . not enter upon or commit any act of trespass upon the [Waterfront Property] . . ." The order left the issues of damages to be determined by a jury.¹

On 10 May 2006, Adams Creek filed a motion to show cause why defendants should not be held in contempt for failing to comply with the 2004 Summary Judgment Order. Thereafter, on 17 May 2006, defendants filed a response to Adams Creek's motion to show cause, a motion to disqualify C.R. Wheatly, III, as Adams Creek's counsel, and a motion to set aside the 19 March 1979 decree of registration.

The trial court granted Adams Creek's motion to show cause on 7 July 2006 and the matter came on for hearing on 7 August 2006. During the hearing, defendants acknowledged that they had gone onto the Waterfront Property since entry of the 2004 Summary Judgment Order and further testified that they would continue to enter upon the Waterfront Property regardless of any court order. As a result, an order was filed on 10 August 2006, holding defendants in contempt and ordering defendants to be held in custody for 21 days. Moreover, the trial

1. Defendants filed notice of appeal from the partial summary judgment order on 14 October 2004. However, defendants' appeal was dismissed by order filed 28 March 2005 for failure to timely perfect the appeal.

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court filed orders on 10 August 2006, denying defendants' motions to disqualify Adams Creek's counsel and set aside the decree of registration.

Defendants appealed all of the trial court's 10 August 2006 orders. Upon review, this Court affirmed the trial court's orders holding defendants in contempt, denying defendants' motion to disqualify Adams Creek's counsel, and denying defendants' motion to set aside the decree of registration. *Adams Creek Assocs. v. Davis*, 186 N.C. App. 512, 652 S.E.2d 677 (2007), *appeal dismissed and disc. review denied*, 362 N.C. 354, 662 S.E.2d 900 (2008) (hereafter "*Adams Creek I*").

Notwithstanding the trial court's orders and this Court's affirmance of those orders, defendants continued to occupy the Waterfront Property. Consequently, on 28 January 2011, Adams Creek filed a motion to hold defendants in civil contempt. By order filed by the Honorable Jack W. Jenkins ("Judge Jenkins") on 31 March 2011, the trial court found defendants in civil contempt of the 2004 Summary Judgment Order and ordered defendants imprisoned until their contempt is purged.²

On 21 December 2011, defendants contemporaneously filed motions to set aside the 2004 Summary Judgment Order and to purge their civil contempt. Defendants then moved for summary judgment in their favor by motion filed 11 January 2012. Adams Creek responded to defendants' motions on 18 January 2012 by filing a motion for sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11 (2011). Thereafter, on 7 February 2012, Adams Creek filed a calendar request and notice of hearing for a jury trial on the issues of damages and a hearing on its motion for Rule 11 sanctions, both to take place the week of 21 May 2012.

Pursuant to an order filed 9 February 2012 by Judge Alford, defendants' motion to set aside the 2004 Summary Judgment Order was denied, defendants' motion for summary judgment was stricken, and defendants' motion to purge civil contempt was referred to Judge Jenkins for hearing, pending notice to be given by defendants. A ruling on Adams Creek's motion for Rule 11 sanctions was deferred pending a hearing. Defendants filed notice of appeal from Judge Alford's 9 February 2012 order on 6 March 2012.

On 16 May 2012, defendants filed a motion pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure to rescind the 2004 Summary Judgment Order and to rescind the 9 February 2012 order denying their motion to set aside the 2004 Summary Judgment Order. On the same

2. Defendants remain in contempt and in custody to this day.

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day, defendants also filed a motion to dismiss the action on the basis that the statute of limitations had run against Adams Creek prior to the filing of the complaint on 30 October 2002. Defendants' motion to dismiss was based upon the statutes of limitation for actions concerning property held under color of title and trespass actions. In response to defendants' additional motions, Adams Creek filed a supplemental Rule 11 motion seeking sanctions for defendants' 16 May 2012 motions to rescind and dismiss.

On 29 May 2012, Judge Alford presided over a hearing on the pending motions. Following the hearing, orders were entered denying defendants' 16 May 2012 motions to rescind and dismiss.³ Furthermore, on 18 May 2012 and 29 May 2012, respectively, Adams Creek dismissed its claims for punitive and compensatory damages, leaving no undecided issues in the underlying action. The trial court then granted Adams Creek's motion for Rule 11 sanctions on 14 June 2012.

On 27 June 2012, defendants filed a withdrawal of their 6 March 2012 notice of appeal on the ground that the appeal would have been interlocutory. Defendants then filed a new notice of appeal from: (1) the 2004 Summary Judgment Order; (2) the 9 February 2012 denial of their motions to set aside and for summary judgment; (3) the 29 May 2012 denial of their motions to rescind and dismiss; (4) the 31 March 2011 civil contempt order; and (5) the 14 June 2012 order imposing Rule 11 sanctions.

II. ANALYSIS

On appeal, defendants raise various issues concerning the trial court's entry of the 2004 Summary Judgment Order and its subsequently filed orders denying defendants relief from the 2004 Summary Judgment Order, holding defendants in contempt, and imposing Rule 11 sanctions. We address the issues in turn.

SUMMARY JUDGMENT

[1] Defendants first argue that the trial court erred by entering partial summary judgment in favor of Adams Creek on 16 September 2004. "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,

3. Defendants also filed a motion for release from custody on 29 May 2012, the day of the hearing. That motion was later denied by order filed 14 June 2012.

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669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). “If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered.” *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

As stated above, Adams Creek’s complaint filed 30 October 2002 included causes of action for trespass and to remove the cloud on its title caused by Licurtis’ claim to ownership. Defendants filed answers on 16 December 2002 and 31 December 2002 in which they disputed the validity of Adams Creek’s title to the Waterfront Property and counter-claimed for quiet title. On 16 September 2004, Judge Alford filed the 2004 Summary Judgment Order granting Adams Creek partial summary judgment, reserving only the issues of damages. Now on appeal, defendants specifically contend that the trial court erred by entering the 2004 Summary Judgment Order because: (1) under the law of lappage, defendants are the rightful owners of the property; (2) the seven-year statute of limitations on actions concerning property held under color of title expired prior to the filing of Adams Creek’s complaint; and (3) Shedrick released the Waterfront Property from the Torrens Act.

1. Law of Lappage

Defendants first argue that the trial court erred by entering partial summary judgment in favor of Adams Creek and awarding title to the Waterfront Property to Adams Creek despite an issue of lappage. Defendants’ argument fails.

A lappage occurs where there is an overlap in the property described in deeds of competing claimants. *Berry v. Coppersmith*, 212 N.C. 50, 54, 193 S.E. 3, 6 (1937). When an issue of lappage arises, the law of lappage sets forth rules to determine the relative rights of the competing claimants. *See Price v. Tomrich Corp.*, 275 N.C. 385, 392-93, 167 S.E.2d 766, 771 (1969) (setting forth the law of lappage rules). In this case, defendants raise the issue of lappage by asserting that the Waterfront Property claimed by Adams Creek is entirely within, and a part of, the Land claimed by defendants. Hence, defendants argue the trial court erred in entering the 2004 Summary Judgment Order without deciding the issue of lappage. We disagree.

It is abundantly clear from the long history of this case that the Waterfront Property is entirely within, and was once a part of, the Land.

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This is evidenced by the fact that neither Adams Creek nor defendants raised the issue of lappage prior to this Court's statement in *Adams Creek I* that, "it is not possible from the record to discern the relative locations of the . . . tracts . . . from their descriptions." 186 N.C. App. at 515, 652 S.E.2d at 680.⁴ Nevertheless, defendants now attempt to capitalize on the statement by claiming the issue of lappage precluded entry of the 2004 Summary Judgment Order.

Defendants specifically argue that, where they are in possession of the Waterfront Property and claim ownership of the Waterfront Property stemming from the 1976 Judgment awarding the Land to Mitchell's heirs, and where Adams Creek is not in possession and claims ownership stemming from the 1979 decree of registration resulting from the Torrens Proceeding, the law of lappage operates to place title in their name. Upon review of the record and arguments, we disagree and hold the issue of lappage raised by defendants is barred by the doctrine of collateral estoppel.

Under the doctrine of collateral estoppel, or issue preclusion, a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies. A party asserting collateral estoppel is required to show that the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both [the party asserting collateral estoppel and the party against whom collateral estoppel is asserted] were either parties to the earlier suit or were in privity with parties.

State ex rel. Tucker v. Frinzi, 344 N.C. 411, 414, 474 S.E.2d 127, 128-29 (1996) (internal quotation marks and citations omitted).

Here, the issue of lappage was settled decades ago in the Torrens Proceeding. As previously described, in the Torrens Proceeding, Shedrick petitioned to register title to 17.23 acres of the Land. Following a hearing and a review of the Examiner of Title's report, the trial court

4. We note that this Court's statements concerning the boundaries of the subject property in *Adams Creek I* did not have any bearing on this Court's decision to affirm the appealed orders. In fact, in *Adams Creek I*, this Court affirmed the trial court's orders holding defendants in contempt of the 2004 Summary Judgment Order and denying defendants' motion to set aside the decree of registration resulting from the Torrens Proceeding. 186 N.C. App. 512, 652 S.E.2d 677.

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entered a decree of registration awarding title to the 13.25 acres constituting the Waterfront Property to Shedrick. The nature of the trial court's award was adverse possession.

Addressing the necessary elements of collateral estoppel, first, there is no doubt that the Torrens Proceeding resulted in a final judgment on the merits as to title of the Waterfront Property.⁵ Second, the very nature of adverse possession necessarily decides any issue of lappage. Third, although the parties to this action were not the named parties in the Torrens Proceeding, they are in privity. Where each element of collateral estoppel is satisfied, we hold the defendants cannot now assert the issue of lappage to re-litigate title to the Waterfront Property stemming from the 1976 Judgment.⁶ Accordingly, we find the trial court did not err in entering the 2004 Summary Judgment Order on this basis.

2. Seven Year Color of Title

On appeal, defendants also argue that the trial court erred by entering partial summary judgment in favor of Adams Creek on the ground that Adams Creek's complaint was barred by the seven-year statute of limitations for adverse possession under color of title. We do not agree.

N.C. Gen. Stat. § 1-38 governs adverse possession under color of title.

When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under color of title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same

N.C. Gen. Stat. § 1-38(a) (2011). Furthermore, this Court has defined color of title as "a writing that purports to pass title to the occupant but which does not actually do so either because the person executing the writing fails to have title or capacity to transfer the title or because of the defective mode of the conveyance used." *Cobb v. Spurlin*, 73 N.C. App. 560, 564, 327 S.E.2d 244, 247 (1985). However, in order to constitute

5. We note that most of defendants' arguments arise as a result of their refusal to accept the validity of the Torrens Proceeding. Yet, that decision is not properly before this Court for review and it is binding on our analysis.

6. Not only is it clear from the Torrens Proceeding that defendants have no interest in the Waterfront Property, but numerous actions have been decided since the Torrens Proceeding that have affirmed title in Shedrick, and now Adams Creek.

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color of title, defendants must have accepted the deed and entered the Waterfront Property in good faith. *Farabow v. Perry*, 223 N.C. 21, 25, 25 S.E.2d 173, 176 (1943); *see also New Covenant Worship Ctr. v. Wright*, 166 N.C. App. 96, 105, 601 S.E.2d 245, 252 (2004) (“It is well settled that, if the grantee knows a deed is fraudulent, the deed cannot qualify as color of title.”).

In this case, defendants assert color of title on two bases. First, defendants claim color of title stemming from the 1976 Judgment awarding title to Mitchell’s heirs. Second, defendants claim color of title stemming from a fraudulent deed executed by Mitchell’s heirs in favor of Licurtis on 20 January 1992. Each of defendants’ claims fail as they cannot show good faith. As discussed above, following the 1976 Judgment in favor of Mitchell’s heirs, Mitchell’s heirs, including defendants, lost all interest in the Waterfront Property in the Torrens Proceeding that awarded title to Shedrick. Furthermore, defendants cannot claim good faith in relying on the fraudulent deed executed by Mitchell’s heirs almost 13 years after Mitchell’s heirs, including defendants, lost all interest in the Waterfront Property. Consequently, defendants cannot claim color of title.

In addition to defendants’ claim under color of title, we note that defendants cannot show adverse possession as of right. Adverse possession as of right requires uninterrupted possession of property with known and visible boundaries that is adverse to all other persons for a period of twenty years. *See* N.C. Gen. Stat. § 1-40 (2011). In this case, Shedrick instituted a trespass action against Melvin and Gertrude on 25 August 1982. Thereafter, an order granting Shedrick summary judgment was filed on 4 January 1984. Approximately 18 years after Shedrick’s successful trespass suit, Adams Creek instituted the present action by filing a complaint on 30 October 2002. Thus, defendants have not occupied the Waterfront Property uninterrupted for the statutory period.

3. Release from the Torrens Act

Defendants also argue that the trial court erred by finding that Shedrick’s release of the Waterfront Property pursuant to N.C. Gen. Stat. § 43-25 was “for purposes of conveyance only[.]” and basing its grant of partial summary judgment on the fact that Adams Creek’s title to the Waterfront Property was protected under the Torrens Act. In making their arguments, defendants contend that Shedrick’s release pursuant to N.C. Gen. Stat. § 43-25 released the Waterfront Property from the Torrens Act for all purposes, as if the property was never registered.

In order to better understand the implications of the release executed by Shedrick, we note

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[t]he general purpose of the Torrens system is to secure by a decree of court, or other similar proceedings, a title impregnable against attack; to make a permanent and complete record of the exact status of the title with the certificate of registration showing at a glance all liens, encumbrances, and claims against the title; and to protect the registered owner against all claims or demands not noted on the book for the registration of titles.

State v. Johnson, 278 N.C. 126, 144, 179 S.E.2d 371, 383 (1971) (internal quotation marks and citation omitted); *see also* N.C. Gen. Stat. § 43-1 *et seq.* (2011). Thus, if Adams Creek's title is not protected under the Torrens Act, its title is subject to claims of adverse possession. With that in mind, Adams Creek and defendants now dispute whether Adams Creek's title to the Waterfront Property remains protected under the Torrens Act.

Upon review of the 2004 Summary Judgment Order and relevant provisions of the Torrens Act, we first note that the 2004 Summary Judgment Order granting Adams Creek partial summary judgment did not determine that Adams Creek holds title to the Waterfront Property under the Torrens Act. The order simply provides:

1. [Adams Creek's] title in this matter originates as a result of [the Torrens Proceedings]

. . . .

6. The said certificate was released under the provisions of [the Torrens Act] for the purposes of conveyance only; . . .

These findings are supported by the evidence in the case and are in no way determinative of the title now held by Adams Creek. Second, based on the language of N.C. Gen. Stat. § 43-25 and the fact that N.C. Gen. Stat. § 43-31 (2011) provides a method for the transfer of title under the Torrens Act, we favor defendants position that Adams Creek's title is no longer afforded the protections of the Torrens Act following Shedrick's release pursuant to N.C. Gen. Stat. § 43-25. Nevertheless, we need not decide the effects of Shedrick's release in the instant case. As discussed above and below, Mitchell's heirs lost all interest in the Waterfront Property as a result of the Torrens Proceeding and defendants fail to meet the requirements to regain title by adverse possession. Therefore, whether or not Adams Creek is afforded the protections of the Torrens Act, the entry of the 2004 Summary Judgment Order was proper.

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MOTION TO RESCIND

[2] On 16 May 2012, defendants filed a motion to rescind the trial court's 2004 Summary Judgment Order and 7 February 2012 order denying defendants' motion to set aside the 2004 Summary Judgment Order on the grounds that Adams Creek's title is not protected under the Torrens Act and Mitchell's heirs are the rightful owners pursuant to the law of lappage. The trial court denied defendants' motion to rescind by order filed 29 May 2012. Defendants now assert that the trial court's denial of their motion to rescind without a hearing was error.

For the reasons discussed above, we hold the trial court did not err in denying defendants' motion to rescind. Whether or not Adams Creek holds a title to the Waterfront Property under the Torrens Act, defendants cannot assert a valid claim to the Waterfront Property. Moreover, the law of lappage is of no consequence in this case following the Torrens Proceeding that awarded title to the Waterfront Property to Shedrick by means of adverse possession.

MOTION TO DISMISS

[3] Subsequent to the trial court's entry of the 2004 Summary Judgment Order, defendants filed a motion on 16 May 2012 to dismiss this action on the ground that the statute of limitations had run. The trial court denied defendants' motion by order filed 29 May 2012. Defendants now argue that the trial court erred by failing to dismiss the action based on the three-year statute of limitations for trespass upon real property.⁷ See N.C. Gen. Stat. § 1-52(3) (2011). "[A] motion to dismiss under N.C.R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979). Thus, "this Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). Upon review, we hold the trial court did not err.

N.C. Gen. Stat. § 1-52(3) provides a three-year statute of limitations for actions alleging trespass upon real property. The statute further provides, "[w]hen the trespass is a continuing one, the action shall be

7. The majority of defendants' 16 May 2012 motion to dismiss argues that the action should be dismissed pursuant to N.C. Gen. Stat. § 1-38 because defendants occupied the Waterfront Property for over seven years under color of title. Defendants only mentioned the three-year statute of limitations for trespass as a bar to this action in the alternative and provided no argument. Nevertheless, we review the issue on appeal.

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commenced within three years from the original trespass, and not thereafter.” N.C. Gen. Stat. § 1-52(3). Defendants now argue that, because they have occupied the Waterfront Property at all times since Adams Creek acquired title to the Waterfront Property by deed dated 8 September 1986, the three-year statute of limitations for trespass expired well before Adams Creek filed this action on 30 October 2002, 16 years later. Defendants’ argument lacks merit.

In construing N.C. Gen. Stat. § 1-52(3), our Supreme Court has stated that

the statute declares that actions for trespass on real estate shall be barred in three years, and when the trespass is a continuing one such action shall be commenced within three years from the original trespass and not thereafter; but this term, “continuing trespass,” was no doubt used in reference to wrongful trespass upon real property, caused by structures permanent in their nature and made by companies in the exercise of some *quasi*-public franchise. Apart from this, the term could only refer to cases where a wrongful act, being entire and complete, causes continuing damage, and was never intended to apply when every successive act amounted to a distinct and separate renewal of the wrong.

Sample v. Lumber Co., 150 N.C. 161, 165–66, 63 S.E. 731, 732 (1909). In light of the Supreme Court’s analysis, in *Bishop v. Reinhold*, 66 N.C. App. 379, 311 S.E.2d 298 (1984), this Court held that the defendants’ maintenance of a portion of a house on the plaintiffs’ land was a “separate and independent trespass each day it so remains and the three-year statute for removal begins to run each day the encroaching structure remains” *Id.* at 384, 311 S.E.2d at 301. “Any action to remove the encroachment . . . would not be barred until defendants had been in continuous use thereof for a period of twenty years so as to acquire the right by prescription.” *Id.* This Court reasoned that “[t]o deny [the] plaintiffs a right of action . . . would be to allow the defendants a right of eminent domain as private persons (and without the payment of just compensation) or grant defendants a permanent prescriptive easement to use the plaintiffs’ land. This the law will not do, as the defendants have not been in possession for 20 years” *Id.* at 384, 311 S.E.2d at 301-02.

In the present case, defendants alleged title to the Waterfront Property and alleged that defendants had erected and continue to maintain structures on the Waterfront Property. Applying the reasoning in

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Bishop to the instant case, we hold that Adams Creek's trespass action was not barred by the three-year statute of limitations and that the pleadings were sufficient to state a claim. Therefore, the trial court did not err in denying defendants' motion to dismiss.⁸

CONTEMPT

[4] Following entry of the 2004 Summary Judgment Order and the 10 August 2006 order holding defendants in contempt, defendants admittedly continued to occupy and maintain structures on the Waterfront Property. Consequently, Adams Creek filed a motion to hold defendants in civil contempt on 28 January 2011. Following a hearing on 17 March 2011, Judge Jenkins filed an order on 31 March 2011 holding defendants in civil contempt and ordering defendants to be held in custody until their contempt is purged. Defendants now argue that the entry of the 31 March 2011 contempt order was error because it relied on the erroneous conclusion that Adams Creek is the rightful owner of the Waterfront Property.⁹

The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment.

Watson v. Watson, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (internal quotation marks and citations omitted), *disc. review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008).

On appeal, defendants do not assign error to any particular finding of fact. Consequently, the trial court's findings of fact are binding on appeal. *See Tucker v. Tucker*, 197 N.C. App. 592, 594, 679 S.E.2d 141,

8. To the extent defendants argue the trial court erred by denying their motion to dismiss based on the statutes of limitation for adverse possession in N.C. Gen. Stat. §§ 1-38 & -40, we hold the trial court did not err for the reasons discussed above in our affirmance of the 2004 Summary Judgment Order.

9. Defendants continue to disregard the result of the Torrens Proceeding and assert that they own the Land awarded to Mitchell's heirs as a result of the 1976 Judgment. Based on their assertion, defendants argue they cannot be in contempt if they occupy their own land. Based on our acknowledgment of the Torrens Proceeding, we find defendants' assertion meritless.

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143 (2009) (Providing that in a contempt proceeding, “[f]indings of fact to which no error is assigned are presumed to be supported by competent evidence and are binding on appeal.”) (quoting *Pascoe v. Pascoe*, 183 N.C. App. 648, 650, 45 S.E.2d 156, 157 (2007)). Instead of challenging particular findings of fact, defendants rely on this Court’s opinion in *Carson v. Reid*, 76 N.C. App. 321, 323, 332 S.E.2d 497, 499 (1985) (“[A] land surveyor[] . . . cannot give his opinion as to where a true boundary is.”), *aff’d per curiam*, 316 N.C. 189, 340 S.E.2d 109 (1986), to argue that the trial court improperly considered testimony from a land surveyor regarding the existence of structures within the boundaries of the Waterfront Property. In the present case, however, we need not decide the propriety of the land surveyor’s testimony because the testimony of defendants and other witnesses support the trial court’s findings and conclusion that defendants “have for six and a half years willfully violated the 2004 [Summary Judgment] Order.”¹⁰

Additionally,

[c]ivil contempt is designed to coerce compliance with a court order, and a party’s ability to satisfy that order is essential. Because civil contempt is based on a willful violation of a lawful court order, a person does not act willfully if compliance is out of his or her power. Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so. Ability to comply has been interpreted as not only the present means to comply, but also the ability to take reasonable measures to comply. A general finding of present ability to comply is sufficient when there is evidence in the record regarding defendant’s assets.

Watson, 187 N.C. App. at 66, 652 S.E.2d at 318 (internal quotation marks and citations omitted). In this case, we find no error on this basis. Based on the evidence presented, the trial court properly found that defendants were able to comply with the 2004 Summary Judgment Order. Hence, defendants’ noncompliance was willful.

Nevertheless, defendants argue that they cannot comply with the 2004 Summary Judgment Order because doing so would require them to surrender ownership of the Land. As we have recognized throughout

10. It is further noted that defendants admit in their brief that “their structures and equipment remain on the 13.25 acres that is the subject of this action[.]”

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this opinion, the Waterfront Property at issue in this case, which was originally included within, and a part of, the Land claimed by defendants, was awarded to Shedrick in the Torrens Proceeding. Thus, defendants' argument that their noncompliance with the 2004 Summary Judgment Order is not willful because it requires them to surrender title to the Waterfront Property fails.

Having determined that the trial court did not err in entering the 2004 Summary Judgment Order determining Adams Creek to be the rightful owner of the Waterfront Property, and having determined defendants remain in noncompliance with the 2004 Summary Judgment Order, we now uphold the 31 March 2011 order holding defendants in civil contempt.

SANCTIONS

[5] The last issue raised by defendants on appeal is whether the trial court erred by imposing sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11 (2011). Under Rule 11, a court may impose sanctions on a party that files a motion that is factually insufficient, legally insufficient, or filed for an improper purpose. N.C. Gen. Stat. § 1A-1, Rule 11; *see also Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992). "A violation of any part of the rule mandates sanctions." *Peters v. Pennington*, 210 N.C. App. 1, 27, 707 S.E.2d 724, 742 (2011) (citing *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365 (1994)).

When a North Carolina appellate court reviews a trial court's grant or denial of Rule 11 sanctions,

[t]he trial court's decision to impose or not to impose mandatory sanctions under [N.C. Gen. Stat.] § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under [N.C. Gen. Stat.] § 1A-1, Rule 11(a).

Turner v. Duke University, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). "[I]n reviewing the appropriateness of the particular sanction imposed, an 'abuse of discretion' standard is proper" *Id.*

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In this case, the Rule 11 sanctions imposed on defendants resulted from Adams Creek's motions for sanctions on 18 January 2012 and 22 May 2012 concerning defendants' filing of the following motions: (1) motion to set aside the order of summary judgment filed 21 December 2011; (2) motion to purge defendants' civil contempt filed 21 December 2011; (3) motion for summary judgment filed 11 January 2012; (4) motion to dismiss filed 16 May 2012; and (5) motion to rescind the order of partial summary judgment filed 16 May 2012. Following a hearing on 29 May 2012, the trial court granted plaintiff's motions for Rule 11 sanctions against defendants and awarded Adams Creek \$11,000 to cover fees incurred in responding to the motions. In imposing Rule 11 sanctions, the trial court concluded:

12. Defendants' Motion to Purge Civil Contempt, Motion for Summary Judgment, Motion to Set Aside Order of Summary Judgment, Motion to Dismiss (Statute of Limitations), and Motion to Rescind Order of Partial Summary Judgment were factually and legally irreconcilable with the law of the case established by the 2004 Summary Judgment Order and subsequent thereto.

13. Defendants' motions sought relief which as a matter of law the defendants were not entitled to pursue or receive.

14. Applying an objective standard as required under Rule 11, defendants' conduct in filing defendants' motions was an intentional effort to harass plaintiff, increase the cost of litigation for plaintiff, and delay and deny plaintiff's use and enjoyment of its land.

15. Defendants' motions derive from an improper purpose in violation of Rule 11 NCRCP.

Following the analysis set forth in *Turner*, we first review the trial court's order to determine "whether the trial court's conclusions of law support its judgment or determination[.]" 325 N.C. at 165, 381 S.E.2d at 714. As stated above, the trial court concluded that defendants' motions "were factually and legally irreconcilable with the law of the case[.]" "sought relief which as a matter of law the defendants were not entitled to pursue or receive[.]" and "derive from an improper purpose[.]" "to harass plaintiff, increase the cost of litigation for plaintiff, and delay and deny plaintiff's use and enjoyment of its land." These conclusions clearly support the trial court's imposition of sanctions.

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In accordance with *Turner*, we next determine “whether the trial court’s conclusions of law are supported by its findings of fact[.]” *Id.* Regarding the trial court’s conclusions, defendants argue that there was a factual and legal basis for the filing of each of their motions and that none of their motions were filed for an improper purpose. We disagree.

“In analyzing whether the [filing] meets the factual certification requirement, the court must make the following determinations: (1) whether the [party] undertook 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.” *In re Will of Durham*, 206 N.C. App. 67, 71, 698 S.E.2d 112, 118 (2010) (internal quotation marks and citation omitted). “To satisfy the legal sufficiency requirement, the disputed action must be warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.” *Dodd*, 114 N.C. App. at 635, 442 S.E.2d at 365. This also requires a two-step analysis.

Initially, the court must determine the facial plausibility of the [motion]. If the [motion] is facially plausible, then the inquiry is complete, and sanctions are not proper. If the [motion] is not facially plausible, the second issue is whether, based on a reasonable inquiry into the law, the alleged offender formed a reasonable belief that the [motion] was warranted by existing law, judged as of the time the [motion] was signed.

Ward v. Jett Properties, LLC, 191 N.C. App. 605, 607-08, 663 S.E.2d 862, 864 (2008) (internal quotation marks and citation omitted).

Upon review of the motions, record, and order, we find the trial court’s conclusions supported by its finding of facts and affirm the conclusions that defendants’ motions were factually and legally insufficient. In arguing their motions were proper, defendants raise the issue of lappage as the basis for their filing the motions seeking relief from the 2004 Summary Judgment Order. Defendant specifically alleges the boundaries of the Waterfront Property and the Land had not been determined. By raising the issue of lappage to contest boundaries of the Waterfront Property and the Land, defendant sought to re-litigate the issue of title to the Waterfront Property dating back to the Torrens Proceeding. However, as previously discussed, any issue of title to the Waterfront Property stemming from the 1976 Judgment awarding the Land to Mitchell’s heirs is barred by the doctrine of collateral estoppel after title was firmly decided decades ago in the Torrens Proceeding. The trial court recognized this when it found:

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11. Instead of seeking through appropriate means appellate review of orders about which they disagree, defendants have continued to ignore and violate the orders and have through various means, including the defendants' motions at issue herein, attempted to re-litigate title to the property that, as a matter of law, was determined by the 2004 Summary Judgment Order and in prior proceedings.

As a result, we cannot hold that defendants' motions were sufficiently grounded in fact or law.¹¹

In the final step of the *Turner* analysis, we must determine "whether the findings of fact are supported by a sufficiency of the evidence." 325 N.C. at 165, 381 S.E.2d at 714. "Since [defendants] [have] not challenged any of the trial court's findings of fact, they are binding on us for purposes of appeal." *In re Will of Durham*, 206 N.C. App. at 82, 698 S.E.2d at 124.¹² Consequently, we find the imposition of Rule 11 sanctions on defendants warranted.

Lastly, concerning the appropriateness of the Rule 11 sanctions awarded, we find no abuse of the trial court's discretion in awarding \$11,000 to Adams Creek to cover fees incurred as a result of defendants' meritless motions. See N.C. Gen. Stat. § 1A-1, Rule 11 (A reasonable sanction may include an order to pay reasonable attorney's fees.). Consequently, we affirm the trial court's 14 June 2012 order imposing Rule 11 sanctions on defendants.

III. CONCLUSION

For the reasons discussed above, we affirm the orders of the trial court.

Affirmed.

Judges HUNTER (Robert C.) and DAVIS concur.

11. Having found defendants' motions factually and legally insufficient, we need not address whether defendants filed the motions for an improper purpose.

12. Defendants do not specifically assign error to findings of fact 8 and 11; however, defendants do argue that the trial court erred in relying on the fact that they did not seek appellate review of the 2004 Summary Judgment Order. While we acknowledge that defendants' motions were not untimely, given that the 2004 Summary Judgment Order was interlocutory until Adams Creek dismissed its claims for punitive and compensatory damages on 18 May 2012 and 29 May 2012, we do not find the findings to be unsupported by the evidence. Furthermore, the conclusions of law are adequately supported by the remaining findings of fact.

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[227 N.C. App. 476 (2013)]

JONATHAN BLITZ, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF

v.

AGEAN, INC., DEFENDANT

No. COA12-1133

Filed 4 June 2013

1. Appeal and Error—interlocutory orders—class certification—substantial right

The Court of Appeals addressed the merits of plaintiff's interlocutory appeal from the trial court's order denying plaintiff's motion for class certification. An interlocutory order denying class certification affects a substantial right.

2. Class Actions—class certification—generalized proof

The trial court did not err by concluding that plaintiff failed to establish the existence of a class. Plaintiff failed to define a class that was subject to generalized proof and therefore, he failed to show that the trial court abused its discretion in denying its motion for class certification.

3. Class Actions—class certification—equitable grounds

The trial court did not err by denying plaintiff's motion for class certification. Since the Court of Appeals concluded that the trial court correctly denied class certification, there was no need to determine whether it was unjust on equitable grounds.

Appeal by plaintiff from order entered 11 April 2012 by Judge Calvin E. Murphy in Durham County Superior Court. Heard in the Court of Appeals 11 February 2013.

DeWitt Law Group, PLLC by N. Gregory DeWitt and Bock & Hatch, LLC, by Phillip A. Bock, pro hac vice, for plaintiff-appellant.

Brown, Crump, Vanore & Tierney, L.L.P., by R. Scott Brown and W. John Cathcart, Jr., for defendant-appellee.

CALABRIA, Judge.

Jonathan Blitz ("plaintiff"), recipient of unsolicited fax advertisements, brought an action against a restaurant operator that contracted with an advertising business to send faxes, alleging violation of the

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Telephone Consumer Protection Act (“TCPA”). Plaintiff appeals from an order denying his motion for class certification. We affirm.

I. Background

Agean, Inc. (“defendant”) owned two restaurants in Durham, Papa’s Grill and Front Street Café (collectively “the restaurants”). Defendant designed a coupon redeemable at either or both of the restaurants. In April 2004, defendant purchased a list from InfoUSA (“InfoUSA list”) of approximately 983¹ business fax numbers in the three zip codes surrounding the restaurants. Defendant contracted with a fax broadcaster, Concord Technologies, Inc. (“Concord”), to fax coupons for defendant’s restaurants to the numbers on the InfoUSA list. During 2004, Concord transmitted by fax 7,000 coupons for defendant’s restaurants to the fax numbers on the InfoUSA list. Plaintiff’s name was included on the InfoUSA list and he received five, one-page, fax transmissions, containing defendant’s restaurant coupons. Plaintiff claimed that he did not request any advertisements from defendant, nor did he give defendant permission to send him fax transmissions.

Plaintiff filed a complaint and subsequently, on 11 February 2005, filed an amended class action complaint in Durham County District Court, seeking, *inter alia*, class certification, statutory damages and a statutory injunction for violation of the Federal Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227. The TCPA, *inter alia*, prohibits the transmission of “unsolicited advertisements” to fax machines. U.S.C. § 227(b)(1)(C) (2000 & Supp. IV 2004). The case was transferred to the North Carolina Business Court on 20 January 2006. On 17 October 2006, plaintiff filed a motion for class certification which defined the class as:

All persons and other entities to whom Defendant sent or caused to be sent, one or more facsimile advertisement transmissions promoting the restaurants of Defendant from February 12, 2001 until February 11, 2005 inclusive, and excluding those persons and other entities who had an established business relationship with Defendant at the time said facsimile advertisement transmissions were sent.

The trial court denied the motion and plaintiff appealed. This Court, *inter alia*, reversed and remanded the trial court’s order denying class

1. “The InfoUSA invoice shows [d]efendant bought 983 fax numbers but the excel file [defendant supplied to plaintiff] ... contained 978 entries.”

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certification in *Blitz v. Agean, Inc.*, 197 N.C. App. 296, 677 S.E.2d 1 (2009) (“*Agean I*”).

On 18 May 2011, plaintiff filed another amended class action complaint, defining the class as “[t]he holders of the 978 telephone numbers contained in the InfoUSA database ... between the dates of February 1, 2004 and December 31, 2004, inclusive.” On 11 April 2012, the trial court denied plaintiff’s motion, concluding that plaintiff had failed to establish the existence of a class because plaintiff “failed to provide a theory of generalized proof that allows for common questions to predominate over individual inquiries.” In addition, the trial court concluded that class certification would be “unjust on equitable grounds” because it would “provide plaintiff with inappropriate leverage in settlement negotiations.” Plaintiff appeals.

II. Interlocutory Appeal

[1] As an initial matter, we note that plaintiff’s appeal is interlocutory. Generally there is no immediate right of appeal from interlocutory orders. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, immediate appeal of an interlocutory order is available when the order “affects a substantial right.” *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (quotation marks omitted). “[T]he appeal of an interlocutory order denying class certification has been held to affect a substantial right[,]” and therefore, plaintiff’s appeal is immediately appealable. *Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 547, 613 S.E.2d 322, 325 (2005).

III. Standard of Review

In general, “appeal from the denial of class certification involves an abuse of discretion standard of review[,]” however, “in appeals from the grant or denial of class certification this Court reviews issues of law, such as statutory interpretation, *de novo*.” *Agean I*, 197 N.C. App. at 299-300, 677 S.E.2d at 4. After conducting a *de novo* review of “the law underpinning the trial court’s denial of class certification, we [then] turn to the specific facts of the instant case to determine if denial of class certification was proper.” *Id.* at 310, 677 S.E.2d at 10. “[A]n appellate court is bound by the trial court’s findings of fact if they are supported by competent evidence.” *Harrison*, 170 N.C. App. at 547, 613 S.E.2d at 325 (citation and brackets omitted). A trial court has abused its discretion if its decision “is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision[.]” *Id.* (citation omitted).

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IV. Class Certification

[2] Plaintiff argues that the trial court erred by concluding that plaintiff had failed to establish the existence of a class. We disagree.

A class action may be initiated “[i]f persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.” N.C. Gen. Stat. § 1A-1, Rule 23 (2011). “The party seeking to bring a class action ... has the burden of showing that the prerequisites to utilizing the class action procedure are present.” *Agean I*, 197 N.C. App. at 302, 677 S.E.2d at 5. If all the prerequisites are met, the trial court has discretion to determine whether a class action is superior to other available methods for adjudication of the controversy. *Id.*

The first prerequisite for certification of a class action is whether a class exists. *See Crow v. Citicorp Acceptance Co., Inc.*, 319 N.C. 274, 354 S.E.2d 459 (1987); *Agean I*, 197 N.C. App. at 302, 677 S.E.2d at 5. “[A] ‘class’ exists . . . when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members.” *Agean I*, 197 N.C. App. at 302, 677 S.E.2d at 5 (citation omitted). This first step is known as the “commonality and typicality” prong of the test. *Id.* The test is whether individual issues will predominate over common ones in terms of being the focus of the litigants’ efforts. *Harrison*, 170 N.C. App. at 550-53, 613 S.E.2d at 327-28. “[A] common question is not enough when the answer may vary with each class member and is determinative of whether the member is properly part of the class.” *Carnett’s, Inc. v. Hammond*, 610 S.E.2d 529, 532 (Ga. 2005).

In the instant case, plaintiff is seeking, for each proposed class member, \$500.00 in statutory damages per fax as well as injunctive relief, pursuant to the TCPA. At the time the faxes in question were allegedly sent, the 2004 version of the TCPA was in effect: “It shall be unlawful for any person within the United States ... to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine[.]” *Agean I*, 197 N.C. App. at 303, 677 S.E.2d at 6 (citation omitted). “The term ‘unsolicited advertisement’ means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.” *Id.* (citation omitted). Since the TCPA only applies to “unsolicited advertisements”

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it is the “[p]laintiff’s burden to show the fax advertisements sent to the class were unsolicited.” *Id.* at 311, 677 S.E.2d at 10.

The primary issue regarding class certifications involving the TCPA “is whether, under the ‘commonality and typicality’ prong of the test, individualized issues concerning whether sent fax advertisements were ‘unsolicited’ predominate over issues of law and fact common to the proposed class members.” *Id.* at 303, 677 S.E.2d at 6. In *Agean I*, this Court held that plaintiff did not meet his burden of showing that the fax advertisements were unsolicited, because his class definition did not limit the class to “persons receiving ‘unsolicited’ fax advertisements” and “the trial court had no basis to determine how many of the fax numbers included in the list represented persons or entities that had given express prior invitation or permission to [d]efendant to receive fax advertisements.” *Id.* at 310-11, 677 S.E.2d at 10-11. However, the Court still reversed and remanded the case for reconsideration by the trial court because it disagreed with the trial court’s analysis in denying class certification. *Id.* at 311, 677 S.E.2d at 11.

This Court rejected a bright line rule regarding class certification because class certification in TCPA cases depends on the facts of each case. *Id.* at 305, 677 S.E.2d at 7. The Court adopted the reasoning of other courts and found that the only statutory defense to a cause of action based on an unsolicited fax advertisement was a defendant’s “prior express invitation or permission[,]” which could not be inferred from an established business relationship. *Id.* at 304-05, 677 S.E.2d at 6. In addition, the Court found that in class certification of TCPA cases, a North Carolina Court should determine whether the plaintiff proceeded with “a theory of generalized proof of invitation or permission” as articulated in *Gene & Gene, LLC v. BioPay, LLC*, 541 F.3d 318 (5th Cir. 2008) and *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642 (W.D. Wash. 2007). *Agean I*, 197 N.C. App. at 310-11, 677 S.E.2d at 11.

In *Kavu*, where the defendant purchased all the fax numbers from a common source, the Court certified the class because of the common question, “whether the inclusion of the recipients’ fax numbers in the purchased database indicated their consent to receive fax advertisements, and there were therefore no questions of individualized consent.” *Gene*, 541 F.3d at 328; *Kavu*, 246 F.R.D. at 645. In *Gene*, the defendant used a purchased database of fax numbers but also gathered numbers from other sources, including the defendant’s website, trade shows, and lists of affiliated companies. *Gene*, 541 F.3d at 328. That Court held that class certification was inappropriate because the plaintiff could not

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“advance a viable theory of generalized proof to identify those persons, if any, to whom [the Defendant] may be liable under the TCPA” as there was evidence that the defendant had obtained consent, the defendant used multiple sources to gather fax numbers and the plaintiff offered “no sensible method of establishing consent or the lack thereof via class-wide proof.” *Id.* at 329.

In the instant case, after this Court’s decision in *Agean I*, plaintiff amended the definition of the class to include “[t]he holders of the 978 telephone numbers contained in the InfoUSA database ... between the dates of February 1, 2004 and December 31, 2004, inclusive.” Plaintiff claimed that there were three common legal and factual questions under the TCPA:

1. Whether Defendant’s fax is an advertisement;
2. Whether Defendant violated the TCPA by faxing that advertisement without first obtaining express invitation or permission to do so; and
3. Whether Plaintiff and the other class members are entitled to statutory damages.

The trial court determined that the answer to plaintiff’s second question would “be a focal point of the litigants’ evidence, and likely direct the outcome of the case.”

Plaintiff’s amended proposed class definition, “[t]he holders of the 978 telephone numbers contained in the InfoUSA database ... between the dates of February 1, 2004 and December 31, 2004, inclusive,” was not limited to individuals or businesses receiving “unsolicited” fax advertisements because it included every number purchased on the InfoUSA list. The trial court found that the restaurants had received numerous requests to fax materials concerning its hours, accommodations and capacity and multiple requests for defendant to fax or email its menus and other materials related to the restaurant’s services. Therefore, it was difficult for the court to discern whether members in defendant’s proposed “class” had previously consented to receive the faxes. Since consent could potentially be shown for numbers on both defendant’s Customer List and the InfoUSA list, plaintiff’s proposed class definition did not “explicitly exclude owners of fax numbers who had previously consented to receive faxes.” It was plaintiff’s burden to exclude the numbers of persons that had authorized receipt of the faxes. However, plaintiff failed to exclude them, therefore, the class was left open to those individuals.

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The trial court applied the authorities set forth by this Court in *Agean I* regarding the “commonality and typicality” prong of the class certification test to the facts of this case and determined that there was “no common source from which the [c]ourt [could] determine consent.” Therefore, under the facts of the case, plaintiff was “unable to articulate a theory of generalized proof” and thus the litigants’ efforts would be focused on “individual questions of whether each class member consented rather than any common questions the class might share.” The trial court ultimately concluded that because plaintiff “failed to provide a theory of generalized proof that allow[ed] for common questions to predominate over individual inquiries, they ... failed to establish the existence of a class and therefore [did] not meet *Crow*’s requirements for class certification.”

Plaintiff relies on *Kavu*. When reviewing the trial court’s certification of a class, the court in *Kavu* found that the question of consent could be easily shown by common proof and would not require individualized evidence. *Kavu*, 246 F.R.D. at 647. Plaintiff claims that because he limited the class to those businesses on the InfoUSA list, the question of whether the class members in the instant case consented to receive faxes from defendant was common to all potential class members. However, plaintiff is mistaken. The trial court found that defendant served over 500,000 meals in its twelve years of service, many of those customers requested information and some of them consented to having information transmitted to them by fax. Since the InfoUSA list included business fax numbers in the three zip codes surrounding defendant’s restaurants, the trial court found there was a likelihood of some overlap between numbers from the InfoUSA list and defendant’s Customer List. In addition, when *Kavu* was decided, an “arguably applicable” federal regulation stated “if a sender obtains the facsimile number from a [commercial database], the sender must take reasonable steps to verify that the recipient agreed to make the number available for distribution.” *Agean I*, 197 N.C. App. at 306, 677 S.E.2d at 7 (citations and quotations omitted). However, the statute “relied upon by the *Kavu* Court was not in effect for the relevant time period” of the instant case. *Id.* at 306, 677 S.E.2d at 8. Therefore, the statute cannot be applied in the same way to plaintiff’s class as it was in *Kavu*.

Finally, although plaintiff cites this Court’s language in *Agean I* that the “mere possibility” some of the class members will later be removed from the class [because of consent] did not “automatically defeat” class certification, the facts in this case present more than a “mere possibility.” In this case, the question remains, if anyone on the list of the 978 fax

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numbers gave their consent to receive defendant's coupons. As the trial court noted, plaintiff was the only individual of the 978 recipients who came forward complaining about the fax transmissions. Accordingly, given the evidence, we agree with the trial court's findings and conclusions that the "individualized issues concerning whether sent fax advertisements were "unsolicited" predominate[d] over issues of law and fact common to the proposed class members." The trial court's findings of fact are supported by competent evidence. Plaintiff failed to define a class that was subject to generalized proof and therefore, he failed to show that the trial court abused its discretion in denying its motion for class certification.

V. Leverage in Settlement Negotiations

[3] Plaintiff also argues that the trial court abused its discretion by refusing to certify the class because of the conclusion that class certification "would principally serve to provide plaintiff with inappropriate leverage in settlement negotiations." The trial court also concluded that "even if the elements [establishing a class] were met," class certification "would be unjust on equitable grounds." Since we have concluded that the trial court correctly denied class certification, there is no need to determine whether or not it would be unjust on equitable grounds.

VI. Conclusion

Since the trial court's findings of fact are supported by competent evidence, we are bound by them. The trial court's findings support its conclusion that plaintiff failed to provide a theory of generalized proof that allows for common questions to predominate over individual inquiries. Therefore, plaintiff failed to establish the existence of a class. Since the trial court properly denied class certification, the trial court's decision was neither manifestly unsupported by reason nor so arbitrary that it could not have been the result of a reasoned decision. *Harrison*, 170 N.C. App. at 547, 613 S.E.2d at 325 (citation omitted). Therefore, the trial court did not abuse its discretion in denying plaintiff's motion for class certification.

Affirmed.

Chief Judge MARTIN and Judge McGEE concur.

BOOTH v. STATE

[227 N.C. App. 484 (2013)]

LEE FRANKLIN BOOTH, PLAINTIFF

v.

STATE OF NORTH CAROLINA, DEFENDANT

No. COA13-2

Filed 4 June 2013

1. Firearms and Other Weapons—North Carolina Felony Firearms Act—statutory construction—prohibition against possession of firearms—not applicable to pardoned individuals

The trial court did not err in a declaratory judgment action by determining that the North Carolina Felony Firearms Act prohibition under N.C.G.S. § 14-415.1(a) did not apply to plaintiff. The plain and unambiguous language of N.C.G.S. § 14-415.1(d) says that N.C.G.S. § 14-415.1 does not apply to individuals who have been pardoned pursuant to the law of the jurisdiction in which the conviction occurred. Although plaintiff had been convicted of felony kidnapping, he was thereafter conditionally pardoned by the governor of North Carolina.

2. Firearms and Other Weapons—North Carolina Felony Firearms Act—constitutional challenge—not applicable

The trial court did not err by failing to determine that the North Carolina Felony Firearms Act under N.C.G.S. § 14-415.1 was unconstitutional as applied to plaintiff because it did not apply to him at all.

Appeal by defendant and plaintiff from order entered 27 September 2012 by Judge Robert F. Johnson in Superior Court, Wake County. Heard in the Court of Appeals 11 April 2013.

Dan L. Hardway Law Office, by Dan L. Hardway, for plaintiff-appellee/cross-appellant.

Attorney General Roy A. Cooper, III, by Assistant Attorney General William P. Hart, Jr., for the State.

STROUD, Judge.

The State of North Carolina appeals an order exempting plaintiff from the Felony Firearms Act due to plaintiff's pardon. For the following reasons, we affirm.

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I. Background

Plaintiff filed a complaint against the State of North Carolina requesting a declaratory judgment that the North Carolina Felony Firearms Act is “unconstitutional on its face and as applied to plaintiff under the provisions of the Constitutions of the United States and the State of North Carolina” and “compensatory damages for violation of his constitutional rights and for harm, loss and damage suffered” and that plaintiff is “exempt from operation of the Felony Firearms Act, due to the fact that he holds a Pardon of Forgiveness[.]” Plaintiff’s complaint alleged that in 1981 plaintiff “pled guilty to one felony count of non-aggravated kidnaping[.]” Plaintiff was sentenced, served his time in prison, and was released on parole; plaintiff’s parole was completed and terminated on 30 December 1985. On 5 January 2001, Governor James B. Hunt Jr. granted plaintiff a “Pardon of Forgiveness[.]” Plaintiff’s pardon reads,

NOW, THEREFORE, I, James B. Hunt Jr., Governor of the State of North Carolina, in consideration of the above factors, and by virtue of the power and authority vested in me by the Constitution of the State, do by these presents PARDON the said Lee Franklin Booth, it being a Pardon of Forgiveness, subject to the following conditions: that Lee Franklin Booth be of general good behavior and not commit any felony or misdemeanor other than a minor traffic offense and further upon the condition that this Pardon shall not apply to any other offense whereof the said party may be guilty.

Plaintiff also made detailed factual allegations regarding his behavior as an upstanding citizen since he completed his prison sentence and his employment and business ventures as “a professional engineer and an entrepreneur.” In addition, plaintiff alleged that he has worked in businesses which provided “the overhaul and repair of high technology systems and components in the aerospace, space, maritime and weapons industries[.]” serving “commercial and military clients both domestic and foreign.” “In 2007 plaintiff organized, and initially served as president of, a new business, Victory Arms, Inc., with a plan to design, develop and produce firearms[.]” but when he applied for a federal license to undertake this business, he learned “that the 2004 amendment to N.C. Gen. Stat. § 14-415.1 was being interpreted by the federal licensing authorities to prohibit issuing a license to the plaintiff or any company which employed plaintiff[.]” thus forcing plaintiff to resign from and have no interest in Victory Arms, Inc.

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On 13 March 2012, the State answered plaintiff's complaint, admitting the material factual allegations regarding plaintiff's prior conviction and his pardon but denying many of plaintiff's other allegations for lack of "sufficient information and knowledge" including plaintiff's factual allegations regarding his conduct and loss of business opportunities based upon his inability to obtain a federal license or to own a firearm. The State also denied that plaintiff was entitled to his requested relief including a declaration that the Felony Firearms Act is unconstitutional on its face and as applied to plaintiff and allowing him to recover damages and that plaintiff is exempt from the Felony Firearms Act due to his Pardon of Forgiveness.

On 10 May 2012, plaintiff filed a "MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS" requesting that the trial court rule upon "only the issue of law on the question of whether the pardon of Plaintiff by Governor Hunt makes the application of N.C. Gen. Stat. § 14-415.1 to Plaintiff unconstitutional." On 27 September 2012, the trial court entered an order determining "that the Plaintiff's Motion for Partial Judgment on the Pleadings for declaratory relief on constitutional grounds as applied to the Plaintiff is DENIED" but "that the Plaintiff's Motion for Partial Judgment on the Pleadings exempting him from the operation of the Felony Firearms Act due to the fact that he holds a Pardon of Forgiveness is ALLOWED." The trial court also noted that the Felony Firearms Act "simply does not apply to the plaintiff" as he has received a pardon and thus "it is not necessary that the Court determine whether the Act is, as to this plaintiff, unconstitutional under an 'as applied' challenge." Although the order was addressing plaintiff's motion for partial judgment, the order actually disposed of the issues raised by plaintiff's complaint and is thus a final order. The State appeals from the trial court's determination that plaintiff's pardon exempts him from the Felony Firearms Act; plaintiff cross-appeals from the trial court's denial of his constitutional claim.

II. State's Appeal

[1] We will first address the State's appeal, which presents a question of the interpretation of the North Carolina Felony Firearms Act. The State argues that "the North Carolina Felony Firearms Act prohibition under N.C. Gen. Stat. § 14-415.1(a) applies to plaintiff by virtue of his 1981 felony kidnapping conviction in this State, notwithstanding the fact that plaintiff's conviction was thereafter conditionally pardoned by the governor of North Carolina."

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Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court.

Legislative intent controls the meaning of a statute. To determine legislative intent, a court must analyze the statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish. First among these considerations, however, is the plain meaning of the words chosen by the legislature; if they are clear and unambiguous within the context of the statute, they are to be given their plain and ordinary meanings. The Court's analysis therefore properly begins with the words themselves.

Jenner v. Ecoplus, Inc., ___ N.C. App. ___, ___, 737 S.E.2d 121, 123-24 (2012) (citations and quotation marks omitted).

North Carolina General Statute § 14-415.1 provides in pertinent part,

(a) It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c) . . .

. . . .

(d) This section does not apply to a person who, pursuant to the law of the jurisdiction in which the conviction occurred, has been pardoned or has had his or her firearms rights restored if such restoration of rights could also be granted under North Carolina law.

N.C. Gen. Stat. § 14-415.1(a), (d) (2011).

The State's argument reviews hundreds of years of the development of the executive pardon, going back to English common law and providing a lengthy "[o]verview" of the history of pardons, examining the different types of pardons including conditional pardons, unconditional pardons, and pardons of innocence and the different ramifications of the different types of pardons. This discussion is informative and interesting but fails to address the plain language of the statute at issue. *See generally Jenner*, ___ N.C. App. at ___, 737 S.E.2d at 123-24. The State claims that the words of North Carolina General Statute § 14-415.1(d) are ambiguous so that we must seek the legislative intent behind it. As to North Carolina General Statute § 14-415.1(d) the State contends,

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The phrase “has been pardoned” as used in N.C. Gen. Stat. § 14-415.1(d) does not have a clear and unambiguous meaning. The phrase follows immediately after the introductory phrase “pursuant to the law of the jurisdiction in which the conviction occurred.” This language limits the succeeding clauses, but the precise implication cannot be readily ascertained from the text of this provision alone.

The State then presents a lengthy discourse on federal law and the laws of other jurisdictions and concludes with a series of hypothetical applications of the statute at issue. But none of this changes the plain language of North Carolina General Statute § 14-415.1(d), and we can ascertain the meaning of the statute from the text alone.

The plain and unambiguous language of subsection (d) of North Carolina General Statute § 14-415.1 says that North Carolina General Statute § 14-415.1 does not apply to individuals who have been pardoned “pursuant to the law of the jurisdiction in which the conviction occurred[.]” N.C. Gen. Stat. § 14-415.1(d). It is true that there are different types of pardons, but the word “pardon” in North Carolina General Statute § 14-415.1(d) is not modified by any adjective or other descriptive phrase and thus includes all types of pardons, whether they are denominated as unconditional, conditional or of innocence. *See id.* We note that in various other statutes our legislature does specify that particular types of pardons have different consequences, but here the legislature chose not to modify the word “pardon” but instead spoke to pardons in general. *See, e.g.*, N.C. Gen. Stat. §§ 13-1 (noting conditional and unconditional pardons); 14-208.6(C) (recognizing the “unconditional pardon of innocence”). The only qualification pursuant to North Carolina General Statute § 14-415.1(d) is that the pardon must be issued pursuant to “the law of the jurisdiction in which the conviction occurred[.]” Here, both plaintiff’s conviction and his pardon occurred in North Carolina. As the plain language of North Carolina General Statute § 14-415.1(d) states, “[t]his section does not apply to a person who, pursuant to the law of the jurisdiction in which the conviction occurred, has been pardoned[.]” N.C. Gen. Stat. § 14-415.1, and as plaintiff has been pardoned in North Carolina, which is the jurisdiction where his kidnapping conviction occurred, the trial court properly determined that North Carolina General Statute § 14-415.1 does not apply to plaintiff. This argument is overruled.

III. Plaintiff’s Appeal

[2] Plaintiff also appeals, contending that the trial court should have also allowed his motion to be granted as to North Carolina General Statute

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§ 14-415.1(d) being unconstitutional as applied to plaintiff. North Carolina General Statute § 14-415.1(d) provides that “[t]his section *does not apply* to a person who, pursuant to the law of the jurisdiction in which the conviction occurred, *has been pardoned* or has had his or her firearms rights restored if such restoration of rights could also be granted under North Carolina law.” (emphasis added.) We have already determined that the trial court properly ruled that North Carolina General Statute § 14-415.1 *does not apply* to plaintiff. Accordingly, North Carolina General Statute § 14-415.1 cannot be unconstitutional *as applied* to plaintiff, because it *does not apply* to him at all. The trial court correctly noted that pursuant to subsection (d) of North Carolina General Statute § 14-415.1 the statute does not apply to plaintiff and declined to address an as applied constitutional challenge.

IV. Conclusion

Since plaintiff has been pardoned, the trial court properly determined that North Carolina General Statute § 14-415.1(a) does not apply to him.

AFFIRMED.

Judges ELMORE and STEELMAN concur.

IN THE MATTER OF D.A.H.-C., B.H.-C., AND E.H.-C.

No. COA12-1537

Filed 4 June 2013

1. Termination of Parental Rights—findings of fact—supported by the evidence

The trial court’s findings of fact in a termination of parental rights case were not erroneous. The trial court did not improperly treat the Court of Appeals’ earlier decision in this case as the law of the case. Furthermore, the challenged findings of fact did not lack adequate evidentiary support.

2. Termination of Parental Rights—neglected juveniles—findings supported—probable future neglect

The trial court did not err in a termination of parental rights case by determining that the juveniles at issue were neglected. The

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trial court's findings of fact, which were either undisputed or supported by competent evidence, indicated that there was a substantial probability that the children would suffer neglect in the future.

Appeal by respondent-mother from orders entered 14 September 2012 and 18 October 2012 by Judge C. Thomas Edwards in Catawba County District Court. Heard in the Court of Appeals on 8 May 2013.

Lauren Vaughan, for Petitioner-Appellee, Catawba County Department of Social Services.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Joyce L. Terres, for Respondent-Appellant, Mother.

Womble Carlyle Sandridge & Rice, PLLC, by Jessica L. Gorczynski, for Guardian ad Litem.

ERVIN, Judge.

Respondent-Mother Nancy C. appeals from an order terminating her parental rights in D.A.H.-C., B.H.-C., and E.H.-C.¹ On appeal, Respondent-Mother argues that several of the trial court's findings of fact lack sufficient evidentiary support and that the trial court's findings do not support its conclusion that Respondent-Mother's parental rights in the children were subject to termination for neglect. After careful consideration of Respondent-Mother's challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

On 27 February 2008, Respondent-Mother left Evan and an unrelated child, E.G.,² in the care of her husband, Armando H. Upon returning home later that day, Respondent-Mother discovered Ethan lying in a bedroom. At the time that Respondent-Mother made this discovery, Ethan was unresponsive, struggling to breathe, and had a very weak pulse. In addition, Ethan was bleeding, had visible bruises on his face,

1. D.A.H.-C., B.H.-C., and E.H.-C. will be referred to as "Daisy," "Brandon," and "Evan," respectively, throughout the remainder of this opinion for ease of reading and to protect their privacy.

2. E.G. will be referred to throughout the remainder of this opinion as Ethan, a pseudonym utilized for ease of reading and to protect the juvenile's privacy.

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and had vomited. Armando H. said that Ethan had fallen in the bathtub. After attempting to contact Ethan's mother for a half hour, Respondent-Mother and her sister-in-law took Ethan to the hospital, leaving Evan and another child with Armando H. Ethan died as a result of his injuries. After admitting that he had thrown Ethan against the bathtub, picked him up by the neck, thrown him onto a bed, and bitten him in the groin, Armando H. was convicted of second degree murder and felonious child abuse and sentenced to more than seventeen years imprisonment.

On the day that Ethan was injured, the Catawba County Department of Social Services took Daisy, Brandon, and Evan into its custody. On 27 February 2008, DSS filed a juvenile petition alleging that Daisy, Brandon, and Evan were neglected and dependent juveniles and obtained the entry of a non-secure custody order authorizing their retention in DSS custody. On 16 June 2008, Judge L. Suzanne Owsley adjudicated Daisy, Brandon, and Evan to be neglected and dependent juveniles. In her adjudication order, Judge Owsley found that, in addition to killing Ethan, Armando H. had frequently hit and raped Respondent-Mother and beaten the other children.

Between the time of the adjudication and the first review hearing on 11 August 2008, Respondent-Mother fully cooperated with the case plan which had been developed for her. Among other things, Respondent-Mother attended and completed parenting classes, underwent a psychological evaluation, participated in counseling, remained gainfully employed, paid child support, and visited the children on a weekly basis. On 1 December 2008, Judge Owsley approved a trial placement of Evan with his father, Raul A. Although Daisy and Brandon remained in foster care, they were allowed to visit Respondent-Mother pursuant to a court-approved visitation plan. A permanent plan of reunification with Respondent-Mother was developed for Brandon and Daisy, while a permanent plan of reunification with Raul A. was developed for Evan.

On 13 April 2009, Daisy and Brandon began a trial placement in Respondent-Mother's home. At a permanency planning hearing held on 18 May 2009, Respondent-Mother and Raul A. expressed the intention to begin living together as soon as they were allowed to do so. Subsequently, Raul A. and Evan moved into the home which had been occupied up to that point by Respondent-Mother, Daisy, and Brandon.

On 1 December 2010, DSS received a report that Raul A. had repeatedly hit Brandon on the back with a belt for not completing his homework on the preceding day. As a result, all three children were

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temporarily placed with their godmother. An investigation into the incident revealed that, although Respondent-Mother had been in the shower at the time of the incident, she had witnessed Raul A. strike Brandon with the belt below his neck. At the time that she was initially questioned about this incident, Respondent-Mother told authorities that Brandon had fallen. After the other children told DSS what had actually occurred, however, Respondent-Mother admitted having observed Raul A. hit Brandon. Although Respondent-Mother admitted that she did not physically intervene to end the violence, she did tell Raul A. to stop and sat next to Brandon.

On 2 December 2010, DSS filed another juvenile petition alleging that Brandon was an abused juvenile and that all three children were neglected juveniles. The children were again placed in foster care. After being interviewed by DSS, Raul A. left the country and was believed to have gone to Mexico. On 24 January 2011, Brandon was adjudicated an abused juvenile and all three children were adjudicated to be neglected juveniles. Judge Owsley also ordered that DSS cease reunification efforts with Respondent-Mother. Respondent-Mother was, however, granted supervised visitation privileges. Although Respondent-Mother appealed Judge Owsley's order ending the requirement that DSS attempt to reunify the children with her, this Court affirmed that order by means of an opinion filed on 20 September 2011.

At a permanency planning hearing held on 12 December 2011, DSS and the guardian *ad litem* recommended that a permanent plan of adoption be approved for all three children. On 12 December 2011, the trial court entered an order establishing a permanent plan of adoption for the children. On 13 March 2012, DSS filed a motion seeking to have Respondent-Mother's parental rights in the children terminated based on neglect and her alleged failure to make reasonable progress in correcting the conditions that led to the children's removal from the home.

Hearings concerning the issue of whether grounds for terminating Respondent-Mother's parental rights existed were held before the trial court on 25 June, 26 June, 23 July, and 20 August 2012. At the conclusion of these proceedings, the trial court determined that Respondent-Mother's parental rights in the children were subject to termination for neglect. After entering a Termination of Parental Rights Adjudication Order on 14 September 2012, the trial court held a disposition hearing on 17 September 2012. On 18 October 2012, the trial court entered an order terminating Respondent-Mother's parental rights in the children. Respondent-Mother noted an appeal from these orders to this Court.

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II. Legal AnalysisA. Standard of Review

“Termination of parental rights is a two-step process. In the first phase of the termination hearing, the petitioner must show by clear, cogent and convincing evidence that a statutory ground to terminate exists.” *In re S.N.*, 194 N.C. App. 142, 145-46, 669 S.E.2d 55, 58 (2008) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997) and *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001)), *aff’d*, 363 N.C. 368, 677 S.E.2d 455 (2009). “The finding of any one of the [statutory] grounds [for termination of parental rights set out in N.C. Gen. Stat. § 7B-1111(a)] is sufficient to order termination.” *Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 267 (2003). In reviewing an order terminating a parent’s parental rights in one or more children, this Court must determine whether the trial court’s “findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the [trial court’s] conclusions of law.” *S.N.*, 194 N.C. App. at 146, 669 S.E.2d at 58-59. “Clear, cogent and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt,” which requires the presence of “ ‘evidence which should fully convince.’ ” *N.C. State Bar. v. Sheffield*, 73 N.C. App. 349, 354, 326 S.E.2d 320, 323 (citations omitted), *disc. review denied*, 314 N.C. 117, 332 S.E.2d 482, *cert. denied*, 474 U.S. 981, 106 S. Ct. 385, 88 L. Ed. 2d 338 (1985). The trial court’s conclusions of law, on the other hand, are reviewable *de novo*. *S.N.*, 194 N.C. App. at 146, 669 S.E.2d at 59. “Once the trial court has found a ground for termination, the court then considers the best interests of the child in making its decision on whether to terminate parental rights. We review this decision on an abuse of discretion standard, and will reverse a court’s decision only where it is ‘manifestly unsupported by reason.’ ” *Id.* at 146, 669 S.E.2d at 59 (quoting *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980)) (citation omitted).

B. Trial Court’s Findings of Fact

[1] As an initial matter, Respondent-Mother challenges several of the findings of fact set out in the trial court’s termination order. In advancing this argument, Respondent-Mother directs our attention to the following findings of fact:

8. The return of the minor children to [Respondent-Mother] on or about May 18, 2009 was followed soon thereafter by her cohabitation with [Raul A.], who

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then perpetrated physical abuse on [Brandon], in spite of [Respondent-Mother's] participation in individual counseling and treatment, family counseling and treatment, parenting classes, psychological evaluation, and in-home community support services during the children's first stay in foster care.

. . . .

10. The minor children report frequent physical discipline by [Raul A.] during the entire time that he resided with them in the home of [Respondent-Mother] from mid-2009 until December 2010. However, [Respondent-Mother] continues to deny any knowledge of such physical discipline prior to the physical abuse of [Brandon] on or about November 30, 2010 which led to the children's second removal from the home and placement in foster care.
11. [Respondent-Mother's] relationship with [Raul A.] ended only after [he] was wanted for a probation violation and absconded to Mexico.

. . . .

16. In large measure, [Respondent-Mother] repeated the services completed after Adjudication following Adjudication II. Unfortunately, [Respondent-Mother] did not protect [Daisy], [Brandon], and [Evan] . . . from violence . . . after the multiple services offered. There is little to suggest that [Respondent-Mother] has the ability to reject her acknowledged "culture of violence" or "duty to her husband," at the peril of her children as evidenced by [Respondent-Mother's] continuing history of minimizing and misleading authorities regarding the nature and extent of the violence inflicted on [Daisy], [Brandon], and [Evan] in [Respondent-Mother's] home(s).

Consistent with the opinion of the North Carolina Court of Appeals in this case, it is improvident to "wait until a child has been killed," or more specifically to wait until *another* child has been killed or another child abused or neglected.

. . . .

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21. At the initial disposition of this matter, [Judge] Owsley made the following findings of fact, which were specifically affirmed by the North Carolina Court of Appeals and which this Court now finds to be true.
 - a. The Court recognizes that there has been no specific competent evidence presented to show that [Respondent-Mother] had advance knowledge that [Raul A.] was going to beat [Brandon] on this specific date. However, the Court cannot ignore [Brandon's] statements that such beatings had happened before and "a lot." The Court cannot ignore a three-year history of involvement with this family, with significant serious domestic violence in the home, which was and about which she in fact lied in the past.
 - b. Furthermore, this Court cannot ignore the numerous findings of fact, based on [Respondent-Mother's] own statements to the Court and to professionals who have talked to her throughout the course of this litigation, that she has grown up in a culture of violence and believed she had a duty to her husband and partner and that that duty superseded her duty to protect her children.
 - c. This Court has found on numerous occasions throughout the course of this litigation that [Respondent-Mother] suffered domestic violence at the hands of her then husband, who on occasion left bruises on her by hitting her, who on occasion had forced her to have sex with him against her will, and who on numerous occasions hit and struck their children [Daisy] and [Brandon], leaving bruises on those children.
 - d. Despite the significant domestic violence in her home against her and her children, [Respondent-Mother] stayed in the home of [Armando H.], who was inflicting the violence on her and her children.
 - e. In the Court's Consolidated Order of Adjudication and Disposition, entered by this Court on or about June 3, 2008, the Court found, among other things,

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based on the testimony of [Respondent-Mother] and others, that [Respondent-Mother] had left her children not only in the care of [Armando H.], who had beaten her and her children and subsequent[ly] caused the death of [Ethan], but also in the care of her brother-in-law [Julio H.], despite her knowledge that he and his wife had a Child Protective Services history and that [Julio H.]'s wife [Erica S.] had been convicted of two counts of misdemeanor child abuse. The Court further found that, not only had [Respondent-Mother] left her children in the care of this person who had this Child Protective Services history and prior court involvement, she also lied to investigators about this during the initial investigation into the death of [Ethan], concealing the fact that she had allowed her children to be in the care of a known abuser.

- f. The Court further found in the Consolidated Order of Adjudication and Disposition that [Respondent-Mother] admitted that her husband [Armando H.] had been abusive and violent toward her and her children in the home, but she was reared in a family where she herself was subjected to violence and abuse and that she believed, based on her religious faith, that she was required to stay with her husband. The Court further found that [Respondent-Mother] did not appear to understand the necessity to protect her own children from the violent behaviors of her husband, perhaps because of her longstanding experiences and beliefs, and that she did not take steps to protect these children despite her longstanding knowledge of the violent behaviors of her husband.
22. [Respondent-Mother's] history of denial of domestic violence, her perceived "duty" to succumb to and subjugate herself to domestic violence, her history of lying while violence was inflicted on her and her children bode poorly for her ability to establish such a safe home within a reasonable period of time.

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23. [Respondent-Mother's] history of living in environments of violence – with [Armando H.] and with [Raul A.] – has led to the death of one child and two separate adjudications of neglect as to [Daisy], [Brandon], and [Evan], as well as one adjudication of abuse. [Respondent-Mother's] entrustment of [Daisy], [Brandon], and [Evan] to the care of [Julio H.] and [Erica S.] after knowledge of [Erica S.]'s conviction for misdemeanor child abuse, to [Armando H.] after knowledge of his conduct which would lead to convictions for second degree murder and felony child abuse and to [Raul A.] after knowledge of his beating [Brandon] “a lot,” when coupled with [Respondent-Mother's] failure to disclose and covering up such violence and abuse, together with [Respondent-Mother's] acknowledged history of condoning domestic violence directed toward her as well as [Daisy], [Brandon], and [Evan] constitutes repeated neglect . . . and the likelihood of repetition of such neglect were the children to once again be returned to her care is substantial.

In her brief, Respondent-Mother argues that the trial court erred by misapprehending our earlier decision upholding Judge Owsley's order requiring the cessation of efforts to reunify Respondent-Mother with the children by treating our opinion as the law of the case and by making findings of fact that lack adequate evidentiary support. We do not find either aspect of Respondent-Mother's argument persuasive.

In support of her “law of the case” argument, Respondent-Mother asserts that the trial court took our earlier statement to the effect that “it is improvident to ‘wait until a child has been killed,’ or more specifically to wait until *another* child has been killed or another child abused or neglected” out of context since the language was originally used in an opinion regarding the cessation of reunification efforts, which has a different evidentiary standard, rather than in an opinion addressing a challenge to the lawfulness of a termination of parental rights order. Put another way, Respondent-Mother contends that the trial court adopted language from this Court's opinion and treated it as dispositive without regard to the information contained in the present record. On the contrary, the trial court specifically stated in Finding of Fact No. 16 that its independent evaluation of the record revealed the presence of clear, cogent, and convincing evidence tending to show that Respondent-Mother had largely repeated the services that she had obtained following

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the first removal of the children from her home and that the provision of these services had apparently not influenced her ability or fostered an inclination on her part to avoid or minimize the danger of placing her children in harm's way, as evidenced by Raul A.'s subsequent beating of Brandon, an event which occurred slightly over a year after custody of the children had been returned to Respondent-Mother. As the trial court noted, this finding was consistent with a similar point which this Court made in the course of resolving Respondent-Mother's earlier appeal. When read in context, the challenged portion of the trial court's order simply cannot be understood as substituting this Court's earlier decision for its own decision in this case.

Secondly, Respondent-Mother challenges Finding of Fact No. 21, which consists of an extensive quote from our decision upholding Judge Owsley's order approving the cessation of efforts to reunify Respondent-Mother with the children, as unsupported by the record. Once again, however, the trial court clearly made an independent decision to find as true the fact listed in that portion of the order based on the present record, as is demonstrated by reference in the trial court's order to the fact that it "now finds [these facts] to be true." Moreover, a careful review of the evidence contained in the present record reflects ample support for the specific factual components contained in Findings of Fact Nos. 16 and 21. The record is replete with evidence in the form of both oral testimony and reports tending to show that Respondent-Mother largely repeated the services that she had utilized during her earlier involvement with DSS after they were removed from her custody a second time and that the receipt of these services had had no apparent effect on the manner in which she cared for the children; that Respondent-Mother grew up in a culture of violence and believed that she had a paramount duty to remain with and be loyal to her husband and partner regardless of the impact of that decision on her children; that she elected to stay with her husband and partner after experiencing repeated instances of violence directed at both herself and the children; and that she knowingly left her children with and allowed them to be in the presence of individuals who had a history of child abuse. As a result, this aspect of Respondent-Mother's challenge to the trial court's order lacks merit.

Finally, Respondent-Mother contends that Findings of Fact Nos. 8, 10, 11, 22, and 23 lack adequate evidentiary support. However, most, if not all, of these findings are supported by the same evidence recited in our discussion of Respondent-Mother's challenge to Finding of Fact No. 21. In addition, we conclude that, even if these findings are deficient in the manner described by Respondent-Mother, any such error

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would be harmless given that many of the alleged errors to which Respondent-Mother directs our attention strike us as relatively minor and given that, as is explained in more detail below, the remaining findings of fact provide ample support for the trial court's conclusion that Respondent-Mother's parental rights in Daisy, Brandon, and Evan were subject to termination for neglect. *See In re S.W.*, 175 N.C. App. 719, 724, 625 S.E.2d 594, 597 (holding that "the remaining findings of fact are more than sufficient to support the trial court's conclusions of law"), *disc. review denied*, 360 N.C. 534, 635 S.E.2d 59 (2006). As a result, none of Respondent-Mother's challenges to Findings of Fact Nos. 8, 10, 11, 16, 21, 22, and 23 have merit.

C. Neglect Determination

[2] Secondly, Respondent-Mother challenges the trial court's determinations that Daisy, Brandon, and Evan are neglected juveniles as defined in N.C. Gen. Stat. § 7B-101(15); that "[s]uch neglect is ongoing and has continued through the dates of these proceedings"; and that "[t]he probability that minor children [Daisy], [Brandon], and [Evan] would again be neglected, if not abused, were they returned to [Respondent-Mother's] care, is substantial." As a result of the fact that all of the trial court's findings of fact either have not been challenged for purposes of appellate review or have been found to have adequate record support, this aspect of Respondent-Mother's challenge to the trial court's order amounts to a contention that the trial court's findings of fact do not support its determination that Respondent-Mother's parental rights in the children were subject to termination for neglect. *See S.N.*, 194 N.C. App. at 146, 669 S.E.2d at 58-59. We do not find this argument persuasive.

According to N.C. Gen. Stat. § 7B-1111(a), a parent's parental rights in his or her children are subject to termination in instances in which "[t]he parent has abused or neglected the juvenile," with a juvenile being deemed to have been "abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of [N.C. Gen. Stat. §] 7B-101 or a neglected juvenile within the meaning of [N.C. Gen. Stat. §] 7B-101." N.C. Gen. Stat. § 7B-1111(a)(1). A neglected juvenile as defined in N.C. Gen. Stat. § 7B-101 is one

who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed

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for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15).

A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect “at the time of the termination proceeding.” *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984). However, the “[t]ermination of parental rights for neglect may not be based solely on past conditions which no longer exist.” *Young*, 346 N.C. at 248, 485 S.E.2d at 615. “Where . . . a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect.” *In re Pierce*, 146 N.C. App. 641, 651, 554 S.E.2d 25, 31 (2001), *aff’d*, 356 N.C. 68, 565 S.E.2d 81 (2002). “This is because requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible.” *Id.* (citing *Ballard*, 311 N.C. at 714, 319 S.E.2d at 231).

According to Respondent-Mother, despite the fact that there was evidence of prior neglect, the record developed at the termination hearing did not support the trial court’s conclusion that there was a substantial probability that the children would again be neglected. In advancing this argument, Respondent-Mother places substantial reliance on evidence tending to show that she had completed various courses and programs, that she received substantial support from her church, and that her visits with the children had gone well. However, according to the applicable standard of review, the trial court is ultimately responsible for evaluating the weight and credibility to be given to the evidence. As we have already discussed, the trial court’s findings of fact, which are either undisputed or supported by competent evidence, indicate that there is a substantial probability that the children will suffer neglect in the future given Respondent-Mother’s failure to recognize the conditions which led to the prior adjudications of dependence, neglect, and abuse; her apparent inability to refrain from associating with individuals who will abuse her or the children; and her seemingly unswerving loyalty to her husband or male partner regardless of the manner in which that person treats her children. As best we can tell from examining the trial court’s findings, the only difference between Respondent-Mother’s

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situation between the period following the initial removal of the children from her custody and that following the second is her involvement in a supportive church and religious community and evidence in the form of testimony by members of that community to the effect that she has become more outgoing and assertive. Although such progress is certainly commendable, it is simply not, given the other evidence tending to support the trial court's conclusion of neglect and the deference which must be given to the trial court's determinations concerning the weight and credibility to be given to the evidence, sufficient to persuade us that the trial court erred by determining that Respondent-Mother's parental rights were subject to termination for neglect. *See In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 224-25 (1995) (stating that "[e]xtremely limited progress is not reasonable progress"). As a result, we are unable to conclude that the trial court's findings of fact failed to support its determination that there would be a substantial probability of future neglect or abuse in the event that the children were returned to Respondent-Mother's custody. *In re Y.Y.E.T.*, 205 N.C. App. 120, 131, 695 S.E.2d 517, 524 (explaining that a parent's "case plan is not just a checklist" and that "parents must demonstrate acknowledgement and understanding of why the juvenile entered DSS custody as well as changed behaviors"), *disc. review denied*, 364 N.C. 434, 703 S.E.2d 150 (2010).

III. Conclusion

Thus, for the reasons set forth above, we hold that the trial court did not err by finding that Respondent-Mother's parental rights in Daisy, Brandon, and Evan were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). As a result, the trial court's orders should be, and hereby are, affirmed.

AFFIRMED.

Judges HUNTER and STROUD concur.

IN RE FORECLOSURE OF YOUNG

[227 N.C. App. 502 (2013)]

IN RE FORECLOSURE OF REAL PROPERTY UNDER DEED OF TRUST FROM TONY RAY YOUNG JR. AND LISA F. YOUNG, DATED SEPTEMBER 28, 2007 AND RECORDED ON OCTOBER 1, 2007 IN BOOK 22878 AT PAGE 847

No. COA12-1224

Filed 4 June 2013

Mortgages and Deeds of Trust—foreclosure—special proceeding—equitable defense—no jurisdiction

The trial court exceeded its jurisdiction in a special proceeding for a foreclosure and sale by considering respondents' equitable estoppel defense. Equitable defenses may not be raised in a hearing pursuant to N.C.G.S. § 85-21.16 but must instead be asserted in an action to enjoin a foreclosure sale under N.C.G.S. § 45-21.34. Moreover, the trial court here tailored its findings and conclusions to the defense of equitable estoppel and did not address the findings required in a foreclosure pursuant to N.C.G.S. § 45-21.6. Although the record in this case was not adequate to determine the status of a prior proceeding, dismissal of the appeal was not necessitated.

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

Appeal by petitioner from order entered 27 June 2012 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 March 2013.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr., and James R. White, for Wells Fargo Bank, N.A., petitioner appellant.

No brief filed for respondent appellees.

McCULLOUGH, Judge.

Wells Fargo Bank, N.A. (“Wells Fargo” or “petitioner”) appeals from an order of the trial court denying its petition to exercise its power of sale after finding that petitioner was barred from foreclosing by the doctrine of equitable estoppel. Because the trial court exceeded its jurisdiction in this special proceeding by considering respondents' equitable defense, we vacate the trial court's order and remand the case to the trial court for further proceedings consistent with this opinion.

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I. Background

On 28 September 2007, Tony Ray Young, Jr., executed a Note in the amount of \$191,075.00 (the “Note”) to finance with DHI Mortgage Company (“DHI”) the purchase of certain real property located in Charlotte, North Carolina. This Note was secured by a Deed of Trust executed on the same date by Tony Ray Young, Jr. and Lisa F. Young (“respondents”) in favor of DHI (the “Deed of Trust”). The Deed of Trust was recorded on 1 October 2007 in Book 22878 at page 847 in the Mecklenburg County Register of Deeds. DHI subsequently endorsed and transferred the Note to petitioner.

Under the terms of the Note, respondents were required to make monthly payments on the first day of each month beginning on 1 November 2007. Failure to pay the full amount of each monthly payment on the date due constituted default under the terms of the Note. The record reveals that respondents failed to make their required monthly payment beginning in April 2009. The record further reveals that respondents had a series of discussions with Wells Fargo regarding potential loss mitigation options. At the hearing below in the present case, respondents asserted that on 15 September 2009, they entered into a loan modification agreement with petitioner and thereafter began making payments to petitioner under the terms of the loan modification agreement. However, petitioner stated that no loss mitigation options were ever finalized with respondents, and therefore, petitioner returned the amount of \$5,143.88 – the total amount paid by respondents beginning September 2009 – to respondents. The record reveals that respondents made no more payments to petitioner thereafter.

On 28 August 2011, petitioner sent respondents a demand letter for the amounts required to reinstate their loan. Respondents failed to submit the amounts stated in the demand letter, and petitioner accelerated their loan. Petitioner then instituted foreclosure proceedings to recover the entire remaining indebtedness due under the Note and Deed of Trust.

A notice of foreclosure hearing was filed by petitioner on 15 November 2011 pursuant to N.C. Gen. Stat. § 45-21.16 (2011). Following a hearing on the matter on 30 March 2012, the assistant clerk of court entered an order on 12 April 2012 dismissing the special proceeding after finding that a prior appeal was still pending in the same matter. Specifically, the assistant clerk of court found that “an appeal is pending in 09-SP-7638 on the same matter such that until 09-SP-7638 is disposed of then it is improper to have a second action pending on the

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same matter.” On 16 April 2012, petitioner appealed from the assistant clerk’s order to the superior court for a hearing *de novo*.

A hearing was held in the matter on 5 June 2012, at which petitioner explained that it had “voluntarily dismiss[ed]” its prior appeal in an effort to complete a loan modification with respondents, but those efforts were exhausted with no resolution. Specifically, petitioner explained:

In other words, in the '09 case, the clerk entered an order dismissing the foreclosure with no lawyer for Wells Fargo present. There was the trustee there, but we were not there. We got hired and we appealed it, and before having the appeal hearing heard, . . . we instructed the trustee to take a voluntary dismissal without prejudice so this modification thing could play out and we could see if we could get something done, which as I said ultimately did not happen.

On 27 June 2012, the trial court entered an order denying petitioner’s petition to exercise its power of sale and foreclose on respondents’ property. The trial court found and concluded that in light of petitioner’s actions concerning the loan modification agreement offered by respondents at the hearing, petitioner did not have a legal right to foreclose on respondents’ property because the doctrine of equitable estoppel barred the foreclosure action. On 5 July 2012, petitioner entered written notice of appeal from the trial court’s order.

II. Discussion

We first address the issue of the trial court’s subject matter jurisdiction to conduct the foreclosure hearing in the present matter. We agree with the dissent that the record on appeal is inadequate for this Court to determine the status of the prior proceedings in 09 SP 7638, referenced in the 12 April 2012 order entered by the assistant clerk of court. The record on appeal is devoid of any filings demonstrating the status of the 09 SP 7638 proceedings. Accordingly, we agree with the dissent that because the assistant clerk’s order dismissed the present action on the basis of a “prior action pending,” the trial court should have first examined the question of its subject matter jurisdiction to conduct a foreclosure hearing in the present action, including a review of the status of the 09 SP 7638 proceedings, before entering a decision on the merits. As the dissent notes, the trial court in the present action may lack subject matter jurisdiction to hear the present foreclosure action, depending on the procedural posture of the prior action.

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Nonetheless, we conclude that our inability to determine the status of the 09 SP 7638 proceedings does not necessitate dismissal of petitioner's present appeal, as dismissal of this appeal would leave intact the trial court's present order denying petitioner's petition to exercise its power of sale and foreclose on respondents' property on the basis of equitable estoppel. Such a result is erroneous as a matter of law, for the trial court had no subject matter jurisdiction to grant equitable relief in this special proceeding.

“ ‘In reviewing a question of subject matter jurisdiction, our standard of review is *de novo*.’ ” *In re Cornblum*, ___ N.C. App. ___, ___, 727 S.E.2d 338, 340 (quoting *In re K.A.D.*, 187 N.C. App. 502, 503, 653 S.E.2d 427, 428 (2007)), *disc. review denied*, ___ N.C. ___, 734 S.E.2d 864 (2012).

At a foreclosure hearing pursuant to N.C. Gen. Stat. § 45-21.16, the clerk of superior court is limited to making the six findings of fact specified under subsection (d) of that statute: (1) the existence of a valid debt of which the party seeking to foreclose is the holder; (2) the existence of default; (3) the trustee's right to foreclose under the instrument; (4) the sufficiency of notice of hearing to the record owners of the property; (5) the sufficiency of pre-foreclosure notice under section 45-102 and the lapse of the periods of time established by Article 11, if the debt is a home loan as defined under section 45-101(1b); and (6) the sale is not barred by section 45-21.12A. N.C. Gen. Stat. § 45-21.16(d); *see also In re Carter*, ___ N.C. App. ___, ___, 725 S.E.2d 22, 24 (2012). The clerk's findings are appealable to the superior court for a hearing *de novo*; however, in a section 45-21.16 foreclosure proceeding, the superior court's authority is similarly limited to determining whether the six criteria of N.C. Gen. Stat. § 45-21.16(d) have been satisfied. *Carter*, ___ N.C. App. at ___, 725 S.E.2d at 24; *Mosler v. Druid Hills Land Co.*, 199 N.C. App. 293, 295-96, 681 S.E.2d 456, 458 (2009). The superior court “has no equitable jurisdiction and cannot enjoin foreclosure upon any ground other than the ones stated in [N.C. Gen. Stat. §] 45-21.16.” *Matter of Helms*, 55 N.C. App. 68, 71-72, 284 S.E.2d 553, 555 (1981).

“On a *de novo* appeal to the Superior Court in a section 45-21.16 foreclosure proceeding, the trial court must ‘declin[e] to address [any party's] argument for equitable relief, as such an action would [] exceed[] the superior court's permissible scope of review[.]’ ” *Mosler*, 199 N.C. App. at 296, 681 S.E.2d at 458 (alterations in original) (quoting *Espinosa v. Martin*, 135 N.C. App. 305, 311, 520 S.E.2d 108, 112 (1999)). Indeed, “[t]his Court has repeatedly held that equitable defenses may not be

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raised in a hearing pursuant to [N.C. Gen. Stat. §] 45-21.16, but must instead be asserted in an action to enjoin the foreclosure sale under [N.C. Gen. Stat. §] 45-21.34.” *In re Foreclosure of Fortescue*, 75 N.C. App. 127, 131, 330 S.E.2d 219, 222 (1985) (citing *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978); *Helms*, 55 N.C. App. at 72, 284 S.E.2d at 555).

Here, in addition to its failure to address the status of its jurisdiction based upon the assistant clerk’s finding of a prior action pending, the trial court’s order likewise fails to address any of the six findings of fact required to be addressed in a foreclosure hearing pursuant to N.C. Gen. Stat. § 45-21.16. Rather, the trial court improperly tailored its findings and conclusions to the defense of equitable estoppel. Because equitable estoppel is an equitable defense, *see George v. Bray*, 130 N.C. App. 552, 556-57, 503 S.E.2d 686, 690 (1998), the trial court’s findings and conclusions regarding equitable estoppel were outside of its jurisdiction and therefore have no legal effect in the present case. *Mosler*, 199 N.C. App. at 297, 681 S.E.2d at 459. Accordingly, we must vacate the trial court’s order and remand the matter to the trial court for further proceedings and the entry of appropriate findings of fact and conclusions of law addressing (1) its jurisdiction to consider the present action in light of the proceedings in 09 SP 7638, and (2) if the trial court finds and concludes it properly has jurisdiction in this special proceeding, only the six criteria specified under N.C. Gen. Stat. § 45-21.16(d).

We note that, although the trial court concluded as a matter of law that “[p]laintiff’s foreclosure action fails on element three because [p]laintiff has no legal right to foreclose under the instrument[,]” the trial court’s conclusion was based on its previous conclusion of law that the defense of equitable estoppel applied under the circumstances of the present case. Such conclusion misapprehends the plain language of element three of N.C. Gen. Stat. § 45-21.16(d), which requires the trial court to consider strictly whether “the instrument” at issue conveys a right to foreclose on petitioner. The existence of any equitable defenses is inapposite to consideration of this element.

We further note that, as stated above, respondents may raise the defense of equitable estoppel in a separate action to enjoin the foreclosure sale pursuant to N.C. Gen. Stat. § 45-21.34 (2011). *Mosler*, 199 N.C. App. at 296, 681 S.E.2d at 458 (“The proper method for invoking equitable jurisdiction to enjoin a foreclosure sale is by bringing an action in the Superior Court pursuant to G.S. 45-21.34.” (quoting *Watts*, 38 N.C. App. at 94, 247 S.E.2d at 430)). Section 45-21.34 provides that “prior to the time that the rights of the parties to the sale or resale becom[e] fixed

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pursuant to [N.C. Gen. Stat. §] 45-21.29A[.]” a party may apply to a judge of the superior court to enjoin the foreclosure sale “upon any . . . *legal or equitable ground* which the court may deem sufficient[.]” N.C. Gen. Stat. § 45–21.34 (emphasis added). Under N.C. Gen. Stat. § 45-21.29A, the rights of the parties to the sale or resale become fixed at the expiration of a ten-day period for the filing of upset bids. *Goad v. Chase Home Fin., LLC*, 208 N.C. App. 259, 263, 704 S.E.2d 1, 4 (2010). The hearing afforded under N.C. Gen. Stat. § 45-21.16 “was not intended to settle all matters in controversy between mortgagor and mortgagee[.]” *Watts*, 38 N.C. App. at 94, 247 S.E.2d at 429. Rather, “for all other ‘matters,’ a party may seek relief under N.C. Gen. Stat. § 45-21.34 where the court’s jurisdiction is much broader.” *Carter*, ___ N.C. App. at ___, 725 S.E.2d at 25. Therefore, “[i]f respondents feel that they have equitable defenses to the foreclosure, they should be asserted in an action to enjoin the foreclosure sale under [N.C. Gen. Stat. §] 45-21.34.” *Helms*, 55 N.C. App. at 72, 284 S.E.2d at 555.

In addition, as the dissent notes, if the trial court finds and concludes that it has no subject matter jurisdiction to consider this matter in light of the proceedings in 09 SP 7638, the proper action for the trial court is to dismiss the present action. Petitioner’s remedy would then be limited to judicial foreclosure procedures pursuant to N.C. Gen. Stat. § 1-339.1 *et seq.*, rather than the summary proceedings provided under N.C. Gen. Stat. § 45-21.1 *et seq.* “Foreclosure by action requires formal judicial proceedings initiated by summons and complaint in the county where the property is located and culminating in a judicial sale of the foreclosed property if the mortgagee prevails.” *Phil Mech. Const. Co., Inc. v. Haywood*, 72 N.C. App. 318, 321, 325 S.E.2d 1, 3 (1985). If petitioner’s present foreclosure action is dismissed, and if petitioner elects to proceed to judicial foreclosure, respondents may present any equitable defenses in that civil action.

III. Conclusion

The record on appeal in the present case is insufficient for this Court to determine the status of the proceedings in 09 SP 7638. Because the assistant clerk dismissed petitioner’s action on the basis of prior action pending, the trial court should have first considered whether it had subject matter jurisdiction in light of the prior proceedings. In addition, in considering the defense of equitable estoppel in a *de novo* hearing under section 45-21.16, the trial court exceeded its subject matter jurisdiction, which is limited to consideration of only those six issues enumerated under subsection (d) of that statute.

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Accordingly, we vacate the trial court's order, and we remand to the trial court for further proceedings and the entry of appropriate findings of fact and conclusions of law addressing (1) its jurisdiction to consider the present action in light of the proceedings in 09 SP 7638, and (2) if the trial court finds and concludes it properly has jurisdiction in this special proceeding, only the six criteria enumerated under N.C. Gen. Stat. § 45-21.16(d), consistent with this opinion.

Vacated and remanded.

Judge BRYANT concurs.

Judge HUNTER, JR. (Robert N.) dissents.

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

Before a court can proceed to the merits of a case the court may (and on occasions where the record on appeal suggests the trial court lacked jurisdiction, the court must), independently examine its jurisdiction. In an appeal, the appellant bears the burden of proving the appeals court has jurisdiction before the court can consider its appeal. *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (2005). This duty includes an obligation for the appellant not only to cite to the proper statutory authority to establish jurisdiction, but also to provide the court with "copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal." N.C. R. App. P. 9(a)(1)(j). In my view, because petitioner fails to provide this Court with copies of all other papers filed and statements of the proceedings in Mecklenburg County Special Proceeding 09 SP 7638, the prior summary foreclosure proceeding on this property, petitioner has failed to fulfill its duty. Because I do not believe the Court has an adequate record to review all of the issues presented in this appeal, both as to jurisdiction and on the merits, I must respectfully dissent from the majority's opinion.

This is an appeal of a summary foreclosure under a power of sale. Such cases are properly characterized as "special proceedings." *See Phil Mechanic Const. Co. v. Haywood*, 72 N.C. App. 318, 321, 325 S.E.2d 1, 2-3 (1985). The Rules of Civil Procedure apply to special proceedings, just as they do to civil actions, unless the governing statute sets out different procedures. *Charns v. Brown*, 129 N.C. App. 635, 638, 502 S.E.2d 7, 9 (1998).

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Foreclosures conducted under the summary procedures provided for in N.C. Gen. Stat. § 45-21.1 et seq. must be strictly examined. *See In re Foreclosure of Deed of Trust by Goforth Props., Inc.*, 334 N.C. 369, 375, 432 S.E.2d 855, 859 (1993) (“[T]his Court [has] also reiterated that foreclosure under a power of sale is not favored in the law, and its exercise will be watched with jealousy.” (quotation marks and citation omitted)). The practical reason to examine foreclosures strictly is to ensure that the chains of title produced by foreclosures are clear and sufficient to convey ownership to future titleholders. Put differently, if the summary foreclosure is defective, then future owners and mortgage lenders cannot rely on the titles resulting from such proceedings.

The Record on Appeal documents that petitioner filed a Special Proceeding, captioned 11 SP 8765, on 15 November 2011. This proceeding was subsequently dismissed by the Assistant Clerk of Court without prejudice by Order of Dismissal filed 12 April 2012 with the following notation: “the foregoing case heard 3/30/12 and the court finding that an appeal is pending in 09-SP-7638 on the same matter such that until 09-SP-7638 is disposed of then it is improper to have a second action pending on the same matter.” We lack a sufficient record to determine whether 09 SP 7638 is still pending. However, assuming that matter was still pending at the time 11 SP 8765 was filed, the Assistant Clerk was correct in her ruling. Our Supreme Court has held that if there is a prior special proceeding pending between the same parties on substantially the same subject matter, and all the material questions and rights can be determined therein, the second special proceeding should be dismissed. *Seawell v. Purvis*, 232 N.C. 194, 196, 59 S.E.2d 572, 573 (1950) (citing *Dwiggins v. Parkway Bus. Co.*, 230 N.C. 234, 52 S.E.2d 892 (1949)). More modern cases from this Court have followed a similar line of reasoning in similar circumstances. *See, e.g., Whitmire v. Cooper*, 153 N.C. App. 730, 734, 570 S.E.2d 908, 911 (2002) (“[I]f . . . two suits are *in rem*, or *quasi in rem*, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought, the jurisdiction of the one court must yield to that of the other.” (quoting *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1939)); *Lisk v. Lisk*, No. COA07-661, 2008 WL 2967092 at *2 (N.C. Ct. App. 2008) (unpublished) (“The *Whitmire* decision . . . establishes that, if two courts are competing for jurisdiction in an *in rem* action, the second court must yield to the jurisdiction of the first court.”). Because the Assistant Clerk’s order was based upon a dismissal of “prior action pending,” the Superior Court reviewing this order should have examined the question of jurisdiction before entering any decision on the merits.

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At the hearing before the Superior Court in 11 SP 8765, counsel for petitioner claimed that petitioner had taken a “voluntary dismissal” in 09 SP 7638. However, this explanation mischaracterizes the legal consequences of dismissing a special proceeding after appeal from a Clerk’s order. As the majority notes, counsel for petitioner explained at the hearing:

In other words . . . in the ‘09 case, the clerk entered an order dismissing the foreclosure with no lawyer for Wells Fargo present. There was the trustee there, but we were not there. We got hired and we appealed it, and *before having the appeal hearing heard . . . we instructed the trustee to take a voluntary dismissal without prejudice* so this modification thing could play out and we could see if we could get something done, which as I said ultimately did not happen. (Emphasis added).

Thus, it appears as though petitioner sought to “voluntarily dismiss” 09 SP 7638 during the pendency of petitioner’s appeal to the superior court only *after* the Clerk had denied relief in that proceeding. This portion of the transcript alone does not provide a documentary basis to know that the prior proceeding was dismissed at the time the Superior Court entered its order.

Furthermore, “voluntary dismissals” are not part of the procedures allowed in special proceedings after the Clerk has reached a decision. Such a “voluntary dismissal” is properly characterized as a *withdrawal* of petitioner’s appeal from 09 SP 7638. Our Supreme Court has held that a party’s withdrawal of its appeal from the decision of a Clerk in a special proceeding makes that decision a “final adjudication.” *See Ramsey v. So. Ry. Co.*, 253 N.C. 230, 116 S.E.2d 490 (1960) (per curiam) (“When the court, in its discretion, permitted the appeal to be withdrawn, the clerk’s judgment became the final adjudication.”). Consequently, petitioner’s withdrawal of its appeal from the 2009 proceeding rendered the Clerk’s dismissal of the 2009 proceeding final. This is problematic to the jurisdiction of our Court in the case *sub judice* in light of the doctrine of *res judicata*. Our Court has held that when a mortgagee or trustee elects to proceed under a power of sale, decisions of the Clerk not appealed are *res judicata* and cannot be relitigated in another action. *See Phil Mechanic Const. Co.*, 72 N.C. App. at 322, 325 S.E.2d at 3 (“Since plaintiffs did not perfect an appeal of the order of the Clerk of Superior Court, the clerk’s order is binding and plaintiffs are estopped from arguing those same issues in this case.”).

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Because petitioner has failed to provide us with a sufficient record to determine whether the Superior Court possessed jurisdiction in this matter, I believe its appeal should be dismissed. *See Wiggins v. Pyramid Life Ins. Co.*, 3 N.C. App. 476, 478, 165 S.E.2d 54, 56 (1969) (“[T]he jurisdiction of the Court of Appeals is derivative; therefore, if the court from which the appeal is taken had no jurisdiction, the Court of Appeals cannot acquire jurisdiction by appeal.”). Furthermore, “ [i]t is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel. ” *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961) (quoting *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956)).

I understand the majority’s reticence to dismiss an appeal from an order it determines is in error on other grounds. However, “a default precluding appellate review on the merits necessarily arises when the appealing party fails to complete all of the steps necessary to vest jurisdiction in the appellate court. It is axiomatic that courts of law must have their power properly invoked by an interested party.” *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 364 (2008). The remedy suggested by the majority is beyond the competency of a trial court. Resolving differences between two conflicting special proceedings must be done by an appellate court possessing jurisdiction. I do not believe a superior court judge can use an appeal of a special proceeding to resolve a potential jurisdictional dispute between two conflicting special proceedings, one of which has not been appealed to him. If he attempted such an effort it would muddle, not clarify, the question of whether title has passed to any subsequent buyer at a foreclosure sale.

Furthermore, petitioner is not without a remedy in this matter, but must proceed to judicial foreclosure under N.C. Gen. Stat. § 1-339.1 *et seq.* rather than use the summary proceedings provided in N.C. Gen. Stat. § 45-21.1 *et seq.* At that time, a properly pled civil action could resolve this question. Accordingly, I would dismiss petitioner’s appeal, and disagree with the majority’s decision to vacate and remand this case.

IN RE L.G.I.

[227 N.C. App. 512 (2013)]

IN THE MATTER OF L.G.I.

No. COA12-1369

Filed 4 June 2013

1. Child Abuse, Dependency, and Neglect—court’s recitation of facts—mother’s agreement—stipulation

The trial court complied with N.C.G.S. § 7B-807 in entering an adjudication order in a child neglect proceeding where the child suffered prenatal exposure to opiates and other drugs, the trial court read the facts into the record, and respondent mother then agreed to the facts under oath. The record did not reflect that respondent’s stipulation was contingent upon any reciprocal agreement with the Department of Social Services and there was evidence in the record as to the child’s prenatal drug exposure, even without respondent-mother’s stipulation.

2. Child Abuse, Dependency, and Neglect—dispositional order—cessation of reunification efforts—not a permanent plan of adoption

In a child neglect proceeding, there was no merit to the mother’s argument that a permanent plan of adoption was improperly ordered where the trial court said in open court that the permanent plan would be adoption, but in its written dispositional order only relieved DSS of reunification efforts and set a permanency planning hearing for a later date. The court allowed respondents to continue to work toward reunification on their own.

3. Child Abuse, Dependency, and Neglect—cessation of reunification—supported by record

A mother’s arguments concerning cessation of reunification efforts in a child neglect proceeding were not supported by the record where the trial court specifically encouraged respondents to do what was necessary to allow reunification to occur and even ordered visitation with the child.

4. Child Visitation—neglected child—visitation plan—insufficiently detailed

A child neglect proceeding was remanded for clarification of respondent’s visitation rights where the original plan was insufficiently detailed.

IN RE L.G.I.

[227 N.C. App. 512 (2013)]

Appeal by respondents from orders entered 15 August 2012 by Judge Sherry Dew Tyler in District Court, Brunswick County. Heard in the Court of Appeals 13 May 2013.

Jess, Isenberg & Thompson, by Elva L. Jess, for petitioner-appellee Brunswick County Department of Social Services.

Jeffrey L. Miller, for respondent-mother-appellant.

Rebekah W. Davis, for respondent-father-appellant.

Poyner Spruill LLP, by Danielle Barbour Wilson, for guardian ad litem.

STROUD, Judge.

Respondents appeal from an order adjudicating their daughter to be neglected and a dispositional order relieving the Department of Social Services from reunification efforts. For the following reasons, we affirm and remand for the trial court to provide a visitation schedule.

I. Background

On 18 June 2012, the Brunswick County Department of Social Services (“DSS”) filed a petition alleging that Lisa¹ was a neglected and dependent juvenile. Without objection the trial court admitted the medical records of Lisa and respondent-mother. During the adjudication portion of the hearing, respondent-mother was sworn in to testify and the trial court asked her,

All right. Ms. [Smith], you’ve heard the allegations and the position of the Department with regard to an adjudication of neglect and the acknowledgments that Ms. Jess indicate[d] that you would make with regard to the “positive morphine at birth and the mother used illegal drugs during the pregnancy.” Do you acknowledge that adjudication of neglect based upon the factors as set forth by Ms. Jess?

Respondent-mother testified, “Yes, ma’am.” Respondent-father’s attorney also stated that respondent-father was “not opposed to admission by” respondent-mother.

1. Pseudonyms will be used to protect the identity of the minor involved.

IN RE L.G.I.

[227 N.C. App. 512 (2013)]

The trial court then moved into the dispositional phase of the hearing wherein a Court Summary prepared by DSS for the hearing was introduced which stated that Lisa had an opiate addiction due to her “prenatal exposure to opiates, Xanax [sic] and marijuana.” The Court Summary further stated that Lisa was “on a feeding tube and ha[d] an irregular heartbeat” and “received morphine to assist in her withdrawal symptoms.” The Court Summary also provided that

[a] case plan has NOT been executed by . . . [respondents]. This social worker has not had an opportunity to explain the terms of the plan and to provide information to assist the parents in securing the recommended services. A Child and Family Team Meeting is being scheduled.

But the report also noted that respondents “have a pervasive and extensive history of involvement with the Brunswick County Department of Social Services and Criminal Justice Agencies” as well as with the Mecklenburg County Department of Social Services; this history included prior adjudications of two other children of respondents for neglect and dependency based upon prenatal drug exposure. In both of the prior cases involving respondents’ children, respondents failed to consistently participate in their family services plans. Respondents eventually relinquished one child and it was not recommended that the other child return to respondents’ care.

Despite the Court Summary, counsel for the parties apparently discussed resolution of the matter prior to the hearing and DSS’s counsel agreed that all parties would continue to work toward reunification:

MS. JESS [DSS’s Attorney]: Through the adjudication process, we agreed that, at disposition, there would be a family services case plan, and we would initially work toward reunification.

. . . .

THE COURT: That’s not what the order is going to say. I’m not going to order reunification. The plan is going to be adoption.

MS. HANKINS [Respondent-father’s Attorney]: Well, can we strike what we’ve done, Your Honor? Your Honor, that was contingent upon—

THE COURT: No, ma’am, because, ultimately, the decision is not the Department’s, the decision is mine.

IN RE L.G.I.

[227 N.C. App. 512 (2013)]

On 15 August 2012, the trial court entered written orders adjudicating Lisa neglected, relieving DSS from reunification efforts, and setting a permanency planning hearing for a later date. Respondents appeal.

II. Adjudication Order

[1] While both respondent-mother and respondent-father make various arguments challenging the adjudication order, all of the arguments hinge on their contention that the trial court entered or failed to properly enter a “consent order.” However, the trial court did not enter a consent order. *See generally In re Thrift*, 137 N.C. App. 559, 562, 528 S.E.2d 394, 396 (2000) (“A judgment by consent is the agreement of the parties, their decree, entered upon the record with the sanction of the court[.]” (citation, quotation marks, and brackets omitted)). Accordingly, all arguments regarding “consent” are without merit.

At most, respondent-mother entered into a stipulation as to certain facts during the adjudication phase of the hearing. North Carolina General Statute § 7B-807 provides:

(a) If the court finds from the evidence, *including stipulations by a party*, that the allegations in the petition have been proven by clear and convincing evidence, the court shall so state. *A record of specific stipulated adjudicatory facts shall be made* by either reducing the facts to a writing, signed by each party stipulating to them and submitted to the court; *or by reading the facts into the record, followed by an oral statement of agreement from each party stipulating to them.* . . .

. . . .

(b) The adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law.

N.C. Gen. Stat. § 7B-807 (2011) (emphasis added).

Here, the trial court “read[] the facts into the record” noting that Lisa tested positive for morphine at birth and respondent-mother had used illegal substances during her pregnancy. *Id.* Respondent-mother then agreed to the facts under oath. The record does not reflect that respondent-mother’s stipulation was contingent upon any reciprocal agreement with DSS that reunification efforts would continue. Even assuming DSS had informed respondents that it would continue to work

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[227 N.C. App. 512 (2013)]

toward reunification, there was evidence in the record as to Lisa's prenatal drug exposure, even without respondent-mother's stipulation.

The trial court moved on to the dispositional phase of the hearing, but throughout the proceedings respondent-mother never attempted to withdraw or change her testimony nor did either party attempt to challenge the medical records or Court Summary admitted into evidence. The record supports the trial court's finding of fact as to Lisa testing "positive for morphine at birth[,]" and respondents do not claim otherwise. Thereafter, the trial court entered a written order of adjudication based on Lisa's positive morphine test and respondent-mother's use of illegal drugs while pregnant. Accordingly, the trial court complied with North Carolina General Statute § 7B-807 in entering its adjudication order. *See id.*

III. Dispositional Order

[2] Respondent-mother next challenges the dispositional order.

A. Permanent Plan for Adoption

Respondent-mother contends that the trial court erred in making the permanent plan for Lisa adoption. While the trial court did say in open court that the permanent plan would be adoption, in its written dispositional order the trial court actually only relieved DSS of reunification efforts and set a permanency planning hearing for a later date. Although the trial court did note that currently "the best plan to secure a safe, stable home for the juvenile within a reasonable period of time is adoption[,]" the trial court also specifically ordered that "[t]he parents have an opportunity, without reunification efforts on the part of the Department, to work their case plan, remain drug free, comply with the terms and conditions of the Family Services Case Plan and demonstrate their ability, desire and commitment to provide proper care for their daughter." Thus, the trial court did not set any permanent plan and allowed respondents to continue to work toward reunification on their own, leaving the door open for them to improve their abilities to care for Lisa and to demonstrate this to the trial court at a future hearing. For this reason, respondent-mother's argument that a permanent plan of adoption was improperly ordered is without merit.

B. Cessation of Reunification Efforts

[3] Respondent-mother also challenges the trial court's cessation of reunification efforts on the part of DSS as unsupported by the evidence and the findings of fact. But respondent-mother's numerous contentions

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again all hinge on her argument that the trial court had ordered a permanent plan of adoption, not only ceasing reunification efforts on the part of DSS but also terminating any opportunity for her to attempt reunification. Again, the trial court specifically encouraged respondents to do what was necessary to allow reunification to occur and even ordered visitation with Lisa; accordingly, respondent-mother's arguments are not supported by the record and are without merit.

IV. Visitation Schedule

[4] Lastly, respondent-mother contends the trial court erred when it ordered that “[a]ny visitation between the child and her parents shall be supervised by the Department and in its discretion.” Respondent-mother argues that the trial court is required to provide a more detailed schedule for DSS and respondents to follow.

Any dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety. This Court reviews the trial court's decision whether it is in the best interests of the juvenile to award visitation to a parent for an abuse of discretion. If the court does award visitation to a parent, the order must include an appropriate visitation plan that sets out at least a minimum outline, such as the time, place, and conditions under which visitation may be exercised.

In re W.V., 204 N.C. App. 290, 294, 693 S.E.2d 383, 387 (2010) (citations, quotation marks, and ellipses omitted). As the trial court here failed to “include an appropriate visitation plan that sets out at least the minimum outline, such as the time, place, and conditions under which visitation may be exercised[,]” we must “remand for proceedings to clarify respondent's visitation rights, including the establishment of a minimum outline of visitation.” *Id.* at 295, 693 S.E.2d at 387. We note that details regarding visitation are particularly important in this case, as DSS is no longer required to assist respondents in their reunification efforts. Any lack of cooperation or communication between respondents and DSS as to visitation could irrevocably prevent respondents from having any opportunity to develop a relationship with Lisa, who was only one month old at the time of the hearing. Respondents should be given a realistic opportunity to develop their parental relationship; whether they take advantage of the opportunity is then their responsibility.

IN RE A.R.

[227 N.C. App. 518 (2013)]

V. Conclusion

For the foregoing reasons, we affirm and remand for the trial court to provide a visitation schedule.

AFFIRMED.

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

IN THE MATTER OF A.R. & F.R.

No. COA12-1554

Filed 4 June 2013

1. Child Abuse, Dependency, and Neglect—findings of fact—conclusions of law—neglect

The trial court did not err in a child abuse and neglect case by making three findings of fact and a conclusion of law that the children were neglected. The unchallenged binding findings of fact alone supported the conclusion of law of neglect.

2. Child Abuse, Neglect, and Dependency—dispositional order—best interests of child—conditions leading to removal

The trial court did not abuse its discretion in a child abuse and neglect case in its dispositional order. It was not in the best interests of the children to return home. Further, requiring respondents to receive and comply with recommendations of mental health assessments, medical professionals supplying prescription medications, substance abuse evaluations, and drug screens was reasonably related to aiding respondents in remedying the conditions which led to the children's removal.

3. Child Abuse, Neglect, and Dependency—Indian Child Welfare Act—notification requirements

A child abuse and neglect case was remanded for the trial court to determine the results of the Wake County Human Services investigation as to the applicability of the Indian Child Welfare Act (ICWA) and to ensure that the ICWA notification requirements, if any, were addressed.

IN RE A.R.

[227 N.C. App. 518 (2013)]

Appeal by respondents from adjudication order filed 13 September 2012 and dispositional order filed 27 September 2012 by Judge Monica M. Bousman in District Court, Wake County. Heard in the Court of Appeals 13 May 2013.

Wake County Attorney's Office by Deputy County Attorney Roger A. Askew, for petitioner- appellee.

Mellonee Kennedy, for guardian ad litem.

Mark Hayes, for respondent-mother-appellant.

Robert W. Ewing, for respondent-father-appellant.

STROUD, Judge.

Respondents appeal adjudication and dispositional orders. For the following reasons, we affirm.

I. Background

On 14 June 2012, Wake County Human Services (“WCHS”) filed a petition alleging that respondents’ sons, Frank and Aaron,¹ (collectively referred to as “the children”) were abused and neglected juveniles. On 13 September 2012, the trial court filed an adjudication order concluding that both the children were neglected and Aaron was abused. On 27 September 2012, the trial court filed a dispositional order concluding that it was not in the best interests of the children to return to their parents’ home. Respondents appealed.

II. Adjudication Order

[1] Respondent-mother challenges three findings of fact or portions thereof as unsupported by the evidence and the trial court’s conclusion of law that the children were neglected as unsupported by the findings of fact.

The role of this Court in reviewing a trial court’s adjudication of neglect and abuse is to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact. If such evidence exists, the

1. Pseudonyms will be used to protect the identity of the minors involved.

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findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary.

In re T.H.T., 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (citations, quotation marks, and brackets omitted), *modified and aff'd*, 362 N.C. 446, 665 S.E.2d 54 (2008). Findings of fact are also binding if they are not challenged on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

The unchallenged findings of fact establish that respondents' family members have reported that over the course of two years that respondents have engaged in "multiple incidents of domestic violence[.]" including an altercation on 6 June 2012, where Frank was present and during which respondent-mother tried to hit respondent-father with a board, missed, and instead hit Aaron in the head; Aaron was two months old at the time. Aaron "sustained a bruise and cut on the right side of his head just above and outside his right eye." Respondents did not seek medical treatment for Aaron. Respondent-mother informed a social worker that Aaron also has other serious health issues including cysts on his only kidney and an enlarged bladder. "The pediatrician's office was contacted and expressed concern" because respondents cancelled two medical appointments within a period of two months despite the difficulties in rescheduling Aaron's "specialized testing[.]" These unchallenged, binding findings of fact alone support the conclusion of law of neglect. *See* N.C. Gen. Stat. § 7B-101(15) (2011) ("A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home."). This argument is overruled.

III. Dispositional Order

[2] Respondents challenge the trial court's dispositional order. We review a trial court's dispositional order for abuse of discretion. *In re Pittman*, 149 N.C. App. 756, 766, 561 S.E.2d 560, 567, *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608, *appeal dismissed*, 356 N.C. 163, 568 S.E.2d 609 (2002). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that

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it was so arbitrary that it could not have been the result of a reasoned decision.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

A. Best Interests

Respondents contend that the trial court erred in ordering it was in the children’s best interests for them to be placed outside the home. The trial court incorporated the WCHS Court Summary into its dispositional order and found that “[t]his Court has considered the evidence in the afore described Court Summary . . . and finds credible and factually sufficient evidence to support the disposition herein.” As the Court Summary contained the facts as noted above regarding the incident in which Aaron was hit with a board by respondent-mother, and respondents’ decision to not seek appropriate medical treatment for either the injury or Aaron’s other medical conditions, we conclude that the trial court did not abuse its discretion in concluding that it was not in the best interests of the children to return home. *See id.*

B. Conditions on Respondents

Respondents argue that the trial court erred by requiring them “to comply with a number of conditions which had nothing to do with the conditions which led to the children’s removal” from the home including: (1) following recommendations of mental health assessments and taking prescribed medications; (2) completing a substance abuse evaluation, submitting to random drug screens, and complying with any recommendations; (3) providing copies of any lease or deed of any new residence; (4) providing documentation of employment or income; (5) maintaining contact with WCHS and notifying the social worker of any change of circumstances within five days of any change; and (6) following the recommendations of a “CME” (child medical evaluation) completed on 3 July 2012. (Original in all caps.) Respondent-father goes so far as to contend that the trial court did not have jurisdiction for the conditions it imposed.

North Carolina General Statute § 7B-904 provides that

(c) At the dispositional hearing or a subsequent hearing the court may determine whether the best interests of the juvenile require that the parent . . . entrusted with the juvenile’s care undergo psychiatric, psychological, or other treatment or counseling directed toward remedial or remedying behaviors or conditions that led to or contributed to the juvenile’s adjudication or to the court’s decision to remove custody of the juvenile from

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the parent . . . entrusted with the juvenile's care. If the court finds that the best interests of the juvenile require the parent . . . entrusted with the juvenile's care undergo treatment, it may order that individual to comply with a plan of treatment approved by the court or condition legal custody or physical placement of the juvenile with the parent . . . entrusted with the juvenile's care upon that individual's compliance with the plan of treatment. . . .

. . . .

(d1) At the dispositional hearing or a subsequent hearing, the court may order the parent . . . served with a copy of the summons pursuant to G.S. 7B-407 to do any of the following:

. . . .

(3) Take appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent[.]

N.C. Gen. Stat. § 7B-904(c), (d1)(3) (2011).

The children here were initially removed primarily for respondents' issues with domestic violence. Requiring respondent-mother and/or respondent-father to receive and comply with recommendations of mental health assessments, medical professionals supplying prescription medications, substance abuse evaluations, and drug screens is reasonably related to aiding respondents in remedying the conditions which led to the children's removal; all of these requirements assist respondents' in both understanding and resolving the possible underlying causes of respondents' domestic violence issues. Providing copies of deeds or leases, of employment or income, and notifying WCHS of any changes in circumstances is also a reasonable requirement upon respondents as it is a manner in which both WCHS can stay in contact with respondents and ensure that they are making progress toward having their children returned home.² Lastly, following the then pending recommendations of

2. Though respondents cite *In re W.V.*, 204 N.C. App. 290, 693 S.E.2d 383 (2010), for the proposition that it is unreasonable to inquire about their employment as it is not reasonably related to the reason the children were removed from their home, we note that this case is distinguishable because in *In re W.V.*, the respondent was required "to obtain and maintain stable employment[.]" whereas here respondents have merely been asked to provide documentation of employment or income they may obtain or receive. *Id.* at 297, 693 S.E.2d at 387.

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[227 N.C. App. 518 (2013)]

the CME conducted by Safe Child is certainly reasonably related to why the children were removed. This argument is overruled.

IV. Indian Child Welfare Act

[3] Lastly, respondents contend that the trial court erred by failing to comply with the notice requirements of the Indian Child Welfare Act because the “children have an affiliation with a Native American group and that they are part Cherokee and part Black Foot.” “The burden is on the party invoking the [Indian Child Welfare] Act to show that its provisions are applicable to the case at issue, through documentation or perhaps testimony from a tribe representative.” *In re C.P.*, 181 N.C. App. 698, 701-02, 641 S.E.2d 13, 16 (2007). WCHS’s Court Summary notes that “it was reported by the parents during the CPC that the children do have affiliation with a Native American group, per the parents report that they are part Cherokee and part Blackfoot.” On 2 July 2012, the trial court filed an “ORDER ON NEED FOR CONTINUING NON-SECURE CUSTODY AND NOTICE OF NEXT HEARING” (“non-secure custody order”) finding as fact “[t]hat the father believes there may be a family connection to a registered Native American group. WCHS will conduct the proper investigation.” Although the trial court did not order WCHS to conduct an investigation or provide any particular notice, the non-secure custody order does indicate the need for further investigation. The mere belief by respondent-father as to “a family connection to a registered Native American group” would normally not meet the burden of triggering the ICWA notification, *see id.*, but in this case, based upon the evidence before it, the trial court specifically found as fact that WCHS should conduct an investigation.

The Indian Child Welfare Act (the Act), passed by Congress in 1978, is intended to regulate placement and custody proceedings involving Indian children in order to strengthen and preserve Native American families and culture. In North Carolina, in order for the Act to apply, a proceeding must first be determined to be a child custody proceeding as defined by the Act itself, and it must then be determined that the child in question is an Indian child of a federally recognized tribe. The burden is on the party invoking the Act to show that its provisions are applicable to the case at issue, through documentation or perhaps testimony from a tribe representative.

According to the Act,

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In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

These requirements of notice and time for preparation allow an Indian tribe to intervene in a pending custody proceeding in order to provide for placement with an Indian family or guardian if possible.

Additionally, an Indian child's tribe shall have a right to intervene at any point in the proceeding of any State court concerning the foster care placement of an Indian child. The Act further provides that, even after the conclusion of the proceedings, the tribe may petition any court of competent jurisdiction to invalidate any action for foster care placement or termination of parental rights under State law upon a showing that such action violated the sections of the Act that outline the proper procedures to follow.

Id. at 701-02, 641 S.E.2d at 16 (citations, quotation marks, ellipses, and brackets omitted).

There is no dispute that this proceeding is an "involuntary proceeding in a State court[;]" the question is whether "the court knows or has reason to know that an Indian child is involved[.]" *Id.* Based upon the non-secure custody order, it appears that the trial court had at least some reason to suspect that an Indian child may be involved as the trial court specifically found that WCHS "will conduct the proper investigation." Though from the record before us we believe it unlikely that Frank and Aaron are subject to the ICWA, we prefer to err on the side of caution

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by remanding for the trial court to determine the results of the WCHS “investigation” and to ensure that the ICWA notification requirements, if any, are addressed as early as possible in this proceeding, to avoid any future delays in establishing a permanent home for Frank and Aaron which could result from a failure to comply with the IWCA, since failure to comply could later invalidate the court’s actions. *See id.*

V. Conclusion

For the foregoing reasons, we affirm in part and remand in part.

AFFIRMED IN PART and REMANDED IN PART.

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

IN RE E.H., N.H.

No. COA13-273

Filed 4 June 2013

1. Appeal and Error—appealability—jurisdiction—child abuse and neglect

The Court of Appeals denied Buncombe County Department of Social Services’s motion to dismiss the appeal in a child abuse and neglect case for lack of jurisdiction. The trial court had jurisdiction to consider its own jurisdiction. Further, the trial court’s order denying the guardian *ad litem*’s motion under N.C.G.S. § 1A-1, Rule 60(b) was appealable under both N.C.G.S. § 7B-1001(a)(1) and (2).

2. Civil Procedure—juvenile petitions—voluntary dismissal—Rule 60(b)

For purposes of a juvenile petition, a voluntary dismissal is a “proceeding” that may be the subject of a motion under N.C.G.S. § 1A-1, Rule 60(b). Thus, the trial court correctly concluded in a child abuse and neglect case that a Rule 60(b) motion was the proper avenue to challenge Buncombe County Department of Social Services’s voluntary dismissal.

3. Civil Procedure—juvenile petitions—Rule 60—voluntary dismissal without prejudice—Rule 41

The trial court did not err by denying a guardian *ad litem*’s

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[227 N.C. App. 525 (2013)]

N.C.G.S. § 1A-1, Rule 60(b) motion for relief from the voluntary dismissal without prejudice filed by Buncombe County Department of Social Services (BCDSS) purporting to dismiss the juvenile petitions. BCDSS had the legal authority prior to an adjudicatory hearing to voluntarily dismiss the petition it had filed. The application of N.C.G.S. § 1A-1, Rule 41(a)(1)(i) to the adjudication of abuse, neglect, and dependency advances the purposes of the Juvenile Code and is not contrary to any provisions of the Code.

Appeal by Guardian Ad Litem from Order entered 25 October 2012 by Judge Ward D. Scott in District Court, Buncombe County. Heard in the Court of Appeals 8 May 2013.

Hanna Frost Honeycutt, for appellee Buncombe County Department of Social Services.

Richard Croutharmel, for appellee respondent-mother.

Wyrick Robbins Yates & Ponton LLP by Tobias S. Hampson, for appellee respondent-father.

Michael N. Tousey, for appellant Guardian ad Litem and the Juveniles.

STROUD, Judge.

The Guardian ad Litem (GAL), representing the juveniles E.H. (“Eliot”) and N.H. (“Neil”),¹ appeals from an order entered 25 October 2012 denying his Rule 60(b) motion for relief from the voluntary dismissal without prejudice filed by Buncombe County Department of Social Services (BCDSS) purporting to dismiss the juvenile petitions as to Eliot and Neil. For the following reasons, we affirm the trial court’s order.

I. Background

On 24 May 2012, BCDSS filed juvenile petitions alleging that respondent-father had sexually abused Eliot and Neil. Before a hearing to adjudicate the allegations was held, BCDSS voluntarily dismissed the juvenile petitions without prejudice on 13 August 2012. On 24 August 2012, the GAL appointed to represent the juveniles moved to schedule

1. To protect the privacy of the juveniles and for ease of reading, we will refer to them by pseudonym.

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an adjudication and disposition hearing, arguing that BCDSS was not authorized to dismiss the petitions. The trial court held a hearing on the motion and determined that the proper avenue to challenge the voluntary dismissal was a motion under N.C. Gen. Stat. § 1A-1, Rule 60(b) (2011), and asked the GAL to re-file his motion under that rule. The GAL filed his motion for relief from the dismissal under Rule 60(b) on 25 October 2012. The trial court denied the motion by order entered 7 December 2012. In that order, the trial court concluded that BCDSS had the authority to voluntarily dismiss juvenile petitions and deemed the dismissal effective. The GAL filed notice of appeal from the order on 18 December 2012.

II. Appellate Jurisdiction and Motion to Dismiss Appeal

[1] First, we must address the question of whether we have jurisdiction to consider the present appeal. BCDSS has filed a motion to dismiss the appeal with this Court. BCDSS argues that we do not have jurisdiction because the voluntary dismissal deprived the trial court of jurisdiction to enter its order denying the GAL's Rule 60(b) motion. BCDSS also argues that the GAL is not entitled to appeal from this order under N.C. Gen. Stat. § 7B-1001(a)(1) or (2).

When the record clearly shows that subject matter jurisdiction is lacking, the Court will take notice and dismiss the action *ex mero motu*. Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction.

Lemmerman v. A.T. Williams Oil Co., 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986) (citations omitted).

The question raised by the GAL's Rule 60(b) motion was whether the voluntary dismissal was void and the juvenile proceeding continued or whether BCDSS's voluntary dismissal was effective, thereby ending the jurisdiction of the trial court. *See In re O.S.*, 175 N.C. App. 745, 749, 625 S.E.2d 606, 609 (2006) ("Without the juvenile petition, the trial court no longer had any jurisdiction over the case."). The trial court had jurisdiction to consider its own jurisdiction; therefore, we are not required to dismiss the appeal on that ground. *Lemmerman*, 318 N.C. at 580, 350 S.E.2d at 86; *cf. McClure v. County of Jackson*, 185 N.C. App. 462, 469, 648 S.E.2d 546, 550 (2007) ("This Court is required to dismiss an appeal *ex mero motu* when it determines the lower court was without jurisdiction to decide the issues." (citation omitted)).

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Second, we hold that the trial court's order denying the GAL's motion under Rule 60(b) is appealable under both N.C. Gen. Stat. § 7B-1001(a)(1) and (2). That statute permits appeal from "[a]ny order finding absence of jurisdiction," and "[a]ny order, including the involuntary dismissal of a petition, which in effect determines the action and prevents a judgment from which appeal might be taken." N.C. Gen. Stat. § 7B-1001(a)(1), (2)(2011). The order at issue here determined that BCDSS's voluntary dismissal of the juvenile petition was effective, thus depriving the trial court of jurisdiction, and preventing a final judgment on the merits "from which appeal might be taken." *Id.* Therefore, the order is appealable.

The GAL timely filed written notice of appeal from the trial court's order denying its Rule 60(b) motion. BCDSS does not argue that the order is interlocutory as there are no remaining claims or parties to the action. Therefore, we properly have jurisdiction to consider the merits of the appeal and deny the motion to dismiss.

III. Rule 60(b) Motion

[2] We must next consider whether a Rule 60(b) motion is the proper avenue to "reopen a case" after a voluntary dismissal. This Court has previously answered that question both in the affirmative, *Carter v. Clowers*, 102 N.C. App. 247, 252, 401 S.E.2d 662, 665 (1991) ("[W]e believe G.S. § 1A-1, Rule 60(b), Relief from Judgment or Order, provides a permissible method to reopen this case."), and the negative, *Troy v. Tucker*, 126 N.C. App. 213, 215, 484 S.E.2d 98, 99 (1997) ("[R]elief from a voluntary dismissal is not available pursuant to Rule 60(b), because no relief is sought from an order, judgment, or proceeding as contemplated by the Rule."). One difference between *Carter* and *Troy* lies in whether the voluntary dismissal was taken with prejudice, as in *Carter*, or without prejudice, as in *Troy*. *Carter*, 102 N.C. App. at 250, 401 S.E.2d at 664; *Troy*, 126 N.C. App. at 215, 484 S.E.2d at 99. Moreover, in *Robinson v. General Mills Restaurants, Inc.*, we questioned whether a voluntary dismissal without prejudice could be subject to a Rule 60(b) motion and implied that it could not as it was not a final judgment. 110 N.C. App. 633, 636-37, 430 S.E.2d 696, 698 (1993), *disc. rev. dismissed as improvidently granted*, 335 N.C. 763, 440 S.E.2d 274 (1994). In *Bradley v. Bradley*, however, we applied the rule from *Carter* despite the fact that the dismissal was without prejudice. *Bradley v. Bradley*, 206 N.C. App. 249, 252, 254, 697 S.E.2d 422, 425, 426 (2010). In *Bradley*, we specifically approved of the use of a Rule 60(b) motion to challenge whether a party had the authority to voluntarily dismiss an action. *Id.* at 254, 697 S.E.2d at 426.

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Bradley, Troy, and Robinson are to some extent conflicting. One of the reasons for the apparent conflict is likely the different types of cases and procedural issues presented in each case. We need not resolve this conflict here, however. “[T]he Rules of Civil Procedure apply only when they do not conflict with the Juvenile Code and only to the extent that the Rules advance the purposes of the legislature as expressed in the Juvenile Code.” *In re L.O.K.*, 174 N.C. App. 426, 431, 621 S.E.2d 236, 240 (2005) (citations omitted). *Bradley, Troy, and Robinson* are not juvenile cases, and juvenile cases do exhibit legal and procedural differences from other types of civil proceedings in which there are parties with clearly opposing interests and each party may assert various claims and counterclaims. The purpose of a proceeding dealing with the abuse, neglect, or dependency of a juvenile is entirely different from the interests involved in a case in which a plaintiff is seeking to obtain a monetary judgment against a defendant to remedy some sort of wrong. Our legislature has declared the purposes of juvenile proceedings for abuse, neglect, and dependency, in N.C. Gen. Stat. § 7B-100. Those purposes are:

- (1) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents;
- (2) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family.
- (3) To provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles’ needs for safety, continuity, and permanence; and
- (4) To provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents.
- (5) To provide standards, consistent with the Adoption and Safe Families Act of 1997, P.L. 105-89, for ensuring that the best interests of the juvenile are of paramount consideration by the court and that when it is not in the juvenile’s best interest to be returned home,

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the juvenile will be placed in a safe, permanent home within a reasonable amount of time.

N.C. Gen. Stat. § 7B-100 (2011).

The tension between the cases mentioned above hinges on whether the dismissal was with prejudice or without and the factual context of the particular case. In the juvenile context, the distinction between a dismissal with prejudice and without prejudice is largely immaterial. No judgment or order is ever truly “final” in the juvenile context if the trial court retains jurisdiction, at least until the juvenile attains the age of majority. Indeed, a voluntary dismissal, assuming *arguendo* it is effective, is more final in this context than any order on the merits, in that the court cannot act in the matter after a voluntary dismissal, *In re O.S.*, 175 N.C. App. at 749, 625 S.E.2d at 609, but can after a disposition or custody order. Therefore, we hold that for purposes of a juvenile petition, a voluntary dismissal is a “proceeding” that may be the subject of a motion under Rule 60(b) and that the trial court correctly concluded that a Rule 60(b) motion was the proper avenue to challenge BCDSS’s voluntary dismissal.

IV. DSS Authority to Voluntarily Dismiss Juvenile Petition

[3] We now turn to the central issue on appeal: Can DSS voluntarily dismiss a petition after it is filed and before an adjudicatory hearing? The GAL argues that BCDSS did not have authority to voluntarily dismiss the petition because the jurisdiction of the district court can only be terminated by one of the methods mentioned in N.C. Gen. Stat. § 7B-200 (2011) and that the trial court erred and abused its discretion in concluding otherwise. For the following reasons, we affirm the trial court’s order.

A. Standard of Review

“Appellate review of an order ruling on a Rule 60(b) motion is limited to whether the trial court abused its discretion.” *Bradley*, 206 N.C. App. at 254, 697 S.E.2d at 426. “An abuse of discretion occurs only upon a showing that the judge’s ruling was so arbitrary that it could not have been the result of a reasoned decision.” *State v. McCallum*, 187 N.C. App. 628, 633, 653 S.E.2d 915, 919 (2007) (citation and quotation marks omitted). “By definition, a court abuses its discretion when it makes an error of law.” *United States v. Ebersole*, 411 F.3d 517, 526 (4th Cir. 2005) (citation and quotation marks omitted).

The only question presented in this appeal is whether the trial court erred in concluding that BCDSS had the legal authority to voluntarily

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dismiss the juvenile petition once filed. Stated otherwise, we must decide whether Rule 41(a)(1)(i) of the Rules of Civil Procedure permits the voluntary dismissal of a juvenile petition. This question is purely one of law. It also appears to be an issue of first impression in North Carolina.

B. Analysis

In proceedings under the Juvenile Code, “the Rules of Civil Procedure apply only when they do not conflict with the Juvenile Code and only to the extent that the Rules advance the purposes of the legislature as expressed in the Juvenile Code.” *In re L.O.K.*, 174 N.C. App. at 431, 621 S.E.2d at 240 (citations omitted). There is no statutory provision that clearly either permits or forbids DSS from voluntarily dismissing a juvenile petition, although the statutes do clearly set forth the authority of DSS to file a juvenile petition. N.C. Gen. Stat. § 7B-302 (2011).

The GAL primarily argues that allowing DSS to voluntarily dismiss a juvenile petition contravenes N.C. Gen. Stat. § 7B-201(a), which provides that “[w]hen the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first.” N.C. Gen. Stat. § 7B-201(a) (2011).

We disagree with the GAL’s interpretation. This provision makes clear that a trial court has continuing jurisdiction over the juvenile to conduct periodic reviews, even after it enters an order that might be considered a final order on the merits in another context. *See, e.g., In re H.S.F.*, 177 N.C. App. 193, 199, 628 S.E.2d 416, 420 (2006) (holding that the trial court retained jurisdiction to conduct periodic reviews, even after it restored custody to a parent). Section 7B-201(a) does not address the power of county departments of social services, generally the only entity entitled to file juvenile petitions, to dismiss the petition once filed.²

The GAL also argues that allowing DSS to dismiss a petition “thwarts all of the duties of a Guardian ad litem and leaves juveniles unprotected.” Under N.C. Gen. Stat. § 7B-601, the duties of the GAL in abuse, neglect, and dependency proceedings are premised on the existence of a juvenile petition. *See* N.C. Gen. Stat. § 7B-601(a) (2011) (“When in a petition a juvenile is alleged to be abused or neglected, the court shall appoint a guardian ad litem to represent the juvenile.”). Although the role of the

2. The district attorney has the power to review a DSS director’s determination not to file a petition and may instruct the director to file a petition. N.C. Gen. Stat. § 7B-306 (2011).

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GAL in juvenile proceedings is unquestionably important, that role does not include initiating a proceeding for abuse, neglect, and dependency. Had the legislature intended to allow the GAL to prosecute such claims independently, it could have authorized the GAL to file juvenile petitions. As it stands, the statutes place that responsibility on the county departments of social services.

Respondent-mother argues that permitting DSS to voluntarily dismiss petitions is contrary to the Juvenile Code in that the only provision in the Code that mentions voluntary dismissal is N.C. Gen. Stat. § 7B-308(b)(1).³ That section applies when a “physician or administrator of a hospital, clinic, or other medical facility” suspects that they are treating an abused juvenile. N.C. Gen. Stat. § 7B-308(a)(2011). In that situation, the physician or administrator must report the suspected abuse to the director of social services. *Id.* Where it is the opinion of the treating physician that certain treatment is necessary for the juvenile, the parent refuses, and the department files a petition and seeks a nonsecure custody order, the petition and nonsecure custody order “shall come on for hearing under the regular provisions of this Subchapter unless the director and the certifying physician together voluntarily dismiss the petition.” N.C. Gen. Stat. § 7B-308(b)(1). Respondent-mother argues that the mention of voluntary dismissal in this subsection shows that voluntary dismissal only applies to petitions brought under that subsection and implies that they are not otherwise permissible.

Instead of supporting mother’s argument, this provision actually undermines it. N.C. Gen. Stat. § 7B-308(b)(1) recognizes that a two entities which have statutory authority to initiate the proceeding addressing medical need—DSS and the certifying physician—also have the authority to dismiss the petition, if both are in agreement that dismissal is warranted. For example, if the parent consents to and provides the needed medical care upon filing of the petition and there are no other issues to be addressed, DSS and the certifying physician may determine that there is no need to proceed with a hearing upon the petition and dismiss it.

3. At the hearing on the GALs Rule 60(b) motion, respondent-mother argued in favor of the motion, but did not formally join in the motion. She also did not file a notice of appeal from the order denying the motion. On appeal, she again argues in favor of the motion and contends that we should reverse the trial court’s order. Thus, although she has labeled herself an appellee, she effectively is arguing as an appellant. Although we would normally not consider the arguments of an appellant who did not file notice of appeal, given the novel procedural posture and the fact that she is requesting the same relief as the GAL, we will consider her arguments.

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We believe the proper inference is that drawn by BCDSS—that normally only DSS needs to consent to a voluntary dismissal, but that in the medical need context, the physician must also consent. The physician plays a unique role under the provisions of § 7B-308. It is in that context alone that the physician gets to decide along with the director of social services whether to voluntarily dismiss a petition. Thus, section 7B-308(b)(1) operates as a limit on the general power of DSS to voluntarily dismiss petitions, not as a limited grant of power.

Permitting DSS to voluntarily dismiss a juvenile petition under Rule 41 does not contradict the continuing jurisdiction provision of N.C. Gen. Stat. § 7B-201(a), the GAL provisions in N.C. Gen. Stat. § 7B-601, or the medical treatment provisions under N.C. Gen. Stat. § 7B-308. Therefore, we must next consider whether voluntary dismissals advance the purposes of the Juvenile Code.

There are two cases in which this Court has discussed the effects of a voluntary dismissal of petitions under the Juvenile Code. In *L.O.K.*, we decided that a party is not precluded from filing a subsequent petition to terminate parental rights after a voluntary dismissal, even if that dismissal was taken after the petitioner rested its case. *In re L.O.K.*, 174 N.C. App. at 432-33, 621 S.E.2d at 240-41. We concluded that preventing a petitioner from filing a subsequent petition after dismissal would be contrary to the need for a hearing under the Juvenile Code and “would be antithetical to a child’s best interests because it would result in no permanent plan of care for the child.” We did not, however, address the propriety of a voluntary dismissal.

In *In re O.S.*, we held that the voluntary dismissal of a juvenile petition deprived the trial court of jurisdiction to enter a permanent custody order. *In re O.S.*, 175 N.C. App. at 749, 625 S.E.2d at 609. Although we did not address whether DSS had authority to dismiss the petition to terminate parental rights, as that issue was apparently not argued, the voluntary dismissal of the petition in *O.S.* would have been void, and therefore of no legal effect, if DSS had no authority to dismiss the petition. *See Bradley*, 206 N.C. App. at 254, 697 S.E.2d at 426. Although both of these cases touched on the issue before us, neither directly addressed it.

BCDSS contends that allowing it to dismiss juvenile petitions advances the purposes of the Juvenile Code. It argues that allowing voluntary dismissal protects the rights of juveniles and parents by allowing the disposition of petitions if DSS realizes prior to an adjudicatory hearing that there is insufficient evidence to support the allegations, prevents the wasting of limited court resources by requiring unnecessary

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hearings, and “prevent[s] the unnecessary or inappropriate separation of juveniles from their parents.” N.C. Gen. Stat. § 7B-100(4) (2011). Additionally, BCDSS argues that foreclosing voluntary dismissal could have a chilling effect on the filing of juvenile petitions. We agree.

DSS is charged by statute with investigating allegations of abuse, neglect, and dependency, and filing a juvenile petition where appropriate. *See generally* N.C. Gen. Stat. § 7B-302. Indeed, where DSS concludes that abuse or neglect did not occur prior to filing a juvenile petition, it does not have the power to invoke the jurisdiction of the court under N.C. Gen. Stat. §§ 7B-302(c) and (d). *In re S.D.A.*, 170 N.C. App. 354, 361, 612 S.E.2d 362, 366 (2005). If DSS initially concludes that there was abuse, neglect, or dependency, and files a petition, it “has the burden, at the adjudicatory hearing stage, to prove neglect and dependency by clear and convincing evidence.” *In re Evans*, 81 N.C. App. 449, 452, 344 S.E.2d 325, 327 (1986) (citation omitted). Neither the GAL nor the parents of the juvenile can file a juvenile petition. Neither has any burden at the adjudication hearing. Only the district attorney has the power to review the decision of the director of social services not to file a juvenile petition if abuse, neglect, or dependency has been alleged. N.C. Gen. Stat. §§ 7B-305, 7B-306. The legislature has thus entrusted DSS with the duty to determine whether allegations of abuse, neglect, or dependency are credible and what action to take, subject to only limited review. Requiring the GAL or the parents to consent to a voluntary dismissal would impermissibly shift this responsibility away from DSS.

There are undoubtedly situations in which DSS receives what initially appear to be credible allegations, files a petition, and then discovers that the evidence underlying the allegations is so weak as to not merit proceeding. In that situation, it is appropriate for DSS to dismiss the petition. Doing so avoids unnecessary periods of family separation and unnecessary burdens on the juveniles and their family. It also allows DSS to devote its limited resources and staff to dealing with other abused, neglected, or dependent juveniles who need protection.

The GAL also argues that jurisdiction of the court can be terminated only by the court’s order because this is the only way to protect the children. He argues that this case

is unusual in that the parents disagree whether abuse has occurred and thus the respondent mother is willing to weigh in on the side of protecting the child. But if the appellees’ argument is accepted, neither the mother nor child will have any opportunity to be heard in juvenile

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court. For the child, who has no standing to bring a custody action, there would be no recourse whatsoever.

We disagree that this is an “unusual situation”; it would actually be more unusual for a father to agree with a mother’s allegations that he has sexually abused a child.

We also disagree that the child is left without protection. Our statutes actually provide numerous avenues for protection of children from abuse. In the most serious situations, there is the possibility that any number of different criminal charges based upon abuse or neglect of a child will be lodged against the alleged abuser. In the civil context, even if the juvenile court no longer has jurisdiction over this particular proceeding, if BCDSS were to receive another report of abuse and were to determine that another petition should be filed, it can do so. In addition, a parent who believes the other parent is abusing a child has the option of to file a complaint seeking custody pursuant to N.C. Gen. Stat. § 50-13.1 (2011), including a motion for an emergency custody order if necessary to protect the child, see N.C. Gen. Stat. § 50-13.1(a), or to file a complaint seeking a domestic violence protective order under N.C. Gen. Stat. § 50B-1, in this case pursuant to 50B-1(a)(3). Although we express absolutely no opinion as to whether any such actions would be justified in this case, we simply note that our General Assembly has provided many different avenues for the protection of children from abuse, although not all avenues are necessarily open in every case.

Respondent-mother next seeks to analogize her claims to a counterclaim as might be filed in a non-juvenile proceeding under N.C. Gen. Stat. § 1A-1, Rule 13 (2011). She argues that the juveniles and the parents “have . . . necessarily asserted ‘affirmative relief’ when they are brought into the action,” and DSS therefore cannot dismiss a petition without the consent of all parties. *See McCarley v. McCarley*, 289 N.C. 109, 112, 221 S.E.2d 490, 492 (1976) (noting that a plaintiff is not permitted to voluntarily dismiss his suit if “the defendant has set up some ground for affirmative relief or some right or advantage of the defendant has supervened, which he has the right to have settled and concluded in the action. If the defendant sets up a counterclaim arising out of the same transaction alleged in the plaintiff’s complaint, the plaintiff cannot take a nonsuit without the consent of the defendant; but if it is an independent counterclaim, the plaintiff may elect to be nonsuited and allow the defendant to proceed with his claim.” (citation and quotation marks omitted)). Affirmative relief is “that for which the defendant might maintain an action entirely independent of plaintiff’s claim, and which he might proceed to establish and recover even if plaintiff abandoned his

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cause of action.” *Id.* at 113-14, 221 S.E.2d at 493-94 (citation, quotation marks, and ellipses omitted).

Respondent-mother’s argument is unconvincing. Only DSS may file juvenile petitions and DSS must prove its case by a higher standard of proof than that used in other types of custody matters-clear and convincing evidence. Although the parents and the GAL may present evidence and argument, they have no right to seek affirmative relief in a juvenile proceeding like that available in a counterclaim. All authority of the trial court in this context arises out of the juvenile petition. See N.C. Gen. Stat. § 7B-200; *In re O.S.*, 175 N.C. App. at 749, 625 S.E.2d at 609. Respondent-mother points to no provisions for “counter-claims” or “cross-claims” by the parents or GAL and we have found no such statutory authority.

Those concerned that a juvenile might be abused, neglected, or dependent are entitled to report such concerns to the local DSS. If DSS determines that there is not sufficient evidence of abuse, neglect, or dependency to file a petition, and the concerned individual is a parent, as noted above, there are other types of legal actions that the parent can take to seek custody and/or protection of the child. No statute allows the GAL to file a juvenile petition independent of DSS. Therefore, neither the GAL nor the other parent can seek affirmative relief in the juvenile proceeding sufficient to function as a “counterclaim” that would deprive DSS of its ability to voluntarily dismiss a juvenile petition. See *McCarley*, 289 N.C. at 113-14, 221 S.E.2d at 493-94.

We conclude that permitting DSS to voluntarily dismiss juvenile petitions under N.C. Gen. Stat. § 1A-1, Rule 41, is not contrary to any provision of the Juvenile Code, but actually advances the purposes of the Code and is consistent with the unique authority and duties granted to DSS by the Juvenile Code. Because BCDSS had the legal authority prior to an adjudicatory hearing to voluntarily dismiss the petition it had filed, we hold that the trial court did not abuse its discretion in denying the GAL’s Rule 60(b) motion.

V. Conclusion

In conclusion, we affirm the trial court’s order denying the GAL’s motion under Rule 60(b) challenging BCDSS’s authority to voluntarily dismiss a juvenile petition. The trial court correctly concluded that it had jurisdiction to consider the GAL’s Rule 60(b) motion, that Rule 60(b) was the proper avenue to challenge the voluntary dismissal, and that BCDSS had the authority to voluntarily dismiss the petition under N.C. Gen. Stat. § 1A-1, Rule 41(a)(1)(i). The application of Rule 41(a)(1)

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(i) to the adjudication of abuse, neglect, and dependency advances the purposes of the Juvenile Code and is not contrary to any provisions of the Code.

AFFIRMED.

Judges HUNTER, Robert C. and ERVIN concur.

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No. COA13-35

Filed 4 June 2013

1. Child Abuse, Dependency, and Neglect—permanent plan—notice—waiver

The trial court did not err in a juvenile abuse and neglect case by adopting a temporary permanent plan at the adjudication hearing and a permanent plan at the disposition hearing for the juveniles without giving respondents notice of its intent to create a permanent plan as required by N.C.G.S. § 7B-907(a). To the extent that the adjudication order adopted a temporary permanent plan without notice, the alleged error was rendered harmless by the trial court's entry of a permanent plan at disposition. Furthermore, respondents waived their right to notice by attending the disposition hearing in which the permanent plan was created, participating in the hearing, and failing to object to the lack of notice.

2. Child Abuse, Dependency, and Neglect—ceasing reunification efforts—findings—related to conclusion

The trial court did not err in a juvenile abuse and neglect case by ceasing reunification efforts with respondent-mother without making findings that such efforts would be futile or would be inconsistent with the children's health, safety, and need for a safe, permanent home within a reasonable period of time. The unchallenged findings of fact were related by the trial court to a conclusion of law that specifically set forth the basis for ceasing reunification efforts under N.C.G.S. § 7B-507(b).

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3. Child Abuse, Dependency, and Neglect—visitation plan—insufficient

The trial court erred in a juvenile abuse and neglect case by failing to adopt a proper visitation plan in accordance with N.C.G.S. § 7B-905(c). The plan provided in the disposition order did not sufficiently set forth the time, place, or conditions of respondent-father's visitation. The issue was remanded to the trial court.

Appeal by respondents from orders entered 13 June 2012 and 11 October 2012 by Judge Charlie Brown in Rowan County District Court. Heard in the Court of Appeals 8 May 2013.

Assistant Appellate Defender Joyce L. Terres for respondent-appellant mother.

Ryan McKaig for respondent-appellant father.

Rowan County Department of Social Services, by Cynthia Dry, petitioner-appellee.

Parker Poe Adams & Bernstein LLP, by Katie M. Iams, for guardian ad litem.

HUNTER, Robert C., Judge.

Respondent-mother, M.F., appeals from the trial court's order adjudicating her minor child J.P. ("Jane") to be abused and neglected.¹ Respondent-mother and respondent-father, J.F., (collectively "respondents") appeal from the trial court's order adjudicating their minor child P.F. ("Penny") to be neglected. Respondents also appeal from the disposition order which ceased reunification efforts by DSS and entered a permanent plan as to Penny and Jane. After careful review, we affirm the adjudication order. As to the disposition order, we affirm in part and reverse in part.

Background

The Rowan County Department of Social Services ("DSS") filed a

1. "Penny" and "Jane" are pseudonyms used to protect the identity of the minor children. Respondent-mother, M.F., and respondent-father, J.F., are the parents of the minor child Penny. Respondent-mother and J.P. are the parents of the minor child Jane; however, the father, J.P., is not a party to this appeal.

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juvenile petition on 20 February 2012 alleging that Penny was a neglected juvenile and that Jane was an abused and neglected juvenile. A non-secure custody order was entered for both children on the same day.

On 10 May 2012, respondents and Jane's father, J.P., signed a consent order acknowledging that Penny and Jane were neglected juveniles and that Jane was an abused juvenile based on clear, cogent, and convincing evidence. On the same day, the trial court entered an adjudication order which created a concurrent plan of reunification with respondent-mother and custody/or guardianship with a family member or court-approved caretaker as a temporary permanent plan for the children. The order also provided that a dispositional hearing was to be scheduled for August 2012.

At the dispositional hearing, the trial court considered the testimony of seven witnesses and the written recommendations of DSS and the children's guardian ad litem ("GAL"). The trial court concluded that efforts to reunite the children with respondents would be futile and inconsistent with the children's safety and their need for a permanent home within a reasonable period of time. In its order entered 11 October 2012, the trial court ruled that reunification efforts should cease and set a permanent plan of custody or guardianship of Penny and Jane with a relative or court-approved caretaker. Custody of the children remained with DSS, and the trial court ordered that a permanency planning review was to be calendared for December 2012. Respondents filed notices of appeal from the trial court's orders. Acknowledging that their notices did not comply with the Rules of Appellate Procedure, respondents also filed petitions for writ of certiorari. Although we granted DSS's motions to dismiss respondents' appeals, we granted respondents' petitions for writ of certiorari.

Discussion

Respondents argue that the trial court erred by adopting a temporary permanent plan at the adjudication hearing and permanent plan for Penny and Jane at the disposition hearing without giving respondents the statutorily required notice of its intent to create a permanent plan as required by N.C. Gen. Stat. § 7B-907(a). We disagree.

"We review a dispositional order only for abuse of discretion." *In re B.W.*, 190 N.C. App. 328, 336, 665 S.E.2d 462, 467 (2008). "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *In re A.C.F.*, 176 N.C. App. 520, 522, 626 S.E.2d 729, 732 (2006) (citation and quotation marks omitted).

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N.C. Gen. Stat. § 7B-507(c) (2011) provides, in pertinent part:

When the court determines that reunification efforts are not required or shall cease, the court shall order a plan for permanence as soon as possible, *after providing each party with a reasonable opportunity to prepare and present evidence*. If the court's determination to cease reunification efforts is made in a hearing that was *duly and timely noticed as a permanency planning hearing*, then the court may immediately proceed to consider all of the criteria contained in G.S. 7B-907(b), make findings of fact, and set forth the best plan of care to achieve a safe, permanent home within a reasonable period of time. If the court's decision to cease reunification efforts arises in any other hearing, the court shall schedule a subsequent hearing within 30 days to address the permanent plan in accordance with G.S. 7B-907.

(Emphasis added.) N.C. Gen. Stat. § 7B-907(a) further provides that when the trial court conducts a permanency plan hearing “[t]he clerk shall give 15 days’ notice of the hearing and its purpose to the parent . . . indicating the court’s impending review.”

The adjudication order purports to enter a “temporary permanent plan” of reunification of Penny and Jane with respondent-mother concurrent with custody or guardianship with a family member or other court-approved caretaker. Although respondents contend it was error for the trial court to enter the “temporary permanent plan” at adjudication without providing notice of its intent to do so, we conclude that respondents cannot demonstrate any prejudice by this alleged error. *See In re H.T.*, 180 N.C. App. 611, 613-14, 637 S.E.2d 923, 925 (2006) (“[I]n general, technical errors and violations of the Juvenile Code will be found to be reversible error only upon a showing of prejudice by respondents.”). To the extent that the adjudication order did so without notice, the alleged error was rendered harmless by the trial court’s entry of a permanent plan at disposition. As discussed below, respondents did not object to the creation of the permanent plan in the disposition order.

As to the disposition hearing, respondents contend they were provided no notice of the trial court’s intent to enter a permanent plan, which is required by section 7B-907(a). However, in *In re J.S.*, 165 N.C. App. 509, 514, 598 S.E.2d 658, 662 (2004), this Court held that a party waives its right to notice under section 7B-907(a) by attending the hearing in

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which the permanent plan is created, participating in the hearing, and failing to object to the lack of notice. *See also In re C.W.*, __ N.C. App. __, 723 S.E.2d 582 (No. COA11-1325) (2012) (unpublished) (concluding that the respondent-mother waived her right to notice that a permanent plan would be created in a hearing scheduled only for adjudication and disposition where the mother and her counsel attended and participated in the hearing without objecting to the lack of notice required by N.C. Gen. Stat. § 7B-907(a)).

The transcript from the 6 September 2006 disposition hearing establishes that the trial court announced its finding that reunification would be inconsistent with Penny's and Jane's safety and announced its intent to enter a permanent plan without objection by respondents:

THE COURT: The [c]ourt . . . further bases [i]ts decision to issue a disposition with a permanent plan of custody to [sic] guardianship.

Further for the Department?

[Counsel for DSS]: No, your Honor. Thank you.

THE COURT: Further for the guardian?

[Counsel for GAL]: Thank you.

THE COURT: Further for Respondents?

[Counsel for respondents]: No, your Honor.

THE COURT: Thank you.

It is apparent that respondents and their counsel attended and participated in the disposition hearing in which the trial court announced its intention to enter a permanent plan, and they did not object to the trial court's failure to give the notice required by section 7B-907(a). In accordance with our holding in *In re J.S.*, respondents waived any objection to lack of notice of a hearing on a permanent plan, and their argument is overruled.

II. Findings of Fact

[2] Respondent-mother contends the trial court erred in ceasing reunification efforts without making findings that such efforts would be futile or would be inconsistent with the children's health, safety, and need for a safe, permanent home within a reasonable period of time. We disagree.

In a dispositional order, a trial court may direct

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that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:

(1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]

N.C. Gen. Stat. § 7B-507(b)(1). "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007).

Respondent-mother contends the trial court's order does not make an ultimate finding relating to the two prongs in N.C. Gen. Stat. § 7B-507(b)(1), that: (1) attempted reunification efforts would be futile or (2) reunification would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time. In *In re I.R.C.*, ___ N.C. App. ___, ___, 714 S.E.2d 495, 498 (2011), we reversed the trial court's order ceasing reunification because the trial court there recited allegations against the respondent but did not "link" any of those allegations to the two prongs of section 7B-507(b)(1). We contrasted the order at issue in *In re I.R.C.* with orders upheld by this Court as meeting the statutory requirements upon the basis that "the trial court in those cases related the findings to a conclusion of law that specifically set forth the basis for ceasing reunification efforts under N.C. Gen. Stat. § 7B-507(b)." *Id.*

Here, the trial court's order contains the following findings of fact:

60. . . . [Respondent-mother] continues to live with [respondent-father] even though she understands that [Jane] cannot be placed with her since [respondent-father] has a no contact order with [Jane], and [respondents] have not complied with the court's order.

61. Based upon [respondent-father's] guilty plea to Misdemeanor Child Abuse in district court, his violation or [sic] probation after having been serving probation only about ninety days, the changing intentions of reconciliation between [respondents], and the substantial risk to [Jane and Penny] if reunified with

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[respondents], a permanent plan of custody or guardianship represents the safest and most appropriate permanent plan for the juveniles.

...

65. It would be contrary to the best interests and welfare of the juveniles to be returned to the custody of [respondents] since the issue of child abuse has not yet been addressed by [respondents].

These findings are not challenged by respondents as lacking competent evidentiary support, and they are therefore binding on appeal. *In re L.A.B.*, 178 N.C. App. 295, 298, 631 S.E.2d 61, 64 (2006).² These findings of fact support the trial court's ultimate conclusion: "Continuing a plan of reunification for the juveniles is futile *based on the findings at adjudication and those enumerated above* and is inconsistent with the juveniles' safety and their need for a permanent home within a reasonable period of time." (Emphasis added.) Thus, the trial court "related the findings to a conclusion of law that specifically set forth the basis for ceasing reunification efforts under N.C. Gen. Stat. § 7B-507(b)[,]" *In re I.R.C.*, ___ N.C. App. at ___, 714 S.E.2d at 498, and respondent-mother's argument is overruled.

III. Visitation Plan

[3] Respondent-father argues, and GAL agrees, that the trial court failed to adopt a proper visitation plan in accordance with N.C. Gen. Stat. § 7B-905(c) as the plan provided in the disposition order does not sufficiently set forth the time, place, or conditions of respondent-father's visitation with Penny. We agree.

Pursuant to the Juvenile Code, "[a]ny dispositional order . . . under which the juvenile's placement is continued outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905(c) (2009). "An appropriate visitation plan *must provide for a minimum outline of visitation, such*

2. We note that respondent-mother challenges the second finding contained in finding No. 65—that the trial court found that the Family Reunification Assessment yields a high risk of harm to the juveniles if they are returned to respondents' home. However, she does not challenge the first finding that the issue of child abuse has not been addressed by respondents.

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as the time, place, and conditions under which visitation may be exercised.” In re E.C., 174 N.C. App. 517, 523, 621 S.E.2d 647, 652 (2005).

In re S.C.R., __ N.C. App. __, __, 718 S.E.2d 709, 713 (2011) (emphasis added).

In *In re T.B.*, 203 N.C. App. 497, 508-09, 692 S.E.2d 182, 189-90 (2010), we concluded that the provisions in the trial court’s dispositional order regarding visitation were inadequate. The order provided that the mother’s visitation with her children would be left to the discretion of the treatment team, must be supervised, and that the visitations must adhere to the rules established by DSS. *Id.* We remanded the order to the trial court for the entry of additional findings and conclusions regarding the time, place, and conditions under which visitation could be exercised. *Id.*; see also *In re W.V.*, 204 N.C. App. 290, 295, 693 S.E.2d 383, 387 (2010) (remanding for proceedings to clarify the respondent’s visitation rights with her child where the trial court’s order provided that the “respondent shall have weekly visitations supervised by [DSS]”); *In re I.S.*, 209 N.C. App. 470, 708 S.E.2d 214 (No. COA10-902) (2011) (unpublished) (concluding provisions of the trial court’s order regarding visitation were inadequate where the order provided that respondent was “entitled to at least two visits per month” that were to take place at the home of the child’s caregiver).

Here, the trial court’s order provides that DSS “shall offer supervised visitation” for respondent-father with Penny “every-other week” and that visitation will be reduced to once a month if respondent-father “acts inappropriately during a visitation or does not attend a visit” without prior notice. Based on this Court’s holdings in *In re T.B.*, in *In re W.V.*, and in *In re I.S.*, we reverse and remand that portion of the disposition order regarding respondent-father’s visitation with Penny. We remand for the entry of additional findings and conclusion as to the time, place, and conditions of an appropriate visitation plan.

Conclusion

Respondents waived their right to notice of the trial court’s intent to enter a permanent plan, as required by N.C. Gen. Stat. §§ 7B-507(c) and 7B-907(a). The trial court’s decision to cease reunification efforts in its 11 October 2012 disposition order is supported by sufficient findings of fact. We reverse and remand that portion of the disposition order regarding respondent-father’s visitation with Penny for the making of additional findings and conclusions as to the time, place, and conditions

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of an appropriate visitation plan. The remainder of the disposition order is affirmed.

The 13 June 2012 adjudication order is **AFFIRMED**.

The 11 October 2012 disposition order is **AFFIRMED** in part and **REVERSED** in part.

Judges **STROUD** and **ERVIN** concur.

GEORGE KING, D/B/A GEORGE'S TOWING AND RECOVERY, PLAINTIFF

v.

TOWN OF CHAPEL HILL, DEFENDANT

No. COA12-1262

Filed 4 June 2013

1. Cities and Towns—towing ordinance—enabling authority

A local towing ordinance was a valid exercise of a town's police power under N.C.G.S. § 160A-174(a), which is ambiguous and therefore interpreted broadly. A town has no inherent police power and may exercise only such powers that are conferred by the General Assembly. Where the authorizing language is ambiguous, a broad construction is used, but the plain meaning is used where there is no ambiguity. A thorough review of the towing ordinance in this case and N.C.G.S. § 160A-174(a) led to the holding that the ordinance covered a proper subject for regulation under the town's police power, and the trial court's order permanently enjoining the towing ordinance was reversed.

2. Constitutional Law—challenge to ordinance—no citation issued

In an action to enjoin a towing ordinance and a mobile phone ordinance (because tow truck drivers used mobile phones in their business), the trial court erred by permanently enjoining enforcement of the mobile phone ordinance where plaintiff was not subject to a manifest threat of irreparable harm. The constitutionality of the ordinance should be left to be tested when a citation is issued; plaintiff must test the ordinance in the context of his own case.

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Appeal by Defendant from Order and Judgment entered 9 August 2012 by Judge Orlando F. Hudson, Jr., in Orange County Superior Court. Heard in the Court of Appeals 11 March 2013.

Stark Law Group, PLLC, by Thomas H. Stark, for Plaintiff.

Ralph D. Karpinos and Matthew J. Sullivan for Defendant.

North Carolina League of Municipalities, by Kimberly S. Hibbard and Gregory F. Schwitzgebel III, as amicus curiae.

STEPHENS, Judge.

Factual Background and Procedural History

This case arises from the enactment of two ordinances by the Town of Chapel Hill (“Defendant” or “the Town”). The ordinances involve the regulation of towing practices and mobile phone usage. Plaintiff George King operates a towing business in the Town under the name “George’s Towing and Recovery” and filed a complaint against the Town on 2 May 2012, requesting (1) a judgment declaring the ordinances invalid and (2) preliminary and permanent injunctions barring their enforcement.

The trial court issued a temporary restraining order that same day and, six days later, ordered a preliminary injunction against enforcement of the ordinances. On 4 June 2012, Defendant filed its amended answer. On 15 June and 18 June 2012, respectively, Defendant and Plaintiff moved for judgment on the pleadings, alleging that there were no material issues of fact and judgment was proper as a matter of law. The case was heard on 2 August 2012. On 9 August 2012, the trial court issued its order and judgment granting Plaintiff’s request to permanently enjoin enforcement of the ordinances. In its order, the trial court made the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

....

2. Defendant . . . enacted a towing ordinance, . . . which came into effect May 1, 2012, hereinafter “the Towing Ordinance.”

....

4. Defendant . . . also enacted an ordinance prohibiting the use of mobile phones while driving a motor vehicle, . . .

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which was to become effective June 1, 2012, hereinafter “the Mobile Phone Ordinance.”

....

9. [The Towing Ordinance] sets a fee schedule, regulates the method of payment, and includes extensive sign and notice requirements for private lots, as well as specifications for a tow storage lot which the Chapel Hill Police Department will inspect once per year All towing operators are required to comply with this ordinance at the risk of civil and criminal penalties.

....

11. To comply with [the Towing Ordinance], Plaintiff is required to use a telephone to report to the police department when he removes an illegally parked vehicle before the vehicle is removed from the private property.

12. It is the nature of Plaintiff’s business to operate from trucks that are constantly driving to carry out their duties to their clients, to check the businesses’ parking lots, check video equipment, and to tow and travel to release vehicles.

13. The use of a mobile phone by Plaintiff’s drivers is necessary to make the required phone calls to the police department while in their vehicles.

14. [B]ecause of Plaintiff’s mobile business, he must be able to use his mobile phone to respond to inquiries regarding vehicles that have been towed and need to be released.

15. [The Mobile Phone Ordinance] prohibits use of a mobile phone, either handheld or hands-free, while driving a vehicle.

16. Plaintiff will suffer irreparable harm if Defendant is allowed to enforce [the Towing Ordinance] and [the Mobile Phone Ordinance] due to the threat of prosecution for violation of any notice requirements or use of a mobile phone while driving, which is a necessary part of his business.

....

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CONCLUSIONS OF LAW

. . . .

3. Article II[,] §[24 (1)(j)] of the North Carolina Constitution states: “The General Assembly shall not enact any local, private, or special act or resolution: [r]egulating labor, trade, mining[,] or manufacturing[.]”

4. The relevant enabling statute for the Towing Ordinance is N.C.[Gen. Stat.] § 20-219.2. Defendant has conceded that [section 219] is a local law.

5. “Trade,” as used in Article II[,] §[24[,] . . . has been defined . . . as “a business venture for profit and includes any employment or business embarked in for gain or profit[.]”

6. [Section 219] and the [Towing Ordinance] . . . regulate trade within the meaning of [Article II, § 24(1)(j)].

7. Because [section 219] is a local law regulating trade, it violates [Article II, § 24(1)(j)].

. . . .

9. In the absence of [section 219], the Town[] has not been granted the authority to regulate towing from the General Assembly.

10. Plaintiff will suffer irreparable harm if Defendant is allowed to enforce [the Towing Ordinance] and [the Mobile Phone Ordinance] due to the threat of prosecution for violation of any notice requirements or use of a mobile phone while driving, which is a necessary part of his business.

. . . .

12. The North Carolina General Assembly has enacted general laws regulating the use of mobile phones by all North Carolina drivers by proscribing the use of cell phones for texting and other media . . . , by prohibiting all use of cell phones by drivers under 18 years of age . . . , and by prohibiting all use of cell phones by anyone operating a school bus

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13. In regulating mobile phone usage . . . , the General Assembly has enacted a comprehensive scheme of mobile phone regulation.

14. As a result . . . , the authority of [the Town] to enact the Mobile Phone Ordinance is preempted, and therefore the ordinance is void, and without force and effect.

. . . .

16. As a result of the foregoing, Plaintiff is entitled to a declaratory judgment entering the conclusions set forth herein and a permanent injunction preventing enforcement of [the Towing Ordinance] and [the Mobile Phone Ordinance].

Accordingly, the trial court determined that (1) N.C. Gen. Stat. § 20-219.2 is unconstitutional, (2) the Towing Ordinance is unconstitutional as an application of section 219, and (3) the Mobile Phone Ordinance is unconstitutional as preempted by State law enacted by the General Assembly. The court permanently restrained enforcement of both ordinances, and this appeal followed.

Standard of Review

Conclusions of law and issues of statutory construction are reviewed *de novo* on appeal. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted); *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) (citation omitted). “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) (citation and quotation marks omitted).

“When a party moves for judgment on the pleadings, he admits the truth of all well-pleaded facts in the pleading of the opposing party and the untruth of his own allegations insofar as they are controverted by the pleadings of the opposing party.” *Pipkin v. Lassiter*, 37 N.C. App. 36, 39, 245 S.E.2d 105, 106 (1978) (citation omitted).

[We review] a trial court’s grant of a motion for judgment on the pleadings *de novo*. Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain.

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Carpenter v. Carpenter, 189 N.C. App. 755, 757, 659 S.E.2d 762, 764–65 (2008) (citations and quotation marks omitted).

Discussion

On appeal, the Town argues (1) that the Towing Ordinance is a lawful exercise of its general police power or, in the alternative, that section 219 is a constitutional grant of authority sufficient to support the Towing Ordinance; and (2) that the trial court erred by addressing the Mobile Phone Ordinance in its order because Plaintiff is not subject to an imminent threat of irreparable harm or, if Plaintiff is subject to an imminent threat of irreparable harm, that the Mobile Phone Ordinance is authorized by the Town's general police power. We find the Town's primary arguments persuasive and decline to address either section 219 or the enforceability of the Mobile Phone Ordinance.

I. The Towing Ordinance

[1] In support of its contention that the Towing Ordinance is enforceable via the Town's general police power, Defendant cites to sections 160A-174(a) and 160A-194 of the North Carolina General Statutes as enabling legislation. We agree that the Towing Ordinance is a valid exercise of the Town's police power under section 174(a) and refrain from addressing its validity under section 194.

A. Municipal Authority to Enact Legislation

The North Carolina Constitution declares that "the legislative power of the State shall be vested in the General Assembly," N.C. Const. art. II, § 1, which "may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable." N.C. Const. art. VII, § 1. Accordingly, "[i]t is a well-established principle that municipalities, as creatures of statute, can exercise only that power which the legislature has conferred upon them." *Bellsouth Telecomms., Inc. v. City of Laurinburg*, 168 N.C. App. 75, 80, 606 S.E.2d 721, 724 (citations and quotation marks omitted), *disc. review denied*, 359 N.C. 629, 615 S.E.2d 660 (2005) [hereinafter *Bellsouth*]. Therefore, "[a] city or town in this State has no inherent police power. It may exercise only such powers as are expressly conferred upon it by the General Assembly or as are necessarily implied from those expressly so conferred." *Town of Conover v. Jolly*, 277 N.C. 439, 443, 177 S.E.2d 879, 881 (1970).

In order to determine whether the legislature intended section 174(a) to authorize cities and towns to implement towing regulations like the

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one here, we rely on established canons of statutory construction. “The polar star of statutory construction is that the intent of the legislature controls. That intent must be found from the language of the act, its legislative history[,] and the circumstances surrounding its adoption[,] which throw light upon the evil sought to be remedied [by the statute].” *Multimedia Publ’g of N.C., Inc. v. Henderson Cnty.*, 136 N.C. App. 567, 570, 525 S.E.2d 786, 789 (citation and quotation marks omitted), *disc. review denied*, 351 N.C. 474, 543 S.E.2d 492 (2000). “To determine legislative intent, a court must analyze the statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish.” *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998). “A construction which operates to defeat or impair the object of the statute must be avoided [where possible]. An analysis . . . must be done in a manner which harmonizes with the underlying reason and purpose of the statute.” *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991).

“Early in our history, [the Supreme Court] broadly construed the State’s grant of legislative authority to municipalities.” *Lanvale Props., LLC v. Cnty. of Cabarrus*, __ N.C. __, __, 731 S.E.2d 800, 808 (2012) [hereinafter *Lanvale*]. This changed in the 1870s, when the “[Supreme] Court adopted a more restrictive approach known as ‘Dillon’s Rule.’” *Id.* at __, 731 S.E.2d at 809. Dillon’s Rule is named for Judge John Dillon of Iowa, who proclaimed in a 19th-century treatise on municipal law that:

It is a general and undisputed proposition of law[] that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in *express words*; second, those *necessarily or fairly implied in or incident to* the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation.

Smith v. City of Newbern, 70 N.C. 14, 18 (1874) (emphasis in original); see also David W. Owens, *Local Government Authority to Implement Smart Growth Programs*, 35 Wake Forest L. Rev. 671, 680–82 (2000) (providing a detailed history of the law regarding local government authority in North Carolina); see generally 1 John F. Dillon, *The Law of Municipal Corporations* ch. V, § 55, at 173 (2d ed. 1873), available at <http://books.google.com/books?id=QeQ9AAAAIAAJ&pg=PA173#v=onepage&q&f=false> (“[The municipal corporation may only possess those powers that are] not simply convenient, but indispensable. Any fair, reasonable doubt

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concerning the existence of power is resolved by the courts against the corporation, and the power is denied.”).

In 1971, however, the General Assembly implicitly overruled Dillon’s Rule by enacting chapter 160A.¹ *Bellsouth*, 168 N.C. App. at 82–83, 606 S.E.2d at 726 (“The narrow Dillon’s Rule of statutory construction used when interpreting municipal powers has been replaced by N.C. Gen. Stat. § 160A-4’s mandate that the language of Chapter 160A be construed in favor of extending powers to a municipality”); *see also Lanvale*, __ N.C. at __, 731 S.E.2d at 809 (noting that, unlike Dillon’s Rule, “section 160A established a legislative mandate that [the appellate courts must] construe in a broad fashion the provisions and grants of power conferred upon municipalities”) (citation and quotation marks omitted).

In chapter 160A, the legislature made the following pronouncement regarding how courts should construe its various grants of legislative authority to municipalities:

ARTICLE 1.

[] STATUTORY CONSTRUCTION.

. . . .

§ 160A-4. Broad construction.

It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and *grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect*: Provided[] that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State.

N.C. Gen. Stat. § 160A-4 (2011) (emphasis added) [hereinafter section 4].

1. An early iteration of Chapter 160A sought to abrogate Dillon’s Rule explicitly, providing in its statement of policy that “the rule of construction commonly called ‘Dillon’s Rule,’ by which cities are held to possess only those powers expressly conferred by law or necessarily to be implied from some specific grant of power, shall not be followed[.]” H.B. 153, § 160A-4 (as referred to the House Committee on Local Government, 5 February 1971).

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*B. Judicial Interpretation of Authority
Granted to Municipalities After 1971*

Our Supreme Court has since determined that section 4 “makes it clear that the provisions of [C]hapter 160A and of city charters *shall* be broadly construed and . . . grants of power *shall* be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry [those provisions] into execution and effect.” *Homebuilders Ass’n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 43–44, 442 S.E.2d 45, 50 (1994) (emphasis in original) [hereinafter *Homebuilders*]. Accordingly, “[w]e treat this language as a legislative mandate that we are to construe in a broad fashion the provisions and grants of power contained in Chapter 160A.” *Id.* at 44, 442 S.E.2d at 50 (citations and quotation marks omitted).

Despite the language in *Homebuilders*, our Supreme Court has failed to broadly construe grants of power to cities and towns with uniformity. Specifically, when the language of a municipal statute is unambiguous, the Court has directed that such language “must be enforced as written.” *Bowers v. City of High Point*, 339 N.C. 413, 419–20, 451 S.E.2d 284, 289 (1994) (citation omitted). In *Bowers*, our Supreme Court allowed the City of High Point to void a contract between itself and certain early-retired police officers as *ultra vires* on grounds that the city did not have the statutory authority to contract with them and pay a separation allowance. *Id.* at 426, 451 S.E.2d at 293. In coming to that determination, the *Bowers* Court — after citing to both Dillon’s Rule and section 4 of Chapter 160A — used a plain meaning analysis of the relevant statutory language. *Id.* at 418–23, 451 S.E.2d at 288–91 (noting that the relevant language “has a definite meaning not subject to alteration by local governments”).

In *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 517 S.E.2d 874 (1999) [hereinafter *Smith Chapel*], decided approximately five years after *Bowers*, the Supreme Court again used a plain meaning construction to interpret certain municipal statutes. *Id.* Employing that construction, the Court determined that the City of Durham had the authority to implement a stormwater management program only to the extent that it involved “those *systems* of physical infrastructure, structural or natural, for servicing stormwater.” *Id.* at 812, 517 S.E.2d at 879 (emphasis added). Given that limitation, the Court struck down the city’s stormwater program as exceeding “the express limitation of the plain and unambiguous reading of the statute[.]” *Id.* Justice Frye authored a dissenting opinion in that case. Joined by two other justices, Justice Frye argued for application of the broad mandate prescribed in section

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4 on grounds that the word “system” in “stormwater drainage system” is impliedly ambiguous, and section 4 should have been used to allow the city to execute its stormwater program. *Id.* at 819–21, 517 S.E.2d at 883–84 (Frye, J., dissenting) (citing *Homebuilders*, 336 N.C. at 42, 442 S.E.2d at 49) (“Any ambiguity in the meaning of the term ‘stormwater and drainage *system*’ must be resolved in favor of enabling municipalities to execute the duties imposed upon them by [law].”).

Six years later, in 2005, we declined to use the plain meaning construction described in *Bowers* and *Smith Chapel* when interpreting certain sections of Chapter 160A. Instead, we relied on *Homebuilders* to hold that the City of Laurinburg had been granted sufficient authority under Chapter 160A to operate a fiber optics network. *Bellsouth*, 168 N.C. App. at 83–87, 606 S.E.2d at 726–28. We found in *Bellsouth* that the alleged legislative grant of authority — which defined certain authorized public enterprises as, *inter alia*, “[c]able television systems” — was ambiguous. *Id.* (citing N.C. Gen. Stat. § 160A-311(7)). Specifically, we noted that the term “cable television systems” is defined by statute as “any system or facility that . . . by wires or cables alone, receives, . . . transmits, or distributes any . . . electronic signal, audio or video or both, to [subscribers].” N.C. Gen. Stat. § 160A-319(b); *see also Bellsouth*, 168 N.C. App. at 86, 606 S.E.2d at 728 (“[T]he language of the statute is ambiguous as to whether the fiber optic network run by [the city] falls within [the statute’s] contours.”). Accordingly, we applied the broad construction required by section 4 to our interpretation of the relevant statutory sections and ruled that the city was acting within its municipal authority even though “[the] fiber optics network was most likely not something the legislature envisioned in 1971 when [it] enacted the statute allowing a municipality to operate a [cable television system] as a public enterprise.” *Id.* (noting, however, that the system — if it had existed in 1971 — would likely have been authorized through those “additional and supplementary powers that are reasonably necessary or expedient” under section 4).

Most recently, in *Lanvale*, our Supreme Court determined that the language of certain zoning statutes was unambiguous and, thus, that the county-equivalent of section 4 did not apply to their interpretation. *Lanvale*, __ N.C. at __, 731 S.E.2d at 810. The relevant statutes in that case (1) provided that county zoning ordinances may “regulate and restrict” certain specific qualities of buildings and real property “or [regulate and restrict] other purposes” and (2) listed those specific “public purposes” that could be regulated, providing that the ensuing regulations should “be designed to promote the public health, safety, and general welfare.”

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Id. at ___, 731 S.E.2d at 808; *see also* N.C. Gen. Stat. § 153A-340(a), -341 (2011). Using a plain meaning analysis, the Court held that the statutes at issue did not give the county implied authority to enact a public facilities ordinance, citing the maxim that “a county’s zoning authority cannot be exercised in a manner contrary to the express provisions of the zoning enabling authority.” *Lanvale*, ___ N.C. at ___, 731 S.E.2d at 810 (citing *Cnty. of Lancaster, S.C. v. Mecklenburg Cnty.*, N.C., 334 N.C. 496, 509, 434 S.E.2d 604, 613 (1993)) (quotation marks omitted).

Justice Hudson authored a dissenting opinion in that case, joined by Justice Timmons-Goodson, in which she argued for the implementation of a broad interpretation under the county-equivalent of section 4. *Id.* at 818–28 (Hudson, J., dissenting). In response, the Court asserted that the language of the statutes already provides “clear guidance.” *Id.* at ___, 731 S.E.2d at 810 (“[The dissent’s] argument overlooks the fact that the plain language of [the statutes] provides *clear guidance* to counties regarding the extent of their zoning powers. Accordingly, [the statutes] simply cannot be employed to give authority to county ordinances that do not fit within the parameters set forth in the enabling statutes.”) (emphasis added). Importantly, in responding to Justice Hudson’s dissent, the Court implicitly affirmed two different approaches that may be employed when evaluating the validity of a statutory grant of authority to municipal corporations. Citing *Homebuilders* and *Smith Chapel* as examples of those different approaches, the Court stated that *Smith Chapel* was binding on it because the statutory language in *Smith Chapel* was also “clear and unambiguous.” *Id.* at ___, 731 S.E.2d at 811. Therefore, the Court concluded, “absent *specific* authority from the General Assembly, [public facilities ordinances like the one in this case] are invalid as a matter of law.” *Id.* at ___, 731 S.E.2d at 815.

It is important to understand the two different approaches referenced in *Lanvale*. These approaches were clearly laid out in *Bellsouth*, where we interpreted *Homebuilders*, *Bowers*, and *Smith Chapel* to be “consistent statements of the law and in accord with [section 4]” because they applied the broad construction mandate only where the statutory language at issue was ambiguous. *Bellsouth*, 168 N.C. App. at 82, 606 S.E.2d at 726. Reconciling the disparate holdings in those cases, we explained that section 4 should be applied only “where there is an ambiguity in the authorizing language, or [where] the powers clearly authorized [by the legislature] reasonably necessitate ‘additional and supplementary powers’ ‘to carry them into execution and effect.’” However, where the plain meaning of the statute is without ambiguity, it must be enforced as written.” *Id.* at 82–83, 606 S.E.2d at 726 (citations, certain quotation

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marks, brackets, and emphasis omitted); *see also Lanvale*, ___ N.C. at ___, 731 S.E.2d at 810 (concluding that a county-specific provision that is similar to the “broad construction” provision embodied in section 4 only applies when the enabling statute is ambiguous); *see generally Bowers*, 339 N.C. at 417, 451 S.E.2d at 288 (“[Section 4], while reflecting our legislature’s desire that cities should have the authority to exercise the powers conferred upon them, nevertheless clearly reiterates the principle that municipalities have only that power which the legislature has given them.”).

*C. Interpretive Construction
of Section 174(a) of Chapter 160A*

Given the instruction we provided in *Bellsouth*, we must examine section 174(a) in this case by asking: (1) whether the language of N.C. Gen. Stat. § 160A-174(a) is *ambiguous* and, thus, should be analyzed under the broad construction of section 4, or (2) whether it is *unambiguous* and, thus, should be analyzed under our stricter plain-meaning inquiry. We hold that the language of section 174(a) is ambiguous, and, therefore, we apply the General Assembly’s mandated broad construction when interpreting section 174(a).

The Town argues that it was delegated the power to regulate towing by the General Assembly as an element of the general police power granted to municipalities under section 174(a) of Chapter 160A of the North Carolina General Statutes. That section provides as follows:

ARTICLE 8.

**DELEGATION AND EXERCISE OF THE GENERAL
POLICE POWER.**

§ 160A-174. General ordinance-making power.

- (a) A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances.

Relevant to this case, section 177 of Chapter 160A elaborates that “[t]he enumeration in this Article or other portions of this Chapter of specific powers to regulate, restrict or prohibit acts, omissions, and conditions shall not be deemed to be exclusive or a limiting factor upon the *general authority* to adopt ordinances conferred on cities by G.S. [§] 160A-174.” N.C. Gen. Stat. § 160A-177 (emphasis added). In addition,

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our Supreme Court has observed that, “when the legislative body undertakes to regulate a business, trade, or profession [*under section 174(a)*], courts assume it acted within its powers until the contrary clearly appears.” *Smith v. Keator*, 285 N.C. 530, 534–35, 206 S.E.2d 203, 206 (1974) (citations omitted); *see, e.g., Cheek v. City of Charlotte*, 273 N.C. 293, 298, 160 S.E.2d 18, 23 (1968) (“We hold that the occupation of a massagist and the business of massage parlors and similar establishments are proper subjects for regulation under the police power of the City of Charlotte.”).

Unlike the zoning ordinances in *Lanvale*, section 174(a) fails to list specific circumstances where the general ordinance-making power may be employed. Rather, it enables municipalities to regulate the broad categories of “health,” “safety,” and “welfare” to the end of ensuring “peace and dignity” and “defin[ing] and abat[ing] nuisances.” Given the far-reaching meanings contained within these terms, section 174(a) is more akin to the statutes in *Bellsouth* and, as such, ambiguous. Given that conclusion, the broad construction required by the General Assembly in section 4 of Chapter 160A is applicable here.

*D. The Town’s Authority to Implement the Towing Ordinance
Under Section 174(a) of Chapter 160A*

Plaintiff asserts that section 174(a) does not operate as a valid enabling statute for the Towing Ordinance, despite its broad construction, for the following reasons: (1) the “North Carolina Supreme Court summarily rejected this argument made under county equivalents of [section 160A-174]” in *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 581 S.E.2d 415 (2003); (2) the Towing Ordinance does not “fall within the limited statutory prescriptions” of section 174(a) because “[towing on private lots] is not detrimental to the health or safety of the public . . . [and] is not a nuisance that needs to be abated”; (3) the fee provisions of the Towing Ordinance are “in no way related to the health, safety, or welfare of its citizens and the peace and dignity of the [Town]”; (4) the Towing Ordinance violates the right to contract under the North Carolina and United States Constitutions “due to its fee setting provision”; and (5) the Towing Ordinance creates a private cause of action under *Williams* and “cannot be upheld by [section 174].” We are unpersuaded.²

2. We note that, in his explanation of the general law regarding the construction of those statutes delegating the State’s police power to municipalities, Plaintiff relies on decisions of our Supreme Court issued *before 1971, i.e.*, previous to the enactment of Chapter 160A and its mandated “broad construction” under section 4. Plaintiff’s reliance on those legal principles, written under the auspices of Dillon’s Rule, is misplaced.

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Plaintiff's reliance on *Williams* in his first and fifth arguments is erroneous. In that case, our Supreme Court determined, *inter alia*, that a county ordinance, which "creat[ed] a civil relationship and a concomitant private cause of action by one citizen against another," was not authorized by section 174 and the county equivalent of section 174 because the ordinance "substantially exceed[ed] the leeway permitted to individual counties by [those] statutes." *Id.* at 191–92, 581 S.E.2d at 430. Specifically, "[t]he [o]rdsinance [was] enforceable by a private cause of action that permit[ted] those affected [by employment discrimination] to recover injunctive relief, back pay, and compensatory and punitive damages up to \$300,000" from their employers. *Id.* at 175, 581 S.E.2d at 420.

Unlike the ordinance in *Williams*, the Towing Ordinance does not create a private cause of action against those individuals who would violate it. While the Towing Ordinance provides that an offender will be subject "to a civil penalty" if he or she violates the ordinance, there is no language granting a private individual the right to bring suit against the towing party. Indeed, the ordinance clearly states that a conviction for its violation shall result in "a misdemeanor," which is a criminal sanction. Accordingly, Plaintiff's first and fifth arguments are without merit.

We are also unpersuaded by Plaintiff's second argument, that the Towing Ordinance does not fall within the broad construction of section 174(a). At oral argument, the Town commented that the Towing Ordinance requires certain signs to be placed "in an interval of one at every fifth parking space" for the purpose of informing citizens that they may be towed even when they lawfully park at a business and then walk to another business in a different parking lot. *See also* Chapel Hill, N.C., Code ch. 11, art. XIX, § 11-301(a) (2012) (requiring signs every fifth space to include the following phrase when the property owner has adopted a walk-off towing policy: "If you walk[]off this property, you are subject to being towed. This includes patrons who are frequenting business on this property."). The Towing Ordinance also includes a credit card requirement for payment of towing fees, which Defendant states is meant to protect young people who get towed early in the morning and do not have the cash necessary to release their cars at that time of the day. *See id.* at § 11-304(d).

While Plaintiff is correct that "[t]owing on private lots is done and allowed by state law for the purpose of protecting private property," this does not obviate the need to regulate that process when it has become "detrimental to the health, safety, or welfare" of the citizens of the Town. In the "Findings and Intent" section of the Towing Ordinance, the Town

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states that its goal is to “protect[] the health, safety, and welfare of the general public and preserv[e] the public order,” which it found had been threatened by certain “practices related to the non-consensual towing of motor vehicles from private property[.]” *Id.* at § 11-300. The Town also states in its brief that the Towing Ordinance is meant to “ensure that persons are on notice” regarding the towing rules that will be employed in various parking lots throughout Chapel Hill. Further, the Towing Ordinance requires “detailed receipts and a towing information sheet” to provide the public with information on why their vehicles were towed, which “can serve to prevent conflicts between unknowledgeable citizens and tow operators.” *See id.* For these reasons, we hold that the Towing Ordinance falls within the purview of section 174(a).

Third, Plaintiff argues that the fee regulations contained in the Towing Ordinance are invalid because (1) the General Assembly did not explicitly delegate the power to decide “what a reasonable fee is with regard to towing,” as it did with taxicabs, and (2) the fee regulations are “in no way related to the health, safety, or welfare of [the] citizens and the peace and dignity of the [Town].” We are unpersuaded.

The fee regulations state that a towing firm may not charge the owner of a towed vehicle more than the Town’s established fee schedule and must refrain from charging storage fees during “the first twenty-four hour time period from the time the vehicle is initially removed from the private property.” *Id.* at § 11-304(a). The provision also requires towing firms to provide receipt for payment and “[a] clear and accurate reason for the towing and the date and time of the towing.” *Id.* at 11-304(b) (4). Payment must be accepted if it is made by cash, one of at least two major national credit cards supported by the tower, or a debit card.³ *Id.* at 11-304(d). Given these provisions, we conclude that, despite Plaintiff’s protestations, the fee regulations “regulate . . . acts, omissions, or conditions, detrimental to the health, safety, or welfare of [the] citizens [of the Town] and the peace and dignity of the [Town].” Accordingly, the fee regulations are implicitly authorized by the General Assembly under the broad ambit of section 174(a). *See* N.C. Gen. Stat. § 160A-174(a).

Fourth, Plaintiff asserts that the Towing Ordinance’s fee provisions violate his right to contract under the North Carolina and United States constitutions. In support of that point, Plaintiff describes the right to contract, generally, as a protected property right and cites to an opinion

3. As noted above, the credit card provision serves to protect young people in the Town who are towed late at night or early in the morning and lack the ability to pay with cash at that time of day.

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of our Supreme Court, which declares that a statute infringing upon an individual's freedom of contract is invalid "unless the law's benefit to the public outweighs the infringement." *State ex rel. Utils. Comm'n v. Edmisten*, 294 N.C. 598, 611, 242 S.E.2d 862, 870 (1978). Plaintiff then argues that any benefit the Towing Ordinance provides is outweighed by his right to contract, contending that the Towing Ordinance attempts to protect "trespassers who were on notice of their unlawful parking and who stole the particular property owner's rights to that parking space." To the extent that the Towing Ordinance violates Plaintiff's right to contract,⁴ we disagree.

As we have already discussed, *supra*, the Towing Ordinance was enacted to protect the citizens of the Town of Chapel Hill and provides a number of beneficial services to those citizens. In addition, we note that Plaintiff has offered no evidence that the purported "trespassers" are actually on notice of any unlawful parking. Accordingly, we find this argument unpersuasive. As Plaintiff provides no other evidence to support his fourth position, it is overruled.

Thus, after a thorough review of the Towing Ordinance and chapter 160A, we broadly construe section 174(a) of Chapter 160A — as the General Assembly mandated in section 4 of that same chapter — and hold that the Towing Ordinance covers a proper subject for regulation under the Town's police power. Accordingly, the trial court's order as to the Towing Ordinance is reversed. For the foregoing reasons, we need not address the constitutionality of section 219 or whether the Towing Ordinance is authorized under section 194.

II. The Mobile Phone Ordinance

[2] The Town also contends that the trial court erred in permanently enjoining enforcement of the Mobile Phone Ordinance because Plaintiff is not subject to a manifest threat of irreparable harm. We agree.

In pertinent part, the Mobile Phone Ordinance states:

[N]o person 18 years of age or older shall use a mobile telephone or any additional technology associated with a mobile telephone while operating a motor vehicle

4. Plaintiff presents no argument that a contract exists or that the Towing Ordinance violates his particular right to make one. Rather, he cites broad legal principles related to the right to contract and then moves immediately to his "benefit versus infringement" argument.

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This prohibition shall not apply to the use of a mobile telephone or additional technology in a stationary vehicle.

Chapel Hill, N.C., Code ch. 21, art. VII, § 21-64(b). The Mobile Phone Ordinance can only be enforced when “the officer issuing [a] citation has cause to stop or arrest the driver of such motor vehicle for the violation of some other provision of State law or local ordinance relating to the operation, ownership, or maintenance of a motor vehicle or any criminal statute[.]” *Id.* at § 21-64(e).

In issuing the preliminary injunction, which bars enforcement of the Mobile Phone Ordinance, the trial court concluded that Plaintiff would suffer “irreparable harm . . . due to the threat of prosecution for violation of . . . [the] use of a mobile phone while driving [provision], which is a necessary part of his business.” This conclusion is rooted in language from the Towing Ordinance, which requires: (1) that the towing company answer or call back within fifteen minutes of receiving any phone call made to the telephone number that it has posted on certain required notification signs located in the parking lots; and (2) that the tow truck operator who removes the vehicle reports by telephone to the Chapel Hill Police Department (a) the license tag number, (b) a description of the vehicle, (c) the original location of the vehicle, and (d) its intended storage location. Chapel Hill, N.C., Code ch. 11, art. XIX, §§ 11-301(a) (3), 11-305.

Arguing that the trial court erred by addressing the Mobile Phone Ordinance at all, the Town primarily cites two cases: *Lanier v. Town of Warsaw*, 226 N.C. 637, 39 S.E.2d 817 (1946) and *Structural Components Int., Inc. v. City of Charlotte*, 154 N.C. App. 119, 573 S.E.2d 166 (2002). In *Lanier*, our Supreme Court explained the law regarding the issuance of permanent injunctions against municipal ordinances as follows:

It is a general principle of law that injunction does not lie to restrain the enforcement of an alleged municipal ordinance, and ordinarily the validity of such ordinance may not be tested by injunction.

However, this principle is subject to the exception that equity will enjoin a threatened enforcement of an alleged unconstitutional ordinance when it is manifest that otherwise property rights or the rights of persons would suffer irreparable injury.

Lanier, 226 N.C. at 639, 39 S.E.2d at 818 (citations omitted). In *Structural Components*, we further noted that “[c]hallenges to the constitutionality

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of the laws one is charged with violating are best brought within the context of one's own case." *Structural Components*, 154 N.C. App. at 125, 573 S.E.2d at 171.

Relying on those cases, the Town argues that the trial court's order was in error because:

No actual contested case was before the [trial court because Plaintiff had not been charged with violating the Mobile Phone Ordinance]. . . . There is no threatened enforcement of the [Mobile Phone Ordinance] evidenced in the pleadings. [And t]here is no claim in this case to establish any irreparable injury arising out of the implementation of the [Mobile Phone Ordinance].

The Town also points out that "[Plaintiff] could not be cited under the [Mobile Phone Ordinance] unless he already has been stopped by the police for some other valid reason." Even then, a violation would only "constitute an infraction and subject the offender to a \$25.00 penalty. No points or costs could be assessed." *See also* Chapel Hill, N.C., Code ch. 21, art. VII, § 21-64(d). Accordingly, the Town concludes "the constitutionality of this ordinance should be left to be tested . . . when a citation is issued."

In response, Plaintiff argues: (1) that the Mobile Phone Ordinance threatens tow operators' ability to conduct their business, which cannot be done "without the ability to use their cell phones, free from threat of prosecution"; and (2) enforcement of the ordinance would result in "irreparable harm by the inability of [Plaintiff's] drivers to use their cell phones." We disagree.

We find the Town's argument under *Lanier* and *Structural Components* to be persuasive in this case and hold that the trial court erred in concluding that Plaintiff was subject to a manifest threat of irreparable harm through enforcement of the Mobile Phone Ordinance. If Plaintiff wishes to challenge the validity of the Mobile Phone Ordinance, he must do so in the context of his own case. *See id.*

REVERSED.

Chief Judge MARTIN and Judge HUNTER, JR., ROBERT N., concur.

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JEFFREY SMITH, ET AL., PLAINTIFFS
v.
CITY OF FAYETTEVILLE, DEFENDANT

No. COA11-1263-2

Filed 4 June 2013

Constitutional Law—Just and Equitable Tax Clause—privilege license tax increase—unreasonable increase

The trial court erred in a case involving plaintiffs’ challenge to the City of Fayetteville’s (City) ordinance imposing an increased privilege license tax on electronic gaming operations by granting summary judgment in favor of the City and denying plaintiffs’ summary judgment motion. The City’s privilege license tax violated the Just and Equitable Tax Clause because the City’s 8,900% minimum tax increase was wholly detached from the moorings of anything reasonably resembling a just and equitable tax.

Appeal by Plaintiffs from order entered 15 August 2011 by Judge Russell J. Lanier, Jr. in Cumberland County Superior Court. The case was originally heard before this Court on 22 February 2012 and decided on 1 May 2012. *See Smith v. City of Fayetteville (Smith I)*, __ N.C. App. __, 725 S.E.2d 405 (2012). Upon remand by order of the North Carolina Supreme Court filed 12 March 2013. *See Smith v. City of Fayetteville*, __ N.C. __, __ S.E.2d __ (2013).

The Law Offices of Lonnie M. Player, Jr., PLLC, by Lonnie M. Player, Jr., for Plaintiff-appellants.

City Attorney for the City of Fayetteville Karen M. McDonald, Assistant City Attorney for the City of Fayetteville Brian K. Leonard, and Parker, Poe, Adams & Bernstein L.L.P., by Anthony Fox and Benjamin Sullivan, for Defendant-appellee.

HUNTER, JR., Robert N., Judge.

Plaintiffs initially challenged the City of Fayetteville’s (the “City’s”) 2010 ordinance imposing an increased privilege license tax on “electronic gaming operations.”¹ *Smith I*, __ N.C. App. at __, 725 S.E.2d at

1. We acknowledge that on 14 December 2012, our Supreme Court upheld the constitutionality of N.C. Gen. Stat. § 14–306.4 (2011), banning the use of “entertaining displays”

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407. On 15 August 2011, Plaintiffs appealed to this Court from a trial court order: (i) granting summary judgment to the City; and (ii) denying Plaintiffs' summary judgment motion. *Id.* at __, 725 S.E.2d at 408. On appeal, Plaintiffs argued the trial court erred because the ordinance at issue is unenforceable under several legal theories. *Id.* at __, 725 S.E.2d at 409. This Court heard the case on 22 February 2012. *Id.* at __, 725 S.E.2d at 407.

Upon review, we: (i) affirmed in part; and (ii) reversed and remanded in part. *Id.* at __, 725 S.E.2d at 415. First, we affirmed the trial court's order as to all plaintiffs on the issues of whether the privilege license tax: (i) unlawfully classifies and exempts property for taxation; (ii) violates the rule of uniformity; and (iii) is preempted by federal law. *Id.* at __, 725 S.E.2d at 414. Next, for Plaintiffs Tanya Marion, Thi Quoc Tran, Triumph Entertainment, LLC, Tim Moore, Douglas Guy, Danny Dye, Beverly K. Harris, Harris Management Services, Inc., JB & H Consulting, Inc., Charles Shannon Silver, and Randy Griffin, we affirmed the trial court's summary judgment order because the parties did not present sufficient evidence to rebut the presumption that the privilege license tax is reasonable and not prohibitive. *Id.* Lastly, for plaintiffs Jeffrey Smith, Chris Marion, and Crafty Corner, LLC, we reversed the trial court's summary judgment order and remanded for trial because these plaintiffs presented sufficient evidence that the privilege license tax is reasonable and not prohibitory. *Id.*

On 1 June 2012, Plaintiffs filed notice of appeal based on the constitutional question to our Supreme Court. On 12 March 2013, our Supreme Court allowed Plaintiffs' notice of appeal only "for the limited purpose of remanding to the Court of Appeals for reconsideration in light of our decision in *IMT, Inc. v. City of Lumberton*, __ N.C. __, [738 S.E.2d 156] (8 March 2013)." *Smith*, __ N.C. at __, __ S.E.2d at __. In *IMT*, our Supreme Court held a city's privilege license tax violated the Just and Equitable Tax Clause of our state's Constitution. *IMT, Inc. v. City of Lumberton*, __ N.C. __, __, 738 S.E.2d 156, 160 (2013).

Per our Supreme Court's order, we now reconsider the instant case in light of *IMT*. Based on our Supreme Court's holding in *IMT*, we reverse the trial court's entire order and remand for proceedings

in electronic sweepstakes. See *Hest Techs., Inc. v. State ex rel. Perdue*, __ N.C. __, __ S.E.2d __, __ (2012). On 1 March 2013, the United States Supreme Court granted the *Hest* plaintiffs' application to extend time to file a petition for writ of certiorari. *Hest's* ultimate outcome is as yet unknown. In either event, *Hest's* pending outcome does not impact our analysis here since the instant case arose before our Supreme Court's *Hest* decision.

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consistent with this opinion. We further note that to the extent this opinion is inconsistent with our prior opinion filed 1 May 2012, *see Smith I*, __ N.C. App. at __, 725 S.E.2d at 405, the instant opinion modifies and replaces that opinion.

I. Facts & Procedural Background

We adopt the facts and procedural background provided in *Smith I*, __ N.C. App. at __, 725 S.E.2d at 408.

II. Jurisdiction & Standard of Review

We adopt the jurisdiction and standard of review provided in *Smith I. Id.*

Additionally, “[t]he standard of review for alleged violations of constitutional rights is *de novo*.” *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. rev. denied*, 363 N.C. 857, 694 S.E.2d 766 (2010). “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) (quotation marks and citation omitted).

III. Analysis

On appeal to this Court, Plaintiffs argued the City’s privilege license tax is unenforceable because it: (i) unlawfully classifies property for taxation; (ii) unlawfully exempts property for taxation; (iii) violates the rule of uniformity; (iv) lacks a rational basis; (v) imposes an unjust and inequitable taxation scheme; and (vi) is preempted by federal law. Because Plaintiffs’ claims on the first four issues were not appealed to the Supreme Court, we need only address the constitutional question herein. Upon review, we reverse and remand based on Plaintiffs’ constitutional argument.

According to the North Carolina Constitution, “[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.” N.C. Const. Art. V, § 2(1). This provision “is a limitation upon the legislative power, separate and apart from the limitation contained in the Law of the Land Clause in Article I, § 19, of the Constitution of North Carolina, and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.” *Foster v. N.C. Med. Care Comm’n*, 283 N.C. 110, 126, 195 S.E.2d 517, 528 (1973). While North Carolina precedent has thoroughly analyzed the Public Purpose Clause and Contracting Away Clause in Art. V, § 2(1), until recently our courts

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had not defined the exact scope of the Just and Equitable Tax Clause. See *IMT*, __ N.C. at __, 738 S.E.2d at 157.

In *IMT*, our Supreme Court directly addressed the substantive protections of the Just and Equitable Tax Clause. There, four promotional sweepstakes companies challenged a Lumberton city ordinance increasing the privilege license tax on sweepstakes. *IMT*, __ N.C. at __, 738 S.E.2d at 157. The prior tax was a flat rate of \$12.50 per year; the new tax was \$5,000 per business location plus \$2,500 per computer terminal. *Id.* The new minimum tax, \$7,500, constituted a 59,900% increase. *Id.* Since most businesses operated multiple computer terminals, the actual tax increase was as high as 1,100,000%. *Id.* For comparison, the second highest privilege license tax in Lumberton was \$500 for “Circuses, Menageries, Wild West, [and] Dog and Pony Shows.” *Id.* (alteration in original). The companies in *IMT* alleged, *inter alia*, the tax increase violated the Just and Equitable Tax Clause. *Id.*

In *IMT*, this Court originally determined the trial court did not err in granting summary judgment for the city because “[t]he only evidence [the companies] presented [was] the new amount of the privilege license tax on [their] business in comparison to the privilege license tax on [their] business in previous years as well as in comparison to the privilege license tax on other businesses.” *IMT, Inc. v. City of Lumberton*, __ N.C. App. __, __, 724 S.E.2d 588, 596 (2012). Since the companies “presented no additional evidence that the privilege license tax was prohibitive on their particular businesses,” we held they failed to present enough evidence to survive summary judgment. *Id.* However, in *IMT* our Supreme Court reversed our decision.

There, our Supreme Court analogized to jurisprudence under the Public Purpose Clause and the Contracting Away Clause to determine the Just and Equitable Tax Clause created a substantive claim. *IMT*, __ N.C. at __, 738 S.E.2d at 158. The Supreme Court then articulated the delicate balance between protection of the public from unjust taxes and preservation of legislative authority to enact taxes:

“The pervading principle to be observed by the General Assembly in the exercise of [the tax] powers is equality and fair play. It is the will of the people of North Carolina, as expressed in the organic law, that justice shall prevail in tax matters, with equal rights to all and special privileges to none. Of course, it is recognized that in devising a scheme of taxation, some play must be allowed for the joints of the machine.”

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Id. at __, 738 S.E.2d at 159 (quoting *Cnty. of Rockingham v. Bd. of Trs. of Elon Coll.*, 219 N.C. 342, 344–45, 13 S.E.2d 618, 620 (1941))(alteration in original).

In *IMT*, our Supreme Court ultimately determined that:

[w]hile these competing considerations might be difficult to reconcile in nuanced cases, the case at bar is hardly nuanced. Here, the City’s 59,900% minimum tax increase is wholly detached from the moorings of anything resembling a just and equitable tax. If the Just and Equitable Tax Clause has any substantive force, as we hold it does, it surely renders the present tax invalid.

Id. at __, 738 S.E.2d at 160. Consequently, our Supreme Court held “the City of Lumberton’s privilege tax at issue constitutes an unconstitutional tax as a matter of law and the trial court erred in granting summary judgment for the City.” *Id.*

In the instant case, we apply *IMT* to determine whether the City’s privilege license tax violates the Just and Equitable Tax Clause.

Here, the previous privilege license tax was only \$50. *Smith I*, __ N.C. App. at __, 725 S.E.2d at 408. The 2010 ordinance enacted a new privilege license tax on “electronic gaming operations” of \$2,000 per business location and \$2,500 per computer terminal. *Id.* The minimum tax under the ordinance, \$4,500, is a 8,900% increase from the prior \$50 tax. *See id.* Like in *IMT*, the actual tax to businesses is usually significantly higher since they operate multiple computer terminals. For instance, Plaintiff Jeffrey Smith’s business, Hi Rollers Sweepstakes, operates twelve computer terminals. His business was taxed \$32,000 under the new ordinance—almost a 64,000% increase from the previous \$50 tax.

While we acknowledge a 8,900% tax increase is not as substantial as the 59,900% increase in *IMT*, we conclude the 8,900% increase violates the Just and Equitable Tax Clause for the reasons stated in *IMT*. Specifically, the City’s 8,900% “minimum tax increase is wholly detached from the moorings of anything reasonably resembling a just and equitable tax.” *IMT*, __ N.C. at __, 738 S.E.2d at 160. Therefore, it is unconstitutional as a matter of law. *See id.* Without a fully-developed record and given the Supreme Court’s reluctance to further define a methodology for evaluating just and equitable taxation claims, we are unwilling to articulate a methodology similar to the methodology previously adopted by this panel in *Smith I*.

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Consequently, the trial court erred in awarding summary judgment to the City and denying Plaintiffs' motion for summary judgment. As such, we reverse.

IV. Conclusion

For the foregoing reasons, we conclude the City's privilege license tax violates the Just and Equitable Tax Clause of our State's Constitution as a matter of law. As such, we reverse the trial court's order and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

Judges BYRANT and DAVIS concur.

STATE OF NORTH CAROLINA
v.
JONATHAN LYNN BURROW

NO. COA11-773-2

Filed 4 June 2013

Process and Service—introduction of forensic report—statutory notice

A new trial was no longer necessary in an oxycodone trafficking prosecution where the record on remand to the Court of Appeals included a copy of a notice provided by the State that it intended to introduce a forensic analysis report. Defendant did not argue that he did not receive the report, but that the notice was defective because it did not contain proof of service or a file stamp. No such requirement exists in N.C.G.S. § 90-95(g) and the findings of the trial court, which is in the best position to judge whether notice was properly given, were not disrupted. N.C.G.S. § 90-95(g) comports with the requirements of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305.

Appeal by defendant from judgment entered 24 February 2011 by Judge Beverly T. Beal in Lincoln County Superior Court. The case was originally heard before this Court 16 November 2011. *See State v. Burrow*, __ N.C. App. __, 721 S.E.2d 356 (2012). Upon remand by order of the North Carolina Supreme Court, filed 14 December 2012. *See State v. Burrow*, __ N.C. __, 736 S.E.2d 484 (2012).

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Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

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

HUNTER JR., Robert N., Judge.

Jonathan Lynn Burrow (“Defendant”) appealed from his convictions for trafficking in oxycodone. The case was originally heard before this Court 16 November 2011. *See State v. Burrow*, __ N.C. App. __, 721 S.E.2d 356 (2012). Defendant argued that the trial court (1) violated his Sixth Amendment right of confrontation by allowing into evidence a non-testifying analyst’s forensic analysis report (the “SBI report”) and testimony of a detective regarding the results of the SBI report and (2) erred by denying Defendant’s motion to dismiss for lack of substantial evidence to support the charge.

This Court granted a new trial due to the violation of Defendant’s Sixth Amendment right to confrontation. *Id.* at __, 721 S.E.2d at 362. The State filed a petition for writ of supersedeas with our Supreme Court, which was allowed. The State then filed a motion with our Supreme Court to amend the record, asking leave to include a copy of a notice provided under N.C. Gen. Stat. § 90-95 (2011) to Defendant by the State indicating its intent to introduce the SBI report. The existence of the notice was apparently not known to appellate counsel when this case was originally before this Court. Our Supreme Court allowed the motion to amend the record, vacated the 7 February 2012 decision of this Court, and remanded the matter to this Court for reconsideration in light of the amended record. *State v. Burrow*, __ N.C. __, 736 S.E.2d 484 (2012).

After review, we find no error. We adopt the facts and procedural background provided in *Burrow*, __ N.C. App. at __, 721 S.E.2d at 357–58.

Section 90-95(g) of our General Statutes lays out a procedure by which the State can introduce a chemical analysis report regarding a controlled substance without the testimony of the analyst.

Whenever matter is submitted to [an investigatory agency] for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication and without the testimony

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of the analyst in all proceedings . . . as evidence of the identity, nature, and quantity of the matter analyzed. Provided, however, the provisions of this subsection may be utilized by the State only if:

(1) The State notifies the defendant at least 15 business days before the proceeding at which the report would be used of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and

(2) The defendant fails to file a written objection with the court, with a copy to the State, at least five business days before the proceeding that the defendant objects to the introduction of the report into evidence.

N.C. Gen. Stat. § 90-95(g) (2011).

In the present case, the notice pursuant to Section 90-95(g) was not presented to this Court in the original appeal, but the record has been amended to include the notice. We thus evaluate whether the notice was effective under Section 90-95(g) to allow introduction of the SBI report.

The notice provided in the present case says that the State intended to introduce the SBI report and that a copy of the SBI report had been provided to Defendant with discovery material. The notice is dated 27 January 2011 and contains a stamp indicating it is “a true copy” from the superior court case file, but the notice does not have a file stamp. The notice also contains a handwritten notation that says “ORIGINAL FILED,” “COPY FAXED,” and “COPY PLACED IN ATTY’S BOX.”

Defendant does not argue that he did not receive notice. Defendant instead argues that the notice is defective because it does not contain proof of service or a file stamp. Defendant advances a number of theories in his brief: (1) in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), notice and demand statutes cited from other states required filing and service of the notice, so such filing and proof of service of the notice must be required for due process; (2) the notice was not properly served under the Criminal Procedure Act; and (3) our Rules of Civil Procedure require certain methods of service which were not complied with in the present case.

Notice and demand statutes from other states are not binding on North Carolina courts. *See Morton Buildings, Inc. v. Tolson*, 172 N.C. App. 119, 127, 615 S.E.2d 906, 912 (2005) (“[W]hile decisions from other jurisdictions may be instructive, they are not binding on the courts of

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this State.”). To the extent that Defendant argues that such filing and service requirements are mandatory under *Melendez-Diaz*, we disagree. *Melendez-Diaz* provides that “[i]n their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst’s report as evidence at trial, after which the defendant is given a period of time in which he may object.” 557 U.S. at 326. Section 90-95(g) of our General Statutes requires the prosecution to provide notice to a defendant of its intent to use an analyst’s report at least 15 business days prior to the proceeding and gives the defendant until 5 business days prior to the proceeding to object. N.C. Gen. Stat. § 90-95(g). This comports with the requirements in *Melendez-Diaz*. We will not read into *Melendez-Diaz* requirements for filing or service that are not stated in the opinion.

Defendant’s reference to the Criminal Procedure Act only cites the service requirements for motions. *See* N.C. Gen. Stat. § 15A-951 (2011). The notice provided under Section 90-95(g) is not a motion, so the provisions cited by Defendant do not apply. The Rules of Civil Procedure cited by Defendant do not apply to criminal cases.

Defendant seems to argue that we should enforce service requirements from the above-referenced sources even though there are no such statutory requirements governing the notice in this case. We disagree. As long as the trial court finds that notice was provided in accordance with Section 90-95(g), we will not impose additional, non-statutory procedural hurdles to the validity of that notice.

The notice in the present case is dated 27 January 2011, which was more than 15 business days prior to the trial that was held during the 21 February 2011 criminal session of the Lincoln County Superior Court. The notice has a handwritten notation that says “ORIGINAL FILED,” “COPY FAXED,” and “COPY PLACED IN ATTY’S BOX.” Defense counsel admitted at the trial that he had seen the SBI report and did not object to its introduction. During the trial, the trial judge commented that “notice on the use of the report was given, and the report came in absent an objection as required by the statute.” The trial court was in the best position to judge whether notice was properly given. Defendant has not contended that notice was not given, but says the notice was defective because there is no evidence it was formally served and it does not contain a file stamp. As we have found no such requirements in the statute, we will not disrupt the trial court’s finding that notice was given.

Because notice was given under N.C. Gen. Stat. § 90-95(g) that the State would introduce the SBI report without evidence from the analyst,

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and because there was no objection by Defendant to the introduction of that report, a new trial is no longer appropriate. *See State v. Jones*, ___ N.C. App. ___, ___, 725 S.E.2d 910, 913 (2012) (“[T]he grounds on which this Court previously awarded a new trial are no longer applicable.”). The chemical analysis constituted substantial evidence that the substance was a controlled substance and Defendant’s motion to dismiss was properly denied.

NO ERROR.

Judges HUNTER, Robert C., and GEER concur.

 STATE OF NORTH CAROLINA

v.

ANTOINE DAVIS

No. COA12-841

Filed 4 June 2013

Criminal Law—guilty plea—plea agreement—informed choice—felonious breaking and entering—habitual felon

The trial court did not err by accepting defendant’s guilty plea to the charges of felonious breaking and entering and attaining habitual felon status even though defendant contended the plea agreement was not the product of an informed choice. Defendant’s right to appeal from the trial court’s order denying his motion to suppress the use of a prior conviction to establish his habitual felon status was not precluded as a matter of law.

Appeal by defendant from judgment entered 13 October 2011 by Judge Henry W. Hight Jr. in Wake County Superior Court. Heard in the Court of Appeals 12 December 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Lisa G. Corbett, for the State.

Guy J. Loranger for defendant-appellant.

BRYANT, Judge.

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Defendant appeals from a judgment entered upon his guilty plea following denial of his motion to suppress. Defendant challenges this Court's jurisdiction to review his appeal from the trial court order denying his motion to suppress a prior conviction made prior to defendant's plea of guilty to the charges of felonious breaking or entering and attaining habitual felon status. After review, we find no error in the trial court's acceptance of defendant's guilty plea and its ensuing judgment.

On or about 11 July 2011, in Wake County Superior Court, defendant was indicted on the charges of felonious breaking or entering and attaining habitual felon status. Defendant's habitual felon indictment listed three prior felonies: second degree burglary, entered 18 April 1994 in Connecticut Superior Court; breaking or entering, entered 14 February 2006 in Wake County Superior Court; and attempted first degree burglary, entered 14 December 2007 also in Wake County Superior Court.

On 31 October 2011, defendant filed a motion to suppress the use of the 1994 Connecticut felony conviction for second degree burglary to establish defendant's habitual felon status. Defendant's personal affidavit was attached to the motion. That same day, the trial court entered an order denying defendant's motion.

Defendant subsequently entered into a plea agreement wherein defendant agreed to plead guilty to the charges of felonious breaking or entering and attaining habitual felon status. Defendant also reserved the right to appeal from the trial court order denying his motion to suppress. The trial court accepted defendant's guilty plea and entered judgment against him in accordance with the plea agreement. Following entry of judgment, defendant noted his appeal in open court "based on the denial of the motion to suppress."

On appeal, defendant argues that the trial court erred by accepting his guilty plea to the charges of felonious breaking and entering and attaining habitual felon status. Defendant contends that the plea agreement which included the reservation of defendant's right to appeal from the trial court's order denying his motion to suppress, was not the product of an informed choice. Defendant argues that he entered into the plea agreement having reserved the right to appeal from the trial court order denying his motion to suppress the admission of a prior felony conviction. Defendant argues that because this Court lacks the jurisdiction to review the trial court order denying his motion to suppress either by statutory right or writ of certiorari, he cannot receive the benefit of

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his bargain, and the judgment entered pursuant to the plea agreement must be vacated. We disagree.

“A defendant’s right to appeal a conviction is purely statutory.” *State v. Santos*, 210 N.C. App. 448, 450, 708 S.E.2d 208, 210 (2011) (citation and quotations omitted). Pursuant to North Carolina General Statutes, sections 15A-1444 and 15A-979, a defendant may appeal a trial court’s denial of a motion to suppress when the defendant has entered a plea of guilty. *See* N.C. Gen. Stat. § 15A-1444(e) (2011) (“[e]xcept as provided [in pertinent part] in . . . G.S. 15A-979 [Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion]), . . . the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court . . .”). Pursuant to General Statutes, section 15A-979, “[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty.” N.C. Gen. Stat. § 15A-979(b) (2011); *see also*, *State v. Reynolds*, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979) (“[W]hen a defendant intends to appeal from a suppression motion denial pursuant to G.S. 15A-979(b), he must give notice of his intention to the prosecutor and the court before plea negotiations are finalized or he will waive the appeal of right provisions of the statute.”).

Citing N.C.G.S. § 15A-1444, defendant notes that appellate review as a matter of right is precluded when a defendant has entered a plea of guilty in the superior court “[e]xcept as provided [in pertinent part] in . . . G.S. 15A-979[.]” N.C.G.S. § 15A-1444(e). Defendant also acknowledges that N.C.G.S. § 15A-979 provides a right to appeal a trial court’s denial of a motion to suppress evidence upon appeal from a judgment of conviction entered upon a guilty plea. *See* N.C.G.S. § 15A-979(b). However, defendant contends that because his motion to suppress was made pursuant to N.C. Gen. Stat. § 15A-980 (“Right to suppress use of certain prior convictions obtained in violation of right to counsel”), this Court lacks jurisdiction to review the trial court’s denial of defendant’s motion to suppress the use of his prior conviction as section 15A-980 does not specifically provide a right to appeal from a trial court’s denial of a motion to suppress.

Defendant cites the doctrine of *expressio unius est exclusio alterius*, “the expression of one thing is the exclusion of another[.]” as the basis for his argument that there is no right to appeal from the denial of a motion to suppress made pursuant to G.S. § 15A-980. *See Baker*

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v. Martin, 330 N.C. 331, 337, 410 S.E.2d 887, 890-91 (1991) (discussing the doctrine of “*expressio unius est exclusio alterius*” as it applies to interpreting our State Constitution). Defendant also distinguishes G.S. § 15A-980 from G.S. § 15A-979. Defendant points out that pursuant to G.S. 15A-980, a defendant has the right to suppress a prior conviction obtained in violation of his right to counsel

if its use by the State is to impeach the defendant or if its use will:

- (1) Increase the degree of crime of which the defendant would be guilty; or
- (2) Result in a sentence of imprisonment that otherwise would not be imposed; or
- (3) Result in a lengthened sentence of imprisonment.

N.C.G.S. § 15A-980(a). However, defendant contends that because this statute does not allow a trial court to suppress the prior conviction for all purposes, he “could not have sought appellate review of the trial court’s denial of his motion to suppress the State’s use of his 1994 Connecticut conviction as a matter of right.”

We note that defendant does not make a substantive argument on appeal that the trial court erred in denying his motion to suppress the prior conviction, and therefore, we do not directly address it. Instead, defendant challenges the trial court’s acceptance of his guilty plea, stating it “was not the product of an informed choice.” He argues that due to the interplay of the statutes discussed, this Court cannot have jurisdiction to hear an appeal from the denial of his motion to suppress made pursuant to N.C. Gen. Stat. § 15A-980, and therefore, his plea bargain must be vacated. We are not persuaded by defendant’s argument that this Court lacks jurisdiction to review the trial court’s 31 October 2011 order denying defendant’s motion to suppress made prior to his plea of guilty: defendant reserved the right to appeal the trial court’s 31 October 2011 order denying his motion to suppress prior to the finalization of plea negotiations; and gave notice of appeal following entry of judgment of conviction. General Statutes, section 15A-979 provides an appeal of right from such an order. N.C.G.S. § 15A-979(b) (“An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty.”); *see also*, N.C.G.S. § 15A-979 commentary (“This provision is intended to prevent a defendant whose only real defense is the motion to suppress from going through a trial simply to preserve his right of appeal.”).

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In his motion to suppress, defendant cites General Statutes, section 15A-980 as the basis upon which his motion should be granted; however, section 15A-980 does not contradict section 15A-979 which allows a defendant to reserve his right to appeal from a trial court order denying his motion to suppress. *See* N.C.G.S. § 15A-979(b); *see also*, *State v. Fulp*, 355 N.C. 171, 558 S.E.2d 156 (2002) (where our Supreme Court conducted a full review of the trial court's denial of the defendant's motion to suppress the use of his prior conviction made pursuant to N.C.G.S. § 15A-980 after the defendant pled guilty pursuant to a plea agreement and reserved his right to appeal the trial court's ruling). Therefore, defendant's right to appeal from the trial court's 31 October 2011 order denying his motion to suppress the use of a prior conviction to establish his habitual felon status was not precluded as a matter of law. Accordingly, defendant's argument is overruled.

No error.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA
v.
SAQUAN TREAY FACYSON

No. COA12-1300

Filed 4 June 2013

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

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder. The State presented substantial circumstantial evidence of each element of second-degree murder in that defendant either acted alone or with others in the shooting and killing of the victim.

2. Sentencing—aggravating range—same evidence for underlying offense

The trial court erred in a second-degree murder case by sentencing defendant in the aggravating range. The evidence supporting the aggravating factor was the same evidence necessary to support an

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element of the underlying offense. The judgment was reversed and remanded for a new sentencing hearing.

Appeal by defendant from judgment entered 23 March 2012 by Judge H.W. Hight in Durham County Superior Court. Heard in the Court of Appeals 11 March 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Philip A. Lehman, for the State.

Sue Genrich Berry for defendant.

HUNTER, Robert C., Judge.

Saquan Treay Facyson (“defendant”) appeals from the judgment entered after a jury found him guilty of second-degree murder. Defendant argues the trial court erred by denying his motion to dismiss the charge for insufficient evidence. Defendant also argues that the trial court erred in sentencing him in the aggravated range because the evidence supporting the aggravating factor was the same evidence necessary to support an element of the underlying offense. After careful review, we conclude the trial court did not err in denying the motion to dismiss. Due to ambiguity in the verdict, however, we reverse the judgment and remand for a new sentencing hearing.

Background

On 19 April 2010, David Andrews was working at a restaurant in Durham, North Carolina when he borrowed a red Ford Fusion from his co-worker so that he could drive to buy some drugs. While borrowing the car, Andrews ran out of money to buy drugs and allowed other people to use the car in exchange for drugs. Andrews loaned the car to Demetrius Lloyd, Neiko Malloy, and defendant for two hours in exchange for a rock of crack cocaine. The men did not return the car to Andrews, but Andrews testified that he saw defendant driving the car later in the day.

At approximately noon on 20 April 2010, Pebbles Kersey walked out of her Durham apartment to retrieve her mail. Jermaine Jackson was standing nearby in a recreational park. As Kersey was walking to her mailbox, she saw a red car approaching with three men in the car. In addition to the driver, the second occupant was in the front passenger seat, and the third was in the back seat; all three occupants were wearing red bandanas. At that moment, Jackson yelled for Kersey to “get

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down,” and Kersey saw the man in the back seat shoot a gun into the park. Multiple shots were fired. Jackson was struck in the face and died from his injuries.

Dennis Diaz was driving by the park and witnessed the shooting. While stopped at a red light, Diaz saw a sedan with three men, two of which were leaning out of the passenger side pointing guns in the direction of the park. He saw Kersey drop to the ground and then immediately heard shots fired. The car from which the shots were fired left the scene. The police later recovered twelve bullet casings from the scene of the shooting. Eight of the casings were from 9 millimeter bullets and four of the casings were from .380 bullets.

At approximately 12:30 p.m. that day, the manager of an apartment complex, Rahjohn Baldwin, called the police to report a suspicious vehicle, a red Ford Fusion, parked in the parking lot of the apartment complex. While Baldwin was on the phone with the police, he observed a gray sedan occupied by four individuals enter the parking lot. Although Baldwin did not know the occupants, they were Lloyd, Malloy, defendant, and a man named Willie Jackson. The men exited the gray sedan and walked toward the red Ford. Baldwin told the men they had to leave, and they began walking away from the red Ford.

A resident of the apartment complex, Andre Jiggetts, testified that he saw one of the men standing at the passenger side of the red Ford wiping the car with a t-shirt or cloth. When Baldwin told the men to leave, the man then closed the car door and walked away. Baldwin and Jiggetts then approached the red Ford to inspect the car and noticed a bullet casing resting on the windshield.

The police arrived on the scene and two of the men from the gray sedan fled on foot but were apprehended. Baldwin noticed one of the men fleeing throw something as he fled, and the police later found the keys to the red Ford in a grassy area near the parking lot. The remaining two men from the gray sedan, one of which was defendant, did not flee and were immediately detained by the police. The police found a 9 millimeter bullet casing resting on the windshield of the red Ford. The State Bureau of Investigation (“SBI”) determined that the 9 millimeter casing found on the red Ford and the 9 millimeter casings found at the scene of the shooting in which Jermaine Jackson was killed were all fired from the same gun. It was also determined that the four .380 casings found at the scene of the shooting were fired from the same weapon and that Jackson was killed by a .380 caliber bullet.

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The SBI tested Lloyd, Malloy, defendant, and Jackson for gunshot residue. There was no residue found on the hands of defendant, Lloyd, or Jackson. However, particles characteristic of gunshot residue were found on the hands of Malloy. Particles characteristic of gunshot residue were also found on all four of the men's clothing, including one particle on defendant's pants.

Defendant was charged with first-degree murder and accessory after the fact to first-degree murder. The jury found defendant guilty of second-degree murder. With the verdict sheet, the trial court submitted the following interrogatory to the jury:

Do you find from the evidence beyond a reasonable doubt that the defendant joined with more than one other person in committing the offense for which you have unanimously found the [d]efendant guilty . . . and that the defendant was not charged with committing a conspiracy as to this offense?

The jury answered this interrogatory in the affirmative. The trial court based its finding of an aggravating factor for sentencing on this interrogatory. Defendant was sentenced to a term of imprisonment of 225 months to 279 months. Defendant appeals.

Discussion

I. Motion to Dismiss

[1] Defendant argues that the trial court erred by denying his motion to dismiss the charges against him as the State failed to present sufficient evidence from which a reasonable jury could find that defendant acted alone or in concert with others to murder Jermaine Jackson. We disagree.

We review the trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). In doing so, we must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *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). When considering defendant's motion to dismiss, "the

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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). “Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). “The evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury for a determination of defendant’s guilt beyond a reasonable doubt.” *Id.*

“Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation.” *State v. Spicer*, 50 N.C. App. 214, 221, 273 S.E.2d 521, 527, *appeal dismissed*, 302 N.C. 401, 279 S.E.2d 356 (1981). “The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions that (1) the killing was unlawful, and (2) done with malice.” *Id.*

The trial court instructed the jury that it could find defendant guilty if the evidence established that defendant acted alone or with other individuals with a common plan or purpose to murder Jackson. “A defendant may be convicted of a crime under the theory of concerted action if he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.” *State v. Giles*, 83 N.C. App. 487, 490, 350 S.E.2d 868, 870 (1986), *disc. review denied*, 319 N.C. 460, 356 S.E.2d 8 (1987).

The evidence presented at trial established that defendant was present with two other individuals when the men borrowed the red Ford from David Andrews. The three men did not return the red Ford to Andrews, and defendant was later seen driving the car. Two witnesses to the shooting of Jackson testified that the men who fired the shots at Jackson were in a sedan, and one of the witnesses testified that the car was red. The testimony of two additional witnesses established that the red Ford borrowed from Andrews was parked in an apartment complex parking lot shortly after the shooting.

Defendant and the other two men who borrowed the red Ford returned to the car located in the parking lot. One of those men was seen wiping either the interior or the exterior of the car with a cloth or t-shirt. The keys to the red Ford were found in the grass near the parking

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lot after one of the men fled from the scene and was seen throwing an object in the bushes. A bullet casing consistent with the bullets found at the scene of the murder was found on the red Ford, and particles consistent with gunshot residue were found on all four of the individuals arrested at the red Ford, including one particle on defendant's pants. Thus, the State presented substantial circumstantial evidence of each element of second-degree murder in that defendant either acted alone or with others in the shooting and killing of Jermaine Jackson. Defendant's argument is overruled.

II. Aggravating Factor

[2] Defendant also argues that the trial court erred in sentencing him in the aggravated range of sentences because the evidence supporting the aggravating factor was the same evidence necessary to support an element of the underlying offense. We agree.

“When a defendant assigns error to the sentence imposed by the trial court, our standard of review is ‘whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.’” *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1) (1996)). “[A]ggravating factors must be submitted to a jury, which must determine whether the State has proven the factors beyond a reasonable doubt.” *State v. Borges*, 183 N.C. App. 240, 244, 644 S.E.2d 250, 253, *disc. review denied*, 361 N.C. 570, 650 S.E.2d 816 (2007), *cert. denied*, 552 U.S. 1126, 169 L. Ed. 2d 776 (2008).

N.C. Gen. Stat. § 15A-1340.16(b) (2012) provides in part that if aggravating factors are present, and the trial court finds that aggravating factors outweigh mitigating factors, the trial court may depart from the presumptive range of sentences and impose a sentence in the aggravated range. The statute provides that the following is an aggravating factor: “The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.” *Id.* § 15A-1340.16(d)(2). However, the statute also provides that “[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation[.]” *Id.* § 15A-1340.16(d).

On the charge of second-degree murder, the trial court instructed the jury as follows:

[I]f you find from the evidence beyond a reasonable doubt that on or about the alleged date the [d]efendant, *acting either by himself or acting together with other persons*, intentionally and with malice wounded Jermaine Anthony

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Jackson with a deadly weapon, thereby proximately causing his death, it would be your duty to return a verdict of guilty of second-degree murder.

(Emphasis added.) The trial court also submitted an interrogatory to the jury which asked whether the jury found beyond a reasonable doubt that defendant joined with more than one other person in committing the crime and that defendant was not charged with conspiracy. The jury answered the interrogatory in the affirmative, and the trial court applied the aggravating factor to sentence defendant in the aggravated range of sentences.

We note that defendant did not object at trial to this alleged error. Generally, by failing to make a timely objection, a defendant waives his right to raise the alleged error on appeal. N.C. R. App. P. 10(a)(1) (2012). Pursuant to N.C. Gen. Stat. § 15A-1446, however, this Court has the discretion to review defendant's argument despite his failure to preserve the issue for review. N.C. Gen. Stat. § 15A-1446(d), (d)(18) (2011) (providing that an alleged error may be reviewed despite the lack of objection before the trial court if the error alleged is that, "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law"). Accordingly, we address defendant's argument.

Defendant contends that the jury necessarily found him guilty of second-degree murder on the theory of acting in concert as there was no evidence of who fired the bullet that killed Jackson. We do not agree. The State presented sufficient evidence for the jury to determine that it was defendant's actions alone that resulted in Jackson's death, including the particle consistent with gunshot residue that was found on defendant's clothing. Therefore, it was possible for defendant to be convicted of second-degree murder without the necessity of the element of acting in concert. However, as described above, the State also presented sufficient evidence to allow the jury to conclude that defendant acted with others in committing the crime. Yet, the verdict sheet did not require the jury to indicate the theory on which it found defendant guilty. We cannot speculate as to the basis of the jury's verdict, and we must resolve the ambiguity in favor of defendant by assuming that the aggravated sentence imposed was based on the same evidence necessary to establish an element of the underlying offense. *See State v. Whittington*, 318 N.C. 114, 123, 347 S.E.2d 403, 408 (1986) (remanding for a new sentencing hearing where the verdict sheet did not specify whether the jury found the defendant guilty of first-degree kidnapping based on the theory that the victim was sexually assaulted or seriously injured, which precluded

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his conviction for kidnapping and sexual offense).¹ Accordingly, we must reverse the judgment entered and remand for a new sentencing hearing without the use of the aggravating factor.

Conclusion

We find no error in the trial court's denial of defendant's motion to dismiss. But, we must reverse the judgment entered upon his conviction for second-degree murder and remand for a new sentencing hearing without the use of the aggravating factor.

REVERSED and REMANDED.

Chief Judge MARTIN and Judge STEPHENS concur.

STATE OF NORTH CAROLINA

v.

LUCAS GUTHRIE GENTRY

No. COA12-1017

Filed 4 June 2013

1. Pretrial Proceedings—motion for appointment of substitute counsel—no good cause

The trial court did not err in a drug case by denying defendant's motion for the appointment of substitute counsel. Although defendant expressed dissatisfaction with the performance of his assigned counsel on several occasions, he failed to establish the requisite "good cause" to appointment of substitute counsel or that his assigned counsel could not provide him with constitutionally adequate representation.

1. *See also State v. Ford*, 162 N.C. App. 722, 592 S.E.2d 294 (No. COA03-140) (2004) (unpublished) (concluding that because the defendant was convicted of first-degree kidnapping and sexual assault and the jury verdict sheet did not specify whether the conviction for kidnapping was elevated to the first-degree based on the sexual assault of the victim, the verdict was ambiguous, and the ambiguity had to be resolved in the defendant's favor to avoid a double punishment for the sexual assault), *cert. denied*, 359 N.C. 412, 612 S.E.2d 631 (2005).

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2. Pretrial Proceedings—motion to continue—denial—no prejudice

The trial court did not err in a drug case by denying defendant's motion to continue his case. Defendant failed to establish that he suffered any prejudice from the court's ruling where he failed to specifically identify how the trial court's rulings impaired his ability to prepare for trial and most, if not all, of the limitations on the ability of his trial counsel to prepare for trial appeared to have resulted from defendant's own conduct.

3. Criminal Law—pro se defendant—knowingly and voluntarily—proper colloquy

The trial court did not err in a drug case by allowing defendant to proceed *pro se* without making a proper determination that his decision to represent himself was knowingly and voluntarily made. Although the trial court misstated the maximum sentence to which defendant was exposed during his colloquies with defendant, the trial court adequately complied with the relevant provisions of N.C.G.S. § 15A-1242.

Appeal by defendant from judgments entered 23 February 2012 by Judge Paul C. Ridgeway in Person County Superior Court. Heard in the Court of Appeals 13 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General Sueanna P. Sumpter, for the State.

Charlotte Gail Blake for Defendant-appellant.

ERVIN, Judge.

Defendant Lucas Guthrie Gentry appeals from judgments entered based upon his convictions for conspiracy to sell and deliver oxycodone, possession of oxycodone with the intent to sell or deliver, selling or delivering oxycodone, selling or delivering a controlled substance within 1000 feet of a public park, and having attained the status of an habitual felon. On appeal, Defendant argues that the trial court erred by denying his motions for the appointment of substitute counsel or, in the alternative, a continuance, and by allowing him to proceed *pro se* without making a proper determination that his decision to represent himself was knowingly and voluntarily made. After careful consideration of Defendant's challenges to the trial court's judgments in light of the

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record and the applicable law, we conclude that the trial court's judgments should remain undisturbed.

I. Factual BackgroundA. Substantive Facts1. State's Evidence

In August 2011, Sergeant John Walker of the Person County Sheriff's Department was involved in a narcotics interdiction operation in which informants would purchase controlled substances from "high profile dealers" while equipped with hidden video cameras. On 8 August 2011, Sergeant Walker assigned an informant named Byron Moore to purchase drugs from Defendant, with whom Mr. Moore had been personally acquainted for about six months.

At a "pre-buy" meeting, Sergeant Walker provided Mr. Moore with currency for use in purchasing narcotics from Defendant and attached a miniaturized video camera to his shirt. During the "pre-buy" meeting, Mr. Moore received a phone call from Defendant, who offered to sell Mr. Moore ten pills at \$12.00 each.

After receiving Defendant's call, Mr. Moore went to Defendant's home, which was located across the street from a public park. Sergeant Walker observed Mr. Moore arrive at Defendant's house, park his scooter, and leave on the scooter shortly thereafter. Upon returning to Sergeant Walker's location, Mr. Moore indicated that he had given the money to Defendant's wife and that Defendant had handed ten pills to him.

Once he had obtained the pills from Mr. Moore, Sergeant Walker submitted them to the State Bureau of Investigation for forensic analysis. A subsequent laboratory analysis identified the pills as Oxycodone. In addition, Sergeant Walker retrieved the video camera from Mr. Moore's person and downloaded the data stored in the camera onto a compact disk so as to create a video recording that was subsequently played for the jury.

2. Defendant's Evidence

Heather Gentry, who had been married to Defendant for eleven years, admitted that the couple lived close to a public park. On 8 August 2011, Mr. Moore telephoned her and asked to purchase some pills. Upon reviewing the video recording that had been introduced into evidence, Ms. Gentry thought that she had observed herself, rather than Defendant, taking money from Mr. Moore in exchange for pills.

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B. Procedural History

On 10 October 2011, the Person County grand jury returned bills of indictment charging Defendant with conspiracy to sell or deliver oxycodone hydrochloride, possession of oxycodone hydrochloride with intent to sell or deliver, sale of oxycodone hydrochloride, sale of oxycodone hydrochloride within 1000 feet of a public park, and having attained the status of an habitual felon. On 13 February 2012, the Person County grand jury returned superseding indictments charging Defendant with having committed the same offenses while changing the name of the controlled substance that Defendant was alleged to have possessed and sold from “oxycodone hydrochloride” to “oxycodone.” On 21 December 2011 the State filed a notice informing Defendant that, in the event that he was convicted of a criminal offense, the State intended to prove as an aggravating factor that, during the ten year period prior to the commission of the offenses with which he was presently charged, he had “been found by a court of this State to be in willful violation of the conditions of probation[.]”

On 8 February 2012, Defendant’s appointed counsel filed a motion seeking leave to withdraw from his representation of Defendant on the grounds that Defendant “does not believe or trust his Attorney,” that Defendant “does not believe his Attorney is working in [his] best interests,” and that there “are numerous disagreements between Attorney and Defendant over the handling of these cases,” making it “[un]likely that Attorney and Defendant will be able to work together effectively to resolve these differences.” On 17 February 2012, Judge W. Osmond Smith, III, conducted a hearing concerning this motion and denied it on the grounds that, despite the fact that Defendant and his counsel had “some disagreements,” there was no indication that Defendant’s appointed counsel would be unable to provide Defendant with competent legal representation.

The charges against Defendant came on for trial before the trial court and a jury at the 20 February 2012 criminal session of the Person County Superior Court. On several occasions during the trial, Defendant expressed dissatisfaction with the representation that he was receiving from his appointed counsel. At the conclusion of all the evidence, Defendant asked permission to proceed *pro se*, executed a written waiver of the right to counsel, and began representing himself. On 22 February 2012, the jury returned verdicts convicting Defendant as charged. After the jury returned its verdicts, Defendant withdrew his request to represent himself, at which point his appointed counsel resumed representing Defendant.

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At the conclusion of the required separate habitual felon proceeding, the jury retired to consider the merits of the State's allegation that Defendant had attained habitual felon status. During the jury's deliberations with respect to this issue, Defendant entered into a stipulation admitting that, during the ten years prior to the date upon which the offenses of which he had been convicted had been committed, he had been found to have violated the terms and conditions of a probationary judgment. After the jury returned a verdict finding that Defendant had attained habitual felon status, the trial court conducted a sentencing hearing at which it found that Defendant had accumulated twelve prior record points and should be sentenced as a Level IV offender. Based upon these determinations, the trial court sentenced Defendant to a term of 96 to 125 months imprisonment based upon his conviction for sale of a controlled substance within 1000 feet of a public park and to a consecutive term of 96 to 125 months imprisonment based upon his convictions for sale and delivery of oxycodone, possession of oxycodone with the intent to sell or deliver, and conspiracy to sell or deliver oxycodone. In spite of Defendant's stipulation to the existence of an aggravating factor, the sentences that the trial court imposed upon Defendant were within the presumptive range. Defendant noted an appeal to this Court from the trial court's judgments.

II. Legal Analysis

A. Motion to Appoint Substitute Counsel

[1] In his first challenge to the trial court's judgments, Defendant argues that the trial court erred by denying his trial counsel's motions to withdraw as Defendant's counsel and for the appointment of substitute counsel on the grounds that "[assigned counsel] could not represent [Defendant] effectively because the attorney-client relationship was irretrievably broken." More specifically, Defendant contends that he and his trial counsel experienced "a complete breakdown in their communications" which prevented his assigned counsel from providing him with "effective assistance of counsel." Defendant's argument lacks merit.

"The sixth amendment of the United States Constitution, as applied to the states through the fourteenth amendment, guarantees persons accused of serious crimes the right to counsel." *State v. Pruitt*, 322 N.C. 600, 602, 369 S.E.2d 590, 592 (1988) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)). "However, this does not mean that the defendant is entitled to counsel of his choice or that defendant and his court-appointed counsel must have a 'meaningful attorney-client relationship.'" *State v. Kuplen*, 316 N.C. 387, 396, 343

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S.E.2d 793, 798 (1986) (quoting *Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 1617, 75 L. Ed. 2d 610, 621 (1983)). “A trial court is constitutionally required to appoint substitute counsel [only when] representation by counsel originally appointed would amount to denial of defendant’s right to effective assistance of counsel,” so that, “when it appears to the trial court that the original counsel is reasonably competent to present defendant’s case,” “denial of defendant’s request to appoint substitute counsel is entirely proper.” *State v. Thacker*, 301 N.C. 348, 352, 271 S.E. 2d 252, 255 (1980) (citing *United States v. Young*, 482 F. 2d 993, 995 (1973) (other citations omitted).

To establish ineffective assistance of counsel, defendant must satisfy a two-prong test[.] . . . Under this two-prong test, the defendant must first show that counsel’s performance fell below an objective standard of reasonableness as defined by professional norms. This means that defendant must show that his attorney made “ ‘errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.’ ” Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error.

State v. Lee, 348 N.C. 474, 491, 501 S.E.2d 334, 345 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and quoting *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. 2064, 80 L. Ed. 2d at 693)). “In the absence of a constitutional violation, the decision about whether appointed counsel shall be replaced is a matter solely for the discretion of the trial court.” *Kuplen*, 316 N.C. at 396, 343 S.E.2d at 798 (citing *State v. Sweezy*, 291 N.C. 366, 371-72, 230 S.E. 2d 524, 529 (1976) (quoting *Young*, 482 F. 2d at 995). After carefully reviewing the transcript, we conclude that, although Defendant expressed dissatisfaction with the performance of his assigned counsel on several occasions, he failed to establish the requisite “good cause” to appointment of substitute counsel or to establish that his assigned counsel could not provide him with constitutionally adequate representation.

At the hearing conducted on 17 February 2012 before Judge Smith, Defendant’s trial counsel stated that Defendant had “expressed his lack of faith and trust in me and does not believe that I have been honest with him and does not believe that I am working in his best interest.” Subsequently, Defendant asked Judge Smith to appoint substitute

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counsel to represent him. In seeking to persuade Judge Smith of the merits of this request, Defendant expressed concern about whether his trial counsel was “aware” that certain prior convictions might not be properly admissible to support a determination that he had attained habitual felon status, whether his trial counsel had provided him with copies of materials produced during discovery, and whether his wife could be compelled to testify against him as a condition of probation. In response, Judge Smith attempted to answer Defendant’s legal questions; determined that Defendant’s assigned counsel had, in fact, made discovery materials available to Defendant; and explained to Defendant that:

The constitution does not guarantee you a lawyer of your choice. It guarantees you adequate, effective representation. You have a lawyer who is experienced and capable of handling these matters, and I have not heard anything to think legally that he’s not able, not prepared, and not capable of proceeding. I am just hearing that y’all have some disagreements.

At that point, Defendant indicated that, given the “irreparable problems” that he and his assigned counsel were experiencing, he would waive the assistance of counsel and told Judge Smith that, although he had “nine [witnesses] plus [his] mother” whom he wanted to testify at trial, his counsel had “never even asked” him to identify any witnesses. After hearing these additional comments, Judge Smith informed Defendant that, although there was no legal justification for the appointment of substitute counsel, he had the option of appearing *pro se*. Upon receiving this information, Defendant stated that, while he did not want to waive his right to counsel, he and his assigned counsel “might end up getting in a tussle” and that he wanted to either “take a restraining order out” on his attorney “or put [his] hands on him.” When Judge Smith asked whether these remarks indicated an intention to be disruptive, Defendant apologized.

Defendant’s case was called for trial on 20 February 2012 before Judge Ridgway. Prior to the selection of the jury, Defendant’s assigned counsel moved that he be allowed to withdraw as counsel or, in the alternative, that the case be continued. In support of this motion, Defendant’s assigned counsel explained that Defendant did not trust him and had requested him to renew the motion for appointment of substitute counsel. In addition, Defendant’s assigned counsel stated that:

[Defendant said that] I had lied to him, and that he didn’t trust me, and he also said during the context of [the 17 February] hearing, Judge, that [“]you don’t talk to me

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again.[”] In 25 years I can never remember a time in open court where I’ve been threatened twice. He wanted to get his hands around my neck, and he wanted to tussle with me. . . . I’m a grandfather. I don’t tussle with anybody but my grandchildren. I’ve never had it happen before[.] [Defendant] mentioned in that hearing that he had a list of witnesses, nine witnesses, I believe, that he wanted me to call, and . . . he indicated to me over the weekend that, “Mr. Butler, that was not true, and I just said that to make you look bad in front of all of those people.”

At that point, Defendant told the trial court that he planned to file a complaint against his trial counsel with the North Carolina State Bar and that he continued to be concerned about the implications of his wife’s probationary sentence and its effect on his own trial. After denying these withdrawal and continuance motions, the trial court explained to Defendant that his assigned attorney was qualified and capable of providing adequate representation and that his constitutional right to the assistance of counsel did not include a right to the appointment of an attorney of his own choosing.

On the following day, Defendant’s assigned counsel renewed his withdrawal motion on the ground that Defendant did not want his services. The trial court denied the renewed withdrawal motion “for the same reasons” stated on the previous day. After several pretrial motions were addressed and the prospective members of the jury were called into the courtroom, Defendant’s assigned counsel informed the trial court that Defendant wanted to “fire” him. At that point, Defendant told the trial court that he believed that he had not seen certain documents that had been produced in discovery and that his “substantial conflict” with his assigned counsel had “created irreparable communication barriers” which precluded his assigned counsel from “effectively represent[ing] [him] as required by Code of Professional Responsibility.” Defendant did not, however, identify any misrepresentations allegedly made by his assigned attorney, describe any disputed issues of trial strategy, or provide any examples of his assigned counsel’s allegedly deficient representation. Instead, Defendant simply expressed his dissatisfaction with his assigned counsel and with the charges that had been lodged against him. After hearing from Defendant, the trial court informed him that no continuance would be granted and asked Defendant to state “unequivocally” whether he wished to hire private counsel, represent himself, or be represented by assigned counsel. In response, Defendant elected to go to trial while represented by his assigned counsel.

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Following the direct examination of Sergeant Walker, Defendant's appointed counsel informed the trial court once again that Defendant had "fired" him. At that time, Defendant explained that he did not trust his assigned attorney and stated that he wanted to represent himself. In response, the trial court began making the inquiry required by N.C. Gen. Stat. § 15A-1242. During that process, the trial court informed Defendant that, in the event that he was convicted as charged and found to have attained habitual felon status, he faced up to 740 months imprisonment, or "about sixty years." After further discussion of the length of the sentence to which Defendant was exposed, Defendant withdrew his motion and agreed to continued representation by his assigned counsel.

At the conclusion of the State's case, Defendant's trial counsel informed the trial court that Defendant wanted to call Ms. Gentry as a witness. Before Ms. Gentry testified, Defendant asked if he could "have [assigned counsel] withdraw or . . . fire him and ask that he be left on as assistant counsel?" In the course of explaining this request, Defendant said that he wanted to represent himself. When the trial court began to question him about his decision, however, Defendant changed his mind once again and informed the trial court that he did not wish to proceed *pro se*.

Once the jury instruction conference had been completed, Defendant's trial counsel informed the trial court yet again that Defendant wanted to fire him and to make his own closing argument. In response, the trial court questioned Defendant for the purpose of ascertaining whether his decision to proceed *pro se* was being made knowingly and voluntarily and, during that process, informed Defendant that, in the event that he was convicted as charged and found to have attained habitual felon status, he could receive a sentence of as long as 60 years in prison. After executing a written waiver of his right to counsel, Defendant delivered a closing argument, which was not recorded, on his own behalf. In the aftermath of the acceptance of the jury's verdict convicting him as charged, Defendant withdrew his request to represent himself and Defendant's assigned counsel began representing him again. As a result, Defendant's self-representation consisted of little more than the delivery of his own closing argument.

In seeking relief from the trial court's judgments, Defendant argues that the appointment of substitute counsel is required in the event that a defendant's assigned counsel is unable to provide effective assistance due to "a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict." *Sweezy*, 291 N.C. at 372, 230 S.E.2d at 529 (quoting *United States*

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v. Calabro, 467 F.2d 973, 986 (2d Cir. 1972), *cert. denied sub nom. Tortorello v. United States*, 410 U.S. 926, 93 S. Ct. 1357, 35 L.Ed.2d 587 (1973)). Since Defendant has not contended that his trial counsel labored under a conflict of interest, that the jury's verdict was unjust, or that the representation that he received from his trial counsel was deficient in any specific manner, the validity of Defendant's argument hinges on the strength of his "breakdown in communication" theory.

Although Defendant argues that he "informed the court of serious concerns about his discovery and information he did not believe he could obtain from his attorney, such as information about marital privilege," our review of the record fails to disclose the existence of any factual basis for Defendant's "concerns." Moreover, Defendant has completely failed to articulate any connection between these "concerns" and any specific deficiencies in the representation that he received from his assigned counsel. Finally, Defendant has not explained the basis of his alleged "conflict" with his counsel. For example, he does not describe any disagreements that they had about issues of trial strategy, assert that his assigned counsel failed to meet with him, or identify any misstatements or other misconduct on the part of his assigned counsel. As a result, Defendant appears to take the position that a "complete breakdown" in communication, standing alone, is sufficient to require the appointment of substitute counsel.

Defendant cites no authority in support of this proposition, and we know of none. On the contrary, we agree with the reasoning of the California Supreme Court, which has stated that:

In determining whether defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result, trial courts properly recognize that if a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment[.] . . . A trial court is not required to conclude that an irreconcilable conflict exists if the defendant has not made a sustained good faith effort to work out any disagreements with counsel and has not given counsel a fair opportunity to demonstrate trustworthiness.

People v. Crandell, 46 Cal. 3d 833, 860, 760 P.2d 423, 435-36 (1988), *cert. denied*, 490 U.S. 1037, 109 S. Ct. 1936, 104 L. Ed. 2d 408 (1989); *see also, e.g., United States v. Darwich*, 2012 U.S. Dist. LEXIS 63163

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*4, *reconsideration denied*, 2012 U.S. Dist. LEXIS 156784 (E.D. Mich. 2012) (finding no abuse of discretion in the denial of a motion for the appointment of substitute counsel where the “court is persuaded that any breakdown in the relationship between Defendant and [assigned counsel] has been entirely the responsibility of defendant, whether born of obstreperousness, paranoia, calculated play-book wilfulness, or some other reason”); *Simms v. LaClair*, 769 F. Supp. 2d 116, 125-26 (W.D.N.Y. 2011) (stating that, “[a]lthough there was a breakdown in communication between [the defendant] and assigned counsel, that is insufficient to create an ‘actual conflict of interest’ where the tension was created solely by [the defendant’s] unreasonable and unjustified hostility towards his assigned attorney”); *State v. Lippert*, 152 Idaho 884, 887-88, 276 P.3d 756, 759-60 (stating that a defendant’s “lack of confidence in otherwise competent counsel is not necessarily grounds for [the appointment of] substitute counsel” and holding, given that a “defendant may not . . . manufacture good cause by abusive or uncooperative behavior,” that the trial court did not err by failing to appoint substitute counsel after “consider[ing] whether [the defendant] substantially and unreasonably contributed to the communication breakdown”), *review denied*, 2012 Ida. LEXIS 134 (2012); and *State v. Thompson*, 169 Wn. App. 436, 457-58, 290 P.3d 996, 1009 (2012) (stating that the trial court was not required to appoint substitute counsel where it was “plain from the record that the [communication] breakdown was entirely one-sided” on the grounds that “ ‘a defendant is not entitled to demand a reassignment of counsel on the basis of a breakdown in communications where he simply refuses to cooperate with his attorneys’ ”) (quoting *State v. Schaller*, 143 Wn. App. 258, 271, 177 P.3d 1139, 1146 (2007), *review denied*, 164 Wn. 2d 1015, 195 P.3d 88 (2008)). Although we are not bound by these decisions, we are persuaded by the logic set out in these and similar cases that the degree to which the defendant is responsible for an alleged breakdown in communication is highly relevant to the determination of whether substitute counsel should be appointed. Moreover, “[t]o the extent there was a credibility question between defendant and counsel at the hearing, the court was ‘entitled to accept counsel’s explanation.’ ” *People v. Smith*, 6 Cal. 4th 684, 696, 863 P.2d 192, 200 (1993) (quoting *People v. Webster*, 54 Cal. 3d 411, 436, 814 P.2d 1273, 1285 (1991), *cert. denied*, 503 U.S. 1009, 112 S. Ct. 1772, 118 L.Ed.2d 431 (1992)).

The record before us in this case reflects that Defendant repeatedly interrupted the trial for the purpose of announcing that he “didn’t trust” his assigned counsel. However, Defendant never described any instances of “untrustworthy” behavior on the part of his assigned attorney. Although Defendant delayed the proceedings on several occasions

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by stating that he wanted to exercise his right to represent himself, he consistently changed his mind as soon as the trial court began to question him in the manner required by N.C. Gen. Stat. § 15A-1242. In addition, Defendant made statements that could reasonably be interpreted as threats to inflict physical violence on his counsel, including warning the trial court that he “might end up” in a “tussle” with his attorney and stating that he wanted to “put [his] hands on” his assigned counsel. After initially telling Judge Smith that his assigned attorney had failed to assist him in contacting up to nine witnesses, Defendant later admitted that he had told this lie for the purpose of making his assigned counsel “look bad.” Finally, Defendant told the trial court that he intended to file a complaint with the State Bar against his assigned attorney without indicating that he had any valid legal or factual basis for acting in that manner. For all of these reasons, we have no hesitation in concluding that any “breakdown” in communication between Defendant and his assigned counsel stemmed largely from Defendant’s own behavior, that Defendant has failed to show that these alleged difficulties in communication resulted in a deprivation of his right to the effective assistance of counsel, and that the trial court did not err by declining to appoint substitute counsel. As a result, Defendant is not entitled to relief on the basis of his challenge to the denial of his motions for the appointment of substitute counsel.

B. Continuance Motion

[2] Secondly, Defendant argues that the trial court committed prejudicial error by denying his continuance motion. In support of this contention, Defendant asserts that, given “the continuing, irreparable communication problems between [Defendant] and his attorney, the trial court’s failure to continue this matter deprived [Defendant] of his right to effective assistance of counsel.” Once again, we conclude that Defendant’s argument lacks merit.

As a preliminary matter, we address the standard of review that we must use in evaluating the merits of Defendant’s claim. Although Defendant acknowledges that a trial court’s decision to deny a continuance motion is generally reviewed using an abuse of discretion standard, he also asserts that, “when a defendant’s constitutional rights are implicated, as is the case here,” this “Court reviews questions of law on a *de novo* basis.” In support of this proposition, Defendant cites *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977). However, *McFadden* actually states that, “when a motion to continue is based on a constitutional right, the question presented is a reviewable question of law.” *McFadden*, 292 N.C. at 611, 234 S.E.2d at 744. The continuance motion

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at issue in this case did not mention and was not “based on” any alleged deprivation of a constitutional right. “[A] motion for continuance which is not based on constitutional guarantees is ordinarily addressed to the sound discretion of the trial court” and will not “be held [to be] error on appeal” in the absence of an abuse of discretion. *State v. Williams*, 304 N.C. 394, 408, 284 S.E.2d 437, 446 (1981) (citing *State v. Easterling*, 300 N.C. 594, 598-99, 268 S.E. 2d 800, 803 (1980) (other citation omitted), *cert. denied*, 456 U.S. 932, 102 S. Ct. 1985, 72 L. Ed.2d 450 (1982)). As a result, we will review Defendant’s challenge to the denial of his continuance motion using an abuse of discretion standard.

As Defendant correctly notes, this Court has held that

Some of the factors considered by North Carolina courts in determining whether a trial court erred in denying a motion to continue have included (1) the diligence of the defendant in preparing for trial and requesting the continuance, (2) the detail and effort with which the defendant communicates to the court the expected evidence or testimony, (3) the materiality of the expected evidence to the defendant’s case, and (4) the gravity of the harm defendant might suffer as a result of a denial of the continuance.

State v. Barlowe, 157 N.C. App 249, 254, 578 S.E.2d 660, 663 (citing *State v. Branch*, 306 N.C. 101, 104-06, 291 S.E.2d 653, 656-57 (1982)) (other citations omitted), *disc. review denied*, 357 N.C. 462, 586 S.E.2d 100 (2003). Similarly, N.C. Gen. Stat. § 15A-952(g) provides, in pertinent part, that, “[i]n superior or district court, the judge shall consider at least the following factors in determining whether to grant a continuance:

- (1) Whether the failure to grant a continuance would be likely to result in a miscarriage of justice; [and]
- (2) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that more time is needed for adequate preparation[.] . . .

A careful examination of the record reveals that this case was neither unusual nor complex; that Defendant completely failed to explain the “expected evidence or testimony” that might become available in the event that a continuance was granted; that, given Defendant’s failure to provide any information concerning the nature and extent of the evidence that he hoped to obtain, “the materiality of the expected evidence to the defendant’s case” cannot be meaningfully assessed; and that the

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denial of the requested continuance did not result in a “miscarriage of justice.”

The offenses with which Defendant was charged allegedly occurred on 8 August 2011. Counsel was appointed to represent Defendant on 13 October 2011. The case was called for trial about four months later. The case that the State presented against Defendant was relatively simple and consisted of evidence tending to show that Defendant participated in a single hand-to-hand drug transaction. The State offered the testimony of only two witnesses, one of whom was an informant and the other of whom was a law enforcement officer who supervised the informant’s activities. Neither of the State’s witness were impeached to any significant degree, the identity of the transferred pills as controlled substances does not appear to have been subject to any dispute, and no challenging legal issues, such as the admissibility of expert witness testimony, the competence of a witness to testify, or the suppression of evidence allegedly obtained in an unconstitutional manner, arose at trial. The only witness called on Defendant’s behalf was his wife, whose testimony did not contradict the State’s contention that an informant had sought to buy drugs from Defendant or Ms. Gentry on the date in question. Finally, we note that most of the interactions among the parties were recorded on a video that was presented for the jury’s consideration. As a result, we conclude that four months was an adequate time for trial preparation.

At the time that this case was called for trial, Defendant’s trial counsel stated that Defendant had not, after four months, provided him with the names of any potential defense witnesses. However, Defendant’s trial counsel also indicated that, if Defendant produced such a list of potential witnesses, he would then need time to conduct further investigation. Defendant’s trial counsel failed to provide any justification for Defendant’s failure to provide him with the names of any potential witnesses, did not express any certainty that such a list of potential witnesses would be forthcoming, and did not explain the role any such witnesses would play in the defense of Defendant’s case. For all of these reasons, we conclude that the mere possibility that Defendant might, at the last minute, produce a list of potential witnesses did not require the trial court to grant the requested continuance.

In addition, Defendant’s trial counsel made a conclusory assertion to the effect that he had not had an adequate opportunity to prepare for trial “because of the animosity and because of conversations that we’ve had melt down into accusations of incriminations against me.” Once again, however, Defendant’s trial counsel failed to describe any specific

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preparatory activities that he had been unable to undertake or complete based upon Defendant's "animosity." In addition, as we have already noted, Defendant appears to have been largely responsible for the conflicts between himself and his trial counsel. As a result, given Defendant's failure to specifically identify how the trial court's rulings impaired his ability to prepare for trial and the fact that most, if not all, of the limitations on the ability of his trial counsel to prepare for trial appear to have resulted from Defendant's own conduct, Defendant has failed to establish that he suffered any prejudice from the trial court's ruling. Thus, the trial court did not err by denying Defendant's continuance motion.

C. Defendant's Waiver of Counsel

[3] Finally, Defendant argues that the trial court erred by "failing to conduct a thorough colloquy with [Defendant] and advise him of the correct maximum punishment he faced if convicted," "result[ing in a] failure to obtain [Defendant's] knowing, voluntary and intelligent waiver of his right to counsel." Although the trial court did misstate the maximum sentence to which Defendant was exposed during his colloquies with Defendant, we conclude, given the specific facts present here, that the trial court adequately complied with the relevant provisions of N.C. Gen. Stat. § 15A-1242.

As this Court has previously noted, "[i]mplicit in defendant's constitutional right to counsel is the right to refuse the assistance of counsel and conduct his own defense." *State v. Love*, 131 N.C. App. 350, 354, 507 S.E.2d 577, 580 (1998) (quoting *State v. Gerald*, 304 N.C. 511, 516, 284 S.E.2d 312, 316 (1981) (other citation omitted), *aff'd* 350 N.C. 586, 516 S.E.2d 382 (1999), *cert. denied*, 528 U.S. 944, 120 S. Ct. 359, 145 L. Ed. 2d 280 (1999)). "The trial court, however, must insure that constitutional and statutory standards are satisfied before allowing a criminal defendant to waive in-court representation. First, a criminal defendant's election to proceed *pro se* must be 'clearly and unequivocally' expressed. Second, the trial court must make a thorough inquiry into whether the defendant's waiver was knowingly, intelligently and voluntarily made." *State v. Watlington*, __ N.C. App __, __, 716 S.E.2d 671, 675 (2011) (citing *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992), and quoting *State v. Carter*, 338 N.C. 569, 581, 451 S.E.2d 157, 163 (1994), *cert. denied*, 515 U.S. 1107, 115 S. Ct. 2256, 132 L. Ed. 2d 263 (1995)). "A trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C. [Gen. Stat.] § 15A-1242." *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008) (citing *Thomas*, 331 N.C. at 673, 417 S.E.2d at 475) (internal citation omitted). N.C. Gen. Stat. § 15A-1242 provides that a criminal defendant may proceed *pro se* "only after the trial judge makes thorough inquiry and is satisfied that the defendant:

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- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

The record in this case clearly reflects that the trial court made a substantially proper inquiry into the extent to which Defendant's waiver of counsel was knowing and voluntary. The only component of the trial court's discussion with Defendant to which Defendant takes issue is the information concerning "the range of permissible punishments" that the trial court provided. On two different occasions, the trial court informed Defendant that, in the event that he was convicted of all offenses and found to have attained habitual felon status, he could be sentenced to more than 60 years imprisonment. The first of these two occasions occurred when, after the direct examination of Sergeant Walker, Defendant stated that he wanted to represent himself. At that point, the trial court informed Defendant, among other things, that, in the event that he was convicted as charged and found to be an habitual felon, he faced up to 740 months imprisonment or "about sixty years." Following this colloquy, Defendant withdrew his request to proceed *pro se*. Similarly, after the completion of the jury instruction conference, Defendant stated that he wanted to "fire" his assigned attorney and make his own closing argument. At that point, the trial court conducted another colloquy with Defendant. In the course of that discussion, the trial court informed Defendant that, if convicted as charged and found to be an habitual felon, he could receive a sentence of up to 60 years imprisonment:

THE COURT: Do you understand that you're charged with four offenses, and that if you are found guilty of those offenses and if you are in the second phase of this trial found to be an habitual felon, that you are facing a possible maximum sentence of up to four times 185 months which comes to 740 months as a maximum possible period of incarceration. Do you understand that?

DEFENDANT: Yes, sir.

Although Defendant elected to proceed *pro se* during closing arguments, he withdrew his request to represent himself after the jury returned its verdicts on the issue of guilt. At that point, Defendant's

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trial counsel resumed the responsibility for representing Defendant. As the jury deliberated concerning whether he had attained habitual felon status, Defendant stipulated to the existence of the aggravating factor that, during the ten years prior to the charged offenses, he had violated the terms of a previous probationary sentence. At that point, the trial court informed Defendant that he might be sentenced in the aggravated, rather than the presumptive, range, stating that:

[W]ithout an aggravating factor, the theoretical maximum you could face for each of the underlying offenses with the habitual felon status would be 185 months. With an aggravating factor for each of the offenses, the theoretical maximum that you could face would be up to 228 months incarceration; namely, an enhancement of up to 43 months from the maximum for each of the four offenses. In other words, there are four offenses based on the habitual felony status. In the event that all four offenses will run consecutively, you could face an enhanced penalty of up to 172 months because of the additional aggravating factor. That's four times 43.

As a result, the information that the trial court provided Defendant concerning the term of imprisonment to which he was exposed upon conviction failed to take into consideration the possibility that Defendant would be sentenced in the aggravated range and understated the amount of term to which Defendant was subject to being imprisoned by 172 months.

The prior decisions of this Court concerning the extent, if any, to which a criminal defendant is entitled to relief based upon the provision of inaccurate advice concerning “the range of permissible punishments” have focused upon the trial court’s failure to advise the defendant of the nature of the punishment to which he was actually exposed, *State v. Taylor*, 187 N.C. App. 291, 294, 652 S.E.2d 741, 743 (2007) (holding that the trial court failed to adequately comply with N.C. Gen. Stat. § 15A-1242 in a case in which, after “correctly inform[ing] defendant of the maximum 60-day imprisonment for a Class 2 misdemeanor,” the trial court “failed to inform defendant that he also faced a maximum \$1,000.00 fine for each of the charges”), or to provide more than a vague indication concerning the length of the sentence to which the defendant was exposed. *State v. Frederick*, ___ N.C. App. ___, ___ 730 S.E.2d 275, 280-81 (2012) (holding that advising the defendant that he could “go to prison for a long, long time” and would be subjected to “a mandatory prison sentence” if convicted as charged did not constitute adequate compliance with N.C. Gen. Stat. § 15A-1242). However, we do not believe that a mistake in the number

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of months which a trial judge employs during a colloquy with a defendant contemplating the assertion of his right to proceed *pro se* constitutes a *per se* violation of N.C. Gen. Stat. § 15A-1242. Instead, such a calculation error would only contravene N.C. Gen. Stat. § 15A-1242 if there was a reasonable likelihood that the defendant might have made a different decision with respect to the issue of self-representation had he or she been more accurately informed about “the range of permissible punishments.”

Although the information that the trial court provided to Defendant concerning “the range of permissible punishments” was technically erroneous, we are unable to conclude that this error invalidated Defendant’s otherwise knowing and voluntary waiver of counsel. Our conclusion to this effect hinges upon the fact that Defendant was thirty-five years old at the time of this trial, that a sentence of 740 months imprisonment would have resulted in Defendant’s incarceration until he reached age 97, and that a sentence of 912 months would have resulted in Defendant’s incarceration until he reached age 111. Although such a fourteen year difference would be sufficient, in many instances, to preclude a finding that Defendant waived his right to counsel knowingly and voluntarily as the result of a trial court’s failure to comply with N.C. Gen. Stat. § 15A-1242, it does not have such an effect in this instance given that either term of imprisonment mentioned in the trial court’s discussions with Defendant was, given Defendant’s age, tantamount to a life sentence. Simply put, the practical effect of either sentence on Defendant would have been identical in any realistic sense. In light of this fact, we cannot conclude that there was a reasonable likelihood that Defendant’s decision concerning the extent, if any, to which he wished to waive his right to the assistance of counsel and represent himself would have been materially influenced by the possibility that he would be incarcerated until age 97 rather than age 111. As a result, we conclude that Defendant’s waiver of the right to counsel was, in fact, knowing and voluntary and that the trial court did not err by allowing him to represent himself.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendant’s challenges to the trial court’s judgments have merit. As a result, the trial court’s judgments should, and hereby do, remain undisturbed.

NO ERROR.

Judges BRYANT and ELMORE concur.

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STATE OF NORTH CAROLINA

v.

RENE REYES HERNANDEZ

STATE OF NORTH CAROLINA

v.

DAWN MICHELLE DAVIS

No. COA12-924

No. COA12-1131

Filed 4 June 2013

1. Appeal and Error—issue not reached—alternative request for writ of certiorari granted

The Court of Appeals allowed defendant Davis' request for a writ of *certiorari* pursuant to N.C. R. App. P. 21(a) in a drug case, and thus, did not reach the issue of whether defendant's appeal was subject to dismissal for having been taken from the order denying her suppression motion instead of from the final judgments.

2. Appeal and Error—preservation of issues—switching theories on appeal not allowed

Although defendants contended that the trial court erred in a drugs case by denying their motions to suppress evidence seized from a motor vehicle owned by defendant Davis and operated by defendant Hernandez and a residence occupied by defendant Davis, a criminal defendant is not entitled to advance a particular theory in the course of challenging the denial of a suppression motion on appeal when the same theory was not advanced in the court below.

3. Constitutional Law—effective assistance of counsel—dismissal of claim without prejudice

Defendant Davis' ineffective assistance of counsel claim was not ripe for consideration on direct appeal and was dismissed without prejudice to her right to raise it in a subsequent motion for appropriate relief.

Appeal by defendants from judgments entered 30 January 2012 by Judge Gary M. Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 30 January 2013.

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Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for the State in response to Defendant Rene Reyes Hernandez.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for the State in response to Defendant Dawn Michelle Davis.

Appellate Defender Staples Hughes, by Assistant Appellate Defender S. Hannah Demeritt, for Defendant-Appellant Hernandez.

Bushnaq Law Office, PLLC, by Faith S. Bushnaq, for Defendant-Appellant Davis.

ERVIN, Judge.

Defendants Rene Reyes Hernandez and Dawn Michelle Davis¹ appeal from judgments sentencing them to 25 to 30 months imprisonment based upon pleas of guilty to various drug-related offenses. On appeal, Defendants argue that the trial court erred by denying their motions to suppress evidence seized from a motor vehicle owned by Defendant Davis and operated by Defendant Hernandez and from a residence occupied by Defendant Davis. After careful consideration of Defendants' challenges to the trial court's order in light of the record and the applicable law, we conclude that Defendants have failed to properly preserve their principal challenge to the trial court's order for appellate review, that Defendant Davis' ineffective assistance of counsel claim is not ripe for determination at this time, and that, for these reasons, the trial court's judgments should remain undisturbed.

I. Factual Background

A. Substantive Facts

At 7:04 p.m. on 19 March 2011, the Buncombe County Sheriff's Department received an anonymous phone call asserting that a drug transaction would occur later that evening at a specific mobile home located in Woodfin. According to the caller, 50 pounds of marijuana would be delivered by an Hispanic male to a tan and off-white mobile home which

1. As a result of the fact that these two cases "involve common issues of law" and arise out of the same incident, the Court has consolidated them for decision on its own initiative pursuant to N.C.R. App. P. 40.

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had a large front porch on which a number of children's bicycles would be situated. The individual making the delivery would be coming from Hendersonville and would be driving a black Chevy Tahoe with tinted windows. According to the caller, an Hispanic male named "Renea" Hernandez and a white female named Dawn Davis would leave the mobile home around 4:00 a.m. in a maroon Honda for the purpose of taking the marijuana into Tennessee via I-26. The caller also indicated that the maroon Honda was registered to and would be driven by Defendant Davis.

Shortly thereafter, Officer Corey Smith of the Woodfin Police Department traveled to the address provided by the anonymous caller in an attempt to verify the accuracy of the information that had been provided by that individual. Upon arriving at the residence, Officer Smith observed a maroon vehicle sitting outside of the mobile home. In addition, Officer Smith observed an Hispanic male sitting on the couch inside the mobile home. Finally, Officer Smith noticed that the mobile home had a large front porch on which a number of bicycles were situated.

Although certain portions of the information provided by the caller were correct, other portions turned out to be inaccurate. For example, no black Tahoe was parked at the residence. In addition, the maroon vehicle which the officers observed was a 1995 Nissan Maxima rather than a Honda. Finally, the mobile home which Officers Lawrence and Smith observed was blue and white rather than tan and off-white.

After this initial examination of the mobile home and its surroundings, Officer Smith left the area and met up with Officer Lawrence Thomas, also of the Woodfin Police Department, to decide how to proceed. The officers returned to the vicinity of the mobile home at approximately 11:00 p.m. for the purpose of conducting surveillance from a nearby church parking lot. At 3:56 a.m., Officer Smith observed a dark-colored vehicle, which he believed to be the same vehicle that he had observed at the time of his earlier visit, leave the area. At that point, Officer Smith began to follow the vehicle, which began heading west on I-26.

After confirming that the vehicle in question was a maroon Nissan Maxima registered to Defendant Davis and that it bore the same registration plate that had been affixed to the vehicle that he had observed at the mobile home earlier that evening, Officer Smith received information to the effect that Defendant Davis' operator's license had been suspended. Although there were two individuals in the maroon Nissan, Officer Smith could not confirm the race, gender, or any other identifying characteristics of the vehicle's driver due to the distance at which he was following it and the limited light that was available at that time of

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morning. In spite of the fact that the driver had not committed any traffic violation in his presence, Officer Smith, eventually joined by Officer Lawrence, stopped the vehicle after following it for approximately two and a half miles based upon the fact that Defendant Davis' operator's license had expired.

After Officer Smith initiated the stop, he activated his spotlight for the purpose of illuminating the interior of the vehicle. Upon doing that, Officer Smith was able to determine that the vehicle was occupied by both a male and a female person and that the male occupant was driving. As a result, Officer Smith knew at this point "that the registered owner was not driving."

Officer Smith then approached the passenger side of the vehicle for the purpose of speaking with Defendant Davis. Upon reaching the vehicle, Officer Smith informed Defendant Davis that he had stopped the car because "the registered owner's driver's license was suspended." Defendant Davis responded that she was the registered owner of the vehicle and that her male friend was driving the car because her license had been suspended. Next, Officer Smith asked Defendant Davis for the vehicle's registration card and asked Defendant Hernandez, who had been driving, for his license. After Defendant Hernandez stated that he did not have a driver's license, Officer Smith told him to turn off the car, hand over the keys, step out of the car, and go to the rear of the vehicle for the purpose of speaking with Officer Lawrence, who had also arrived on the scene.

As soon as Defendant Hernandez had complied with this instruction, Officer Smith asked Defendant Davis whether the vehicle contained anything that he needed to know about, including "drugs, guns, illegal knives, or anything." In response, Defendant Davis told Officer Smith that there were twenty pounds of marijuana in the car and pointed to the location at which the marijuana was situated. Upon receiving that information, investigating officers searched the vehicle and found some powder cocaine and approximately twenty pounds of marijuana in a garbage bag. After Defendant Davis consented to a search of her residence, investigating officers found a small quantity of marijuana, a pipe, and some rolling papers at that location.

B. Procedural History

On 20 March 2011, magistrate's orders were issued charging Defendants with trafficking in marijuana by possession, maintaining a vehicle resorted to by persons using controlled substances, and conspiring with each other to traffic in marijuana. On the same date, a magistrate's order charging Defendant Davis with possession of cocaine and

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a citation charging Defendant Davis with possession of drug paraphernalia were issued. On 11 July 2011, the Buncombe County grand jury returned bills of indictment charging Defendants with trafficking in marijuana by transportation, trafficking in marijuana by possession, maintaining a vehicle used for keeping and selling controlled substances, and conspiring with each other to traffic in marijuana by possession and transportation. In addition, the Buncombe County grand jury returned bills of indictment charging Defendant Davis with possession of cocaine and possession of drug paraphernalia.²

On 10 October 2011, Defendant Hernandez filed a motion seeking to have all of the evidence seized as a result of the search of Defendant Davis' vehicle and residence suppressed on the grounds that the information provided to investigating officers by the anonymous caller was insufficient to create a reasonable articulable suspicion that criminal activity was afoot. On 8 December 2011, Defendant Davis filed a substantively identical suppression motion. Defendants' suppression motions came on for a joint hearing before Judge James U. Downs at the 5 December 2011 criminal session of the Buncombe County Superior Court. During the hearing, the State presented the testimony of Officers Lawrence and Smith, who were cross-examined by counsel for Defendant Hernandez. Neither defendant presented any evidence at the suppression hearing.

After all the evidence had been received at the suppression hearing, Judge Downs heard arguments from counsel for the State and Defendants. In the course of seeking to persuade Judge Downs to deny Defendants' suppression motions, the State argued that the issue raised by Defendants' suppression motions was controlled by the decision of this Court in *State v. Hess*, 185 N.C. App. 530, 648 S.E.2d 913 (2007), *disc. review improvidently granted*, 362 N.C. 283, 658 S.E.2d 657 (2008), given that investigating officers had a reasonable articulable suspicion that Defendant Davis was operating a motor vehicle without a license at the time that they stopped her vehicle. In response, Defendant Hernandez's trial counsel argued that the justification for the stop advanced by the investigating officers was "nothing more than a pretext;" that the "only reason that [officers] were there that night [was] because of the anonymous tip;" and that the information provided by the anonymous caller did not suffice to establish the reasonable articulable suspicion needed to support a valid traffic stop. Defendant Davis' trial counsel did not present

2. At some point, Defendant Hernandez was also charged with driving without being properly licensed to do so. However, no criminal pleading charging Defendant Hernandez with that offense appears in the record.

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an argument in support of her suppression motion before Judge Downs. At the conclusion of the suppression hearing, Judge Downs concluded that the investigating officers had a valid basis for stopping Defendants based upon the fact that Defendant Davis did not have a valid operator's license and that, given "the totality of the circumstances," "the stop was proper, not in violation of the Fourth Amendment."

After reserving her right to seek appellate review of the denial of her suppression motion, Defendant Davis entered a plea of guilty as charged on 30 January 2012. Based on Defendant Davis' guilty pleas, the trial court entered a judgment consolidating Defendant Davis' trafficking in marijuana by possession and trafficking in marijuana by transportation convictions for judgment and sentencing her to a term of 25 to 30 months imprisonment and a separate judgment consolidating her convictions for conspiracy to traffic in marijuana by possession and transportation, maintaining a vehicle for keeping and selling marijuana, possession of cocaine, and possession of drug paraphernalia for judgment and sentencing her to a concurrent term of 25 to 30 months imprisonment. On the same date, after also reserving his right to seek appellate review of the denial of his suppression motion, Defendant Hernandez entered a plea of guilty as charged. Based on Defendant Hernandez's guilty pleas, the trial court entered a judgment consolidating Defendant Hernandez's conspiracy to traffic in marijuana by possession and transportation, maintaining a vehicle for the purpose of keeping or selling controlled substances, and driving without being properly licensed to do so for judgment and sentencing Defendant Hernandez to a term of 25 to 30 months imprisonment and a separate judgment consolidating Defendant Hernandez's convictions for trafficking in marijuana by possession and trafficking in marijuana by transportation for judgment and sentencing Defendant Hernandez to a concurrent term of 25 to 30 months imprisonment. Defendants noted an appeal to this Court from the trial court's judgments.

II. Legal Analysis

A. Appealability

[1] As an initial matter, we note that Defendant Davis' appellate counsel has petitioned this Court for the issuance of a writ of *certiorari* authorizing review of her challenges to the trial court's judgments out of concern that the notice of appeal given by her trial counsel was inadequate. At the time that she noted Defendant Davis' appeal, Defendant Davis' trial counsel stated, "Miss Davis gives notice of appeal, also, and asks that the appellate defender be appointed to represent her to appeal the motion to suppress."

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“An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty.” N.C. Gen. Stat. § 15A-979 (b). This Court has held on numerous occasions that a defendant seeking appellate review of an order denying a suppression motion following the entry of a guilty plea is required to note his or her appeal from the trial court’s judgment rather than from the order denying the defendant’s suppression motion. As we noted in one such decision:

Defendant has failed to appeal from the judgment of conviction and our Court does not have jurisdiction to consider Defendant’s appeal. In North Carolina, a defendant’s right to pursue an appeal from a criminal conviction is a creation of state statute. Notice of *intent* to appeal prior to plea bargain finalization is a rule designed to promote a fair posture for appeal from a guilty plea. Notice of Appeal is a procedural appellate rule, required in order to give this Court jurisdiction to hear and decide a case. Although Defendant preserved his right to appeal by filing his written notice of intent to appeal from the denial of his motion to suppress, he failed to appeal from his final judgment, as required by N.C. [Gen. Stat.] § 15A-979(b).

State v. Miller, 205 N.C. App. 724, 725, 696 S.E.2d 542, 542-43 (2010) (citations and quotation marks omitted). As a result, this Court dismissed the defendant’s appeal. *Id.* at 726, 696 S.E.2d at 543.

We need not, however, reach the issue of whether Defendant Davis’ appeal is subject to dismissal as having been taken from the order denying her suppression motion instead of from the trial court’s judgments given our decision, in the exercise of our discretion, to allow her alternative request for the issuance of a writ of *certiorari* pursuant to N.C.R. App. P. 21(a) (stating that “[t]he writ of *certiorari* may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action”). Thus, we will now proceed to evaluate the merits of both Defendants’ challenges to the denial of their suppression motions.

B. Impermissible Extension of an Investigative Detention

[2] In challenging the denial of their suppression motions before this Court, Defendants argue that, even though the initial stop of Defendant Davis’ vehicle did not offend applicable constitutional limits, the stop

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was impermissibly extended given that investigating officers had no justification for continuing to detain Defendants or to question Defendant Davis after determining that Defendant Hernandez, rather than Defendant Davis, had been driving. There is no need for us to address the merits of this contention, however, given that it was never advanced at the suppression hearing held before Judge Downs.

According to well-established North Carolina law, “where a theory argued on a[n] appeal was not raised before the trial court[,] the argument is deemed waived on appeal.” *State v. Davis*, 207 N.C. App. 359, 363, 700 S.E.2d 85, 88 (2010) (citing *State v. Augustine*, 359 N.C. 709, 721, 616 S.E.2d 515, 525 (2005), *cert denied*, 548 U.S. 925, 126 S. Ct. 2980, 165 L. Ed. 2d 988 (2006)); *see also* N.C.R. App. P. 10(a)(1) (providing that “a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling . . . [and] obtain a ruling”). As a result, in a situation in which a defendant argued on appeal that his confession should have been suppressed as the product of an unlawful arrest after asserting an entirely different basis for seeking the suppression of the confession in question before the trial court, the Supreme Court declined to address the defendant’s argument on the merits in reliance upon the principle that a “[d]efendant may not swap horses after trial in order to obtain a thoroughbred upon appeal.” *State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 518-19 (1988) (citing *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). Thus, a criminal defendant is not entitled to advance a particular theory in the course of challenging the denial of a suppression motion on appeal when the same theory was not advanced in the court below.

Although Defendants filed separate suppression motions in the trial court, the sections describing the reasons that the evidence in question should be suppressed were the same in both motions. For that reason, the only issue raised by Defendants’ motions was the extent, if any, to which the information provided by the anonymous caller afforded the investigating officers the reasonable articulable suspicion needed to justify stopping Defendant Davis’ vehicle. During the joint hearing held for the purpose of considering Defendants’ suppression motions, Defendant Hernandez’s trial counsel focused his attention on the sufficiency of the anonymous tip, concluding his argument by stating that “it’s clear that the reason that [Defendants] were pulled on this evening was because of the tip, and we’d ask the court to suppress it.” Defendant Davis’ trial counsel made no separate argument, apparently opting to rely on the contentions advanced on behalf of Defendant Hernandez. At no point during the suppression hearing did either defendant make an

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“impermissible extension” argument such as the one which they seek to assert on appeal. As a result, given that Defendants have advanced an argument before this Court to which they did not allude in the court below, we conclude that their challenge to the trial court’s suppression order has not been properly preserved for appellate review and cannot provide a basis for an award of appellate relief.³

C. Ineffective Assistance of Counsel

[3] In addition, Defendant Davis argues that, in the event that her challenge to the denial of her suppression motion as advanced before this Court was not properly preserved for appellate review, she received constitutionally deficient representation from her trial counsel. More specifically, Defendant Davis argues that “[t]here can be no reasonably strategic reason to fail to raise the argument that reasonable suspicion ceased to exist once the officer established that a man, not Ms. Davis, was driving the car” and that she was prejudiced by her trial counsel’s failure to properly preserve the challenge to the seizure of evidence from her vehicle and residence for appellate review. After carefully reviewing the record, however, we conclude that this issue is not ripe for consideration on direct appeal and should be dismissed without prejudice to Defendant Davis’ right to raise it in a subsequent motion for appropriate relief.

As a general proposition, “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), *disc. review denied*, 356 N.C. 623, 575 S.E.2d 758 (2002).

It is well established that ineffective assistance of counsel claims “brought on direct review will be decided on the

3. Aside from the argument discussed in the text, Defendant Hernandez contends on appeal, as he did in the court below, that the information communicated to investigating officers during the anonymous call did not suffice to provide investigating officers with the reasonable articulable suspicion needed to support a valid traffic stop. We need not address this argument in any detail, however, given that the trial court’s findings of fact establish that investigating officers stopped Defendant Davis’ vehicle because it was registered in her name, her driver’s license was suspended, and they were unable to determine the identity of the driver. As this Court has previously held, investigatory stops made on this basis are lawful. *See Hess*, 185 N.C. App. at 534, 648 S.E.2d at 917 (holding, consistently with the result reached in the majority of jurisdictions, that, “when a police officer becomes aware that a vehicle being operated is registered to an owner with a suspended or revoked driver’s license, and there is no evidence appearing to the officer that the owner is not the individual driving the automobile, reasonable suspicion exists to warrant an investigatory stop”). Thus, Defendant Hernandez’s alternative challenge to Judge Downs’ order lacks merit.

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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[s] 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) (citation omitted) (quoting *State v. Fair*, 354 N.C. 131, 166, 577 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002)), *cert. denied.*, 546 U.S. 830, 126 S. Ct. 48, 163 L. Ed. 2d 80 (2005). After carefully reviewing the record developed in this case, we believe that Defendant Davis has asserted this ineffective assistance of counsel claim prematurely.

To make a successful ineffective assistance of counsel claim, a defendant must show that (1) defense counsel’s “performance was deficient,” and (2) “the deficient performance prejudiced the defense.” Counsel’s performance is deficient when it falls “below an objective standard of reasonableness.” Deficient performance prejudices a defendant when there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” “A reasonable probability is a probability sufficient to undermine confidence in the outcome.”

State v. Waring, 364 N.C. 443, 502, 701 S.E.2d 615, 652 (2010) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064-65, 2068, 80 L. Ed. 2d 674, 693-94, 698 (1984)) (other citation omitted), *cert. denied*, __ U.S. __, 132 S. Ct. 132, 181 L. Ed. 2d 53 (2011). In considering the merits of ineffective assistance of counsel claims, “[d]ecisions concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed by this Court.” *State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002), *cert. denied*, 538 U.S. 986, 123 S. Ct. 1800, 155 L. Ed. 2d 681 (2003).

Although Defendant Davis argues that there is no possible strategic or tactical justification for her trial counsel’s failure to argue that the seizure of the items that she sought to have suppressed resulted from the impermissible extension of a lawful investigatory detention, we are

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unable to make that determination based on our review of the record that is before us on direct appeal. Ordinarily, the extent to which a defendant's trial counsel made a particular strategic or tactical decision is a question of fact. *E.g. United States v. Cockrell*, 720 F.2d 1423, 1426 (5th Cir. 1983) (stating that "the district court's determinations of whether counsel's actions were strategic and reasonable are questions of fact that should govern unless they are clearly erroneous"), *reh'g denied*, 724 F.2d 926 (5th Cir.), *cert. denied*, 467 U.S. 1251, 104 S. Ct. 3534, 82 L. Ed. 2d 839 (1984); *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir.) (stating that, "[a]lthough the reasonableness of counsel's decision is best described as a question of law, whether [counsel's] actions were indeed 'tactical' is a question of fact"), *cert. denied*, 552 U.S. 1009, 128 S. Ct. 532, 169 L. Ed. 2d 371 (2007); *Provenzano v. Singletary*, 148 F.3d 1327, 1330 (11th Cir.) (stating that "[t]he question of whether an attorney's actions were actually the product of a tactical or strategic decision is an issue of fact, and a state court's decision concerning that issue is presumptively correct"), *reh'g en banc denied*, 162 F.3d 100 (11th Cir. 1998). However, the present record sheds little or no light on the reason that Defendant Davis' trial counsel failed to raise the "impermissible extension" issue at the suppression hearing held before Judge Downs. On the one hand, the "impermissible extension" issue may simply have not occurred to her. On the other hand, she might have researched the issue in question and determined that such an argument would not have been successful or that the argument actually advanced at the suppression hearing was more likely to succeed than the one upon which Defendant Davis now seeks to rely. In the absence of additional information concerning the nature and extent of Defendant Davis' trial counsel's preparation and the defense strategy that she elected to adopt, we cannot determine whether the failure of Defendant Davis' trial counsel to raise the "impermissible extension" issue resulted from oversight or from a legitimate strategic or tactical decision without speculating about the answer to questions about which we lack sufficient information. For obvious reasons, this Court should refrain from making such speculative determinations. *State v. Gillis*, 158 N.C. App. 48, 55, 580 S.E.2d 32, 37-38 (stating that this "Court is bound on appeal by the record on appeal as certified and can judicially know only what appears in it"), *disc. review denied*, 357 N.C. 508, 587 S.E.2d 887 (2003); *see also, e.g., State v. Al-Bayyinah*, 359 N.C. 741, 752-53, 616 S.E.2d 500, 509-10 (2005) (dismissing an ineffective assistance of counsel claim asserted on direct appeal without prejudice because "[t]rial counsel's strategy and the reasons therefor [were] not readily apparent from the record," necessitating the development of "more information . . . [in order] to [permit a] determin[ation]

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as to whether] defendant's claim satisfies the *Strickland* test"), *cert. denied*, 547 U.S. 1076, 126 S. Ct. 1784, 164 L. Ed. 2d 528 (2006); *State v. Campbell*, 359 N.C. 644, 693, 617 S.E.2d 1, 31 (2005) (dismissing an ineffective assistance of counsel claim asserted on direct appeal without prejudice because, "from the record before the Court, it could only speculate as to why defense counsel chose to argue self-defense"), *cert. denied*, 547 U.S. 1073, 126 S. Ct. 1773, 164 L. Ed. 2d 523 (2006); *State v. Patel*, __ N.C. App. __, __, 719 S.E.2d 101, 110 (2011) (dismissing an ineffective assistance of counsel claim asserted on direct appeal without prejudice on the grounds that this Court was unable to "determine from the cold record whether defense counsel in this case had a strategic reason for stipulating that North Carolina has jurisdiction"), *disc. review denied*, __ N.C. __, 720 S.E.2d 395 (2012); *State v. Loftis*, 185 N.C. App. 190, 203, 649 S.E.2d 1, 10 (2007) (dismissing an ineffective assistance of counsel claim asserted on direct appeal without prejudice on the grounds that the Court lacked "sufficient information regarding trial counsel's strategy"), *disc. review denied*, 362 N.C. 241, 660 S.E.2d 494 (2008). The inappropriateness of engaging in such speculation clearly underlies our Supreme Court's recognition that, in many cases, " 'defendants likely will not be in a position to adequately develop many [ineffective assistance of counsel] claims on direct appeal.' " *State v. Long*, 354 N.C. 534, 540, 557 S.E.2d 89, 93 (2001) (quoting *Fair*, 354 N.C. at 167, 557 S.E.2d at 525). As a result, given our determination that additional factual development is needed in order to properly resolve Defendant Davis' ineffective assistance of counsel claim, we conclude that this claim should be dismissed without prejudice to Ms. Davis' right to assert it in a subsequent motion for appropriate relief.⁴

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendants' challenges to the trial court's judgments justify an award of appellate relief. As a result, the trial court's judgments as to Defendant Hernandez (COA12-924) should, and hereby do, remain undisturbed and

4. Defendant Davis has requested that we excuse her failure to challenge the denial of her suppression motion before the trial court on "impermissible extension" grounds and to decide that issue on the merits pursuant to our authority under N.C.R. App. P. 2 (authorizing an appellate court, in order "[t]o prevent manifest injustice" or "to expedite decision in the public interest," to "suspend or vary the requirements or provisions of any of these rules"). However, given that this issue was not litigated before the trial court, there is a substantial possibility that the record concerning this issue was not fully developed and certain important factual issues not resolved. As a result, we decline Defendant Davis' invitation to utilize our authority under N.C.R. App. P. 2 in order to reach the merits of this "impermissible extension" issue.

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the trial court's judgments as to Defendant Davis (COA12-1131) should, and hereby do, remain undisturbed without prejudice to her right to file and litigate a subsequent motion for appropriate relief raising the ineffective assistance of counsel claim discussed above.

AFFIRM as to No. COA12-924; **AFFIRM IN PART, DISMISSED IN PART** as to No. COA12-1131.

Judges Bryant and Elmore concur.

STATE OF NORTH CAROLINA
v.
MICHAEL RAY MARLEY

No. COA12-770

Filed 4 June 2013

**Motor Vehicles—driving while impaired—motion to dismiss—
sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired. The breathalyzer test results showing defendant's blood alcohol concentration of .09 were sufficient evidence for the charge of impaired driving to be submitted to the jury.

Appeal by defendant from judgment entered 30 June 2011 by Judge James W. Morgan in Caldwell County Superior Court. Heard in the Court of Appeals 13 February 2013.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for the State.

C. Gary Triggs for defendant-appellant.

STEELMAN, Judge.

Where the State presented substantial evidence that defendant was driving while impaired based upon an alcohol concentration of .08 or more, the trial court properly denied defendant's motion to dismiss.

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I. Factual and Procedural History

At approximately 1:45 a.m. on the morning of 30 April 2009, Officer Lail of the Granite Falls Police Department responded to a report of a possible intoxicated driver. Officer Lail observed a blue Mitsubishi matching the description he received; the vehicle drifted across the center dividing line of the road, made wide turns, and weaved in its lane of traffic from left to right. When the vehicle drifted off the road with its right tires, Officer Lail stopped the vehicle. Michael Ray Marley (defendant) was operating the vehicle, from which Officer Lail detected a slight odor of alcohol. Defendant informed the officer that he had consumed two or three beers. Upon emerging from the vehicle, defendant stumbled and had to brace himself to regain his balance. Defendant submitted to various field sobriety tests and an Alco-Sensor Test, all of which he failed. Defendant was arrested for driving while impaired and driving left of center. Defendant submitted to a breath test at the Caldwell County Detention Center. The test revealed a blood alcohol concentration of .09.

Defendant was charged with driving while impaired and driving left of center. At trial, the State called Officer Lail and Trooper Hyatt, the breathalyzer operator. Defendant's motion to dismiss at the close of the State's evidence was denied. Defendant offered no evidence, and his renewed motion to dismiss was denied. The jury returned a verdict of guilty on the charge of driving while impaired, and a verdict of responsible on the charge of driving left of center.

Defendant appeals.

II. Argument

In his sole argument on appeal, defendant contends that the trial court erred in denying his motions to dismiss the charge of driving while impaired. We disagree.

A. Standard of Review

"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,

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455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *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).

B. Analysis

Defendant contends that the trial court committed prejudicial error by failing to grant defendant’s motions to dismiss. Defendant argues that “[i]n order to withstand a Motion to Dismiss at the close of the States’ case and the close of all evidence . . . the State must prove [the elements of its case] beyond a reasonable doubt.” This is not a correct statement of the law.

The standard of review of a decision to deny a motion to dismiss is not “beyond a reasonable doubt,” but whether there is substantial evidence, which is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Smith*, 300 N.C. at 78-79, 265 S.E.2d at 169.

In the instant case, defendant was charged under N.C. Gen. Stat. § 20-138.1, which states in relevant part that:

A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

- (1) While under the influence of an impairing substance; or
- (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person’s alcohol concentration; or
- (3) With any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine.

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N.C. Gen. Stat. § 20-138.1(a) (2011). In its instruction to the jury, the trial court stated:

The defendant has been charged with impaired driving. For you to find the defendant guilty of this offense the state must prove three things beyond a reasonable doubt.

First, that the defendant was driving a vehicle.

Second, that the defendant was driving that vehicle upon a street within the state.

And third, that at the time the defendant was driving that vehicle the defendant had consumed sufficient alcohol that at any relevant time after the driving the defendant had an alcohol concentration of .08 or more grams of alcohol per two hundred and ten liters of breath.

The State proceeded with the charge of impaired driving under the theory that defendant's blood alcohol level was in excess of the legal limit of .08. Defendant contends that the State failed to present sufficient evidence of blood alcohol concentration.

Defendant contends that the jury was improperly required to speculate as to the results of Trooper Hyatt's breathalyzer test. According to Trooper Hyatt's testimony, a machine with a margin of error of .02 or less performs acceptably. Defendant contends that this is evidence that the machine had a margin of error of .02. Since the breathalyzer revealed that defendant's blood alcohol concentration was .09, defendant contends that this indicates that defendant could have had a blood alcohol concentration anywhere between .07 and .11. Defendant argues that this presented a situation where the jury was required to speculate as to whether the results were accurate.

The standard of review of a motion to dismiss is whether there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Smith*, 300 N.C. at 78-79, 265 S.E.2d at 169. Our Supreme Court has held that "[o]nce it is determined that the chemical analysis of the defendant's breath was valid, then a reading of 0.10 constitutes reliable evidence and is sufficient to satisfy the State's burden of proof as to this element of the offense of DWI." *State v. Shuping*, 312 N.C. 421, 431, 323 S.E.2d 350, 356 (1984).¹

1. The version of N.C. Gen. Stat. § 20-138.1(a)(2) relied upon in *Shuping* provided that the legal limit was .10 BAC. Since that time, the statute has been amended to set the limit at .08.

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Defendant's argument goes to the credibility of the State's evidence, not its sufficiency to withstand defendant's motion to dismiss. Such an argument is more appropriately made to the jury at trial, and not to an appellate court.

We hold that the breathalyzer test results showing defendant's blood alcohol concentration of .09 were sufficient evidence under this standard for the charge of impaired driving to be submitted to the jury. Accordingly, we find no error.

NO ERROR.

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

STATE OF NORTH CAROLINA
v.
KEVIN CHRISTOPHER ROGERS

No. COA12-1415

Filed 4 June 2013

1. Homicide—first-degree murder—short form indictment

The trial court did not err by failing to dismiss *ex mero motu* the short form first-degree murder indictment because our courts have repeatedly held that it is constitutional.

2. Homicide—first-degree murder—motion to dismiss—sufficiency of evidence—premeditation—deliberation—felony murder

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder. There was substantial evidence presented to support a conclusion that defendant killed the victim with premeditation and deliberation. Since the trial court did not arrest judgment on defendant's conviction for robbery with a dangerous weapon, but imposed judgment on the underlying felony, analysis of felony murder was irrelevant.

3. Robbery—dangerous weapon—motion to dismiss—sufficiency of evidence—continuous transaction

The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon. A

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coparticipant's testimony constituted substantial evidence that the robbery and the shooting were part of a continuous transaction.

4. Conspiracy—motion to dismiss—sufficiency of evidence—implied understanding—robbery with dangerous weapon

The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to commit robbery. The facts showed an implied understanding to commit robbery with a dangerous weapon.

5. Burglary and Unlawful Breaking or Entering—first-degree burglary—failure to instruct—no prejudice

The trial court did not commit plain error by failing to instruct the jury on the theory of first-degree burglary alleged in the bill of indictment. Defendant could not demonstrate prejudice.

6. Homicide—first-degree murder—failure to instruct on lesser-included offense—second-degree murder

The trial court did not err in a first-degree murder case by failing to submit to the jury the lesser-included offense of second-degree murder. The State presented evidence of premeditation and deliberation, and there was no evidence in the record to suggest a lack thereof.

Appeal by defendant from judgments entered 8 December 2011 by Judge Claire V. Hill in Bladen County Superior Court. Heard in the Court of Appeals 11 April 2013.

Roy Cooper, Attorney General, by Sonya Calloway-Durham, Special Deputy Attorney General, for the State.

William D. Spence for defendant-appellant.

STEELMAN, Judge.

Where there was substantial evidence that defendant committed the crimes charged, the trial court did not err in denying each of defendant's motions to dismiss. Where the trial court's instruction to the jury on first-degree burglary cited the underlying felony as robbery with a dangerous weapon, rather than felony larceny as set forth in the indictment, any error was not prejudicial. Where the State presented substantial evidence of defendant's premeditation, deliberation and intent to commit first-degree murder, and defendant directs us to no contradictory

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evidence in the record, the trial court did not err in declining to instruct the jury on the lesser included offense of second-degree murder.

I. Factual and Procedural Background

On 24 August 2009, the body of Sean Lesane (Lesane) was discovered in his mobile home by his father. There were no signs of forced entry or of a struggle. Four bullets were found in Lesane's body. An autopsy revealed that the cause of death was multiple gunshot wounds.

The shell casings were .40 caliber Smith and Wesson shells, fired from the same gun. The six bullets were .40 caliber hollow point bullets. The gun was not recovered.

Laterra Ross (Ross), the girlfriend of Kevin Rogers (defendant), testified that she knew Lesane, from whom she periodically received money and drugs. She testified that defendant decided to rob Lesane. On the evening of 20 August 2009, Lesane picked her up and took her to his mobile home where they used drugs. She borrowed Lesane's phone and called defendant, describing the location of the residence and unlocking the front door. When defendant arrived, Ross fled. As she fled, she heard gunshots, and heard Lesane begging for his life. When she returned, Lesane appeared to be dead. Defendant then retrieved money and drugs from a vent above the bathroom door, at which point defendant and Ross left the house. Ross further testified that defendant first buried the .40 caliber hand gun used in the crimes, and then later dug it up and threw it into a river.

In January of 2010, Ross and defendant were arrested in Georgia and brought back to Bladen County. Ross pled guilty to robbery with a dangerous weapon and aiding and abetting first-degree burglary.

Defendant was indicted for the felonies of aiding and abetting robbery with a dangerous weapon, conspiring to commit robbery with a dangerous weapon, first-degree murder, robbery with a dangerous weapon, and first-degree burglary. On 8 December 2011, the jury found defendant guilty of first-degree murder based upon both premeditation and deliberation and felony murder. Defendant was also found guilty of robbery with a dangerous weapon, first-degree burglary, and conspiracy to commit robbery with a dangerous weapon. The State voluntarily dismissed the charge of aiding and abetting robbery with a dangerous weapon. The trial court sentenced defendant to life imprisonment for the first-degree murder charge. The trial court also sentenced defendant to a consecutive sentence of 29-44 months for conspiracy to commit robbery with a

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dangerous weapon. The trial court consolidated the remaining two convictions, and imposed a concurrent sentence of 61-83 months.

Defendant appeals.

II. Failure to Dismiss *Ex Mero Motu*

[1] In his first argument, defendant contends that the trial court erred in failing to dismiss, *ex mero motu*, the “short form” first-degree murder indictment. We disagree.

Defendant concedes in his brief that this issue has been decided against him. *See e.g. State v. Braxton*, 352 N.C. 158, 174-75, 531 S.E.2d 428, 437-38 (2000); *State v. Brown*, 320 N.C. 179, 191, 358 S.E.2d 1, 11 (1987). Our courts have repeatedly held that a short form indictment for first-degree murder pursuant to N.C. Gen. Stat. § 14-17 is not fatally defective for failure to specify whether it is based on premeditation and deliberation, felony murder, or other theories articulated in the statute.

This argument is without merit.

III. Denial of Motions to Dismiss

In his second, third, and sixth arguments, defendant contends that the trial court erred in denying his motions to dismiss the charges against him based upon the insufficiency of the evidence. We disagree.

A. Standard of Review

“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 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *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*,

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339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

B. Analysis1. First-Degree Murder

[2] “In order to convict a defendant of premeditated, first-degree murder, the State must prove: (1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation.” *State v. Bonilla*, 209 N.C. App. 576, 582, 706 S.E.2d 288, 293 (2011); N.C. Gen. Stat. § 14-17(a) (2011). Defendant contends that the State failed to present evidence that defendant intentionally killed Lesane with premeditation and deliberation.

Premeditation and deliberation are mental processes. Generally, they are not subject to proof by direct evidence but must be proved, if at all, by circumstantial evidence. Among other circumstances from which premeditation and deliberation may be inferred are “(1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim’s wounds.”

State v. Keel, 337 N.C. 469, 489, 447 S.E.2d 748, 759 (1994) (citing *State v. Gladden*, 315 N.C. 398, 430-31, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L.Ed.2d 166 (1986)).

In the instant case, Ross testified that she heard Lesane beg for his life. A victim’s pleas for his life are competent evidence of a lack of provocation. *State v. Spence*, 271 N.C. 23, 34, 155 S.E.2d 802, 811 (1967), *vacated on other grounds*, 392 U.S. 649, 88 S. Ct. 2290, 20 L. Ed. 2d 1350 (1968). The State also presented evidence that Lesane’s body had eight gunshot wounds, primarily in the head and chest, with four bullets found inside Lesane’s body. The nature and number of a victim’s wounds are circumstances from which premeditation and deliberation may be inferred. *Keel*, 337 N.C. at 489, 447 S.E.2d at 759. Further, there was a lack of provocation. The State’s evidence showed that defendant went to Lesane’s trailer with the express purpose of committing robbery.

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Considering this, and the other evidence in the record, in a light most favorable to the State, we hold that there was substantial evidence presented to support a conclusion that defendant killed Lesane with premeditation and deliberation.

Defendant further contends that there was insufficient evidence to find defendant guilty of first-degree murder based upon felony murder. However, because the trial court did not arrest judgment on defendant's conviction for robbery with a dangerous weapon, but imposed judgment on the underlying felony, analysis of felony murder is irrelevant. *See State v. Robinson*, 342 N.C. 74, 82-83, 463 S.E.2d 218, 223 (1995) (holding that "where defendant is convicted of first-degree murder based upon both premeditation and deliberation and felony murder, the underlying felony does not merge with the murder conviction and the trial court is free to impose a sentence thereon." (quoting *State v. Bell*, 338 N.C. 363, 394, 450 S.E.2d 710, 727 (1994), *cert. denied*, 515 U.S. 1163, 132 L.Ed.2d 861 (1995))).

This argument is without merit.

2. Robbery with a Dangerous Weapon

[3] "Under N.C.G.S. § 14-87(a), '[t]he essential elements of robbery with a dangerous weapon are: (1) an unlawful taking or an attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened.' " *State v. Gwynn*, 362 N.C. 334, 337, 661 S.E.2d 706, 707-08 (2008) (citations omitted); *see* N.C.G.S. § 14-87(a) (2011). Defendant contends that the State failed to present evidence that the robbery and use of force were part of a continuous transaction.

Defendant contends that the State's evidence of what occurred after Ross left the trailer is nebulous, depending entirely upon what she heard. However, our standard for review is whether the State presented evidence that "a reasonable mind might accept as adequate to support a conclusion." *Smith*, 300 N.C. at 78-79, 265 S.E.2d at 169.

"[T]he exact time relationship, in armed robbery cases, between the violence and the actual taking is unimportant as long as there is one continuing transaction." *State v. Bellamy*, 159 N.C. App. 143, 149, 582 S.E.2d 663, 668 (2003) (quoting *State v. Lilly*, 32 N.C. App. 467, 469, 232 S.E.2d 495, 496-97 (1977)).

We have previously held that a continuous transaction was shown at trial where there was substantial evidence that a defendant killed his

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victims and took their property, not as a mere afterthought, but with intent. *See State v. Blue*, 207 N.C. App. 267, 275-76, 699 S.E.2d 661, 667-68 (2010) (continuous transaction existed where evidence showed that defendant attacked victim with intent to take her money); *State v. Stitt*, 201 N.C. App. 233, 250, 689 S.E.2d 539, 552 (2009) (continuous transaction existed where evidence showed that defendant had intent to take victims's money and property prior to the shooting).

In the instant case, Ross testified that defendant came to Lesane's mobile home with the intent to rob Lesane, that defendant shot and killed Lesane, and that defendant left with money and drugs taken from the mobile home. This testimony constituted substantial evidence that defendant threatened the victim with a weapon, and that defendant then took Lesane's property, having formed the intent to do so prior to the shooting, and not merely as an afterthought. The taking and the threat of violence were thus joined by time and circumstances. Ross' testimony constituted substantial evidence that the robbery and the shooting were part of a continuous transaction.

This argument is without merit.

3. Conspiracy to Commit Robbery

[4] "To hold a defendant liable for the substantive crime of conspiracy, the State must prove an agreement to perform every element of the crime." *State v. Suggs*, 117 N.C. App. 654, 661, 453 S.E.2d 211, 215 (1995). Defendant contends that the State failed to show that defendant and Ross agreed to commit robbery with a dangerous weapon. Specifically, defendant asserts that in the planning of the robbery of Lesane between defendant and Ross, there was no evidence that the use of a weapon was discussed.

In *State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (1975), our Supreme Court stated:

A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. To constitute a conspiracy it is not necessary that the parties should have come together and agreed in *express* terms to unite for a common object: A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense.

Id. at 615-16, 220 S.E.2d at 526 (internal quotations and citations omitted) (emphasis in original).

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In *State v. Johnson*, 164 N.C. App. 1, 595 S.E.2d 176, *appeal dismissed and disc. review denied*, 359 N.C. 194, 607 S.E.2d 658 (2004), three persons agreed to rob three other persons. There was no initial discussion of the use of a weapon. However, as the robbery began, the defendant, Johnson, pointed a sawed-off shotgun at the victims, while the other two robbers stole their wallets. The three robbers then equally divided the swag. We held that “[t]hese facts are sufficient to support a *prima facie* case that defendant conspired with others to commit robbery with a dangerous weapon at the moment he pointed the gun at the victims.” This was an “implied understanding to commit robbery with a dangerous weapon.” *Id.* at 17, 607 S.E.2d at 186.

The facts of the instant case also support an “implied understanding to commit robbery with a dangerous weapon.” Defendant and Ross agreed to rob Lesane. Ross was aware that defendant owned a .40 caliber pistol, which he had used to assault her. After Ross let defendant into Lesane’s mobile home, defendant used that gun to shoot and kill Lesane. Ross re-entered the mobile home and assisted defendant in the removal of Lesane’s money and drugs. Following the robbery, defendant and Ross together used the drugs to get high, and the money to pay for motel rooms and shopping sprees.

The trial court did not err in denying defendant’s motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon.

This argument is without merit.

IV. Instruction on First-Degree Burglary

[5] In his fourth argument, defendant contends that the trial court committed plain error by failing to instruct the jury on the theory of first-degree burglary alleged in the bill of indictment. We disagree.

A. Standard of Review

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. 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 id.* (citations and quotation marks omitted); *see also Walker*, 316 N.C. at 39, 340 S.E.2d at 83 (stating “that absent the error the jury probably would have reached a different verdict” and concluding that although the evidentiary error affected a fundamental

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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,” *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, the error will often be one that “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,” *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting McCaskill, 676 F.2d at 1002).

State v. Lawrence, ___ N.C. ___, ___ 723 S.E.2d 326, 334 (2012).

B. Analysis

The indictment for first-degree burglary alleged that defendant entered Lesane’s dwelling with intent to commit larceny. However, in its instructions to the jury, the trial court stated that the State had to prove that, “at the time of the breaking and entering the defendant intended to commit robbery with a dangerous weapon within the dwelling house.” Defendant contends that this variance between the indictment and the jury instruction was plain error.

Our Supreme Court’s decision in *State v. Farrar*, 361 N.C. 675, 651 S.E.2d 865 (2007), is dispositive of this argument. In *Farrar*, the defendant’s burglary indictment alleged larceny as the underlying felony. The jury instructions stated that the underlying felony was robbery with a dangerous weapon, and defendant failed to object to the jury instruction at trial. Our Supreme Court, reviewing the issue for plain error, held that defendant had not been prejudiced by the instruction, noting that “larceny is a lesser-included offense of robbery with a dangerous weapon, and thus, the jury instructions actually benefitted defendant by adding an additional element for the State to prove.” *Id.* at 677, 651 S.E.2d at 866. The Court held this “error favorable to the defendant” was not prejudicial. *Id.* at 679, 651 S.E.2d at 867. *See also State v. Beamer*, 339 N.C. 477, 485, 451 S.E.2d 190, 195 (1994) (holding that, where the jury instruction required the jury to find that defendant committed a crime with more elements than that alleged in the indictment, error was favorable to defendant). We hold that defendant cannot demonstrate prejudice and thus cannot show plain error.

This argument is without merit.

V. Failure to Submit Lesser Included Offense to Jury

[6] In his fifth argument, defendant contends that the trial court erred in failing to submit to the jury the lesser included offense of second-degree murder. We disagree.

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A. Standard of Review

“[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).

“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

Defendant contends that the trial court erred in denying his request that the lesser offense of second-degree murder be submitted to the jury. The distinction between first-degree murder and second-degree murder is that the former requires a showing of premeditation and deliberation. Our Supreme Court has held:

If the evidence is sufficient to fully satisfy the State’s burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant’s denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

State v. Locklear, 363 N.C. 438, 454-55, 681 S.E.2d 293, 306 (2009) (quoting *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 203, 344 S.E.2d 775, 781 (1986)).

At trial, the State presented evidence of defendant’s premeditation and deliberation, including Ross’ testimony that Lesane begged for his life, the multiple gunshot wounds, and the lack of provocation. As we have previously stated, this was competent evidence of premeditation and deliberation.

On appeal, defendant argues that Ross’ testimony as to what transpired in the trailer was speculative, in that Ross did not actually witness what happened, and thus was not evidence sufficient to support a finding of premeditation and deliberation. However, defendant’s challenge to Ross’ testimony is one of credibility, and the credibility of witnesses is not for this Court to determine. *State v. Buckom*, 126 N.C. App. 368, 375, 485 S.E.2d 319, 323 (1997) (quoting *State v. Hanes*, 268 N.C. 335,

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339, 150 S.E.2d 489, 492 (1966)). Defendant cites to no other evidence in the record which would suggest a lack of premeditation or deliberation.

Given that the State presented evidence of premeditation and deliberation, and there is no evidence in the record to suggest a lack thereof, we hold that the trial court did not err in denying defendant's request for an instruction on the lesser included offense of second-degree murder.

This argument is without merit.

NO ERROR.

Judges ELMORE and STROUD concur.

STATE OF NORTH CAROLINA
v.
DENNIS DWAYNE TUCKER

No. COA12-1068

Filed 4 June 2013

1. Indictment and Information—amendment—embezzlement—relationship between defendant and victim

The trial court did not err by allowing an amendment to an indictment for embezzlement where the amendment added that defendant truck driver was the agent of the victim, the company for which he worked, rather than just an employee. Although defendant argued that the amendment would prejudice his defense because it changed the nature of the relationship between defendant and the victim, the terms “employee” and “agent” are essentially interchangeable for purposes of the embezzlement statute.

2. Embezzlement—duty to account doctrine—truck driver paid by customer in cash

The trial court properly denied defendant's motion to dismiss an embezzlement prosecution against a truck driver working for a moving company where defendant contended that the court lacked territorial jurisdiction to adjudicate the charge. Defendant was paid for one delivery in cash in Nevada and used part of the money to buy an airplane ticket to North Carolina when his commercial

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driver's license expired. While defendant turned in the paperwork, he never turned in the money collected in Nevada. Defendant had a pre-existing duty to account for the proceeds to the company in North Carolina and, under the duty to account doctrine, the State presented sufficient evidence that an essential component of the crime was committed in North Carolina.

3. Embezzlement—failure to instruct jury—territorial jurisdiction—legal rather than factual issue

The trial court did not err in an embezzlement prosecution by not instructing the jury on the territorial jurisdiction issue where the argument involved a legal rather than a factual issue.

Appeal by defendant from judgment entered 1 March 2012 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 26 February 2013.

Roy Cooper, Attorney General, by Robert K. Smith, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Hannah Hall, Assistant Appellate Defender, for defendant-appellant.

DAVIS, Judge.

Dennis Dwayne Tucker (“defendant”) appeals his embezzlement conviction. After careful review, we find no error.

Factual Background

The State's evidence at trial tended to establish the following facts: Sometime prior to December 2010, defendant was hired by MBM Moving Systems, LLC (“MBM”), headquartered in Greensboro, North Carolina, to work as a long-distance truck driver. According to MBM's company policy, drivers are responsible for collecting payment upon delivery. When they receive the payment, they are supposed to use the company's FedEx account to send the payment, along with the paperwork associated with the move, to MBM headquarters. When a driver receives the payment in cash, the driver is required to convert the cash into a money order and then follow the established procedure for sending it in to MBM.

Under MBM's policy, drivers are not permitted to use funds derived from customer payments. MBM typically uses a system called Com Data to advance drivers money to pay for fuel, to make repairs, or to cover

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emergencies. The company will sometimes use a corporate credit card for such purposes when funds cannot be transferred quickly enough through Com Data.

Defendant, after delivering a load in the state of Washington in early December 2010, picked up another load consisting of household goods belonging to Leah Plotkin (“Plotkin”), a customer of MBM. Defendant delivered these goods to Plotkin at her new address in Las Vegas, Nevada on 4 December 2010. Upon delivery, Plotkin paid defendant the outstanding balance for the move – \$2,086.19 – in cash. Defendant then drove to Arizona to make another delivery. While he was in Arizona, defendant’s commercial driver’s license from Washington expired. For this reason, defendant purchased a plane ticket back to North Carolina – using some portion of the cash he received from Plotkin – and left the truck in Arizona.

Defendant eventually turned in the paperwork for the Plotkin move to MBM but never remitted the \$2,086.19. Defendant stopped working for MBM in February 2011 and his “closeout statement” included an entry for “Missing Money” in the amount of \$2,086.19. Matt Moran, MBM’s vice president, contacted defendant several times in February and March 2011 in an attempt to resolve the issue. Moran, however, eventually lost contact with defendant and informed the police on 23 March 2011 that defendant had not returned the money.

Defendant was subsequently charged with embezzling the Plotkin funds. Prior to trial, the State moved to amend the indictment as described more fully below and, over defendant’s objection, the trial court allowed the amendment. At the close of the State’s evidence, defendant moved to dismiss the embezzlement charge on the ground that North Carolina lacked territorial jurisdiction over the offense. The trial court, after considering arguments from counsel, denied the motion.

Defendant then testified in his own defense, admitting that he had, in fact, used some of the Plotkin funds to purchase the airline ticket from Arizona to North Carolina. He claimed that although he had never been allowed by MBM management to use customer money before, he believed that, in this case, his supervisor had given him permission to use the money he had received from Plotkin. After testifying, defendant renewed his motion to dismiss for lack of territorial jurisdiction, and the trial court once again denied the motion.

The jury found defendant guilty of embezzlement. The trial court sentenced defendant to a presumptive range term of five to six months

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imprisonment, with credit for one day already served. Defendant gave notice of appeal in open court.

Analysis**I. Amendment of the Indictment**

Defendant contends that the trial court erred in allowing the State to amend the indictment for the embezzlement charge prior to trial, claiming that the amendment substantially altered the charge in violation of N.C. Gen. Stat. § 15A-923 (2011). Originally, the indictment provided that, at the time of the alleged embezzlement, “the defendant . . . was the employee of MBM Moving Systems, LLC” Just prior to jury selection, however, the State moved to amend the indictment to include the words “or agent” after “employee” so that the indictment would allege that defendant was an “employee or *agent* of MBM Moving Systems, LLC.” Defendant objected, arguing that the amendment would prejudice his defense in that it would alter the nature of the relationship between defendant and MBM that the State would be attempting to establish at trial. The trial court allowed the amendment, ruling that it would not substantially alter the charge or prejudice defendant’s defense.

Although N.C. Gen. Stat. § 15A-923(e) provides that “[a] bill of indictment may not be amended[,]” our appellate courts have “interpreted that provision to mean a bill of indictment may not be amended in a manner that substantially alters the charged offense.” *State v. Silas*, 360 N.C. 377, 379, 627 S.E.2d 604, 606 (2006). In determining whether an amendment is a substantial alteration of the charge, courts “must consider the multiple purposes served by indictments, the primary one being ‘to enable the accused to prepare for trial.’” *Id.* at 380, 627 S.E.2d at 606 (quoting *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600, *cert. denied*, 539 U.S. 985, 156 L.Ed.2d 702 (2003)).

Defendant was charged with embezzlement under section 14-90, which provides, in pertinent part, as follows:

(a) This section shall apply to any person:

- (1) Exercising a public trust.
- (2) Holding a public office.
- (3) Who is a guardian, administrator, executor, trustee, or any receiver, or any other fiduciary, including, but not limited to, a settlement agent, as defined in G.S. 45A-3.

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(4) Who is an officer or agent of a corporation, or any agent, consignee, clerk, bailee or servant, except persons under the age of 16 years, of any person.

(b) Any person who shall:

(1) Embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or

(2) Take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use,

any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever that (i) belongs to any other person or corporation, unincorporated association or organization or (ii) are closing funds as defined in G.S. 45A-3, which shall have come into his possession or under his care, shall be guilty of a felony.

N.C. Gen. Stat. § 14-90(a)-(b) (2011).

Because “[t]he embezzlement statute makes criminal the fraudulent conversion of personal property by one occupying some position of trust or some fiduciary relationship as specified in the statute[,]” *State v. Griffin*, 239 N.C. 41, 45, 79 S.E.2d 230, 233 (1953), defendant contends that the nature of that relationship is “critical to the charge of embezzlement” such that the amendment of the indictment in this case substantially altered the charge against him. We disagree.

It is well established that “[a]n agent is one who, by the authority of another, undertakes to transact some business or manage some affairs on account of such other, and to render an account of it.” *SNML Corp. v. Bank of North Carolina*, 41 N.C. App. 28, 36, 254 S.E.2d 274, 279, *disc. review denied*, 298 N.C. 204, 254 S.E.2d 274 (1979). Similarly, an employee is defined as “a person in the service of another under a contract of hire . . . which gives the employer the right to control and direct the person in the material details of how the work is to be performed.” 27 Am. Jur. 2d *Employment Relationship* § 2 (2013). The overlap in meaning between the terms “employee” and “agent” is illustrated by the fact that the *Restatement* defines “employee” by referencing the term

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“agent”: “[A]n employee is an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work” *Restatement (Third) Of Agency* § 7.07(3)(a) (2006).

We believe that the terms “employee” and “agent” are essentially interchangeable for purposes of N.C. Gen. Stat. § 14-90(a). Accordingly, we hold that the amendment of the indictment in this case to allege that defendant was an “employee or agent” of MBM did not substantially alter the crime charged. *See also Patterson v. State*, 38 Ala. App. 166, 168-69, 81 So.2d 344, 346 (Ala. Ct. App.) (holding embezzlement indictment was not subject to dismissal due to “addition of ‘or servant’ to the description of defendant” as “officer, agent, clerk, [or] employee” because indictment still allowed defendant to “know what [was] intended” and enabled trial court to “pronounce the proper judgment”), *cert. denied*, 262 Ala. 684, 81 So.2d 349 (1955); *Lemmon v. State*, 121 N.J.L. 466, 467-68, 3 A.2d 299, 299-300 (N.J. 1938) (holding defendant was not prejudiced by embezzlement indictment charging defendant as “agent and servant” of complainant because terms were fundamentally interchangeable and similar legal consequences flowed from relationships).

Significantly, although defendant stresses the critical nature of the agency or fiduciary relationship to an indictment for embezzlement, he does not contend that he was “misled or surprised as to the nature of the charge[] against him.” *State v. Bailey*, 97 N.C. App. 472, 476, 389 S.E.2d 131, 133 (1990). Indeed, the record – including the transcript of defendant’s own testimony – is utterly devoid of any suggestion that he was unaware of the factual basis for the embezzlement charge or that his defense was compromised in any way by the amendment of the indictment.

We conclude that defendant has not shown that the amendment to the indictment prejudiced his defense. *See State v. Tesenair*, 35 N.C. App. 531, 534, 241 S.E.2d 877, 879 (1978) (holding defendant “could not possibly have been prejudiced” by amendment to indictment where defendant’s own testimony showed that “he was completely aware of the nature of the charge against him” and his defense did not rely on challenging the factual propositions changed by amendment). The trial court, accordingly, did not err in allowing the amendment in this case.¹

1. Defendant also argues that the trial court erred in permitting the amendment due to a resulting fatal variance between the original allegation in the indictment and the proof at trial. This contention, however, is derivative of defendant’s argument that the amendment substantially altered the charged offense in violation of § 15A-923(e). Consequently, this argument fails for the same reasons.

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II Territorial Jurisdiction**A. Motion to Dismiss**

Defendant's principal argument on appeal is that the trial court lacked territorial jurisdiction to adjudicate the embezzlement charge because, he contends, any act of embezzlement occurred outside North Carolina. The controlling statute on this issue is N.C. Gen. Stat. § 15A-134 (2011), which provides that North Carolina's courts have jurisdiction over a criminal offense if any of the essential acts forming the crime occur in this State. *State v. Rick*, 342 N.C. 91, 99, 463 S.E.2d 182, 186 (1995).

In order to obtain a conviction for embezzlement, the State must prove that (1) the defendant was the agent or fiduciary of the complainant; (2) pursuant to the terms of the defendant's engagement, he was to receive property of the complainant; (3) he did receive such property in the course of his engagement; and (4) knowing the property was not his, the defendant either converted it to his own use or fraudulently misapplied it. *State v. Robinson*, 166 N.C. App. 654, 658, 603 S.E.2d 345, 347 (2004). It is the fourth element that is at issue in this case – that is, the question of where, if anywhere, defendant converted or misapplied MBM's property.

At trial, in support of his motion challenging the trial court's jurisdiction, defense counsel argued that defendant converted the Plotkin funds, if at all, in Nevada (where he received the money) or in Arizona (where he spent a portion of the money to purchase a plane ticket back to North Carolina). The prosecutor countered that defendant, due to the nature of his relationship with MBM, owed the company a fiduciary duty to remit the Plotkin funds to MBM and that the "locus" of this duty was in North Carolina – where MBM is headquartered. Thus, the prosecutor contended, because "the completion of that fiduciary duty [could] only occur here in North Carolina," North Carolina had jurisdiction to adjudicate the offense.

The trial court determined that the crime had occurred when defendant "fail[ed] to deliver" the Plotkin funds to MBM in North Carolina. The court, therefore, denied defendant's motion to dismiss.²

The State's jurisdictional theory was premised on the "duty to account" doctrine. Under this doctrine, "territorial jurisdiction of a prosecution for embezzlement may be exercised by the state in which

2. Defense counsel acknowledged that defendant had not been indicted for this offense in any other jurisdiction, and the trial court took judicial notice of this fact.

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the accused was under a duty to account for the property.” Herbert B. Chermiside, Jr., Annot., *Where Is Embezzlement Committed for Purposes of Territorial Jurisdiction or Venue*, 80 A.L.R.3d 514 § 4 (1977) [hereinafter Chermiside, *Where Is Embezzlement Committed*]; accord *State v. Cain*, 360 Md. 205, 211 n.2, 757 A.2d 142, 145 n.2 (Md. 2000) (“[T]he courts of a state have territorial jurisdiction of a crime involving misappropriation of property if the accused had a preexisting obligation to account for the property in that state.”). Although North Carolina’s appellate courts have not previously had occasion to expressly adopt this theory by name, we do so now based on our conclusion that the doctrine is consistent with the precedents of this Court and our Supreme Court.

The Supreme Court has recognized that the crime of embezzlement, as codified in § 14-90, involves the unlawful conversion of property after the defendant has lawfully acquired possession of the property subject to a duty to deliver the property to, or use the property for the benefit of, its rightful owner. See *State v. Cohoon*, 206 N.C. 388, 393, 174 S.E. 91, 93 (1934) (“In general terms embezzlement ‘is the fraudulent conversion of property by one who has lawfully acquired possession of it for the use and benefit of the owner.’ ”).

While not explicitly addressing the duty to account doctrine by name, our Supreme Court has nevertheless applied the doctrine in determining the proper venue for adjudicating an embezzlement charge. In *State v. Carter*, 126 N.C. 1011, 35 S.E. 591 (1900), the defendant contracted in Robeson County to sell some livestock on behalf of his principal. *Id.* at 1013, 35 S.E. at 592. When the defendant was charged with embezzlement in Robeson County, he moved to have venue transferred to New Hanover County or Columbus County – the counties where, he argued, any misappropriation or conversion would have occurred. *Id.* at 1012-13, 35 S.E. at 592. The trial court denied the motion and the defendant appealed his conviction.

On appeal, our Supreme Court held that venue in Robeson County was proper for the embezzlement prosecution because the defendant owed a duty to account to his principal in that county, explaining as follows:

[A]s the contract was made in Robeson by which the defendant came into possession of this property, that it was delivered to him and he received the same in Robeson County, and that he was to return it to [his principal] from whom he got possession, *or to account for and pay over*

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the proceeds to [his principal] in Robeson County, that Robeson County . . . had jurisdiction of the offense.

Id. at 1013, 35 S.E. at 592 (emphasis added).³

Having determined that North Carolina law recognizes the duty to account doctrine, we must apply the doctrine to the facts presented in this case. MBM's vice president, Moran, testified that (1) the company was headquartered in Guilford County, North Carolina; and (2) pursuant to corporate policy, when long-distance drivers – such as defendant – are out on the road, they are required to mail the customer's payment, along with the related paperwork, back to corporate headquarters in Guilford County in order to complete the job and get paid. Moran further testified, and defendant admitted, that defendant never turned over to MBM the \$2,086.19 in cash he received from Plotkin.

This undisputed evidence establishes that defendant, as an agent of MBM, had a pre-existing duty to account for the proceeds from the Plotkin move and that this duty was owed to MBM in North Carolina. Consequently, the State presented sufficient evidence showing that an essential act of the crime for which defendant was charged was committed in North Carolina. See Carter, 126 N.C. at 1013, 35 S.E. at 592.

While defendant argues that this case is controlled by *State v. Blackley*, 138 N.C. 620, 50 S.E. 310 (1905), overruled on other grounds by *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977), we disagree. In *Blackley*, the defendant contracted in Atlanta, Georgia to sell livestock in Raleigh, North Carolina on behalf of his principal. *Id.* at 621, 50 S.E. at 311. When the defendant was “‘short’ in his returns” after selling the livestock, he was charged and convicted of embezzlement in North Carolina. *Id.*

On appeal, the defendant argued that he could not be prosecuted in North Carolina because the evidence showed that the contract to sell the livestock was entered into in Georgia. *Id.* Our Supreme Court rejected this argument, holding that North Carolina had jurisdiction to adjudicate the charged offense because the State's evidence established

3. The fact that Carter dealt with venue while the present case deals with jurisdiction is immaterial. Our statutes governing venue and jurisdiction in criminal cases are substantively similar with regard to this issue. N.C. Gen. Stat. § 15A-131(e) (2011), the statute governing venue in criminal cases, provides that “[a]n offense occurs in a county if any act or omission constituting part of the offense occurs within the territorial limits of the county.” Similarly, § 15A-134 has been interpreted to provide jurisdiction in the courts of this State “if any of the essential acts forming the crime take place in this [S]tate.” *State v. Vines*, 317 N.C. 242, 251, 345 S.E.2d 169, 174 (1986).

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that “the conversion into money took place here, and the sum thus realized for [the principal] has not been paid over to him.” *Id.*

Defendant reads *Blackley* as holding that North Carolina has territorial jurisdiction to prosecute a charge of embezzlement only if the essential act of conversion takes place in this State. We believe, however, that *Blackley* stands for the proposition that the actual conversion of the property in North Carolina is merely a *sufficient* – as opposed to a *necessary* – basis for such jurisdiction in North Carolina’s courts. See Chermiside, *Where Is Embezzlement Committed*, 80 A.L.R.3d 514 § 2 (explaining that territorial jurisdiction may be exercised to prosecute embezzlement charges by states in which the defendant (1) was under a duty to account for the property; (2) received or possessed the property with fraudulent intent; or (3) converted the property).

Thus, so long as “any of the essential acts forming the crime take place in this [S]tate[.]” *Vines*, 317 N.C. at 251, 345 S.E.2d at 174 (emphasis added), North Carolina’s courts have territorial jurisdiction over the offense. As we have concluded that the duty to account is an essential component of the crime of embezzlement and that the uncontested evidence establishes that defendant owed such a duty to MBM in North Carolina, we hold that the trial court possessed territorial jurisdiction over the charged offense.

We note that the Maryland Court of Appeals addressed a similar issue in *Wright v. State*, 339 Md. 399, 663 A.2d 590 (Md. 1995). In *Wright*, the defendant was a Maryland truck driver employed by a Maryland trucking company who was responsible for making a round of pick-ups and deliveries in several states throughout the Mid-Atlantic region. *Id.* at 400, 663 A.2d at 590. Under the terms of his employment, the defendant was not authorized to retain for his own use the tractor-trailer provided by his employer, and when he ultimately failed to return to the trucking company’s office in Maryland, he was charged with the felony theft of the truck. *Id.* at 400-01, 663 A.2d at 590-91.

Prior to trial, the defendant moved to dismiss the charge based on a lack of territorial jurisdiction. *Id.* at 401, 663 A.2d at 591. The trial court, after considering the State’s evidence at trial, denied the defendant’s motion and submitted the theft charge to the jury. *Id.* at 401-02, 663 A.2d at 591. On appeal, the Maryland Court of Appeals concluded that the trial court possessed territorial jurisdiction over the charged theft and, therefore, had properly denied the defendant’s motion to dismiss – based on the fact that the defendant had “lawfully acquired the tractor-trailer,

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subject to a duty to account for this property[,] in Maryland.” *Id.* at 406, 663 A.2d at 593.⁴

Our application of the duty to account doctrine here yields the same result reached by the court in *Wright*. The trial court, therefore, properly denied defendant’s motion to dismiss.

B. Jury Instructions

In a related argument, defendant contends that the trial court erred by failing to instruct the jury on the territorial jurisdiction issue. Our Supreme Court has explained that, when the State’s jurisdiction is challenged, “the State must prove beyond a reasonable doubt that the crime with which the accused is charged occurred in North Carolina.” *State v. Darroch*, 305 N.C. 196, 211, 287 S.E.2d 856, 865-66, *cert. denied*, 457 U.S. 1138, 73 L.Ed.2d 1356 (1982). Where the facts upon which the assertion of jurisdiction is based are contested, the trial court is required to instruct the jury that (1) the State has the burden of proving jurisdiction beyond a reasonable doubt; and (2) if the jury is not satisfied, it should return a special verdict indicating a lack of jurisdiction. *Rick*, 342 N.C. at 100-01, 463 S.E.2d at 187.

Where, however, a defendant’s challenge is not to the factual basis for jurisdiction but rather to “the theory of jurisdiction relied upon by the State,” the trial court is not required to give these instructions since the issue regarding “[w]hether the theory supports jurisdiction is a legal question” for the court. *Darroch*, 305 N.C. at 212, 287 S.E.2d at 866; accord *State v. Dial*, 122 N.C. App. 298, 305, 470 S.E.2d 84, 88 (“Where a criminal defendant challenges the theory upon which the State claims jurisdiction to try him, the question is a legal question for the court; however, where the defendant challenges the facts upon which jurisdiction is claimed, the question is one for the jury.”), *disc. review and cert. denied*, 343 N.C. 754, 473 S.E.2d 620 (1996).

While defendant attempts to portray his jurisdictional argument as one involving a factual dispute, this characterization is incorrect. Defendant’s argument is that jurisdiction lies solely in the state where defendant either (1) lawfully obtained possession of his principal’s property with fraudulent intent; or (2) misapplied or converted the funds for

4. While decisions from other jurisdictions are, of course, not binding on the courts of this State, *Morton Bldgs., Inc. v. Tolson*, 172 N.C. App. 119, 127, 615 S.E.2d 906, 912 (2005), we believe that the analysis in *Wright* correctly applies the duty to account doctrine to a set of facts similar to those existing in the present case and, therefore, find it instructive.

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his own use. This argument involves a legal issue rather than a factual one. Defendant and the State disagreed about which theory of jurisdiction should be applied to determine whether North Carolina's courts had territorial jurisdiction to prosecute defendant for embezzlement. As addressed above, the facts relevant to the application of the duty to account doctrine were uncontested. Because "[d]efendant's challenge goes to the [State's] theory of jurisdiction," it was a "question for the courts." *Darrock*, 305 N.C. at 212, 287 S.E.2d at 866. Consequently, the trial court was not required to (1) instruct the jury on the State's burden of proving jurisdiction; or (2) allow the jury to return a special verdict. *Id.* Accordingly, defendant's argument is overruled.

Conclusion

For the reasons stated above, we conclude that defendant received a fair trial free from error.

NO ERROR.

Judges HUNTER and McCULLOUGH concur.

CLAUDE WOODRING, PLAINTIFF
v.
ANGELA WOODRING, DEFENDANT

No. COA12-679

Filed 4 June 2013

1. Child Custody and Support—temporary and permanent orders—determination

The trial court erred in a child custody and visitation case by not mentioning the latest permanent custody order (14 July 2011) in its modification order, and instead mistakenly using another order. The order relied on by the court as the last permanent order (14 June 2010) was in fact temporary because it did not determine all of the issues, and it did not become permanent by the operation of time because a hearing was set within a reasonable time and the order did not set an ongoing visitation schedule. The ensuing 14 July 2011 order was permanent because it was not entered without prejudice to either party, did not state a clear and specific reconvening time, and determined all of the issues by determining custody and setting an ongoing visitation schedule.

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2. Child Custody and Support—visitation—findings—res judicata

Findings in an order that modified child custody and visitation were *res judicata* and improperly considered to the extent that they contained information disclosed to the court before a hearing on 8 July 2011, which resulted in a permanent order. When evaluating whether there has been a substantial change in circumstances, courts may only consider events which occurred after the entry of the previous order, unless the events were previously undisclosed to the court.

3. Child Visitation—authority to determine and supervise

The trial court erred in a child custody and visitation action by granting the custodial parent the exclusive authority to decide when, where, and if the non-custodial parent had visitation, as well as the supervision of visitation.

Appeal by defendant from orders entered 8 September 2011 and 8 February 2012 by Judge Thomas M. Brittain, Jr. in Henderson County District Court. Heard in the Court of Appeals 7 January 2013.

No brief, for plaintiff-appellee.

Arlaine Rockey, for defendant-appellant.

MARTIN, Chief Judge.

According to the limited record on appeal before us, defendant Angela Woodring (“mother”) and plaintiff Claude Woodring (“father”), having been married, separated on or about 15 January 2010, when mother took their two minor children—T.M.W. and C.E.W.—with her to Missouri. At the time of the separation, the minor children were ages fourteen and ten, respectively. Less than a week later, father filed an action in North Carolina seeking primary physical and legal custody of the minor children. On 14 June 2010, the parties entered a temporary consent order which, among other things, granted father visitation on three specific dates in 2010 and provided the children were “to be with the mother except for those times in this Order when they are with the father.”

After the three scheduled visitations, it appears from the record the parties handled ongoing visitation in an *ad hoc* fashion, with an additional court-ordered overnight visitation scheduled for December 2010. However, mother failed to deliver the minor children to father for the

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visitation. After finding mother in contempt, the court ordered same-day visitation between father and the minor children in February 2011.

With a permanent custody hearing set for 12 July 2011, father made a 31 May 2011 “Motion for Visitation,” requesting to see the minor children on the days before the scheduled permanent custody hearing. The motion was calendared and continued twice, the second time because mother had car trouble. On 5 July 2011, mother allegedly prepared a voluntary dismissal of father’s claims, had C.E.W. sign the dismissal, and filed it. The next day, father filed a motion to strike the voluntary dismissal, to reinstate his claim, and for sanctions and attorney’s fees pursuant to N.C.G.S. § 1A-1, Rule 11.

A hearing was held on 8 July 2011. Mother was not present at the hearing, but was represented by counsel. The trial court allowed father’s motion to strike the dismissal and reinstated his claim, but delayed ruling on the Rule 11 portion of the motion, pending a criminal investigation into the matter. Mother’s motion to continue was denied and the court took testimony concerning father’s “Motion for Visitation.” The trial court expressed frustration that the parties were dealing with each visitation one hearing at a time, rather than setting a schedule for visitation. In an effort to address the issue, the court interpreted the temporary order as granting “primary physical custody to [mother, and] joint legal custody to the parties”——even though the order did not explicitly state such. The court determined the temporary consent order had, by operation of time, become a permanent custody order, but that “the issue of visitation on an ongoing basis need[ed] to be addressed by [the court.]” The court also noted that since the temporary order did not address ongoing visitation, father would not have to show a change of circumstances from the temporary order, but rather “address the best interest of the children in establishing an ongoing visitation schedule”

After hearing testimony from father and a social worker from Henderson County DSS, the court concluded it was “in the best interests of the minor children for [father] to have reasonable visitation with them” and set an ongoing visitation schedule giving father four weeks of visitation each summer, each spring break, and each odd-numbered year Christmas break. Additionally, father was permitted to have visitation with the children in Missouri on the first weekend of each month, provided he gave notice to mother seven days in advance. An order reflecting the court’s decision was entered 14 July 2011. The scheduled 12 July 2011 permanent custody hearing was continued and does not appear to have ever taken place.

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The terms of the 14 July 2011 order required mother to deliver the minor children to father at the Henderson County Sheriff's office on 16 July 2011 for summer visitation. Mother did not comply with the order and a show cause order was issued on 19 July 2011. On 21 July 2011, mother's counsel made a motion to withdraw from representation, which was granted by the court on 5 August 2011. The hearing on the show cause order was continued for lack of service on mother.

On 17 August 2011, father made a motion to modify custody. The motion alleged that mother had "interfered with and prevented reasonable visitation" and cited examples from November 2010, December 2010, and July 2011. The motion also cited the earlier voluntary dismissal of father's claim for custody that mother had allegedly filed.

On 2 September 2011, a hearing was held to address the order to show cause and the motion to modify custody. Mother was not present for the hearing, and consideration of the order to show cause was once again continued due to lack of service on her. However, father produced a notice of hearing for the motion to modify custody that was mailed to mother and returned marked "refused." Based on the refusal, the trial court concluded the motion to modify custody was properly noticed. The trial court did not hear any additional testimony and based its decision solely upon the verified pleadings.

In an order dated 8 September 2011, the trial court found that "since the entry of the June 14, 2010 custody order, the mother has repeatedly refused to allow the father visitation with the minor children and has interfered with the father's attempts to exercise his court ordered visitation." The court found that mother had "repeatedly refused visits between the father and the minor children since February 2011." The court found that, "for purposes of [the] hearing," mother "filed a document on July 5, 2011 purporting to dismiss the father's action for custody." The court also found that "the actions of the mother since at least June 14, 2010 have been calculated and intentional and for the purpose of denying the father visitation with the minor children." The court then purported to modify the 14 June 2010 consent order and awarded primary physical custody to father. The order also stated that "mother's visits with the minor childre [sic] shall be at the discretion of the father, to be supervised by the father or an appropriate adult as determined by the father." The trial court's 8 September 2011 order did not mention its recent 14 July 2011 order. Repeated attempts to serve the 8 September 2011 order on mother were unsuccessful.

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On 7 December 2011, mother filed a motion pursuant to N.C.G.S. § 1A-1, Rule 59 requesting a new trial or amendment of the 8 September 2011 modification order. Following a 6 February 2012 hearing, the court denied mother's Rule 59 motion. The court memorialized this ruling in a written order dated 8 February 2012. The 8 February 2012 order acknowledged the 14 July 2011 order, but concluded that it was not a modification of custody, or in the alternative, that mother's refusal to abide by that order amounted to a substantial change in circumstances sufficient to modify custody. Mother appeals from the 8 September 2011 order and the denial of her Rule 59 motion.

[1] Mother first argues the trial court erred by “failing to mention the last permanent custody order of 14 July 2011 and mistakenly using the temporary order of 14 June 2010 as the last permanent custody order in the modification order.” Advancing this argument, mother also contends the trial court erred when it determined the temporary order had become permanent by operation of time. We review such questions of law *de novo*. *Romulus v. Romulus*, __ N.C. App. __, __, 715 S.E.2d 889, 892 (2011) (“Defendant’s N.C. Gen. Stat. § 1A-1, Rule 59 motion also presents ‘a question of law or legal inference’ which is reviewed *de novo*.”); *Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (“[W]hether an order is temporary or permanent in nature is a question of law, reviewed on appeal *de novo*.”), *disc. review denied*, 363 N.C. 375, 678 S.E.2d 670 (2009).

Custody orders may either be “temporary” or “permanent.” The term “permanent” is somewhat of a misnomer, because “[a]fter an initial custody determination, the trial court retains jurisdiction of the issue of custody until the death of one of the parties or the emancipation of the youngest child[.]” *McIntyre v. McIntyre*, 341 N.C. 629, 633, 461 S.E.2d 745, 748 (1995) (citing *Shoaf v. Shoaf*, 282 N.C. 287, 290, 192 S.E.2d 299, 302 (1972)), and the court may, upon a showing of a substantial change in circumstances, modify the “permanent” custody order. *Simmons v. Arriola*, 160 N.C. App. 671, 674, 586 S.E.2d 809, 811 (2003).

We have considered whether a custody order is temporary or permanent primarily in two situations: First, to determine if an appeal from such an order is interlocutory, *see Sood v. Sood*, __ N.C. App. __, __, 732 S.E.2d 603, 606, *cert. denied, disc. review denied, and appeal dismissed*, __ N.C. __, 735 S.E.2d 336 (2012); second, where this Court reviews the standard a trial court applied in a determination of custody, *see Lamond v. Mahoney*, 159 N.C. App. 400, 403-04, 583 S.E.2d 656,

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658–59 (2003). Permanent child custody or visitation orders may not be modified unless the trial court finds there has been a substantial change in circumstances affecting the welfare of the child. *Simmons*, 160 N.C. App. at 674, 586 S.E.2d at 811. If there has been a substantial change in circumstances, the court may modify the order if the modification is in the best interests of the child. *Pass v. Beck*, 210 N.C. App. 192, 195, 708 S.E.2d 87, 90 (2011). Conversely, temporary orders may be modified by proceeding directly to the best-interests analysis. *Simmons*, 160 N.C. App. at 674, 586 S.E.2d at 811.

A trial court’s designation of an order as “temporary” or “permanent” is neither dispositive nor binding on an appellate court. *Smith*, 195 N.C. App. at 249, 671 S.E.2d at 582. “[A]n order is temporary if either (1) it is entered without prejudice to either party[;] (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues.’” *Peters v. Pennington*, 210 N.C. App. 1, 13–14, 707 S.E.2d 724, 734 (2011) (alterations in original) (quoting *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003)). “If the order does not meet any of these criteria, it is permanent.” *Id.*

Temporary orders may, however, become permanent by operation of time. See *Anderson v. Lackey*, 163 N.C. App. 246, 254–55, 593 S.E.2d 87, 92 (2004); *Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677; *LaValley v. LaValley*, 151 N.C. App. 290, 292–93, 564 S.E.2d 913, 915 (2002). “[W]here neither party sets the matter for a hearing within a reasonable time,” a temporary order is converted into a permanent order. *Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677. “Whether a request for the calendaring of the matter is done within a reasonable period of time must be addressed on a case-by-case basis.” *LaValley*, 151 N.C. App. at 293 n.6, 564 S.E.2d at 915 n.6.

In *LaValley*, we held that a temporary order became permanent because twenty-three months was not a reasonable amount of time between the entry of a temporary order and setting a date for an additional hearing on the matter where there were no unresolved issues between the parties. *Id.* at 291–93, 564 S.E.2d at 914–15. Likewise, in *Brewer v. Brewer*, 139 N.C. App. 222, 533 S.E.2d 541 (2000), we held that an order that set a reconvening date more than a year after its issuance was not reasonably brief—and thus permanent—where no unresolved issues remained to be determined. *Id.* at 228, 533 S.E.2d at 546. However, in *Senner*, we held that a delay of twenty months was not unreasonable where the parties continued to negotiate the issue of

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custody after entry of the temporary order. *Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677. In fact, this Court has found orders to be temporary as long as four years after entry where extenuating circumstances existed. *See Simmons*, 160 N.C. App. at 675–76, 586 S.E.2d at 812.

In this case, the 14 June 2010 order did not address father’s ongoing visitation, but rather provided father with only three specific instances of visitation in 2010. Nor did the 14 June 2010 order explicitly address legal custody. Thus, the order “[did] not determine all the issues” and was a temporary order. *See Peters*, 210 N.C. App. at 14, 707 S.E.2d at 734.

However, following father’s motion for visitation, the trial court concluded that the temporary order had “by operation of time, become a permanent custody order.” The court made this determination despite the fact that a permanent custody hearing was scheduled to occur in only four days. The record indicates that by at least 8 June 2011, the date was set for the permanent custody hearing. Thus, the permanent custody hearing was set in less than twelve months from the entry of the 14 June 2010 temporary order, a shorter interval than in *LaValley*, *Brewer*, *Senner*, and *Simmons*. The record also indicates the parties were before the court at least three times in the intervening period between the entry of the temporary order and the scheduled permanent custody hearing. Additionally, the temporary order did not resolve all of the issues between the parties—unlike in *LaValley* and *Brewer*. Based on these facts, we conclude a hearing was set “within a reasonable time” and the temporary order did not, therefore, become a final order by operation of time. *See LaValley*, 151 N.C. App. at 291–93, 564 S.E.2d at 914–15.

Additional support for the conclusion that the 14 June 2010 order remained a temporary order can be found in the standard the court used to modify the order to include ongoing visitation. While the trial court concluded the temporary order had become permanent by operation of time, the court did not require father to show a substantial change in circumstances before the modification, as is the standard for modification of a permanent order. *See Simmons*, 160 N.C. App. at 674, 586 S.E.2d at 811.

Moreover, had this particular temporary consent order become a permanent custody order by operation of time, father would not have been entitled to any visitation with his children. “ ‘In the absence of extraordinary circumstances, a parent should not be denied the right of visitation.’ ” *Moore v. Moore*, 160 N.C. App. 569, 573, 587 S.E.2d 74, 76 (2003) (quoting *In re Stancil*, 10 N.C. App. 545, 551, 179 S.E.2d 844, 849 (1971)). In fact, “prior to denying a parent the right of reasonable visitation, [the trial court] shall make a written finding of fact that the parent

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being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.” N.C. Gen. Stat. § 50-13.5(i) (2011). We therefore clarify that a temporary custody order that does not set an ongoing visitation schedule cannot become permanent by operation of time.¹

While the 14 June 2010 order was temporary and did not become a permanent order by operation of time, the ensuing 14 July 2011 order was a permanent order. The 14 July 2011 order was not “entered without prejudice to either party”; it did not state “a clear and specific reconvening time”; and the order did “determine all the issues” by setting an ongoing visitation schedule and determining primary and legal custody. *See Peters*, 210 N.C. App. at 13–14, 707 S.E.2d at 734. Therefore, the 14 July 2011 order was a permanent order. *See id.*

Having determined the 14 July 2011 order was a permanent order, we must agree with mother that the trial court erred by failing to mention its latest permanent order and purporting to modify the older 14 June 2010 order. When considering a modification of custody, courts must look to the latest permanent custody order, because “a new order for custody . . . modifies or supersedes” the old order. *See, e.g.,* N.C. Gen. Stat. § 50-13.7(b) (2011). Failing to do so was erroneous as a matter of law.

[2] Mother next argues the trial court erred “by using findings of fact that were *res judicata* to support a conclusion of law that there has been a substantial change of circumstances and to modify custody.” We agree.

“When all substantial facts relevant to the issue of custody are revealed to the court at the time of the original custody decree, a change of circumstances must be shown before that decree can be modified.” *Wehlau v. Witek*, 75 N.C. App. 596, 599, 331 S.E.2d 223, 225 (1985), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 620 & n.1, 501 S.E.2d 898, 900 & n.1 (1998). “The reason behind the often stated requirement that there must be a change of circumstances before a custody decree can be modified is to prevent *re litigation* of conduct and circumstances that antedate the prior custody order.” *Newsome v. Newsome*, 42 N.C. App. 416, 425, 256 S.E.2d 849, 854 (1979). Therefore, when evaluating whether there has been a substantial change in circumstances, courts may only consider events which occurred after the entry of the previous order, unless the events were previously undisclosed to the court. *See Lang v. Lang*, 197 N.C. App. 746, 750, 678 S.E.2d 395,

1. A court may not, however, attempt to use repeated temporary orders to evade appellate review. *See Cox v. Cox*, 133 N.C. App. 221, 232–33, 515 S.E.2d 61, 69 (1999).

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398 (2009) (holding that the trial court properly considered only events which occurred after entry of the prior custody order when it concluded that there was a change of circumstances); *Ford v. Wright*, 170 N.C. App. 89, 96, 611 S.E.2d 456, 461 (2005) (“As the trial court had already considered the parties’ past domestic troubles and communication difficulties in the prior order, without findings of additional changes in circumstances or conditions, modification of the prior custody order was in error.”); *Newsome*, 42 N.C. App. at 425, 256 S.E.2d at 854 (“When, however, as in the present case, facts pertinent to the custody issue were not disclosed to the court at the time the original custody decree was rendered, courts have held that a prior decree is not *res judicata* as to those facts not before the court.”).

In this case, the trial court’s 8 September 2011 order modifying custody contains the finding that “since the entry of the June 14, 2010 custody order, the mother has repeatedly refused to allow the father visitation with the minor children and has interfered with the father’s attempts to exercise his court ordered visitation,” and cites instances in November and December of 2010. The trial court also found that “mother has repeatedly refused visits between the father and the minor children since February 2011” and “[t]hat the actions of mother since at least June 14, 2010 have been calculated and intentional and for the purpose of denying the father visitation with the minor children.” As we have concluded that a permanent order was entered on 14 July 2011, the only facts that are not *res judicata* for a determination of a substantial change in circumstances are facts that occurred after the 8 July 2011 hearing or prior facts that were not disclosed to the court. See *Newsome*, 42 N.C. App. at 425, 256 S.E.2d at 854. To the extent these findings contain information that was disclosed to the court on or before the 8 July 2011 hearing, we hold those findings were *res judicata* and were improperly considered.²

[3] Mother next argues the trial court erred “in granting the custodial parent the exclusive authority to decide when, where and if the non-custodial parent has visitation” and “erred in granting the custodial parent the exclusive authority to decide under whose supervision the

2. From the record before us, it appears the only facts properly before the court during the modification hearing were the missed summer 2011 visitation (which is not mentioned in the modification order) and the alleged dismissal of father’s complaint, on which the court had delayed ruling. We do not address today whether this is a sufficient basis to modify custody, but rather reverse the trial court’s denial of the Rule 59 motion, vacate the 8 September 2011 order, and remand for a new hearing on the issue of permanent custody.

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non-custodial parent has visitation and/or by allowing the custodial parent to be the supervisor.” We agree.

A court may not award the custodial parent exclusive control over visitation. *Brewington v. Serrato*, 77 N.C. App. 726, 733, 336 S.E.2d 444, 449 (1985) (citing *Stancil*, 10 N.C. App. at 551–52, 179 S.E.2d at 849). “To give the custodian of the child authority to decide when, where and under what circumstances a parent may visit his or her child could result in a complete denial of the right and in any event would be delegating a judicial function to the custodian.” *Stancil*, 10 N.C. App. at 552, 179 S.E.2d at 849.

In this case, the 8 September 2011 order stated “mother’s visits with the minor childre [sic] shall be at the discretion of the father, to be supervised by the father or an appropriate adult as determined by the father.” This provision plainly awards father exclusive control over mother’s visitation, and as such is erroneous.

For the foregoing reasons, we must reverse the trial court’s denial of mother’s motion pursuant to N.C.G.S. § 1A-1, Rule 59, vacate the 8 September 2011 order, and remand with instructions for the trial court to hold a new custody hearing. As mother is entitled to a new hearing, we decline to address the remaining issues she raises on appeal.

Reversed and Remanded.

Judges ERVIN and DILLON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 JUNE 2013)

ANWAY v. SILVER CREEK CMTY. PROP. OWNERS ASS'N, INC. No. 12-1460	Burke (10CVS1968)	Affirmed
BARBEE v. TRANSIT MGMT. OF CHARLOTTE, INC. No. 12-1001	Mecklenburg (11CVS22442)	Affirmed
BERNHARDT v. N.C. DEP'T OF PUB. SAFETY/HIGHWAY PATROL No. 12-1254	N.C.Industrial Commission (TA-20918)	Affirmed
COUCHON v. N.C. DEP'T. OF TRANSP No. 12-1226	N.C.Industrial Commission (TA-13518)	Affirmed
DAVIS v. CHASE HOME FIN., LLC No. 12-1246	Randolph (11CVS2696)	Affirmed
HOLMES v. WAKE CNTY. No. 12-1332	Wake (12CVS5580)	Affirmed
HUFF v. CBS QUALITY CARS, INC. No. 12-1134	Durham (10CVS4971)	Affirmed in part, Vacated in part
IN RE A.J.W. No. 12-1458	Caldwell (05J63-64)	Affirmed
IN RE D.L.B. No. 12-1387	Guilford (05JT43-44)	Affirmed
IN RE D.L.C. No. 12-1330	Guilford (11JT16-17)	Affirmed in Part and Reversed in Part
IN RE E.C.M. No. 12-1408	Stokes (12JT33)	Affirmed
IN RE H.S. No. 12-1430	Wake (11JT24)	Affirmed
IN RE J.M. No. 12-1392	Wayne (10JT130)	Affirmed in part, remanded in part
IN RE K.C. No.12-1497	Edgecombe (12JA59-62)	Reversed and Remanded

IN RE K.M. No. 12-1252	Carteret (09JA36)	Affirmed
IN RE L.D.W. No. 12-1482	Wilkes (11JT93-94)	Affirmed in part and Remanded in part
IN RE T.A.D. No. 12-1368	New Hanover (11JT65)	Affirmed
IN RE THE FORECLOSURE OF RADISI No. 13-74	Iredell (11SP1217)	Dismissed
IN RE A.T.I. No. 13-80	Harnett (11J162-163)	Affirmed
IN RE C.H. No. 13-127	Chatham (11JT90-91)	Affirmed
IN RE D.K. No. 13-117	Durham (10JT222)	Affirmed
IN RE E.M. No. 13-13	Durham (12JB115)	Juvenile's contempt order is vacated; disposition order is vacated and remanded
IN RE J.R. No. 13-26	Mecklenburg (10JA739)	Reversed
IN RE R.J.M. No. 13-40	Gaston (10JT398)	Affirmed
MINAR v. MURRAY No. 12-1428	Guilford (10CVD12467)	Dismissed
SIMPSON v. AVILA No. 12-1234	Chatham (11CVD560)	Reversed and Remanded
STATE v. DAVIAU No. 13-208	Transylvania (10CRS23-24)	Reversed in part; vacated in part
STATE v. ROBINSON No. 12-1556	Union (11CRS3250) (11CRS54955)	Reversed and Remanded
STATE v. STOKES No. 12-810-2	Hoke (11CRS50130-31) (11CRS800)	Vacated and Remanded

STATE v. BAJJA No. 12-1515	Gaston (11CRS52790)	No Error
STATE v. BASS No. 12-1237	Durham (10CRS62203) (11CRS1448)	No Error
STATE v. BENFIELD No. 12-1383	Rowan (10CRS57840) (11CRS77)	No Error
STATE v. BLACK No. 12-1510	Cabarrus (09CRS10993) (09CRS9589-90)	No prejudicial error in part; no error in part
STATE v. BROWN No. 12-708	Wayne (10CRS53335) (10CRS53337)	Remanded
STATE v. CALDWELL No. 12-1358	Iredell (10CRS54435-6) (11CRS2692)	No Error
STATE v. DASH No. 12-1508	Mecklenburg (11CRS225472)	No Error
STATE v. DAVIS No. 12-833	Beaufort (09CRS1057)	Affirmed in part; remanded in part
STATE v. FOREMAN No. 12-1313	Edgecombe (10CRS51371)	No Error
STATE v. GORHAM No. 12-1370	Beaufort (09CRS50895-97)	Vacated in part and remanded for resentencing in part
STATE v. HAIRSTON No. 12-1356	Forsyth (08CRS60908) (08CRS60973) (10CRS5852)	No Error
STATE v. JOYNER No.12-1244	Iredell (10CRS5359) (10CRS55158)	No Error
STATE v. LAYTON No. 12-1197	Cabarrus (10CRS52882) (11CRS1117)	No Error

STATE v. MARKHAM No. 12-1470	Durham (11CRS56628) (11CRS5835)	No Error
STATE v. MARLEY No. 12-1216	Iredell (09CRS59542)	New Trial
STATE v. MARTIN No. 12-1080	Wayne (09CRS53990) (09CRS6077)	No Error
STATE v. MCCRAY No. 12-1309	Hoke (11CRS51360-61)	No Error
STATE v. RHODES No. 12-1143	Rowan (11CRS50937) (11CRS5429)	No Error
STATE v. ROJAS No. 12-1255	Cabarrus (11CRS54160-61)	Affirmed
STATE v. STANLEY No. 12-1354	Guilford (10CRS92133)	Dismissed
STATE v. STUBBS No. 12-1280	Robeson (10CRS52348)	No error in part and dismissed in part
STATE v. SWANN No. 12-1171	Henderson (11CRS53458)	No Error
STATE v. WILLIAMS No. 12-991	Onslow (11CRS2066)	No Error
STATE v. WOMACK No. 12-1006	Guilford (10CRS95382) (11CRS24064)	No Error
TONNEY v. COLONIAL PROPS. TRUST No. 12-1114	N.C. Industrial Commission (I.C.) (W80630)	Affirmed
WALKER v. N.C. DEP'T OF CORR. No. 12-1371	N.C.Industrial Commission (TA-21806)	Affirmed
WILHITE v. PIKE ELECTRIC, INC. No. 13-19	N.C.Industrial Commission (143496)	Affirmed

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APPEAL AND ERROR

Appealability—jurisdiction—child abuse and neglect—The Court of Appeals denied Buncombe County Department of Social Services's motion to dismiss the appeal in a child abuse and neglect case for lack of jurisdiction. The trial court had jurisdiction to consider its own jurisdiction. Further, the trial court's order denying the guardian *ad litem*'s motion under N.C.G.S. § 1A-1, Rule 60(b) was appealable under both N.C.G.S. § 7B-1001(a)(1) and (2). **In re E.H., 525.**

Argument—reference to prior contention—The trial court did not err by denying defendant's motion to amend an alimony order where his argument amounted to a one-sentence reference to his previous contention that the trial court erred in determining that plaintiff did not engage in cohabitation. Defendant did not present any additional argument regarding his motion to amend. **Smallwood v. Smallwood, 319.**

Interlocutory orders—class certification—substantial right—The Court of Appeals addressed the merits of plaintiff's interlocutory appeal from the trial court's order denying plaintiff's motion for class certification. An interlocutory order denying class certification affects a substantial right. **Blitz v. Agean, Inc. 476.**

Interlocutory orders and appeals—certification—immediately appealable—The trial court's interlocutory order dismissing all claims against defendant First Bank was immediately appealable as the order resolved all claims against that defendant and the trial court certified under N.C.G.S. § 1A-1, Rule 54(b) that there was no just reason to delay the appeal. **Highland Paving Co., LLC v. First Bank, 36.**

Issue abandoned—failure to argue issue in appellate brief—The issue of collateral estoppel was deemed abandoned pursuant to N.C. R. App. P. 28(b)(6) where petitioner failed to discuss the issue in his brief. **Johnson v. Robertson, 281.**

Issue not addressed—motion to withdraw appeal—previously granted—Defendant J. Wright's argument that the Industrial Commission erred in a workers' compensation case by ordering her to pay a civil penalty for the failure to bring defendant Exceptional Landscapes into compliance with the requirements of N.C.G.S. § 97-93 was not addressed. Wright's motion to withdraw her appeal of that issue had been previously granted. **Allred v. Exceptional Landscapes, Inc., 229.**

Issue not reached—alternative request for writ of certiorari granted—The Court of Appeals allowed defendant Davis' request for a writ of *certiorari* pursuant to N.C. R. App. P. 21(a) in a drug case, and thus, did not reach the issue of whether defendant's appeal was subject to dismissal for having been taken from the order denying her suppression motion instead of from the final judgments. **State v. Hernandez, 601.**

Issue on appeal—deemed abandoned—Defendants' argument on appeal concerning the Industrial Commission's findings of fact and conclusions of law piercing the corporate veil as to them was deemed abandoned pursuant to N.C.R. App. P. 28(b)(6). **Allred v. Exceptional Landscapes, Inc., 229.**

Notice of appeal—proof of service—The State waived defendant's failure to include proof of service on the State in his notice of appeal where the State did not object to the appeal and participated by filing a responsive brief on the merits. Furthermore, the State acknowledged that the Court of Appeals had the discretion to hear the appeal and defendant's petition for writ of *certiorari*, included as part of his appellate brief, was denied as moot. **State v. Gerald, 127.**

APPEAL AND ERROR—Continued

Preservation of issues—argument not raised at trial—grounds for exclusion of evidence—Defendant in an alimony and cohabitation claim did not raise at trial the grounds on which he argued that the trial court erred by excluding the testimony of his detective. It is well-established that a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court. **Smallwood v. Smallwood, 319.**

Preservation of issues—argument not raised below—not supported by evidence—The trial court did not err by granting summary judgment to plaintiff in an action arising from an automobile accident and a lien on settlement proceeds sought by plaintiff where defendant Ellison argued the possibility that plaintiff failed to mitigate its damages by filing a proof of claim against defendant Barnett in her bankruptcy case. The record did not reflect that Ellison raised this issue before the trial court, and, even assuming that the issue was preserved, there was no evidence in the record which established whether or not plaintiff filed a claim in Barnett's bankruptcy proceeding. **State Health Plan for Teachers & State Emps. v. Barnett, 114.**

Preservation of issues—contention not supported by authority or explanation of merit—abandoned—An issue was deemed abandoned where summary judgment had been granted for the insurance company in a declaratory judgment action arising from an automobile crash and the victims did not cite controlling authority in support of their contention or otherwise explain why it had merit. **N.C. Farm Bureau Mut. Ins. Co. v. Smith, 288.**

Preservation of issues—failure to present argument to trial court—The State's appeal from the trial court's order concluding that petitioner did not have a reportable out-of-state conviction and that petitioner was eligible for early termination under N.C.G.S. § 14-208.12A was dismissed. The State failed to preserve these arguments for appeal by presenting them at the trial level. **In re Bunch, 258.**

Preservation of issues—jury instructions—failure to object—Defendant's argument that the trial court erred in its jury instructions by referring to the prosecuting witness as "the victim" was reviewed for plain error where defendant failed to object and properly preserve the issue for review. **State v. Phillips, 416.**

Preservation of issues—switching theories on appeal not allowed—Although defendants contended that the trial court erred in a drugs case by denying their motions to suppress evidence seized from a motor vehicle owned by defendant Davis and operated by defendant Hernandez at a residence occupied by defendant Davis, a criminal defendant is not entitled to advance a particular theory in the course of challenging the denial of a suppression motion on appeal when the same theory was not advanced in the court below. **State v. Hernandez, 601.**

Preservation of issues—unanimity of jury verdict—not raised at trial—plain error review not argued—Defendant-prisoner waived appellate review of whether the jury verdict was unanimous in a prosecution for communicating threats where he did not raise the issue at trial and did not argue for plain error review. There was no disjunctive instruction concerning which deputy the threats were communicated to and defendant had ample opportunity during the charge conference and again following the charge to the jury to request that the judge specify the deputy. **State v. Hill, 371.**

ASSAULT

Jury instructions—reference to witness as victim—not expression of trial court’s opinion—The trial court’s use of the term “victim” to refer to the prosecuting witness in the jury instructions for assault with a deadly weapon with intent to kill was not an expression of the trial court’s opinion and defendant’s argument to the contrary was overruled. **State v. Phillips, 416.**

ATTORNEY FEES

No longer prevailing party—cross-appeal dismissed—Since it was determined that the trial court erred in a reformation of a deed of trust case by granting intervening defendants’ motion for summary judgment, and thus they were no longer the prevailing party, there was no need to address the merits of their cross-appeal regarding attorney fees and expenses under N.C.G.S. § 6-21.5, and it was dismissed. **REO Props. Corp. v. Smith, 298.**

ATTORNEYS

Professional malpractice—failure to supervise—no knowledge of wrongdoing—The trial court did not err in a professional malpractice case by granting defendants Clements’ and Bernard’s individual motions for summary judgment. Plaintiff failed to present evidence that Clements and Bernard knew that another member of the limited liability company was engaged in wrongdoing. **Revolutionary Concepts, Inc. v. Clements Walker PLLC, 102.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

First-degree burglary—failure to instruct—no prejudice—The trial court did not commit plain error by failing to instruct the jury on the theory of first-degree burglary alleged in the bill of indictment. Defendant could not demonstrate prejudice. **State v. Rogers, 617.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Ceasing reunification efforts—findings—related to conclusion—The trial court did not err in a juvenile abuse and neglect case by ceasing reunification efforts with respondent mother without making findings that such efforts would be futile or would be inconsistent with the children’s health, safety, and need for a safe, permanent home within a reasonable period of time. The unchallenged findings of fact were related by the trial court to a conclusion of law that specifically set forth the basis for ceasing reunification efforts under N.C.G.S. § 7B-507(b). **In re J.P., 537.**

Cessation of reunification—supported by record—A mother’s arguments concerning cessation of reunification efforts in a child neglect proceeding were not supported by the record where the trial court specifically encouraged respondents to do what was necessary to allow reunification to occur and even ordered visitation with the child. **In re L.G.I., 512.**

Cessation of reunification efforts—insufficient findings of fact—The trial court abused its discretion in a child neglect and dependency case by ceasing reunification efforts and awarding guardianship of a minor child to her foster parents. The evidence and the findings failed to support a conclusion that reunification efforts would be futile or would be inconsistent with the juvenile’s health, safety, and need

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

for a safe, permanent home within a reasonable period of time. The case was remanded for entry of an order containing proper findings and conclusions. **In re I.K., 264.**

Court's recitation of facts—mother's agreement—stipulation—The trial court complied with N.C.G.S. § 7B-807 in entering an adjudication order in a child neglect proceeding where the child suffered prenatal exposure to opiates and other drugs, the trial court read the facts into the record, and respondent mother then agreed to the facts under oath. The record did not reflect that respondent's stipulation was contingent upon any reciprocal agreement with the Department of Social Services and there was evidence in the record as to the child's prenatal drug exposure, even without respondent mother's stipulation. **In re L.G.I., 512.**

Dispositional order—best interests of child—conditions leading to removal—The trial court did not abuse its discretion in a child abuse and neglect case in its dispositional order. It was not in the best interests of the children to return home. Further, requiring respondents to receive and comply with recommendations of mental health assessments, medical professionals supplying prescription medications, substance abuse evaluations, and drug screens was reasonably related to aiding respondents in remedying the conditions which led to the children's removal. **In re A.R., 518.**

Dispositional order—cessation of reunification efforts—not a permanent plan of adoption—In a child neglect proceeding, there was no merit to the mother's argument that a permanent plan of adoption was improperly ordered where the trial court said in open court that the permanent plan would be adoption, but in its written dispositional order only relieved the Department of Social Services of reunification efforts and set a permanency planning hearing for a later date. The court allowed respondents to continue to work toward reunification on their own. **In re L.G.I., 512.**

Findings of fact—conclusions of law—neglect—The trial court did not err in a child abuse and neglect case by making three findings of fact and a conclusion of law that the children were neglected. The unchallenged binding findings of fact alone supported the conclusion of law of neglect. **In re A.R., 518.**

Indian Child Welfare Act—notification requirements—A child abuse and neglect case was remanded for the trial court to determine the results of the Wake County Human Services investigation as to the applicability of the Indian Child Welfare Act (ICWA) and to ensure that the ICWA notification requirements, if any, were addressed. **In re A.R., 518.**

Permanent plan—notice—waiver—The trial court did not err in a juvenile abuse and neglect case by adopting a temporary permanent plan at the adjudication hearing and a permanent plan at the disposition hearing for the juveniles without giving respondents notice of its intent to create a permanent plan as required by N.C.G.S. § 7B-907(a). To the extent that the adjudication order adopted a temporary permanent plan without notice, the alleged error was rendered harmless by the trial court's entry of a permanent plan at disposition. Furthermore, respondents waived their right to notice by attending the disposition hearing in which the permanent plan was created, participating in the hearing, and failing to object to the lack of notice. **In re J.P., 537.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Visitation plan—insufficient—The trial court erred in a juvenile abuse and neglect case by failing to adopt a proper visitation plan in accordance with N.C.G.S. § 7B-905(c). The plan provided in the disposition order did not sufficiently set forth the time, place, or conditions of respondent-father's visitation. The issue was remanded to the trial court. **In re J.P.**, 537.

CHILD CUSTODY AND SUPPORT

Temporary and permanent orders—determination—The trial court erred in a child custody and visitation case by not mentioning the latest permanent custody order (14 July 2011) in its modification order, and instead mistakenly using another order. The order relied on by the court as the last permanent order (14 June 2010) was in fact temporary because it did not determine all of the issues, it did not become permanent by the operation of time because a hearing was set within a reasonable time and the order did not set an ongoing visitation schedule. The ensuing 14 July 2011 order was permanent because it was not entered without prejudice to either party, did not state a clear and specific reconvening time, and determined all of the issues by determining custody and setting an ongoing visitation schedule. **Woodring v. Woodring**, 638.

Visitation—findings—res judicata—Findings in an order that modified child custody and visitation were *res judicata* and improperly considered to the extent that they contained information disclosed to the court before a hearing on 8 July 2011, which resulted in a permanent order. When evaluating whether there has been a substantial change in circumstances, courts may only consider events which occurred after the entry of the previous order, unless the events were previously undisclosed to the court. **Woodring v. Woodring**, 638.

CHILD VISITATION

Authority to determine and supervise—The trial court erred in a child custody and visitation action by granting the custodial parent the exclusive authority to decide when, where, and if the non-custodial parent had visitation, as well as the supervision of visitation. **Woodring v. Woodring**, 638.

Neglected child—visitation plan—insufficiently detailed—A child neglect proceeding was remanded for clarification of respondent's visitation rights where the original plan was insufficiently detailed. **In re L.G.I.**, 512.

CITIES AND TOWNS

Towing ordinance—enabling authority—A local towing ordinance was a valid exercise of a town's police power under N.C.G.S. § 160A-174(a), which is ambiguous and therefore interpreted broadly. A town has no inherent police power and may exercise only such powers that are conferred by the General Assembly. Where the authorizing language is ambiguous, a broad construction is used, but the plain meaning is used where there is no ambiguity. A thorough review of the towing ordinance in this case and N.C.G.S. § 160A-174(a) led to the holding that the ordinance covered a proper subject for regulation under the town's police power, and the trial court's order permanently enjoining the towing ordinance was reversed. **King v. Town of Chapel Hill**, 545.

CIVIL PROCEDURE

Judgment on the pleadings—consideration of contract—consideration of briefs—summary judgment—The trial court’s consideration of defendant’s insurance policy and the legal briefs submitted by the parties did not convert plaintiff’s Rule 12(c) motion for judgment on the pleadings into a Rule 56 motion of summary judgment. Therefore, the trial court did not err in making a determination on the pleadings without allowing defendant the opportunity to present additional materials. **Erie Ins. Exchange v. Builders Mutual Ins. Co.**, 238.

Juvenile petitions—Rule 60—voluntary dismissal without prejudice—Rule 41—The trial court did not err by denying a guardian ad litem’s N.C.G.S. § 1A-1, Rule 60(b) motion for relief from the voluntary dismissal without prejudice filed by Buncombe County Department of Social Services (DSS) purporting to dismiss the juvenile petitions. DSS had the legal authority prior to an adjudicatory hearing to voluntarily dismiss the petition it had filed. The application of N.C.G.S. § 1A-1, Rule 41(a)(1)(i) to the adjudication of abuse, neglect, and dependency advances the purposes of the Juvenile Code and is not contrary to any provisions of the Code. **In re E.H.**, 525.

Juvenile petitions—voluntary dismissal—Rule 60(b)—For purposes of a juvenile petition, a voluntary dismissal is a “proceeding” that may be the subject of a motion under N.C.G.S. § 1A-1, Rule 60(b). Thus, the trial court correctly concluded in a child abuse and neglect case that a Rule 60(b) motion was the proper avenue to challenge Buncombe County Department of Social Services’s voluntary dismissal. **In re E.H.**, 525.

CLASS ACTIONS

Class certification—equitable grounds—The trial court did not err by denying plaintiff’s motion for class certification. Since the Court of Appeals concluded that the trial court correctly denied class certification, there was no need to determine whether it was unjust on equitable grounds. **Blitz v. Agean, Inc.**, 476.

Class certification—generalized proof—The trial court did not err by concluding that plaintiff failed to establish the existence of a class. Plaintiff failed to define a class that was subject to generalized proof and therefore, he failed to show that the trial court abused its discretion in denying its motion for class certification. **Blitz v. Agean, Inc.**, 476.

COMPROMISE AND SETTLEMENT

Execution on judgment precluded—summary judgment—The trial court correctly granted summary judgment in Farm Bureau’s favor in an action involving an automobile accident and a settlement agreement where the settlement agreement precluded the individuals who were injured in the accident from executing on any judgment obtained against the driver who crashed into them. **N.C. Farm Bureau Mut. Ins. Co. v. Smith**, 288.

Settlement language—bar to insurance coverage—settlement payments statute—not applicable—N.C.G.S. § 1-540.3 did not apply to an automobile accident case where the issue was whether the language in a settlement agreement operated to bar coverage under the Farm Bureau policy as a matter of law rather than whether settlement payments bared further recovery. **N.C. Farm Bureau Mut. Ins. Co. v. Smith**, 288.

CONFESSIONS AND INCRIMINATING STATEMENTS

Motion to suppress statements—right to be taken before court official without unnecessary delay following arrest—The trial court did not err in a first-degree murder, robbery with a dangerous weapon, and felony conspiracy to commit robbery with a dangerous weapon case by denying defendant's second motion to suppress his statements to officers of the Oak Island Police Department. The trial court's findings of fact supported its conclusion that there was no violation of defendant's rights under N.C.G.S. § 15A-501(2) or defendant's constitutional right to be taken before a court official without unnecessary delay following his arrest. **State v. Caudill, 119.**

CONSPIRACY

Motion to dismiss—sufficiency of evidence—implied understanding—robbery with dangerous weapon—The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to commit robbery. The facts showed an implied understanding to commit robbery with a dangerous weapon. **State v. Rogers, 617.**

CONSTITUTIONAL LAW

Challenge to ordinance—no citation issued—In an action to enjoin a towing ordinance and a mobile phone ordinance (because tow truck drivers used mobile phones in their business), the trial court erred by permanently enjoining enforcement of the mobile phone ordinance where plaintiff was not subject to a manifest threat of irreparable harm. The constitutionality of the ordinance should be left to be tested when a citation is issued; plaintiff must test the ordinance in the context of his own case. **King v. Town of Chapel Hill, 545.**

Effective assistance of counsel—dismissal of claim without prejudice—Defendant Davis' ineffective assistance of counsel claim was not ripe for consideration on direct appeal and was dismissed without prejudice to her right to raise it in a subsequent motion for appropriate relief. **State v. Hernandez, 601.**

Effective assistance of counsel—record not sufficient—Defendant's assertion that he received ineffective assistance of counsel was dismissed without prejudice to his ability to raise the challenge through a motion for appropriate relief where the record was not adequate to address the issue. **State v. King, 390.**

Ineffective assistance of counsel—failure to object—Defendant received ineffective assistance of counsel when his trial counsel did not make a timely motion to suppress the statements and observations made during the warrantless entry of defendant's home. Because credibility was central to the jury's ultimate decision, and because the evidence had a strong tendency to corroborate victim's account and contradict the defendant's version of events, it could not be concluded that there was not a reasonable probability of a different result in the absence of the alleged errors by counsel. **State v. Gerald, 127.**

Ineffective assistance of counsel—not per se ineffective—no prejudice—A juvenile defendant charged with misdemeanor assault could not sustain a claim for ineffective assistance of counsel. Counsel's failure to make any closing argument was not ineffective assistance of counsel *per se*. Furthermore, the juvenile failed to establish a reasonable probability that had counsel asserted on closing argument that the incident in the boys' bathroom was an accident occurring as a result of horseplay, the result of the proceeding would have been different. **In re C.W.N., 63.**

CONSTITUTIONAL LAW—Continued

Just and Equitable Tax Clause—privilege license tax increase—unreasonable increase—The trial court erred in a case involving plaintiffs' challenge to the City of Fayetteville's (City) ordinance imposing an increased privilege license tax on electronic gaming operations by granting summary judgment in favor of the City and denying plaintiffs' summary judgment motion. The City's privilege license tax violated the Just and Equitable Tax Clause because the City's 8,900% minimum tax increase was wholly detached from the moorings of anything reasonably resembling a just and equitable tax. **Smith v. City of Fayetteville, 563.**

Right to counsel—motion for postconviction DNA testing—failure to show materiality—The trial court did not err in a multiple statutory rape case by failing to appoint counsel to represent defendant on his motion for postconviction DNA testing. Defendant failed to make the requisite showing of materiality. **State v. Gardner, 364.**

Right to silence—no probable impact on jury verdict—The trial court did not err in a first-degree murder case by concluding that the State did not use defendant's constitutional right to silence against her. A review of the totality of the evidence revealed that the challenged instances did not have a substantial or probable impact on the jury's verdict. **State v. Bean, 335.**

CONTEMPT

Civil—noncompliance with order—The trial court did not err in a trespass case by holding defendants in civil contempt. Plaintiff was the rightful owner of the pertinent Waterfront Property, and defendants remained noncompliant with the 2004 summary judgment order. **Adams Creek Assocs. v. Davis, 457.**

CONTRACTS

Breach of contract—exhibits contradicted allegations—no breach—The trial court did not err by dismissing plaintiff's breach of contract claim. Even assuming an enforceable contract between plaintiff and defendant First Bank existed, plaintiff's exhibits contradicted its allegations that defendant First Bank breached its agreement to hold proceeds from the sale of certain property at issue in escrow. **Highland Paving Co., LLC v. First Bank, 36.**

Breach of contract—failure to plead valid contract—pre-audit statement required—The trial court did not err by granting defendant's motion to dismiss a claim of breach of contract. Plaintiff failed to plead a valid contract based upon the absence of a pre-audit statement mandated by N.C.G.S. § 159-28(a). **Howard v. Cty. of Durham, 46.**

CORPORATIONS

Piercing the corporate veil—no alter ego—The Industrial Commission erred in a worker's compensation case by piercing the corporate veil as to defendant J. Wright because she was not a shareholder of the defendant corporation. The findings of fact were insufficient to support a conclusion of law that J. Wright was an alter ego of the corporation. **Allred v. Exceptional Landscapes, Inc., 229.**

COSTS

Notice and opportunity to be heard—statutory requirements met—The trial court did not err in an assault with a deadly weapon inflicting serious injury case by failing to provide defendant notice and an opportunity to be heard before imposing court costs upon him. Considering statutory requirements that, absent a waiver, court costs be assessed when an active sentence is imposed, the trial court's order that court costs be assessed following the pronouncement that defendant would serve an active sentence satisfied the requirements that defendant be provided notice and an opportunity to be heard on the imposition of those costs. **State v. Phillips, 416.**

CRIMINAL LAW

Guilty plea—plea agreement—informed choice—felonious breaking and entering—habitual felon—The trial court did not err by accepting defendant's guilty plea to the charges of felonious breaking and entering and attaining habitual felon status even though defendant contended the plea agreement was not the product of an informed choice. Defendant's right to appeal from the trial court's order denying his motion to suppress the use of a prior conviction to establish his habitual felon status was not precluded as a matter of law. **State v. Davis, 572.**

Jury instruction—entrapment—The trial court did not err in a drugs case by failing to instruct the jury on the theory of entrapment. The record failed to indicate that law enforcement officers utilized acts of persuasion, trickery or fraud to induce defendant to commit a crime, or that the criminal design originated in the minds of law enforcement, rather than with defendant. **State v. Thomas, 170.**

Motion for appropriate relief hearing—statutory mandates—request for continuance—The trial court complied with statutory mandates for raising and allowing its *sua sponte* motion for appropriate relief (MAR) to change a criminal sentence imposed the day before. Furthermore, although the State contended that the trial court erred by failing to conduct a hearing, the State asked for a continuance so that the prosecutor from the day before could decide how to proceed and did not argue that the trial court erred by refusing the continuance. **State v. Williams, 209.**

Motion for appropriate relief—sua sponte—change of sentence—The trial court supplied appropriate notice of a *sua sponte* motion for appropriate relief (MAR) to change a sentence imposed the day before where the judge announced his *sua sponte* MAR in open court; he was the judge who presided over the guilty plea and sentencing hearing; the guilty plea, sentencing hearing, and MAR were all made during the same criminal session; and the notice came much sooner than within 10 days after entry of judgment. **State v. Williams, 209.**

Motion for appropriate relief—sua sponte—sentence altered—burden not shifted to State—At a hearing on a trial court's *sua sponte* motion for appropriate relief (MAR) at which a sentence imposed the previous day was altered, the trial court did not place the burden on the State to disprove the existence of extraordinary mitigation **State v. Williams, 209.**

Pro se defendant—statutory requirement—knowingly and voluntarily—proper colloquy—The trial court did not err in a drug case by allowing defendant to proceed *pro se* without making a proper determination that his decision to represent himself was knowingly and voluntarily made. Although the trial court misstated the maximum sentence to which defendant was exposed during his colloquies with defendant, the trial court adequately complied with the relevant provisions of N.C.G.S. § 15A-1242. **State v. Gentry, 583.**

CRIMINAL LAW—Continued

Prosecutor's argument—defendant's right to plead not guilty—The trial court did not err in a first-degree murder case by concluding that the State did not violate defendant's right to plead not guilty by commenting during closing arguments that despite the mounting evidence against her, defendant could still say she did not do it. The jury was properly instructed regarding the State's burden of proof and defendant's right to plead not guilty. **State v. Bean, 335.**

Requested instruction denied—credibility of witness—There was no error in a first-degree murder prosecution where the trial court refused to instruct the jury using defendant's proposed special instruction concerning the effect of drug use on a witness's credibility. The trial court properly instructed the jury using the general witness credibility instruction, defendant made it clear on cross-examination that the witness had been smoking marijuana before the masked perpetrators entered the apartment, and defendant argued in closing that the witness could not be believed. **State v. King, 390.**

Retrial following mistrial—de novo—refusal to give instruction at first trial—not binding at second—The judge in a driving while impaired prosecution following a mistrial did not err by giving an instruction that refusal to take an alcohol breath test could be considered as evidence of guilt even though the judge in the first trial had refused to give the instruction. A trial following a mistrial is *de novo*, unaffected by rulings made during the original trial, and the rule that one superior court judge cannot overrule another in the same matter does not apply. Moreover, the doctrine of collateral estoppel applies only to an issue of ultimate fact determined by a final judgment. In this case, since there was no final judgment because of the mistrial, collateral estoppel cannot apply. **State v. Macon, 152.**

Self-defense—instruction on defendant as aggressor—not supported by evidence—There was plain error in a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury where there was a stabbing in a night club parking lot, defendant claimed self-defense, and the judge instructed the jury that defendant was not entitled to the benefit of self-defense if she was the aggressor in the altercation. The undisputed evidence showed that the victim lunged at defendant before she was able to initiate any action and was not sufficient to support the instruction. **State v. Vaughn, 198.**

DAMAGES AND REMEDIES

Property damage—replacement cost—fair market value—The Industrial Commission erred in a Tort Claims Act case by erroneously basing fair market value of the replacement property, as a component of the total award, on a finding not supported by the evidence. The matter was remanded to the Commission. The Commission erroneously did not 1) consider “out-of-pocket expenses,” 2) measure damages according to a replacement cost analysis, rather than a diminished value or repair cost analysis, or 3) calculate damages based on “replacement costs” rather than “repair costs.” **Russell v. N.C. Dep't of Env't & Nat. Res., 306.**

DIVORCE

Alimony—cohabitation—conclusion—Although the trial court in an alimony claim did not include a conclusion of law specifically stating that plaintiff was not engaged in cohabitation, the order contained a finding that plaintiff and her boyfriend did not voluntarily assume the marital rights, duties and obligations that are

DIVORCE—Continued

usually manifested by married people. The presence of competent evidence in the record supporting the trial court's determination of non-cohabitation compelled the affirmation of its decision. **Smallwood v. Smallwood, 319.**

Alimony—cohabitation—findings—Challenged findings concerning cohabitation in an alimony action were supported by the evidence except for a finding concerning where plaintiff's boyfriend did his laundry. However, defendant did not demonstrate how he has been prejudiced by that erroneous finding. The Court of Appeals declined defendant's invitation to categorically hold that the mere presence of certain isolated factors automatically mandated a finding of cohabitation. **Smallwood v. Smallwood, 319.**

Alimony—cohabitation—findings—subjective intent—There was no error in an alimony claim involving cohabitation where the trial court did not make findings on subjective intent. It was clear that the trial court was able to rule on the cohabitation issue based on the objective facts introduced into evidence by the parties and plaintiff nowhere contended that the objective evidence was conflicting. **Smallwood v. Smallwood, 319.**

Alimony—date of separation to filing of claim—The trial court is authorized by longstanding precedent and N.C.G.S. § 50-16.3A to award alimony for the period between the parties' date of separation and the filing of the claim for alimony in appropriate circumstances. **Smallwood v. Smallwood, 319.**

Alimony order—correction of order—additional order issued—findings sufficient for both—The trial court's order contained sufficient findings to support its award of retroactive alimony where the original order, through an apparent oversight, omitted a period of time. Rather than amending the order, the trial court entered another order awarding the retroactive alimony and the two orders, read together, were sufficient to support the entirety of the award. **Smallwood v. Smallwood, 319.**

Equitable distribution—unequal division—findings—The trial court erred in an equitable distribution action by not addressing the parties' contentions regarding an unequal distribution where the parties presented evidence about those issues. On remand, the parties were permitted to offer additional evidence on the income, liabilities and property of the parties on the date of division, since the division had not yet become effective. **Hinkle v. Hinkle, 252.**

Equitable distribution—value of property—findings—In an equitable distribution case remanded on other grounds, the trial court was directed to make findings clarifying the valuation of certain property where the trial court had not made a specific finding about the date of the valuation or of the value of the mortgage on the property. **Hinkle v. Hinkle, 252.**

DRUGS

Cocaine—conspiracy to traffic and constructive possession—evidence sufficient—The trial court properly denied defendant's motion to dismiss charges of conspiracy to traffic in cocaine by possession and trafficking in cocaine by possession where a reasonable juror could have inferred that defendant and another individual (Blanco) agreed to traffic in and constructively possessed approximately 425 grams of cocaine. A series of events with a detective, Blanco, and defendant, taken together, constituted substantial evidence sufficient to establish conspiracy

DRUGS—Continued

to traffic, and the fact that Blanco went to defendant's house to pick up the drugs before driving to a parking lot to complete the sale with the detective was substantial evidence of constructive possession. **State v. Torres-Gonzalez, 188.**

Trafficking heroin—jury instruction—guilty knowledge—plain error—The trial court committed plain error in a trafficking in heroin by possession and trafficking in heroin by transportation by failing to adequately instruct the jury on the law of guilty knowledge. The trial court should have instructed the jury in accordance with the pattern jury instructions regarding circumstances where a defendant contends he did not know the true identity of what he possessed. **State v. Coleman, 354.**

Verdicts—conspiracy to traffic—trafficking by possession—not inconsistent—Verdicts convicting defendant of conspiracy to traffic in cocaine by possession but not convicting him of trafficking by possession did not present any inconsistency, legal or otherwise, because conspiracy to traffic by possession does not include possession as an element. **State v. Torres-Gonzalez, 188.**

EMBEZZLEMENT

Duty to account doctrine—truck driver paid by customer in cash—The trial court properly denied defendant's motion to dismiss an embezzlement prosecution against a truck driver working for a moving company where defendant contended that the court lacked territorial jurisdiction to adjudicate the charge. Defendant was paid for one delivery in cash in Nevada and used part of the money to buy an airplane ticket to North Carolina when his commercial driver's license expired. While defendant turned in the paperwork, he never turned in the money collected in Nevada. Defendant had a pre-existing duty to account for the proceeds to the company in North Carolina and, under the duty to account doctrine, the State presented sufficient evidence that an essential component of the crime was committed in North Carolina. **State v. Tucker, 627.**

Failure to instruct jury—territorial jurisdiction—legal rather than factual issue—The trial court did not err in an embezzlement prosecution by not instructing the jury on the territorial jurisdiction issue where the argument involved a legal rather than a factual issue. **State v. Tucker, 627.**

ENGINEERS AND SURVEYORS

Suspension of surveyor's license—dispute with client—authority of Board—Plaintiff Suttles contended that the Board of Examiners for Engineers and Surveyors (Board) exceeded its statutory authority when it suspended his surveyor's license and reprimanded his surveying company. Specifically, Suttles asserted that the Board lacked statutory authority to adjudicate a purely contractual dispute, but the Board's decision did not render judgment on whether Suttles breached any contract with Smith. The Board's decision focused on Suttles' actions throughout his business dealings with this client. **In re Suttles Surveying, P.A., 70.**

Suspension of surveyor's license—dispute with client—rules not unconstitutionally vague—The Court of Appeals rejected the contention of a surveyor (Suttles) that the decision of the Board of Examiners for Engineers and Surveyors (Board) to suspend his surveyor's license and reprimand his surveying company was based on unconstitutionally vague and overbroad rules. Any reasonably intelligent

ENGINEERS AND SURVEYORS—Continued

member of the profession must have understood that issuing a preliminary plat with knowledge that it would be improperly recorded violated the Board's rules. Also, the record reflected Suttles' personal knowledge that a confidentiality clause in a settlement agreement would necessarily subvert the Board's investigation. **In re Suttles Surveying, P.A., 70.**

ESTOPPEL

Equitable—representations during business purchase—The trial court erred by granting summary judgment for defendant in an action arising from representations allegedly made by defendant during the financing of a business purchase where the statute of limitations had run, but plaintiffs' allegations raised a permissible inference of equitable estoppel. **Ussery v. Branch Banking & Trust Co., 434.**

EVIDENCE

Postconviction DNA testing—sufficiency of findings of fact—The trial court did not err in a multiple statutory rape case by failing to make sufficient findings of fact and conclusions of law demonstrating that it analyzed the requirements set forth in N.C.G.S. § 15A-269 regarding postconviction DNA testing of evidence because the statute does not contain any requirement that the trial court make specific findings of facts. **State v. Gardner, 364.**

Use by jury—during deliberations—statutory analysis—no prejudice—The trial court's failure to submit a surveillance video to the jury during deliberations should have been analyzed under N.C.G.S. § 1-181.2 (2011), rather than under *Nunnery v. Baucom*, 135 N.C. App. 556. However, plaintiff's substantive argument was without merit because the jury withdrew its request to review the videotape and had otherwise reached a verdict. **Redd v. WilcoHess, L.L.C., 293.**

Victim impact testimony—not prejudicial—The trial court did not commit prejudicial error in a robbery with a dangerous weapon case by allowing the State to present victim impact testimony at trial. Even assuming arguendo that the testimony was inadmissible as victim impact testimony, the evidence did not prejudice defendant. **State v. Bell, 339.**

FALSE PRETENSE

Motion to dismiss—acting in concert—no actual or constructive presence—The trial court erred by denying defendant's motion to dismiss the two charges of obtaining property by false pretenses in cases 11 CRS 50681 and 11 CRS 50682 based upon the theory of acting in concert. The State failed to present evidence of defendant's actual or constructive presence at the time his friend sold or pawned the item. The remaining cases were remanded for resentencing. **State v. Greenlee, 133.**

Motion to dismiss—stolen items sold to pawn shop—The trial court did not err by denying defendant's motion to dismiss two charges of obtaining property by false pretense in cases 10 CRS 64054 and 11 CRS 00066. There was sufficient evidence that the items sold by defendant to a pawn shop were stolen. **State v. Greenlee, 133.**

FIDUCIARY RELATIONSHIP

Failure to allege—breach of fiduciary duty—constructive fraud—The trial court did not err by dismissing plaintiff's claims for breach of fiduciary duty and constructive fraud. Plaintiff failed to allege a relationship between it and defendant First Bank that could constitute a fiduciary relationship. **Highland Paving Co., LLC v. First Bank, 36.**

FIREARMS AND OTHER WEAPONS

North Carolina Felony Firearms Act—constitutional challenge—not applicable—The trial court did not err by failing to determine that the North Carolina Felony Firearms Act under N.C.G.S. § 14-415.1 was unconstitutional as applied to plaintiff because it did not apply to him at all. **Booth v. State of N.C., 484.**

North Carolina Felony Firearms Act—statutory construction—prohibition against possession of firearms—not applicable to pardoned individuals—The trial court did not err in a declaratory judgment action by determining that the North Carolina Felony Firearms Act prohibition under N.C.G.S. § 14-415.1(a) did not apply to plaintiff. The plain and unambiguous language of N.C.G.S. § 14-415.1(d) says that N.C.G.S. § 14-415.1 does not apply to individuals who have been pardoned pursuant to the law of the jurisdiction in which the conviction occurred. Although plaintiff had been convicted of felony kidnapping, he was thereafter conditionally pardoned by the governor of North Carolina. **Booth v. State of N.C., 484.**

FRAUD

Negligent misrepresentation—motion to dismiss—failure to allege pecuniary loss—The trial court did not err by granting defendant's motion to dismiss a claim of negligent misrepresentation. Plaintiff failed to allege any pecuniary loss. **Howard v. Cty. of Durham, 46.**

HOMICIDE

First-degree murder—failure to instruct on lesser-included offense of second-degree murder—The trial court did not err in a first-degree murder case by declining to instruct the jury on the lesser-included offense of second-degree murder. Assuming *arguendo* that defendant properly preserved this issue for appellate review, all of the evidence tended to show that defendant had the intent to kill the victim with premeditation and deliberation. **State v. Ingram, 383.**

First-degree murder—failure to instruct on lesser-included offense—second-degree murder—The trial court did not err in a first-degree murder case by failing to submit to the jury the lesser-included offense of second-degree murder. The State presented evidence of premeditation and deliberation, and there was no evidence in the record to suggest a lack thereof. **State v. Rogers, 617.**

First-degree murder—motion to dismiss—sufficiency of evidence—premeditation—deliberation—felony murder—The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder. There was substantial evidence presented to support a conclusion that defendant killed the victim with premeditation and deliberation. Since the trial court did not arrest judgment on defendant's conviction for robbery with a dangerous weapon, but imposed judgment on the underlying felony, analysis of felony murder was irrelevant. **State v. Rogers, 617.**

HOMICIDE—Continued

First-degree murder—motion to dismiss—sufficiency of evidence—shooter—motive not required—The trial court did not err by denying defendant’s motion to dismiss the charge of first-degree murder because the State presented substantial evidence that defendant was the shooter. Further, the State had no burden to show that defendant had a motive. **State v. Ingram, 383.**

First-degree murder—short form indictment—The trial court did not err by failing to dismiss *ex mero motu* the short form first-degree murder indictment because our courts have repeatedly held that it is constitutional. **State v. Rogers, 617.**

Second-degree murder—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant’s motion to dismiss the charge of second-degree murder. The State presented substantial circumstantial evidence of each element of second-degree murder in that defendant either acted alone or with others in the shooting and killing of the victim. **State v. Facyson, 576.**

INDICTMENT AND INFORMATION

Amendment—embezzlement—relationship between defendant and victim—The trial court did not err by allowing an amendment to an indictment for embezzlement where the amendment added that defendant truck driver was the agent of the victim, the company for which he worked, rather than just an employee. Although defendant argued that the amendment would prejudice his defense because it changed the nature of the relationship between defendant and the victim, the terms “employee” and “agent” are essentially interchangeable for purposes of the embezzlement statute. **State v. Tucker, 627.**

INSURANCE

Duty to defend—unjustifiable refusal—judgment on the pleadings—The trial court properly granted judgment on the pleadings in favor of plaintiffs in a declaratory judgment action. As a matter of law, the allegations presented in the underlying action triggered defendant’s duty to defend its insured under the terms of defendant’s insurance policy. Because defendant unjustifiably refused to defend its insured in the underlying action, judgment on the pleadings in favor of plaintiffs for the amount expended in settlement of the underlying action on behalf of the insured was proper. However, plaintiffs’ amended complaint failed to include allegations pertaining to any “defense costs” expended, and therefore, judgment on the pleadings in favor of plaintiffs for any such defense costs was improper. **Erie Ins. Exchange v. Builders Mutual Ins. Co., 238.**

JURISDICTION

Standing—professional malpractice—assignment invalid—claim vested—The trial court erred in a professional malpractice case by concluding that plaintiff Carter lacked standing to assert the claims. Malpractice claims are not assignable in North Carolina so Carter’s attempted assignment was invalid. Furthermore, Carter’s right to assert this claim had vested prior to the attempted assignment. **Revolutionary Concepts, Inc. v. Clements Walker PLLC, 102.**

Standing—professional malpractice—assignment invalid—no post-merger action to assert claims—The trial court did not err in a professional malpractice case by concluding that plaintiff RCI-NV did not have standing to assert the

JURISDICTION—Continued

malpractice claims at issue and granting defendants' motion for summary judgment. RCI-NV did not acquire the claims as a result of the assignment from RCI-NC and RCI-NV did not take any action post-merger to assert those claims as the surviving entity of the merger. **Revolutionary Concepts, Inc. v. Clements Walker PLLC, 102.**

JURY

Extraneous information—admission erroneous—no contribution to conviction—The trial court did not err in a malicious conduct by a prisoner case by denying defendant's motion for appropriate relief. Although it was error for the trial court to receive evidence about the subjective impact of extraneous information a juror received from a conversation the juror had with defendant's mother while waiting in the courthouse hallway prior to jury selection, there was no reasonable possibility that the violation might have contributed to the conviction. **State v. Heavner, 139.**

LARCENY

Attempted felony larceny—injury to personal property—jury instruction—wires and piping connected to air-conditioning unit—The trial court did not err in an attempted felony larceny and injury to personal property case by instructing the jury that wires and piping connected to an air-conditioning unit were personal property. If the statement amounted to error, it was an instructional error that was not preserved for appeal. Further, assuming *arguendo* that the instruction was an opinion as to a factual issue, the error was harmless since it was supported by the evidence. **State v. Primus, 428.**

Attempted felony larceny—motion to dismiss—sufficiency of evidence—completed commission of crime includes attempt—The trial court did not err by denying defendant's motion to dismiss an attempted felony larceny charge. The completed commission of a crime must necessarily include an attempt to commit the crime and the evidence was sufficient to show a completed larceny. **State v. Primus, 428.**

LIENS

State Health Plan—settlement from auto accident—The trial court erred by granting plaintiff's motion for summary judgment in a case arising from an automobile accident where there was a settlement and plaintiff sought a lien on the proceeds. The plain language of N.C.G.S. § 135-45.15 places a duty upon an injured party's attorney to direct settlement funds recovered by an injured State Health Plan member to plaintiff in satisfaction of its statutory lien. An attorney cannot ignore a valid State Health Plan lien when disbursing settlement funds, regardless of his client's wishes. **State Health Plan for Teachers & State Emps. v. Barnett, 114.**

LOANS

Enforcement of note—interest and attorney fees—equitable estoppel—The trial court erroneously allowed summary judgment for defendant as to the enforceability of a promissory note, the amount of interest accrued on the note, and attorney fees where plaintiffs' claims were sufficient to allow the jury to determine whether equitable estoppel barred operation of the statute of limitations. **Ussery v. Branch Banking & Trust Co., 434.**

MEDICAL MALPRACTICE

Apparent agency—summary judgment proper—release form—The trial court did not err in a medical malpractice case by granting summary judgment in favor of hospital defendants on the issue of whether Dr. Forgy was the hospital defendants' apparent agent. It would not be reasonable for a patient presented with the pertinent release form to assume that Dr. Forgy was a hospital employee. **Estate of Ray v. Forgy, 24.**

Corporate negligence—Rule 9(j) certification not required—The trial court did not err in a medical malpractice case by denying defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 9(j). Where corporate negligence claims arise out of policy, management or administrative decisions, the claim is rooted in ordinary negligence principles and the reasonably prudent person standard should be applied. Rule 9(j) certification is not required for these types of corporate negligence claims. **Estate of Ray v. Forgy, 24.**

Corporate negligence—summary judgment improper—The trial court's order in a medical malpractice case granting hospital defendants' motion for summary judgment on the theory of corporate negligence based on the hospital granting Dr. Forgy privileges was reversed and remanded for further proceedings. The evidence permitted at least an inference that the hospital defendants were not reasonably diligent in reviewing Dr. Forgy's qualifications when renewing his surgical privileges. **Estate of Ray v. Forgy, 24.**

MORTGAGES AND DEEDS OF TRUST

Foreclosure—special proceeding—equitable defense—no jurisdiction—The trial court exceeded its jurisdiction in a special proceeding for a foreclosure and sale by considering respondents' equitable estoppel defense. Equitable defenses may not be raised in a hearing pursuant to N.C.G.S. § 85-21.16 but must instead be asserted in an action to enjoin a foreclosure sale under N.C.G.S. § 45-21.34. Moreover, the trial court here tailored its findings and conclusions to the defense of equitable estoppel and did not address the findings required in a foreclosure pursuant to N.C.G.S. § 45-21.6. Although the record in this case was not adequate to determine the status of a prior proceeding, dismissal of the appeal was not necessitated. **In re Foreclosure of Young, 502.**

Reformation of deed of trust—lis pendens properly cross-indexed—The trial court erred in a reformation of a deed of trust case by granting intervening defendants' motion for summary judgment and dismissing the action. Intervening defendants should not have been permitted to raise defenses to plaintiffs' claims because plaintiffs filed a notice of *lis pendens* that was properly cross-indexed in the records of the Clerk of Court in Davidson County. **REO Props. Corp. v. Smith, 298.**

MOTOR VEHICLES

Driver's license revocation—admission of evidence—Rules of Evidence not applicable—The Division of Motor Vehicles (DMV) did not err in a driver's license revocation hearing by allowing into evidence reports from two police officers and an affidavit from one officer. The North Carolina Rules of Evidence do not apply to proceedings before the DMV pursuant to N.C. Gen. Stat. § 20-16.2. Furthermore, even if the Rules of Evidence did apply, the exhibits were properly admitted as substantive evidence. **Johnson v. Robertson, 281.**

MOTOR VEHICLES—Continued

Driver's license revocation—standard of review correct—determination correct—The superior court applied the correct standard of review to a driver's license revocation hearing and the superior court correctly determined that there was sufficient evidence in the record to support the Division of Motor Vehicle's findings of fact and that its conclusions of law were supported by the findings of fact. **Johnson v. Robertson, 281.**

Driving while impaired—instructions—refusal to take alcohol breath test—sufficient evidence—The judge in a driving while impaired prosecution that followed an initial mistrial did not err by giving an instruction that refusal to take the alcohol breath test could be considered as evidence of guilt where there was evidence supporting the instruction. Evidence of defendant's failure to follow instructions regarding the breath test was evidence that defendant refused to take the test, despite the fact that she did blow into the instrument. The officer's testimony that he did not mark the test as a refusal immediately following administration of the test and did not report defendant's test as a refusal to the Department of Motor Vehicles went only to the weight and credibility of the evidence. **State v. Macon, 152.**

Driving while impaired—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired. The breathalyzer test results showing defendant's blood alcohol concentration of .09 were sufficient evidence for the charge of impaired driving to be submitted to the jury. **State v. Marley, 613.**

Impaired driving—sequential test results—The trial court erred in an impaired driving prosecution by concluding that Intoximeter test results were not sequential for the purposes of N.C.G.S. § 20-139.1(b3). The fact that the machine timed out and was restarted was not material to the determination of whether the tests were sequential; the only reason the tests were not immediately consecutive was because defendant gave an insufficient breath sample. Neither the trial court nor defendant cited any statute, regulation, or other authority that required that the sequential tests actually appear on the same test result ticket. **State v. Cathcart, 347.**

Impaired driving—testing—observational period—The trial court erred in an impaired driving prosecution by concluding that the trooper failed to follow the proper procedure by not conducting another observational period after the test machine timed out. Defendant was under constant observation by the trooper prior to the second test and there was no evidence that defendant ate, drank, smoked, vomited, or did anything that might require a break before the subsequent test. **State v. Cathcart, 347.**

NEGLIGENCE

Common knowledge—standard of care—breach of standard—no expert testimony required—The Industrial Commission did not err in a Tort Claims Act case by concluding that plaintiff's employee was negligent, even though plaintiff failed to offer expert testimony establishing breach of duty and causation. The common knowledge and experience of the finder of fact, the Industrial Commission in this case, was sufficient to establish the standard of care and that the employee breached the standard of care; no expert testimony was required. **Russell v. N.C. Dep't of Env't & Nat. Res., 306.**

NEGLIGENCE—Continued

Sudden emergency—vehicular accident—The trial court did not err in a negligence case arising out of a vehicular accident by granting defendants' motion for summary judgment based upon the doctrine of sudden emergency. Plaintiff failed to demonstrate that defendant driver's alleged violation of various safety regulations proximately caused the accident; the exact details of the accident as argued by plaintiff were not genuine issues of material fact; and while defendant driver could have had other reactions to the sudden emergency which may have resulted in a different outcome, this did not create a genuine issue of material fact. **Fulmore v. Howell, 31.**

PARTIES

Motion to amend complaint—futile—claims time-barred—motion to substitute party—failure to substitute within reasonable time—The trial court did not err in a professional negligence case by denying plaintiff's N.C.G.S. § 1A-1, Rule 15 motion to amend the complaint to add RCI-NC as a plaintiff and by not giving post-merger RCI-NV the opportunity to be substituted in as the real party in interest pursuant to Rule 17. Plaintiff's claims would have been time-barred and the amendment would have been futile and plaintiffs failed to offer any compelling reason why they failed to substitute RCI-NV in a reasonable time after the merger. **Revolutionary Concepts, Inc. v. Clements Walker PLLC, 102.**

PLEADINGS

Sanctions—meritless motions—The trial court did not abuse its discretion in a trespass case by imposing sanctions of \$11,000 pursuant to N.C.G.S. § 1A-1, Rule 11 in favor of plaintiff to cover fees incurred as a result of defendants' meritless motions. **Adams Creek Assocs. v. Davis, 457.**

PRETRIAL PROCEEDINGS

Continuance to procure expert—denied—defendant's inactivity—The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant's motion to continue to permit him to procure a DNA expert. Defendant had sufficient time to review the evidence against him and to procure the assistance of an expert, but simply failed to do so in time. **State v. King, 390.**

Motion for appointment of substitute counsel—no good cause—The trial court did not err in a drug case by denying defendant's motion for the appointment of substitute counsel. Although defendant expressed dissatisfaction with the performance of his assigned counsel on several occasions, he failed to establish the requisite "good cause" to appoint substitute counsel or that his assigned counsel could not provide him with constitutionally adequate representation. **State v. Gentry, 583.**

Motion to continue—denial—no prejudice—The trial court did not err in a drug case by denying defendant's motion to continue his case. Defendant failed to establish that he suffered any prejudice from the court's ruling where he failed to specifically identify how the trial court's rulings impaired his ability to prepare for trial and most, if not all, of the limitations on the ability of his trial counsel to prepare for trial appeared to have resulted from defendant's own conduct. **State v. Gentry, 583.**

PRISONS AND PRISONERS

Carrying a concealed weapon—razor blade under table—The trial court did not err when it denied defendant-prisoner's motion to dismiss the charge of carrying a concealed weapon where the razor blades from a pencil sharpener were found beneath a table in the day room and on a window ledge. There was such relevant evidence as a reasonable mind might accept as adequate to support the conclusion that defendant had the ability to and did conceal the razor blade underneath the table. There was no need to address the remaining argument on this issue. **State v. Hill, 371.**

Communicating threats to deputy—ability to carry out threats—deputy's belief—The trial court did not err by denying defendant-prisoner's motion to dismiss the charge of communicating threats where defendant asserted that there was insufficient evidence that a deputy believed defendant would carry out his threats against her. Even though the deputy thought that she and the other officers could contain an attempt by defendant to carry out his threats, she also believed that defendant was capable of carrying out his threats and would do so if he had the opportunity. **State v. Hill, 371.**

Malicious conduct by a prisoner—statute not ambiguous—two distinct acts—The trial court did not err in a malicious conduct by a prisoner case by failing to dismiss one of the two charges. The rule of lenity, which requires that ambiguity concerning the ambit of a criminal statute be resolved in favor of lenity, was not applicable as there is no ambiguity in the statute defining malicious conduct by a prisoner. Furthermore, defendant was charged with two separate, distinct acts. **State v. Heavner, 139.**

Writ of habeas corpus—denial of request for release on parole—failure to show entitlement to discharge—The trial court did not err by denying defendant's petition for the issuance of a writ of *habeas corpus* regarding the denial of his request for release on parole pursuant to a petition for the issuance of a writ of *certiorari* that was allowed by the Court of Appeals on 8 February 2012. Defendant failed to establish that he had a colorable claim to be entitled to be discharged from custody based on an alleged deprivation of a constitutionally protected liberty interest without due process of law. **State v. Leach, 399.**

PROBATION AND PAROLE

Activation of sentence—substitution of counsel—failure to show prejudice—The trial court did not err by allowing an attorney to represent defendant at a probation revocation hearing even though he was not the attorney appointed to represent defendant. Defendant did not provide any reasonable possibility that the result of his hearing would have been different had the trial court followed the statutory mandate and either made the proper findings in open court or refused to allow the substitute attorney to represent defendant. **State v. Webb, 205.**

Revocation—notice—insufficient—The trial court improperly revoked defendant's probation where defendant received notice that she had violated the conditions of her probation by using illegal drugs and failing to comply with treatment requirements but was not notified that her probation could be revoked when she appeared at the hearing. **State v. Tindall, 183.**

PROCESS AND SERVICE

Introduction of forensic report—statutory notice—A new trial was no longer necessary in an oxycodone trafficking prosecution where the record on remand to the Court of Appeals included a copy of a notice provided by the State that it intended to introduce a forensic analysis report. Defendant did not argue that he did not receive the report, but that the notice was defective because it did not contain proof of service or a file stamp. No such requirement exists in N.C.G.S. § 90-95(g) and the findings of the trial court, which is in the best position to judge whether notice was properly given, were not disrupted. N.C.G.S. § 90-95(g) comports with the requirements of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305. **State v. Burrow, 568.**

PUBLIC OFFICERS AND EMPLOYEES

Sanitation workers—wrongful discharge—Although the trial court did not err in a wrongful discharge case by granting defendants' N.C.G.S. § 1A-1, Rule 12(c) motion for judgment on the pleadings for defendant town manager Stencil in his individual capacity, the remainder of the trial court's 29 May 2012 order was vacated and remanded. Plaintiff sanitation workers sufficiently pled a claim for wrongful discharge. **Bigelow v. Town of Chapel Hill, 1.**

Whistleblower Act—county board of elections employees—The language of the North Carolina Whistleblower Act and statutes concerning the State Personnel System are clear and unambiguous: county board of elections employees are not covered by the Whistleblower Act. The trial court did not err by dismissing plaintiffs' Whistleblower claims for failure to state a claim upon which relief could be granted. **Johnson v. Forsyth Cnty., 276.**

QUANTUM MERUIT

No unjust enrichment—claim properly dismissed—The trial court did not err by dismissing plaintiff's claim in quantum meruit where defendant was not enriched, much less unjustly enriched, from the transaction at issue. **Highland Paving Co., LLC v. First Bank, 36.**

RAPE

Second-degree rape—lesser-included offense—attempted second-degree rape—jury instruction—The trial court did not err in a second-degree rape and second-degree sexual offense case by failing to submit a lesser-included offense of attempted second-degree rape. There was clear and positive evidence of intercourse between defendant and the victim. **State v. Norman, 162.**

Second-degree rape—second-degree sexual offense—sufficient evidence—use of force—The trial court did not err in a second-degree rape and second-degree sexual offense case by failing to dismiss the charges for insufficient evidence. There was sufficient evidence of all the elements of the charges, including defendant's use of force to overcome the victim's will. **State v. Norman, 162.**

ROBBERY

Dangerous weapon—evidence—gun dangerous weapon—The trial court properly denied defendant's motion to dismiss the charge of robbery with a dangerous weapon. Although there was evidence that the gun used by defendant was unloaded,

ROBBERY—Continued

there was evidence that defendant used a dangerous weapon to take money from the victim. **State v. Bell, 339.**

Dangerous weapon—jury instructions—not misleading—The trial court's instructions in a robbery with a dangerous weapon case were not erroneous as there was no reasonable cause to believe the jury was misled or misinformed by them. **State v. Bell, 339.**

Dangerous weapon—jury instruction—weapon displayed—The trial court did not err in a robbery with a dangerous weapon case by failing to instruct the jury on footnote six of element seven of the jury instructions. The evidence showed that defendant did display and threaten to use the weapon by pointing it at the victim; thus, the "mere possession of the firearm" was not an issue in the case. **State v. Bell, 339.**

Dangerous weapon—motion to dismiss—sufficiency of evidence—continuous transaction—The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon. A coparticipant's testimony constituted substantial evidence that the robbery and the shooting were part of a continuous transaction. **State v. Rogers, 617.**

SCHOOLS AND EDUCATION

Dismissed teacher—use of force against student—findings supported by evidence—The trial court correctly dismissed a teacher's petition for judicial review of a school board decision to terminate her employment after she used physical force on a misbehaving student. The school board's decision was supported by substantial evidence; findings indicating that the events of the day were chaotic and confusing did not negate the evidence supporting the school board's decision. **Diamond v. Charlotte-Mecklenburg Cty. Bd. of Educ., 17.**

Dismissed teacher—use of force against student—statutory exception—not applicable—The trial court correctly dismissed the petition of a terminated teacher for judicial review where the trial court did not err in concluding that the school board properly applied N.C.G.S. § 115C-391 in determining that the statutory exception to the use of physical force against a student did not apply. The school board's findings indicated that the behavior of the unruly student, while annoying and extremely disruptive, did not pose a threat to the safety or well-being of teachers or students, nor did his actions threaten to damage property. **Diamond v. Charlotte-Mecklenburg Cty. Bd. of Educ., 17.**

SEARCH AND SEIZURE

Juvenile—no probable cause—The trial court erred in a juvenile case by denying juvenile defendant's motion to suppress evidence seized from her person. When the officer ordered the juvenile to empty her pockets, he conducted a search lacking probable cause and not incident to arrest or custody. **In re V.C.R., 80.**

Warrant—probable cause—drugs—The search warrant in a cocaine trafficking prosecution was supported by probable cause where the detective laid out a number of specific facts that would have supported a belief that the contraband could have been found at the location to be searched. **State v. Torres-Gonzalez, 188.**

SENTENCING

Aggravating range—same evidence for underlying—The trial court erred in a second-degree murder case by sentencing defendant in the aggravating range. The evidence supporting the aggravating factor was the same evidence necessary to support an element of the underlying offense. The judgment was reversed and remanded for a new sentencing hearing. **State v. Facyson, 576.**

Change of sentence—extraordinary mitigation—findings required—The trial court's granting of its *sua sponte* motion for appropriate relief and change of a sentence imposed the day before was reversed and remanded for appropriate findings as to the factors of extraordinary mitigation. While there was certainly evidence in the record to support extraordinary mitigation, appellate review is not de novo and the trial court must make the appropriate findings based upon the evidence in order to support its determination. **State v. Williams, 209.**

Prior record level—foreign conviction—not substantially similar to NC offense—The trial court erred in an assault with a deadly weapon with intent to kill case by calculating defendant's prior record level and sentencing him as having obtained a prior record level of IV for felony sentencing purposes. The trial court erroneously determined that the Ohio offense "Shoot with Intent to Kill" was substantially similar to the North Carolina offense assault with a deadly weapon with intent to kill. **State v. Phillips, 416.**

Prior record level points—South Carolina conviction—felony—The trial court did not err in a forgery and obtaining property by false pretenses case by assigning two points to defendant's prior record level based upon a South Carolina conviction. The trial court correctly classified the South Carolina conviction as a Class I felony and assigned two points to defendant's prior record level on this basis. **State v. Threadgill, 175.**

Prior record level points—no ex post facto violation—prior conviction—The trial court did not violate defendant's rights under the *ex post facto* clause of the United States Constitution in a forgery and obtaining property by false pretenses case by assigning two points to his prior record level. Defendant's Anson County conviction was entered more than one year prior to entry of judgment and sentencing in the instant case, and the plain language of N.C.G.S. § 15A-1340.11(7) defines a prior conviction as one that exists on the date a criminal judgment is entered. **State v. Threadgill, 175.**

STATUTES OF LIMITATION AND REPOSE

Claims arising from business purchase—outside the longest limitations period—Plaintiffs' claims arising from representations allegedly made by a bank during a business purchase were barred by the statute of limitations where the claims were filed six and one half years after they accrued, which was after the longest statute of limitations (4 years for unfair trade practices). **Ussery v. Branch Banking & Trust Co., 434.**

Declaratory judgment—nonpayment of retirement benefits—The trial court did not err in a declaratory judgment action involving the State's refusal to pay plaintiff's retirement benefits by dismissing plaintiff's complaint. Plaintiff's action was barred by the three-year statute of limitations and the doctrine of continuing wrong was inapplicable. **Ludlum v. State, 92.**

STATUTES OF LIMITATION AND REPOSE—Continued

Trespass on real property—not a bar to claim—The trial court did not err by failing to dismiss a trespass action based on the three-year statute of limitations under N.C.G.S. § 1-52(3). To deny plaintiff a right of action would have been to allow defendants a right of eminent domain as private persons, without the payment of just compensation, or grant defendants a permanent prescriptive easement to use plaintiff's land. **Adams Creek Assocs. v. Davis, 457.**

TERMINATION OF PARENTAL RIGHTS

Termination of Parental Rights—findings of fact—supported by the evidence—The trial court's findings of fact in a termination of parental rights case were not erroneous. The trial court did not improperly treat the Court of Appeals' earlier decision in this case as the law of the case. Furthermore, the challenged findings of fact did not lack adequate evidentiary support. **In Re D.A.H.-C, 489.**

Grounds for termination—improper reliance on stipulation—The trial court erred in a termination of parental rights case by terminating respondent's rights to his two children. The trial court improperly relied on the parties' stipulation that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(7). **In re A.K.D., 58.**

Termination of Parental Rights—neglected juveniles—findings supported—probable future neglect—The trial court did not err in a termination of parental rights case by determining that the juveniles at issue were neglected. The trial court's findings of fact, which were either undisputed or supported by competent evidence, indicated that there was a substantial probability that the children would suffer neglect in the future. **In Re D.A.H.-C., 489.**

TORT CLAIMS ACT

Negligence—insufficient findings of fact—contributory negligence—The Full Industrial Commission erred in a negligence case brought by a former prison inmate for injuries he suffered as a result of an assault by another inmate. The Commission failed to make the necessary findings to support its conclusion that there was insufficient evidence that defendant's employees breached their duty to plaintiff. On remand, the Commission must also make a finding of fact and conclusion of law regarding contributory negligence. **Nunn v. N.C. Dep't of Pub. Safety, 95.**

TRESPASS

Lappage—collateral estoppel—color of title—adverse possession—The trial court did not err in a trespass case by entering partial summary judgment in favor of plaintiff. The issue of lappage raised by defendants was barred by the doctrine of collateral estoppel. Further, defendants did not have a claim under color of title, nor did they show adverse possession as of right. **Adams Creek Assocs. v. Davis, 457.**

Motion to rescind—Torrens Act—lappage—adverse possession—The trial court did not err in a trespass case by denying defendants' motion to rescind. Regardless of whether plaintiff held a title to the Waterfront Property under the Torrens Act, defendants could not assert a valid claim to the Waterfront Property. Moreover, the law of lappage was of no consequence following the Torrens Proceeding that awarded title of the Waterfront Property to Shedrick by means of adverse possession. **Adams Creek Assocs. v. Davis, 457.**

UNFAIR TRADE PRACTICES

No sales proceeds—no conversion—no deceit—The trial court did not err by granting defendant First Bank's motion to dismiss plaintiff's claim for unfair and deceptive trade practices. As there were no sales proceeds to escrow from the transaction at issue, defendant First Bank could not have converted those funds to its own use by deceiving plaintiff about the existence of those funds. **Highland Paving Co., LLC v. First Bank, 36.**

WORKERS' COMPENSATION

Attorney fees—insurer—The Industrial Commission erred in a workers' compensation case by assessing attorney fees against defendants under N.C. Gen. Stat. § 97-88. Defendants were not "insurers" and the "insurer" did not appeal the decision of the Deputy Commissioner to the Full Commission. **Allred v. Exceptional Landscapes, Inc., 229.**

Jurisdiction—Form 33 filed—The Industrial Commission had jurisdiction over plaintiff's workers' compensation claim. Plaintiff initiated a workers' compensation claim before the Commission when he filed his Form 33. Once filed, the Commission retained continuing and exclusive jurisdiction over that claim and all related matters. **Allred v. Exceptional Landscapes, Inc., 229.**

Settlement agreement—not fair and just—The Industrial Commission did not err in a workers' compensation case by ruling that the parties' settlement was not fair and just. The settlement agreement did not comply with the statutory requirements in that the agreement did not make any provision for payment of plaintiff's medical expenses, and did not provide adequate indemnity compensation given plaintiff's physical and vocational limitations at the time of the settlement. Further, the agreement made no mention of payment of unpaid medical bills, as required by Industrial Commission Rule 502. **Allred v. Exceptional Landscapes, Inc., 229.**

